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

No. 5:08—CV—00275—KS—BWR

JEFFREY HAVARD
Petitioner

v.

BURL CAIN
MISSISSIPPI DEPARTMENT OF CORRECTIONS COMMISSIONER

LYNN FITCH
MISSISSIPPI ATTORNEY GENERAL
Respondents

ANSWER IN OPPOSITION TO SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

Petitioner Jeffrey Havard was indicted on one count of capital murder with the underlying felony of sexual battery for the death of six-month-old Chloe Britt. An Adams County jury found him guilty of the capital offense and, after a penalty trial, recommended the death penalty be imposed. Following a post-conviction evidentiary hearing, the Circuit Court of Adams County, Mississippi (trial court) vacated Havard's death sentence and imposed a sentence of life without the possibility of parole or probation.

The State of Mississippi now holds him in the custody of the Mississippi Department of Corrections. He continues to serve his life sentence without the possibility of parole or probation.

Havard began this action under 28 U.S.C. § 2254 on April 10, 2009 by filing a Petition for Writ of Habeas Corpus with this Court. (Doc. 10). Since then, he has filed two amended petitions. He filed the first one at the end of September 2012. (Doc. 60). He filed his Second Amended Petition for Writ of Habeas Corpus (Petition)[1] on August 8, 2022. (Doc. 108). Respondents understand his Petition to be raising these twenty-one[2] claims:

[1] Respondents will refer to Havard's Second Amended Petition for Writ of Habeas Corpus simply as his "Petition." They deny the allegations under the Introduction section of the Petition (Doc. 108 at 1–5).

[2] Havard admits, and Respondents agree, that Claims III–IX in his Petition are moot given the vacation of his death sentence. (Doc. 108 at 43–44).

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.

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.

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.

IV. Petitioner's right to effective assistance of counsel was violated by his counsel's failure to adequately investigate and present mitigation evidence.

V. Petitioner's right to effective assistance of counsel was violated by his counsel's closing argument during the sentencing phase of the trial.

VI. The trial court improperly issued an instruction to the jury about the especially heinous atrocious or cruel aggravating circumstance.

VII. There was insufficient evidence to support the aggravating circumstance that the killing was especially heinous, atrocious or cruel.

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.

IX. The trial court improperly answered a question from the jury concerning the definition of life without parole.

X. Petitioner's right to effective assistance of counsel was violated by his counsel's failure to ask death-qualifying questions during voir dire.

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.

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.

XIII. The Mississippi Supreme Court's "Aggregate Error" review was inadequate and deprived Petitioner of due process.

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.

XV. Petitioner is entitled to habeas corpus relief due to the cumulative effect of the errors at his trial.

XVI. Petitioner's constitutional rights were violated by the State's solicitation and/or failure to correct false testimony in violation of *Naupe v. Illinois* and its progeny.

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.

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.

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.

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 new-available objective medicine evidence.

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.

(Doc. 108 at 15–43, 44–80). If the Court interprets the Petition to be raising different grounds, then Respondents request an opportunity to file an amended or supplemental responsive pleading. If Havard fails to raise other claims presented to the state courts, then he has forfeited them. *See Gonzales v. Davis*, 924 F.3d 236, 247 (5th Cir. 2019) (finding that the petitioner forfeited a challenge to the adequacy of a retrospective competency hearing when he did not present it to the district court). Habeas review of abandoned claims is barred.

ANSWER

Respondents Burl Cain and Lynn Fitch **ADMIT** the allegations at paragraphs 1–8 of Havard's Petition (Doc. 108 at 5–6). They **DENY** the allegations of the errors raised on direct appeal in paragraph 9. (Doc. 108 at 6–7). They **ADMIT** the allegations at paragraphs 10–12. (Doc. 108 at 8). They **DENY** the allegations of the errors raised during Havard's initial post-conviction review (PCR) proceedings in paragraph 13. (Doc. 108 at 8–10). Respondents **ADMIT** the allegations listed at paragraph 14–16. (Doc. 108 at 11). They **DENY** the claims for relief raised in Havard's second attempt to obtain PCR relief under paragraph 17. (Doc. 108 at 11). They **ADMIT** the allegations listed at paragraph 18–19. (Doc. 108 at 12). They **DENY** the allegations appearing at paragraph 20–21. (Doc. 108 at 12). They **ADMIT** the allegations listed at paragraph 22–25. (Doc. 108 at 13). They **DENY** the

allegations listed at paragraph 26. (Doc. 108 at 13). They **ADMIT** the allegations under paragraphs 27–35.

Respondents will show why Havard's Petition should be denied and assert the following in compliance with Habeas Rule 5(b):

STATEMENT OF THE CASE

I. Procedural History

This case began its journey through state court in June 2002, when the Adams County Grand Jury returned an indictment that charged Havard with one count of capital murder for the February 1, 2002 killing of six-month-old Chloe Britt. In December 2002, the case proceeded to trial and concluded with the jury convicting Havard of capital murder and recommending the death penalty be imposed.

In October 2004, Havard directly appealed his conviction and sentence to the Mississippi Supreme Court with these fourteen assignments of error:

> I. Trial counsel were ineffective for failing to ensure that juror Dorothy Sylvester was excused for cause where she was biased against [Havard].
>
> II. Trial counsel were ineffective by failing to ask any questions related to the potential jurors qualifications to serve of [sic] a death penalty jury.
>
> III. The seating of a juror who would automatically vote for the death penalty in any and all murder cases and this juror's failure to answer the trial court's question on this point deprived Jeffrey Havard of a fair trial consistent with the Sixth, Eigth [sic] and Fourteenth Amendments to the

Constitution of the United States and the corresponding provisions of our state constitution.

IV. Jeffrey Havard was denied effective assistance of counsel where counsel adopted a defensive strategy and then failed to investigate, secure expert assistance, offer any evidence in support of the theory or request a jury instruction in support of the theory.

V. Prosecutorial misconduct at closing argument of the culpability phase violated Jeffrey Havard's state and federal constitutional rights and deprived him of a fundamentally fair trial.

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

VII. Counsel were ineffective for not developing and presenting compelling evidence in mitigation of punishment.

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

IX. The trial court erred in overruling an objection made by defense counsel to the use of an irrelevant life photograph of the victim thereby causing prejudicial sympathy for the victim.

X. The trial court erred in answering a jury question in such a way as to cause speculation of some future release if the defendant is not sentenced to death thereby injection 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 aggravators of sexual battery and especially heinous, atrocious and cruel, which the jury used in support of a sentence of death, denying Havard of a reliable sentence as guaranteed by the United States and the Mississippi constitutions.

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

Appellant's Brief at vii–viii, *Havard v. State*, No. 2003-DP-00457SCT (Miss. Oct. 4, 2004). The Mississippi Supreme Court reviewed each assignment, found no error, and affirmed. *Havard v. State*, 928 So. 2d 771 (Miss. 2006) (*Havard I*). He then petitioned the U.S. Supreme Court for certiorari review, which was denied on January 8, 2007. *See Havard v. Mississippi*, 549 U.S. 1119 (2007) (Mem.). His petition presented this question:

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

Petition for Writ of Certiorari to the Supreme Court, *Havard*, 549 U.S. 1119 (No. 06–6279) (Aug. 26, 2006).

At that point, Havard turned his attention to preparing and presenting claims for collateral relief in a post-conviction (PCR) application. His initial Application for Leave to Proceed in the Trial Court and Motion for Other Relief raised these claims:

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 guilty 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. Jeffrey 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 depriving 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 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 provisions of the Mississippi Constitution due to cumulative error. Mr. Havard's constitutional rights were violated during both the guilt and sentencing phases of his trial and each individual claim articulated above warrants post-conviction relief. More importantly, the combined prejudicial effect of all these errors, taken together, requires reversal.

Petition for Post-Conviction Relief with Exhibits at i-iv, *Havard v. State*, No. 2006-DR-01161-SCT (Miss. May 25, 2007). The state supreme court denied each

claim on May 22, 2008, and Havard's motion for rehearing on August 28, 2008. *Havard v. State*, 988 So. 2d 322 (Miss. 2008) (*Havard II*).

So on April 10, 2009, Havard filed his original habeas petition in this Court. (Doc. 10). He raised these claims:

I. Petitioner's trial counsel were grossly ineffective in challenging the underlying felony of sexual batter, in violation of Petitioner's rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

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

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

IV. Petitioner's right to effective assistance of counsel was violated by his counsel's failure to adequately investigate and present mitigation evidence

V. Petitioner's right to effective assistance of counsel was violated by his counsel's closing argument during the sentencing phase of the trial

VI. The trial court improperly issued an instruction to the jury about the especially heinous atrocious or cruel aggravating circumstance

VII. There was insufficient evidence to support the aggravating circumstance that the killing was especially heinous, atrocious or cruel

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

IX. The trial court improperly answered a question from the jury concerning the definition of life without parole

X. Petitioner's right to effective assistance of counsel was violated by his counsel's failure to ask death-qualifying questions during voir dire

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

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

XIII. The Mississippi Supreme Court's "aggregate error" review was inadequate and deprived Petitioner of due process

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

XV. Petitioner is entitled to habeas corpus relief due to the cumulative effect of the errors at his trial

(Doc. 10 at 11–59).

Two years later, in April 2011, Havard moved to stay (Doc. 49) these proceedings. He filed a second state-court PCR application the same day as his motion to stay. This PCR application asserted these claims:

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

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

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

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

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

Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief, *Havard v. State of Mississippi*, No. 2011-DR-00539-SCT (Apr. 12, 2011). This Court stayed these proceedings in July 2011. (Doc. 54). And the state supreme court denied Havard's second PCR application in March 2012. *Havard v. State*, 86 So. 3d 896 (Miss. 2012) (*Havard III*).

In June 2012, the Court lifted the stay and gave Havard until September 28, 2012 to file an amended petition. (Doc. 58). He did on September 28, 2012. (Doc. 60). Havard moved the Court for yet another stay. (Doc. 85). As he had before, he filed a third PCR application in state court at the end of November 2013—without leave from this Court. Motion for Relief from Judgment or Leave to File Successive Petition for Post-Conviction Relief (Second Successive PCR Application), *Havard v. State*, No. 2013-DR-01995-SCT (Nov. 25, 2013). The Court granted his second request to stay these proceedings in May 2014. (Doc. 96).

In September 2014, Havard amended his third state-court PCR Application by adding a *Brady* claim and a one-sentence alternative "claim" of ineffective assistance of trial counsel (IATC). Amended Second Successive PCR Application (Amended Third PCR Application), *Havard*, No. 2013-DR-01995-SCT (Sept. 3, 2014). In Spring 2015, the Mississippi Supreme Court granted Havard limited leave to proceed in the trial court on the issue of newly

discovered evidence related to Chloe's cause and manner of death in the Amended Third PCR Application. Order, *Havard*, No. 2013-DR-01995-SCT (Apr. 2, 2015). The state supreme court denied leave on all other claims. *Id.*

In August 2017, an evidentiary hearing took place in the trial court related to Havard's newly discovered evidence issues. The trial court heard and considered evidence and testimony from three physicians board-certified in forensic pathology, a physician double-board certified in pediatrics and child-abuse pediatrics, and a biomechanical engineer. Based on its review, the trial court concluded that Havard had carried his burden of proving he was entitled to relief from his sentence, but not his conviction. Trial Court Order at 5, *Havard*, No. 2013-DR-01995-SCT (Sept. 17, 2018). Shortly after, the trial court sentenced Havard to serve a term of life without the possibility of parole or probation after hearing the District Attorney announce that the passage of time prevented the State from seeking a death sentence at a second penalty trial.

In December 2018, Havard directly appealed the trial court's order to the Mississippi Supreme Court. *Havard v. State*, No. 2018-CA-01709-SCT (Dec. 10, 2018). In this appeal, he raised these three assignments of error:

I. The circuit court erred by not granting Havard a new trial, when the newly discovered evidence had bearing on guilt/innocence issues and would dramatically alter the jury question if the case was tried again using the new evidence.

II. The circuit court committed error by admitting the opinions of the State's new expert, Dr. Scott Benton.

III. The circuit court erred by excluding evidence that Chloe Britt was not sexually abused.

Principal Brief of Appellant, *Havard*, No. 2018-CA-01709-SCT (Sept. 18, 2019). The Mississippi Supreme Court reviewed each assignment, found none had merit, and affirmed the trial court's order in December 2020. *Havard v. State*, 312 So. 3d 326 (Miss. 2020) (*Havard IV*).

In March 2021, Havard moved to lift the stay of these proceedings. (Doc. 98). Soon after, the case was returned to the Court's active docket. (Doc. 99). And on August 8, 2022, Havard filed his Second Amended Petition for Writ of Habeas Corpus (Petition). (Doc. 108). Respondents now file their Answer in Opposition to Second Amended Petition for Writ of Habeas Corpus (Answer).

II. Factual Background

The *Havard I* opinion, entered on direct review, relates:

> Jeffrey Havard was living in Adams County with Rebecca Britt, the mother of six-month old Chloe Britt. Havard was not Chloe's father. Havard and Britt had been dating for a few months when Britt and Chloe moved in with Havard in his trailer located on property owned by Havard's grandfather. Around 8:00 p.m. on February 21, 2002, Havard gave Britt some money and asked her to go to the grocery store to get supper. Britt returned to find Chloe bathed and asleep. Havard told Britt he had given Chloe her bath and put her to bed. Havard had also stripped the sheets off the bed and told Britt he was washing them. Before that night, Havard had never bathed Chloe or changed her diaper. After Britt checked on Chloe, Havard insisted that Britt go back out to the video store to rent some movies. When Britt returned, Havard was in the bathroom, and Chloe was blue and no longer breathing. Britt performed CPR on Chloe in an attempt to resuscitate her. Britt and Havard drove Chloe to Natchez Community Hospital, where

Britt's mother worked. The pathologist who prepared Chloe's autopsy report would later testify that some of her injuries were consistent with penetration of the rectum with an object. Other injuries of the child included abrasions and bruises inside her mouth and internal bleeding inside her skull consistent with shaken baby syndrome. Both the hospital staff and the Sheriff observed anal injuries on Chloe as well, but no one at Chloe's day care had ever noticed bruises or marks on Chloe. No anal injuries or anything unusual about the child's rectum was noticed by the day care staff earlier on the day of February 21st. Chloe was pronounced dead at the hospital later that night.

In the course of the investigation, Havard was charged with capital murder. In a videotaped statement two days after Chloe's death, Havard denied committing sexual battery on Chloe, but instead claimed he accidentally dropped her against the commode after bathing her, shook her in a panic, and then rubbed her down with lavender lotion before putting her to bed. The State presented DNA evidence which had been collected from the bed sheet. This evidence matched the DNA of both Havard and Chloe. A sexual assault kit testing for any of Havard's DNA in Chloe's rectum or vagina produced negative results. Havard offered no explanation for Chloe's injuries other than the possibility that he wiped her down too vigorously when preparing her for bed. Because Havard was indigent at trial, counsel was appointed to represent Havard, who also has court-appointed counsel for this appeal. Various events in the trial proceedings give rise to Havard's issues on appeal. In a pre-trial motion, defense counsel requested that any victim impact statement be excluded; and, the trial judge granted the motion as to the guilt/innocence phase of the trial. During the trial court's voir dire concerning any personal relationships jurors may have had with Havard, one juror stated she felt she could not be fair because her niece had been raped. The trial court later questioned the potential jurors to ascertain whether any one juror would either automatically vote for the death penalty, or would be unable to vote for the death penalty in the sentencing phase of the trial, regardless of the evidence presented at trial. One juror, who would later swear in a post-trial affidavit that he felt the death penalty was always appropriate in murder cases, was selected as a juror for the trial of this case. Trial counsel's defense strategy was to defend against any allegations of the underlying felony of sexual battery, consistent with Havard's version of the events of

> that night. The jury returned a verdict of guilty; and, in a separate sentencing hearing, the same jury found that Havard should be sentenced to death. Havard raises fourteen issues on appeal, including questions of ineffective assistance of counsel, trial court error, prosecutorial misconduct, and a legally defective indictment. These issues arise from various phases of the trial, including the voir dire examination of the jury, the introduction of certain testimony and other evidence, the closing arguments, and the sentencing phase of the trial. Additionally, in death penalty cases here on direct appeal, this Court is required by statute to review other issues, regardless of whether the appellant has specifically raised those issues. These issues include the proportionality of the death sentence and other designated questions regarding the death sentence. Miss. Code Ann. § 99–19–105 (1972).

Havard I, 928 So. 2d at 778–79 (footnote omitted).

Respondents oppose any factual assertions that Havard makes which are not directly supported by or consistent with the state court record. The recitation above enjoys AEPDA's presumption of correctness under 28 U.S.C. § 2254(e). This presumption extends to record–based factual findings of all state courts, including state appellate courts. *See Sumner v. Mata*, 449 U.S. 539, 545–46 (1981) (holding record-based factual determinations of *all* state courts are presumed correct until the petitioner shows they are erroneous by clear and convincing evidence). Havard does not attempt to rebut the presumption and does not present clear and convincing evidence that shows any state-court factual finding is clearly erroneous or even incorrect.

AEDPA's STANDARD OF REVIEW

Review of Havard's Petition is governed by AEDPA.[3] And AEDPA prevents a federal court from granting habeas relief based on any claim "adjudicated on the merits" in state court, unless the petitioner can show the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Under the "contrary to" clause of section 2254(d)(1), the petitioner must establish that "the state court arrive[d] at a conclusion opposite to that reached by [the Supreme] Court on a question of law or ... decide[d] a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Metrish v. Lancaster*, 569 U.S. 351, 357 n. 2 (2013). When proceeding under section 2254(d)(1)'s "unreasonable application" clause, the petitioner must show that, after identifying the correct governing legal principle from the Supreme Court's decisions, the state court unreasonably applied the principle to the facts in his case. *See Holland*, 542 U.S. at 652 (citing *Williams v. Taylor*, 529 U.S. 362, 413 (2000)). The state court's legal and factual determinations must be so lacking

[3] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L No. 104–132, Apr. 24, 1996, 110 Stat. 1214.

in justification as to give rise to error beyond any possibility for fairminded disagreement. *See Dunn v. Madison*, 138 S. Ct. 9, 12 (2017) (per curiam) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). "[E]ven 'clear error' will not suffice." *White v. Woodall*, 572 U.A. 415, 419 (2014).

Not just any Supreme Court decision will do. "Clearly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta," of the Supreme Court's decisions. *Woods v. Donald*, 575 U.S. 312, 316 (2015) (per curiam). If no Supreme Court case addresses "the specific question presented" by the petitioner, then "the state court's decision [cannot] be contrary to any holding from [the Supreme] Court." *Donald*, 575 U.S. at 317. So clearly established federal law will be found only in the Supreme Court's opinions on the books at "the time the state court render[ed] its decision." *Greene v. Fisher*, 565 U.S. 34, 38 (2011); *see Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) ("State-court decisions are measured against [the Supreme] Court's precedents as of the time the state court renders its decision."). "It is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court." *Richter*, 562 U.S. at 101.

"[S]tate-court decisions, treatises, or law review articles" are not clearly established Federal law. *Kernan v. Cuero*, 138 S. Ct. 4, 8 (2017) (per curiam). Circuit precedent is not clearly established federal law. *Id.* at 8 (quoting *Glebe*

v. Frost, 574 U.S. 21, 23 (2014)). And circuit precedent cannot "refine or sharpen a general principle of Supreme Court jurisprudence into a specific rule that [the Supreme] Court has not announced." *Marshall v. Rodgers*, 569 U.S. 58, 63 (2013) (per curiam). If there is no Supreme Court decision that addresses "the specific question presented by [a] case" a circuit court cannot reject a state court's assessment of that question. *Lopez v. Smith*, 574 U.S. 1, 6 (2014).

Under section 2254(d)(2)—the "unreasonable determination" subsection, "a determination of a factual issue made by a state court shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *Wood v. Allen*, 558 U.S. 290, 293 (2010). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Burt v. Titlow*, 571 U.S. 12, 15 (2013). Precedent also directs habeas courts to presume a "federal claim was adjudicated on the merits" even "[w]hen a state court rejects a federal claim without expressly addressing that claim." *Johnson v. Williams*, 586 U.S. 289, 301 (2013); *see, e.g.*, *Kernan v. Hinojosa*, 578 U.S. 412, 415 (2016) ("Containing no statement to the contrary, the Supreme Court of California's summary denial of Hinojosa's petition was therefore on the merits.").

The significance of section 2254(d)'s standard cannot be overstated. It is intentionally difficult to meet. *See Richter*, 562 U.S. at 102 (citing *Felker v. Turpin*, 518 U.S. 651, 664 (1996)). It "reflects the view that habeas corpus is a

'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal. *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 332, n. 5 (1979)). It is all but an absolute "relitigation bar." *See id.* at 100. It "stops [just] short of imposing a complete bar on federal claims already rejected in state proceedings." *Id.* at 102. And when it applies, habeas review is "limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 181.

The long-standing requirement that deference to a state court's factual findings remains under AEPDA. Section 2254 states, in part:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1). The standard to be applied under AEDPA is different; it is clear and convincing. *See, e.g., Patterson v. Dretke*, 370 F.3d 480, 484 (5th Cir. 2004); *Morrow*, 367 F.3d at 315.

AEDPA also circumscribes a petitioner's ability to develop facts or expand the record with new or additional facts that were not presented in state court. *See, e.g.*, *Shinn*, 142 S. Ct. 1731–39. Section 2254(e) states:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that —
>
> (A) The claim relies on —

> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

AEDPA curtails federal review of claims and the evidence supporting them. 28 U.S.C. § 2254(a)-(e). Section 2254(d) restricts review to claims adjudicated in state court and the state-court record. *Pinholster*, 563 U.S. at 181, 186. "Review of factual determinations under § 2254(d)(2) is expressly limited to the evidence presented in the State court proceeding," *Shoop v. Twyford*, 142 S. Ct. 2037, 2043 (2022). Subsection 2254(e)(2) applies to claims that have not been adjudicated and new evidence. *See Shinn*, 142 S. Ct. at 1735–38. Subsection 2254(e)(2) severely limits review of factual determinations and development of evidence in habeas proceedings. When that subsection applies, a federal court may order an evidentiary hearing, expand the state-court record, and consider new evidence only when the statute's stringent requirements are met. *See id.* at 1734. AEDPA's limitations on evidentiary development extend to claims for good cause and actual prejudice. *See id.* at 1735–38. "[I]t serves no purpose to develop such evidence just to assess cause and prejudice" if the prisoner cannot satisfy section 2254(e)(2)'s

stringent requirement and show what he hopes to obtain would be admissible. *See Shoop*, 142 S. Ct. at 2046 (citing *Shinn*, 142 S. Ct. at 1739).

Along with AEDPA's highly-deferential standard of review, precedent teaches that harmless error review applies. So when a federal court finds error in some aspect of a habeas case, it must determine whether that error was harmless under the standard first-announced in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *See Fry v. Pliler*, 551 U.S. 112, 116–22 (2007). Under *Brecht's* standard, the federal court must determine whether the "error had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. Respondents address the grounds presented in the Petition under these standards. And under them, Havard is not entitled to relief.

ARGUMENT

I. Whether the IATC claim under Claim I overcomes the procedural default doctrine, AEDPA's relitigation bar, and warrants relief.

Respondents deny the allegations under Claim I of the Petition. (Doc. 108 at 15–40).

A. Two adequate and independent state procedural law grounds bar review of Claim I.

Havard failed to present Claim I to the Mississippi Supreme Court in a procedurally proper manner. He did not fairly present this claim in *Havard I*, *Havard II*, or *Havard III*. The last time Havard raised the IATC claim under

Claim I in state court, the Mississippi Supreme Court expressly denied his Motion for Relief from Judgment or For Leave to File Successive Petition for Post-Conviction Relief and all of the claims in it as "time-barred and as a successive writ." *Havard III*, 86 So. 3d at 910 (citing Miss. Code Ann. §§ 99-39-5(2)(b), 99-39-27(9)).

Fifth Circuit caselaw recognizes Mississippi's time and successive writ bars are adequate and independent state law grounds that preclude federal review of Claim I. *See Spicer v. Cain*, 2021 WL 4465828, at **4–5 (5th Cir. 2021) (unpublished op.). Havard does not identify any reason that might supply cause to excuse his procedural default or overcome the adequate and independent state procedural law ground doctrine. Because he does not, Havard cannot establish the requisite cause or actual prejudice to overcome the doctrine of procedural default. In explaining the cause necessary for excusing a default, the Supreme Court instructed that "there must be something *external* to the petitioner, something that cannot fairly be attributed to him." *Coleman*, 501 U.S. at 753 (emphasis in the original). Examples of objective factors which have been found to constitute *cause* to excuse a procedural default include "interference by officials" and "a showing that the factual and legal basis for a claim was not reasonably available to [the petitioner]." *McClesky v. Zant*, 499 U.S. 467 (1991).

Respondents recognize that attorney error can constitute cause to overstep the bar when such error rises to the level of the denial of effective assistance of counsel. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). In addressing cause for a procedural default that may be based in attorney error, the United States Supreme Court has stated as follows:

> We think, then, that the question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, supra, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default.

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

Nor does Havard assert the fundamental miscarriage of justice exception under Claims I–XVIII and XXI. The "fundamental miscarriage of justice" exception is even more circumscribed than the cause and prejudice exception and is confined to cases of actual innocence, "where the petitioner shows, as a factual matter, that he did not commit the crime of conviction." *Fairman v. Anderson*, 188 F.3d 635, 644 (5th Cir. 1999) (citing *Ward v. Cain*, 53 F.3d 106, 108 (5th Cir.

1995)). Havard does not state how, as a factual matter, he is innocent of sexual battery.

Because the procedural default doctrine precludes review of Claim I, the Court should refuse to consider it. It cannot be the basis for granting Havard relief. Claim I should be denied for this reason.

B. AEDPA bars Havard from obtaining relief for Claim I.

Without waiving the previous argument, the Court should deny Claim I because Havard fails to overcome AEDPA's relitigation bar or show that Claim I has merit. His assertions under Claim I do not show any error was made at trial, much less one that would leave the Court in "grave doubt" over a matter so "evenly balanced" that the Court would have to find it is in a "virtual equipoise" as to the harmlessness of the error. *See O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

1. The Mississippi Supreme Court's adjudications of the IATC claim under Claim I.

Havard presented different versions of the IATC claim under Claim I to the Mississippi Supreme Court in *Havard I*, 928 So. 2d at 787–89, and *Havard II*, 988 So. 2d at 327–333. Both times, the state supreme court concluded Havard's IATC had no merit. So naturally, Havard tried again. After obtaining leave to conduct discovery from this Court and deposing Dr. Hayne, he raised

a third IATC in state court. It was denied in *Havard III*. The *Havard III* opinion reads, in pertinent part:

> **V. WHETHER NEWLY DISCOVERED EVIDENCE DEMONSTRATES THAT HAVARD'S TRIAL COUNSEL WERE INEFFECTIVE IN CHALLENGING THE UNDERLYING FELONY OF SEXUAL BATTERY.**
>
> Havard claims that the deposition testimony of Dr. Hayne, taken during discovery on federal habeas review, constitutes newly discovered evidence that supports his claim of ineffective assistance of counsel. Specifically, Havard claims that this newly discovered evidence "supports [his] prior claims of ineffective assistance of counsel with respect to trial counsel's efforts (or lack thereof) in challenging the underlying felony of sexual battery." He contends that those claims were central to the original post-conviction challenge.
>
> This claim is an attempt to rehabilitate failed claims that already have been addressed by this Court. On direct appeal, Havard claimed that his trial counsel were ineffective for failing to secure a pathologist to investigate the case and develop a defense strategy. *Havard*, 928 So.2d at 788. Havard's counsel did request an independent review of the autopsy report, but the trial court denied the motion, because no basis for need was shown when Dr. Hayne was available. *Id.* Havard argued that it was his attorneys' failure to present the trial court with a basis for the request that constituted ineffective assistance. *Id.* To support this claim, Havard relied on the affidavit of Dr. Lauridson and a medical journal article in an attempt to show the substantial need that he claimed his attorneys failed to show. *Id.* at 789. The Court refused to consider the documentation on direct appeal, because it was outside of the record. *Id.* Ultimately, the Court found that Havard's counsels' actions were not ineffective and that the trial court did not abuse its discretion by denying Havard's motion for an independent evaluation. *Id.*
>
> Subsequently, in his original post-conviction-relief motion, Havard again raised the issue that his counsel were ineffective in failing to secure an expert witness to aid in research and the development of a defense strategy. The Court reconsidered the issue, in light of Dr. Lauridson's affidavit. Havard also submitted the affidavit of

an attorney unrelated to Havard's case, who opined Havard's trial counsel were ineffective.

The Court considered, for the sake of argument, that even if Havard's counsel performed deficiently, meeting the first prong under *Strickland*, Havard could not show prejudice. *Havard*, 988 So.2d at 331. Although the Court's reasoning is more fully explained in that opinion, suffice it to state here that this Court found Dr. Lauridson's affidavit and reports did not contain evidence that would create a reasonable probability that the outcome of Havard's trial would have been different. *Id*. at 333.

In our discussion, we quoted Dr. Lauridson as follows:

> [e]xperienced medical examiners commonly encounter dilated anal sphincter's [sic] during post-mortem examinations. Experience as well as the medical literature recognizes that this finding does not imply anal sexual abuse. Studies of this phenomenon, in fact have shown that children who have died of brain injuries have an increased likelihood of having a dilated anus.
>
> Dr. Lauridson concluded his report stating, "Postmortem anal dilation in infants is a commonly recognized artifact that does not signify sexual abuse." However, as the state points out, Chloe's dilated anal sphincter was discovered while Chloe was in the emergency room and still alive.
>
> Further, Dr. Lauridson's conclusion was not only contrary to that of Dr. Hayne, it was contrary to the sworn testimony from experienced emergency-room doctors and nurses.

Id. at 332.

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

> Q: Do you commonly encounter dilated anal sphincters during a postmortem examination?
>
> A: It can occur, but it's not as common as I think people think.

> Q: Is it a recognized finding in the postmortem period.
>
> A: It can be, yes.
>
> Q: And do children who have died of brain injuries have an increased likelihood of having a dilated anus postmortem?
>
> A: It's possible. I think you supplied me with one article from Orange Journal, '97, "American Journal of Forensic Medicine and Pathology." In that particular article, there were 65 cases of which only a handful were involving children of less than one year of age, and of those—
>
> [objection made by the State]
>
> Q: Go ahead, sir.
>
> A: And of all those, only one had suffered a traumatic death. In that particular case, the anus was described as slit-like. So in that case, there was no dilation in a violent death that Dr. Lauridson is referring to in his opinion of 65 cases published in the Orange Journal.

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

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

> Q: Did you ever meet with Gus Sermos or Robert Clark, Mr. Havard's attorneys about this case?
>
> A: I don't remember that, Counselor, but I—

[Objection made by the State]

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

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

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

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

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

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

Havard III, 86 So. 3d at 907–910.

In his Petition, Havard says this IATC claim was presented to the state supreme court a fourth time in his third attempt to obtain post-conviction relief as an alternative claim requested in his third PCR application. (Doc. 108 at 39, ¶ 4). Not so. What Havard filed was an amended PCR application in the state supreme court on May 30, 2014. In it, he raised a *Brady* claim and made two statements about an alternative IATC claim. His *Brady* claim concluded by stating:

> In the alternative, if the Court determines that a *Brady* violation has not been articulated, 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).
>
> Based upon the facts and law set forth above, Havard is entitled to relief from his conviction and sentence obtained in violation of *Brady* and its progeny or, alternatively, because of ineffective assistance of counsel. At the very least, this matter should be remanded to the trial court for discovery and an evidentiary hearing on this issue.

Amended Third PCR Application at 41, *Havard*, No. 2013-DR-01995-SCT.

In April 2015, the Mississippi Supreme Court entered an order that permitted 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." Order, *Havard*, No. 2013-DR-01995-SCT (Miss. Apr. 2, 2015). But the Order also stated that:

> The Court finds no merit in Havard's assertions that the prosecution suppressed evidence and, thereby, violated his due process rights. *See Brady v. Maryland*, 373 U.S. 83 (1963). Likewise, we find no merit in Havard's assertion that his counsel was ineffective for failing to interview Dr. Steven Hayne prior to trial. Accordingly, Havard is not granted leave to proceed in the trial court on those two claims.

Id.

Havard also says he properly developed the factual basis of his IATC claim with evidence related to sexual battery in his most recent state PCR proceedings. (Doc. 108 at 40, ¶ 4, n. 8). According to him, he developed the state-court record by attaching evidence concerning sexual battery issues to his Amended Third PCR Application and making a proffer in the trial court. He is mistaken.

In *Havard IV*, the Mississippi Supreme Court expressly stated: "A review of the Court's orders makes clear that the issue addressed in the order specifically pertained to Havard's claim of newly discovered evidence concerning Chloe's cause and manner of death and shaken-baby syndrome." *Havard IV*, 312 So. 3d at 341. When the Mississippi Supreme Court remanded Havard's case to the trial court for an evidentiary hearing, it strictly limited the jurisdiction of the trial court. Havard fails to mention this jurisdictional limitation. He never had permission to proceed in the trial court with any IATC claim or any sexual battery issue. The trial court had no jurisdiction to hear them.

That Havard attempted to improperly expand the scope of a state-court remand is not a federal matter or basis for habeas relief. Nor can it be said that Havard exhausted any "issue" (*e.g.,* an IATC or underlying felony issue) that was not presented to the Mississippi Supreme Court—the appropriate court with exclusive jurisdiction—in his third state post-conviction proceedings. *See* Miss. Code Ann. §§ 99-39-7, 99-39-27. Nor did he develop the state-court record with evidence related to a claim that was not presented to the state supreme court.

2. AEDPA bars Havard from obtaining relief for Claim I.

In any event, AEDPA's relitigation bar stops Havard from litigating the IATC claim under Claim I in these proceedings or obtaining relief for it. The Mississippi Supreme Court adjudicated Claim I on the merits in Havard's third state PCR proceedings. It's adjudication is correct and entitled to AEDPA deference. *Strickland v. Washington* provided the clearly established federal law for adjudicating Claim I. Federal review of the Mississippi Supreme Court's resolution of Claim I is doubly deferential and entitled to considerable leeway. *See Richter*, 562 U.S. at 101; *Pinholster*, 563 U.S. at 190.

Under this doubly deferential standard, "the question is … whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard. *Id.* at 105. To obtain relief, Havard must show the state court's rule "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of

fairminded disagreement." *Id.* at 103. The burden is on Havard to overcome any reasonable argument supporting the state court decision whether articulated by the state courts or not. *See id.* at 99–100. This is so because Section 2254 actions are not intended as "a substitute for ordinary error correction through appeal" but as a "guard against extreme malfunctions in the state criminal justice systems...." *Id.* at 102–03 (citation omitted).

The Mississippi Supreme Court's decision finding no merit to this IATC claim was not contrary to or an unreasonable application of *Strickland's* rule, or based on an unreasonable determination of the facts before that court. Because Havard does not and cannot show that "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with" *Strickland*, he is not entitled to relief for Claim I. The state court's analysis of Claim I is not contrary to *Strickland v. Washington*, nor was that analysis unreasonable as applied to the facts in that case.

Looking closely at Havard's three state court challenges, he has built his *Strickland* claim backwards. Starting with the prejudice prong, Havard argues that because it is possible Chloe's rectal injury was caused by something other than a sexual battery, the jury should not have been allowed to find him guilty. He then takes this alleged "possibility prejudice" (essentially a challenge to the sufficiency of the evidence in supporting a finding of the underlying sexual battery), and uses it to presume *Strickland* deficiency: arguing not just that counsel was deficient for not

bringing the possibility of Havard's innocence to light, but that counsel was deficient for not securing an acquittal based on that possibility.

Both Havard's *Strickland* claim and his subtle sufficiency of the evidence claim lack merit. And his challenge to the weight of the evidence is not an issue within the purview of a federal habeas court. *See Young v. Kemp*, 760 F.2d 1097, 1105 (11th Cir. 1985) ("A federal habeas court has no power to grant habeas corpus relief because it finds that the state conviction is against the 'weight' of the evidence…"). Further, even if the matter were appropriate for habeas review, the state appellate court reviewed the issue in great detail and found the verdict was not contrary to the weight of the evidence. Such a determination on the weight of the evidence should be entitled to the same deference afforded a state appellate court's finding of the sufficiency of the evidence. *Cf. Parker v. Procunier*, 763 F.2d 665, 666 (5th Cir.); *Gibson v. Collins*, 947 F.2d 780 (5th Cir. 1991); *Callins v. Collins*, 998 F.2d 269, 276 (5th Cir. 1993) (stating that "where [a] state appellate court has conducted a thorough review of the evidence … its determination is entitled to great deference"). Havard presents nothing in his habeas petition to overcome the deference afforded to the findings of fact made by the Mississippi Supreme Court. (*see* 28 U.S.C. § 2254(e)(1)). And he has failed to prove that the state court decision was an unreasonable application of law to the facts. His claim contradicts the record. Havard is not entitled to relief based on any claim (direct or implied) of the sufficiency of the evidence.

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

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

To warrant habeas corpus relief on an IATC claim, a habeas petitioner must satisfy the two-prong test set out in *Strickland*, 466 U.S. 668, by demonstrating both constitutionally deficient performance by counsel and actual prejudice as a result of such ineffective assistance. *See Motley v. Collins*, 18 F.3d 1223, 1226 (5th Cir. 1994) (summarizing the *Strickland* standard of review). A petitioner's failure to establish both prongs of the *Strickland* test dooms his IATC claim. *Moawad v. Anderson*, 143 F.3d 942, 946 (5th Cir. 1998); *Bates v. Blackburn*, 805 F.2d 569, 578 (5th Cir. 1986) (overruled on other grounds). The test in *Strickland* is applied to appellate counsel as well as trial counsel. *Henderson v. Quarterman*, 460 F.3d 654, 665 (5th Cir. 2006).

Havard argues that trial counsel were ineffective for failing to sufficiently argue against the underlying felony of sexual battery. The Mississippi Supreme Court rejected this issue in *Havard I*, *Havard II*, and *Havard III*. Each time, the state court noted that 1) Dr. Lauridson's affidavit testimony shows only that there is a "possibility" that Chloe was not sexually battered; 2) Dr. Hayne testified at trial that he could not conclude Chloe was sexually battered; and 3) the remaining evidence presented by the State at trial, including testimony from several medical personnel, Dr. Hayne's added testimony, and testimony from Havard himself, were sufficient to support a finding of sexual battery.

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

In determining whether the trial court should have granted Havard's request for an expert, the Mississippi Supreme Court analyzed *Ake v. Oklahoma*, 470 U.S. 68 (1985). Under *Ake*, the State must assure a defendant access to competent experts. But a defendant does not have a constitutional right to choose an expert of his personal liking or receive funds to hire his own. The concern in *Ake* was that the defendant be provided "access" to experts. *Id.* at 83. Havard has not once asserted he was refused such access. He only asserts he was refused access to a particular expert—a non-argument.

The trial court properly found no basis under the law to grant Havard's motion for another expert. For the court, Dr. Hayne was just as available to both parties, and he was not prevented from testifying in favor of Havard, should the

evidence support such testimony (which it did not). At all times Dr. Hayne testified only on behalf of the evidence—not the parties. It cannot be said that there was any error of the trial court, or any deficiency on the part of defense counsel in failing to secure another expert.

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

Nor did those reports suggest a reasonable probability that the presentation of Dr. Lauridson would have resulted in a different outcome at trial. Dr. Lauridson stated, for example, that medical examiners commonly encounter dilated anal sphincters during postmortem exams. But Dr. Lauridson could not explain how doctors and nurses in the emergency room testified that Chloe's anal area was "gaping" while she was still alive and being treated in the emergency room.

Further, Dr. Lauridson argued that the injury to Chloe's anal area—described by medical personnel as being gaping and oozing, and opened to the size of a quarter—was caused by the insertion of an infant thermometer. Apart from

the implausibility of the argument that a small thermometer could have caused a gaping wound an inch in diameter, Dr. Lauridson also failed to address the testimony that medical personnel discovered the injury to Chloe's anal area when they first tried to take Chloe's temperature rectally. Dr. Lauridson offered no opinion on how Chloe's injuries could have been caused by a thermometer, when the injury was discovered before its attempted use.

Dr. Lauridson tried to couch his opinions in contradiction to those of Dr. Hayne. But Dr. Lauridson failed to explain why his opinions also contradicted the sworn testimony of the emergency room doctors and nurses who observed Chloe that night. Angel Godbold, a registered nurse of eleven years (with eight years of emergency room experience), described the trauma to Chloe's anal area as being so graphic that she later had to seek counseling. (R. 367, 379). Patricia Murphy, a registered nurse of nearly thirty years (twenty in the emergency room), found that the injuries stemmed from "the worst sexual trauma she had ever seen." (R. 386, 393). Dr. Laurie Patterson, the emergency room physician, also offered her medical opinion that Chloe's anal area had been penetrated. (R. 402, 407). Dr. Ayesha Dar, Chloe's pediatrician, gave a firsthand description of Chloe's injuries, including her medical opinion that a foreign object had been forcibly inserted into Chloe's rectum. (R. 412, 418).

The Mississippi Supreme Court did not violate the laws of the United States Supreme Court in determining Dr. Lauridson's testimony to be vague, without an

evidentiary predicate and conclusory (such that trial counsel was *Strickland* deficient). The state court properly held that Dr. Lauridson did not attack the competence of the "clinical observers" in their detection, evaluation and interpretation of the injuries found to have been inflicted upon Chloe (such that trial counsel was *Strickland* deficient). The state court also correctly held that Dr. Hayne's affidavit and deposition testimony was not a contradiction of his trial testimony (such that trial counsel was *Strickland* deficient). Finally, even during Havard's successive PCR, the state court noted that this appellate battle over the question of when it is possible for post-mortem anal dilation to occur (and when it might have occurred in Chloe) disregarded whether the dilation could have been caused by sexual battery—something the state court held was proven by the evidence at trial, and was not sufficiently disproven in the ten years following that trial, such that the jury reached its verdict in error.

Taking all post-trial evidence into consideration, the state court was correct in finding trial counsel to have rendered effective assistance. There is no reasonable probability that a jury—after hearing the testimony of Dr. Hayne, the testimony of doctors and nurses who treated Chloe after she was injured, and the testimony of Havard himself that his fingers may have "slipped" inside Chloe's rectum at some point that night—would have placed credence in the testimony of Dr. Lauridson, who was neither present nor ever examined the victim herself. There is no reasonable probability that Dr. Lauridson's unsworn reports, or Dr.

Hayne's deposition testimony (which mirrored his trial testimony), would have resulted in Havard being found not guilty of capital murder. Thus, he fails to establish resulting prejudice to sustain a claim of ineffective assistance of counsel. The Mississippi Supreme Court rendered a decision that was not contrary to nor an unreasonable application of clearly established law as announced by the Supreme Court; and the court did not unreasonably apply that law to this case. Havard is entitled to no relief on this claim.

Havard also argues the state court was unreasonable in not accounting for the affidavit offered by attorney Ross Parker Simmons. Mr. Simmons, who has no involvement at all argued that Havard's counsel rendered ineffective assistance. In *Johnson v. Quarterman*, 306 F.App'x. 116, 128-29 (5th Cir. 2009), the Fifth Circuit found disfavor with attorney affidavits about claims of ineffective assistance of counsel:

> This court is intimately acquainted with the legal standards governing ineffective assistance of counsel claims. Expert testimony purporting to tell the court how those legal standards apply to the facts of a particular case invade the court's province as a trier of the law, and are not helpful to the court in determining the facts of the case. Because the proposed expert testimony both moves beyond the appropriate boundaries of expert testimony and is unhelpful to the court in its role as a trier of fact, the affidavits will not be considered.
>
> We conclude that, for the reasons given by the district court, the district court did not abuse its discretion in refusing to consider the attorney affidavits. We agree with the reasoning of the Eleventh Circuit in *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998):

> [I]t would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable. The question is not one to be decided by plebiscite, by affidavits, by deposition, or by live testimony. It is a question of law to be decided by the state courts, by the district court, and by this Court, each in its own turn.
>
> The decision by the lower court was clearly not unreasonable nor in contradiction to any federal law.

As to Havard's claim that the state court erred in holding defense counsel was not ineffective about the failure to obtain a lesser offense instruction, again, the court's analysis was not contrary to established law as announced by the U.S. Supreme Court nor was it unreasonable as applied to the case of this case. The court properly found that the decision not to ask for a lesser offense instruction was reasonable trial strategy. Nothing in Havard's argument attacks the validity of that determination other than the bare allegation that it was unreasonable based on the fact he claimed Chloe's death was accidental. If Havard's version of the facts was to be believed, the incident did not rise to the level of murder or manslaughter. Havard's "accident" defense contained no felonious or premeditated intent to kill Chloe; it contained no evidence that Havard killed Chloe in a provoked heat of passion. Even now, he fails to present evidentiary support for a lesser offense instruction.

Counsel cannot be deficient for failing to request an instruction unsupported by the evidence and contrary to the valid theory of the defense and when no such defense exists under state law. *See Nelson v. State*, 995 So. 2d 799, 808 (Miss. Ct.

App. 2008) (accident is not a defense to a charge of capital murder under Miss. Code Ann. § 97-3-19(2)(e)). "Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process." *Hopkins v. Reeves*, 524 U.S. 88, 99 (1998) (quoting *Spaziano v. Florida*, 468 U.S. 447, 455 (1984)). The court rightfully held counsel's decision not to request such instruction was proper.

Moreover, by limiting the State's options to capital murder or nothing, trial counsel also limited the jury's alternatives in relation to finding Havard guilty. Without a lesser offense instruction, had the jury failed to find the underlying felony, Havard would have been acquitted, instead of being sentenced to a lesser crime. There was no presentation of prejudicial evidence resulting from counsel's decision not to employ a lesser included offense instruction, such that the giving of either of these instructions would have, by a reasonable probability, affected the outcome of Havard's trial. If the jury had believed Havard's accidental defense, it would have simply acquitted him; factually, it could not have found him guilty of any lesser included offense. Use of such instruction ran the high risk of petitioner being found guilty for a crime which, legally, he could not have been found guilty.

Lastly, Havard now claims that defense counsel was ineffective for failing to object to the testimony of the medical personnel about Chloe's injuries. This new argument has never been fairly presented to the Mississippi Supreme Court for consideration and is technically exhausted. *See Ruiz v. Quarterman*, 460 F.2d 638

(5th Cir. 2006). It is technically exhausted because it cannot be presented in a procedurally proper manner under state law. He has made no cognizable showing of either cause or actual prejudice; nor has he shown how this issue resulted in a fundamental miscarriage of justice, such that he can overcome the controlling procedural bar.

For all of the reasons set forth above, there is no *Strickland* error by trial counsel and therefore no error by the Mississippi Supreme Court in finding that Havard was not the victim of ineffective assistance. State procedural law grounds and AEDPA bar Havard from obtaining relief for Claim I. Claim I lacks merit and cannot be the basis for granting Havard relief. Claim I should be denied.

II. Whether the prosecutorial misconduct and alternative IATC claims under Claim II overcome the procedural default and adequate and independent state law grounds doctrines, AEDPA's relitigation bar, and warrant relief.

Respondents deny the allegations under Claim II of Havard's Petition. (Doc. 108 at 40–42).

A. Claim II is technically exhausted.

Havard raises the allegations under Claim II for the first time in these proceedings, specifically that the prosecution "crossed the line time and time again" during closing argument to appeal to the emotions of the jury. (Doc. 108 at 41 ¶¶ 3–4). His failure to raise Claim II, as stated in his Petition, to the Mississippi Supreme Court according to Mississippi law bars federal review.

Claim II is technically exhausted because there are no available state-court remedies available for resolving the allegations under Claim II. *See Shinn*, 142 S. Ct. at 1732 (quoting *Ngo*, 548 U.S. at 91–92).

Technically exhausted claims, like Claim II, are considered procedurally defaulted. "[T]o allow a state prisoner simply to ignore state procedure on the way to federal court would defeat the evident goal of the exhaustion rule." *Id.* (citing *Coleman*, 501 U.S. at 732). "Thus, federal habeas courts must apply … the doctrine of procedural default. *Id.* (citing *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017)). "Under that doctrine, federal courts generally decline to hear any federal claim that was not presented to the state courts 'consistent with the State's own procedural rules.'" *Id.* (quoting *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000)).

Claim II revolves around what Havard describes as repeated statements by the prosecution made to create bias in the jury. (Doc. 108 at 41–42, ¶ 3). Because Havard's claim does not revolve around the specific statement complained of in state court, Claim II remains unexhausted and cannot be fairly presented under state procedural law. *See id.*; *Ruiz*, 460 F.3d at 642–43. Claim II rests on allegations of repeated misconduct during the State's closing arguments in the guilt phase.

But the misconduct claim presented in state court was not based on allegations of repeated misconduct. And at no time has Havard raised an IATC

claim based on any failure to object to these statements in state court. (Doc. 108 at 42, ¶ 6). "[F]or a claim to be exhausted, the state court system must have been presented with the same facts and legal theory upon which the petitioner bases his current assertions." *Ruiz*, 460 F.3d at 643 (citing *Picard v. Connor*, 404 U.S. 270, 275–77 (1971)). Claim II is technically exhausted and must be treated as procedurally defaulted.

And because it is technically exhausted, Havard is not entitled to yet another stay of these proceedings. *See Shinn*, 142 S. Ct. at 1732 ("When a claim is procedurally defaulted, a federal court can forgive the default and adjudicate the claim if the prisoner provides an adequate excuse."). Havard must show good cause and actual prejudice for his default—a question that this Court should make based on the record before the state supreme court. Havard does not attempt to show cause or actual prejudice for his procedural default. Havard's default bars federal review of Claim II.

Additionally, Havard's alternative argument—that trial counsel were ineffective for failing to object to the complained of statements at closing—is likewise barred from consideration in these habeas proceedings. He did not fairly present this argument in state court. It cannot be raised in a procedurally proper manner under state law. So it too is technically exhausted. Havard did mention the word ineffectiveness in his appeal brief. But reducing an argument of *Strickland* magnitude—constitutional dimension—to a reference in a footnote is

not a fair presentation of an IATC claim for failing to object to the statement made by the prosecution during closing. It is not a presentation at all of a claim of ineffective assistance for failing to object to the prosecution's closing argument as a whole. This claim is barred from consideration. *Ruiz*, 460 F.3d at 642-43.

To be safe, Respondents also submit the narrow exception announced in *Martinez v. Ryan*, 566 U.S. 1 (2012), does not apply because Havard raised a different misconduct claim and alternative IATC claim based on a failure to object to that misconduct on direct appeal. State post-conviction proceedings were not the first time Havard could have raised the IATC claim under Claim II in state court. As a result, PCR counsel's ineffectiveness for failing to develop the state-court record as it relates to Claim II cannot supply cause. *See Shinn*, 142 S. Ct. at 1736.

B. An adequate and independent state procedural law ground bars review of Claim II.

Havard failed to present the IATC claim under Claim II to the Mississippi Supreme Court in a procedurally proper manner. *See Havard I*, 928 So. 2d at 791. And the state court found Havard waived this issue at trial for failing to make a contemporaneous objection. *See id.* Fifth Circuit precedent holds Mississippi's contemporaneous objection rule is an adequate and independent bar that precludes federal habeas review. *See Smith v. Black*, 970 F.2d 1383, 1387 (5th Cir. 1992)*; Hill v. Black*, 932 F.2d 369, 373 (5th Cir. 1991);

Hill v. Black, 887 F.2d 513, 516 (5th Cir. 1989). The Mississippi Supreme Court's alternative discussion of the merits of Petitioner's claim does not vitiate the imposed bar. *See Harris v. Reed*, 489 U.S. 255, 264 n. 10 (1989). Havard gives the Court no excuse to overlook his default of Claim II. Because he does not, this Court is precluded from considering Claim II. Claim II cannot be the basis for granting him habeas relief and should be denied.

C. AEDPA bars Havard from obtaining relief for Claim II.

Havard claimed misconduct in on direct review and during his initial PCR proceedings. The *Havard I* opinion provides:

1. The Mississippi Supreme Court's adjudication of the misconduct claim under Claim II.

The *Havard I* opinion states:

> **V. WHETHER HAVARD WAS DENIED HIS CONSTITUTIONAL RIGHT OF A FUNDAMENTALLY FAIR TRIAL BECAUSE OF PROSECUTORIAL MISCONDUCT AT CLOSING ARGUMENT**
>
> In closing argument, counsel for the State stated, "Now, I'm not making any accusations. I don't know if anything had ever happened with that child before, but that night he got carried away or something, and he hurt that child more than he intended to in this sexual battery." Havard claims this amounts to a suggestion that Havard had previously sexually assaulted Chloe and is prosecutorial misconduct.
>
> Havard's counsel failed to object to these statements at trial. The applicable rule here is clear. "In order to preserve an issue for appeal, counsel must object. The failure to object acts as a waiver." *Carr v. State*, 873 So.2d 991, 1004 (Miss. 2004). Were Havard now alleging ineffective counsel for failure to object to this statement, our analysis here would be different. Because trial counsel failed

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

Havard I, 928 So. 2d at 791. Havard did not assert an IATC claim based on a failure to object to any prosecutorial misconduct on direct review in *Havard I*.

Additionally, the Mississippi Supreme Court adjudicated a second prosecutorial misconduct claim raised in Havard's initial PCR application in *Havard II*. The *Havard II* opinion relates:

> **VII. Prosecutorial misconduct during closing argument at the guilt phase.**
>
> During closing arguments, the prosecutor stated, "Now, I'm not making any accusations. I don't know if anything had ever happened with that child before, but that night he got carried away or something, and he hurt that child more than he intended to in

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

Havard II, 988 So. 2d at 342.

2. Havard is not entitled to relief for prosecutorial misconduct claim under Claim II.

Again, even if Havard raised Claim II in state court, AEDPA bars him from relitigating this claim in these proceedings. The Mississippi Supreme Court's adjudication of Havard's misconduct claim in *Havard II* is a merits adjudication. It is entitled to AEDPA deference. Havard fails to identify any clearly established federal law that controlled the state supreme court's determination or shows that

court's decision was contrary to, inconsistent with, or rested on an unreasonable application of the facts before it in *Havard II*.

Under *Darden v. Wainwright*, 477 U.S. 168 (1986), a prosecutor's comments at closing violate the Constitution only when they "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" 477 U.S. at 181; *see also Parker v. Matthews*, 567 U.S. 37, 45 (2012). The State's closing argument can hardly be characterized as having "infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*

And Havard cannot show otherwise considering the allegations under Claim II. He cannot show the Mississippi Supreme Court's decision is contrary to or unreasonably applies *Darden* or rested on an unreasonable determination of the facts before it. As the Supreme Court noted in *Parker*, "*Darden* itself held that a closing argument considerably more inflammatory than the one at issue here did not warrant habeas relief." *Id.* at 47–48 (citing *Darden*, 477 U.S. at 180, nn. 11, 12) (noting that the "prosecutor in *Darden* referred to the defendant as an animal, and stated that, "I wish I could see the defendant with no face, blown away by a shotgun" (cleaned up)). This is particularly true considering *Darden's* standard "is a very general one, leaving courts 'more leeway … in reaching outcomes in case-by-case determinations[.]'" *Id.* at 48 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). He cannot overcome AEDPA's relitigation bar. And because he cannot, Havard is not entitled to relief for the assertions under Claim II.

Alternatively, and assuming there are no bars to federal review, Claim II lacks merit. Havard's laundry list of alleged misconduct in this case includes the specific statement that he argued in state court constituted prosecutorial misconduct. But a review record reveals the State's closing argument amounted to a request for the jury to focus on the evidence. The State's comments were not misstatements of the law, they were not speculative, and did not suggest Havard had sexually assaulted Chloe or on anyone else before the night of Chloe's death. The State's comments were in direct response to the defense's closing argument. And taken both by themselves and in the context of the trial, they were proper.

During closing argument, defense counsel repeatedly argued the prosecution failed to present sufficient evidence to support its burden of proving Havard guilty beyond a reasonable doubt. Defense counsel stressed that the State had no confession, no eyewitnesses, and no physical evidence of sexual battery. Counsel also argued that the State had not hypothesized what object could have caused the sexual injury to Chloe and had not tested Havard for physical signs of sexual battery. Doing so allowed counsel to argue it was plausible to believe Havard's version of events: that Chloe slipped while he was bathing her; he panicked and shook her, setting off an accidental chain of events that resulted in her death.

The State responded to defense counsel's closing by arguing:

> He admits it, ladies and gentlemen, but they want you to believe this house of cards they're building over here. And this to me the most incriminating thing he says in this statement, folks. They ask him did

> he do it, and I couldn't believe this when I heard it. He said, "I can't explain it. I don't know." Do you think you've done it. And he said and I quote, I don't think I did it. I don't recollect doing it. I don't remember doing it." Folks, if you hadn't done that, you'd be saying, hell, no. I didn't do it. You wouldn't be not recollecting doing it or not remembering doing it or not thinking you did it. That ain't reasonable. That ain't common sense. Ladies and gentlemen, I submit to you what happened out there that night was very simple. Now, I'm not making any accusations. I don't know if anything had ever happened with that child before, but that night he got carried away or something, and he hurt that child more than he intended to in this sexual battery. He hurt her.

The State continued to address defense counsel's insufficient evidence argument during its closing argument, explaining that:

> He hurt her. You heard him talking about how she was injured in her rectal area, and what does a child do—what's the only defense an infant baby has got when something like that happens to them? They scream. They don't just cry, folks. They scream in pain. When they're in pain, they scream. And what's he going to do then? She's screaming. He's injured her. Stop her. I got to stop her from screaming. Well, he stopped her all right….

The State informed the jury it was not making allegations against anyone. It never mentioned previous sexual abuse or battery. It never even mentioned Havard when admitting that it did not know if anything had ever happened to Chloe before the night she died. The State used a fleeting reference in a greater response to Havard's theory that there was insufficient evidence to show what happened the night of Chloe's death. What the State did know—what it told the jury—was that Havard intentionally harmed Chloe the night she was murdered.

And after making this affirmation, the State supported it by arguing facts in evidence that proved it beyond a reasonable doubt.

The Mississippi Supreme Court found this sentence so fleeting, so unimportant, as to be prejudicial in light of the remaining evidence. There had been no suggestion at trial that Havard had previously injured or abused Chloe. The trial court instructed the jury that comments of the attorneys are not law. It instructed the jury that "arguments, statements and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence." Further, the jury was instructed to "disregard" any such statements made by counsel, if said statement "has no basis in the evidence." Finally, the jury was instructed that they were to base their verdict "on the evidence and not upon speculation, guesswork or conjecture." In light of these facts, it cannot be said that the prosecution's statement resulted in prejudice to Havard.

So even if the procedural default and adequate and independent state law grounds doctrines did not bar review, Claim II rests on baseless allegations that lack legal merit. are not supported by the record and lack merit. Havard received a fair trial. He is not entitled to relief for Claim II.

III. Havard's constitutional rights were not violated by the state trial court's admission of evidence during sentencing, and trial counsel was not ineffective for failing to object to the admission of any evidence at sentencing.

Havard states: "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. (Doc. 108 at 43). Respondents agree. Claim III in Havard's Petition is moot and provides no basis for granting him relief.

IV. Havard was not denied his right to effective assistance of counsel for a failure to adequately investigate and present mitigating evidence.

Havard states: "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. (Doc. 108 at 43). Respondents agree. Claim IV in Havard's Petition is moot and provides no basis for granting him relief.

V. Havard was not denied his right to effective assistance of counsel during counsel's closing argument during the sentencing phase of trial.

Havard states: "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. (Doc. 108 at 44). Respondents agree. Claim V in Havard's Petition is moot and provides no basis for granting him relief.

VI. The trial court did not improperly give the HAC aggravating circumstance jury instruction.

Havard states: "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. (Doc. 108 at 44). Respondents agree. Claim VI in Havard's Petition is moot and provides no basis for granting him relief.

VII. There was sufficient evidence to support the HAC aggravating circumstance jury instruction.

Havard states: "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. (Doc. 108 at 44). Respondents agree. Claim VII in Havard's Petition is moot and provides no basis for granting him relief.

VIII. There was sufficient evidence to support the jury instruction that the capital offense was committed during the commission of, or an attempt to commit sexual battery.

Havard states: "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. (Doc. 108 at 44). Respondents agree. Claim VIII in Havard's Petition is moot and provides no basis for granting him relief.

IX. The trial court did not improperly answer a question from the jury concerning the definition of life without parole.

Havard states: "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. (Doc. 108 at 44). Respondents agree. Claim IX in Havard's Petition is moot and provides no basis for granting him relief.

X. Whether the IATC claim under Claim X overcomes AEDPA's relitigation bar and warrants relief.

Respondents deny the allegations under Claim X of the Petition. (Doc. 108 at 45–47).

A. AEDPA bars Havard from obtaining relief for Claim X.

Havard presented the IATC claim under Claim X to the Mississippi Supreme Court on direct review in *Havard I*, 928 So. 2d at 782–87, and during his initial state PCR proceedings in *Havard II*, 988 So. 2d at 339–342.

1. The Mississippi Supreme Court's adjudications of Havard's IATC claim based on a failure to ask "reverse-*Witherspoon*" questions during voir dire.

First, the *Havard I* opinion provides:

> **II. WHETHER TRIAL COUNSEL WERE INEFFECTIVE BY FAILING TO ASK "REVERSE-*WITHERSPOON*" QUESTIONS RELATING TO THE JURORS' POTENTIAL STRONG FEELINGS ABOUT THE DEATH PENALTY**
>
> Havard's next assignment of error, also one of ineffective assistance of counsel, is that his trial attorneys were ineffective in failing to ask questions relating to the jurors' qualifications to serve on a jury to decide a death sentence. Havard specifically claims defense counsel impermissibly failed to ask "reverse-*Witherspoon*" questions—whether jurors would automatically vote for the death penalty. *Irving v. State*, 498 So.2d 305, 310 (Miss.1986) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)). Havard, relying on an outside-the-record affidavit from juror number twenty-nine, Willie Thomas, asserts that Thomas believed the death penalty was the only

appropriate sentence in a murder trial. Thomas was ultimately selected as juror number eight, in the order of selection, to serve as a member of the trial jury.

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

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

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

consideration of the issues in post-conviction proceedings." *Id.* The comment to the current Rule 22 also makes clear that failing to raise certain, though not all, issues on direct appeal in a case such as this will constitute a waiver, specifically when those issues are claims of ineffective assistance of counsel.

> Rule 22(b) allows the appellant to raise post-conviction issues on direct appeal where the issues are fully apparent from the record of the trial, and failure to raise such issues constitutes a waiver. Under this provision, *issues such as claims of ineffective assistance of counsel* for failure to object to evidence offered by the state or to argument by the state *must be raised on direct appeal*. Other post-conviction issues which cannot be raised at the time of appeal because they involve actions or inaction outside the record are not waived since they cannot practically be raised without further development or investigation.

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

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

In *Branch*, we continued on a course of wrestling with the procedural quagmire resulting from what we respectfully characterize as a less than clear decision by the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242,

153 L.Ed.2d 335 (2002). After declaring the execution of the mentally retarded amounted to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution, the Court stated:

> To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright*, with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." 477 U.S. 399, 405, 416–417, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

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

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

> The State challenges Branch's appendices which were not part of trial record. According to the State, these documents are barred from consideration. *Wansley v. State*, 798 So.2d 460, 464 (Miss. 2001). However, Branch is not represented

> by the same counsel. Initially, Branch was represented by Callestyne Crawford and Solomon Osborne. Prior to trial, Osborne was replaced by W.S. Stuckey. The Office of Capital Defense Counsel was appointed for this direct appeal. We note M.R.A.P. Rule 22(b):
>
> > Issues which may be raised in post-conviction proceedings may also be raised on direct appeal. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute waiver barring consideration of the issues in post-conviction proceedings.
>
> If new counsel on direct appeal is required to assert collateral claims, there must be an opportunity to submit extraneous facts and discovery and evidentiary hearing to develop and prove the allegations. *See Brown v. State*, 798 So.2d 481, 491 (Miss. 2001) (citing *Smith v. State*, 477 So.2d 191, 195 (Miss. 1985) and *Turner v. State*, 590 So.2d 871, 874 (Miss. 1991)); *Jackson v. State*, 732 So.2d 187, 190 (Miss. 1999).
>
> We have stated that "there is conflicting authority on whether this Court should apply the procedural bar" in a post-conviction relief case raising ineffective assistance of counsel on direct appeal. *Goodin v. State*, 856 So.2d 267, 279 (¶ 30) (Miss. 2003). Goodin was then permitted to proceed on the issue of ineffective assistance of counsel and was granted an evidentiary hearing to determine whether he was "mentally retarded within the meaning of *Atkins*." *Although this case is a direct appeal, Branch is represented by counsel who did not represent him in the trial court. Branch must raise Atkins and ineffective assistance of counsel issues in this direct appeal or he will be barred from doing so in subsequent appeals. Therefore, we will permit Branch to proceed with these issues, and we will consider the additional documents supplied in Appendices to Original Brief of Appellant.*

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

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

> Hodges argues that according to *Branch v. State*, 882 So.2d 36, 49 (Miss. 2004), this Court is allowed to consider such extraneous evidence not in the record. However, this Court in Branch clearly set forth that such appendices which were not part of the trial record were to be considered only on the *Atkins* [*v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)] and ineffective assistance of counsel issues. Here, during oral argument, defense counsel conceded that he was not pursuing this issue as ineffective assistance of counsel, but rather was doing so under the theory of prosecutorial misconduct. Also, this Court has recently amended Rule 22 of the Mississippi Rules of Appellate Procedure. Even though this amendment does not apply to the case sub judice, this Court holds that the plea hearing, which is not in the record, is barred from consideration and *Branch* does not allow this Court to consider such extraneous evidence. To make it clear what this Court can consider on direct appeal in future cases, Rule 22 has been amended to state that "[i]ssues which may be raised in post-conviction proceedings may also be raised on direct appeal" *if such issues are based on facts fully apparent from the record*. M.R.A.P. 22 (emphasis added).

912 So.2d at 750.

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

Considering the "reverse-*Witherspoon*" issue, absent the juror affidavit, the exact assignment of error here is that defense counsel was ineffective by failing to ask "reverse-*Witherspoon*" questions, meaning defense counsel should have asked whether the jurors

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

Havard I, 928 So. 2d at 782–87.

And the *Havard II* opinion reports:

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

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

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

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

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

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

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

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

(Emphasis added).

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

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

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

Havard also offers the affidavit of Natman Schaye, whom Havard asserts is a nationally recognized capital litigator. The summation of Mr. Schaye's affidavit is that he is of the opinion that Havard's defense counsel were deficient in failing to ask questions during voir dire to determine the opinions and attitudes of the venire regarding the death penalty. He further believes that Havard was prejudiced by counsel's deficient performance as evidenced by juror Willie Thomas's affidavit.

Our previous discussion *supra* regarding this issue reveals that both *Witherspoon* and "reverse-*Witherspoon*" questions were asked by the trial court. The trial court then instructed counsel for the state and the defense not to repeat questions already asked of the venire panel. This Court concluded that the panel was adequately questioned during the whole of the voir dire examination. Mr. Schaye's affidavit is not persuasive to the contrary. Havard's claim

> of ineffective assistance of counsel still does not pass the standard set forth in *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. This issue is without merit.

Havard II, 988 So. 2d at 339–42.

2. Havard is not entitled to relief for Claim X.

AEDPA's relitigation bar prevents Havard from obtaining relief for the IATC claim under Claim X. Claim X should be denied because the state supreme court's merits adjudication of that claim is entitled to AEPDA deference and correctly disposes of it. *Strickland v. Washington* was clearly established federal law that controlled Claim X. The Mississippi Supreme Court correctly identified and applied *Strickland's* rule to Claim X. Its application of *Strickland's* rule is entitled to considerable leeway in "'reaching outcomes in case–by–case determinations.'" *See Richter*, 562 U.S. at 101 (quoting *Alvarado*, 541 U.S. at 664). This Court's review of the Mississippi Supreme Court's resolution of the IATC claim under Claim X is "doubly deferential" because of *Strickland's* requirement of "a 'highly deferential' look at counsel's performance," and "the 'deferential lens of § 2254(d)[.]'" *Pinholster*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 121 (2009)).

Under this doubly deferential standard, "the question is … whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Richter*, 562 U.S. at 105. To obtain relief, Havard must show that the state court's ruling "was so lacking in justification that there was an error well

understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See id.* at 103. Havard does not state how the Mississippi Supreme Court's adjudication of this IATC meets either exception under section 2254(d). Nor does he explain how this IATC claim entitles him to relief. Havard cannot overcome AEDPA's relitigation bar or show Claim X entitles him to relief. Because he cannot, the Court should deny Claim X.

XI. Whether the IATC claim under Claim XI overcomes AEDPA's relitigation bar and warrants relief.

Respondents deny the allegations under Claim XI of the Petition. (Doc. 108 at 47–49).

A. AEDPA bars Havard from obtaining relief for Claim XI.

Havard presented the IATC claim under Claim XI to the Mississippi Supreme Court on direct review in *Havard I*, 928 So. 2d at 780–82.

1. The Mississippi Supreme Court's adjudication of Havard's IATC claim under Claim XI.

The *Havard I* opinion states:

> **I. WHETHER TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO ENSURE THAT A JUROR WAS EXCUSED FOR CAUSE AFTER EXHIBITING BIAS**
>
> Havard argues his representation was ineffective at several points during the trial, violating his right to effective counsel. Havard specifically asserts his trial counsel failed to ensure that juror number twenty-five, Dorothy Sylvester, was excused for cause because she was biased against him. During the court's voir dire, the trial judge asked whether any of the prospective jurors knew Havard or his family. In response, Sylvester stated, "I don't know him, but I had a niece to be raped—you know—I don't think I could be fair

about it, too." The trial judge clarified that he would deal with those concerns later, and at that point in the questioning, he was merely asking if any member of the venire was acquainted with Havard or his family. Sylvester was eventually selected and served on the trial jury as juror number seven in the order of selection.

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

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

reasonableness; counsel must have provided "reasonably effective assistance." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. For a defendant to prevail on a claim of ineffectiveness, counsel's representation must have fallen "below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. The United States Supreme Court in *Strickland* laid out the standard and the test that must be met for a successful claim of ineffectiveness of counsel. "The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. 2052.

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

Though juror Sylvester initially commented that she did not think she could be fair because of her niece's experience, the voir dire examination did not end there, and the jurors were continually under oath to be truthful in their answers to all voir dire questions propounded by the trial judge and the attorneys. After this comment by juror Sylvester, counsel for both the State and the defendant, as well as the trial judge, continued to ask the potential jurors if any of them felt that they could not be fair in deciding the fate of the defendant in this type of case. Defense counsel did not sit idly by. The record reveals several instances of juror challenges where defense counsel struck for cause certain jurors who felt they could not be fair. Defense counsel did ask the venire members if

any of them had been a victim of a crime. Answers were not restricted to situations where venire members themselves were victims; two other jurors, numbers 47 and 60, both answered that a family member had been a victim of a crime. Sylvester did not respond to this question. Defense counsel also made clear that he was going to avoid repeating questions already asked by the trial judge or the prosecutor. The trial court explained to the jurors the presumption of innocence and the necessity of deciding the case based solely on the evidence presented. The trial judge asked if any potential juror would automatically vote for the death penalty. The judge also asked the converse question—if any potential juror would be unable to vote for the death penalty regardless of the evidence presented at trial. Finally, the trial judge asked the prosecutor, who followed the trial judge in the voir dire examination, not to cover the same subject matter already covered by the trial judge in his voir dire examination. Counsel for the State ensured through questioning that the jurors understood they were to notify the court and the attorneys if any existing problem would affect their ability to consider death as an appropriate sentence. The prosecutor also explored in detail the jury venire's understanding of the burden of proof, reasonable doubt, the presumption of innocence, and the fairness demanded of the jury. The State, through counsel, also inquired if any juror thought he or she could not be fair or reasonable in deciding the issue of the defendant's guilt. From the record, we are simply unable to find defense counsel's decision not to repeat these same questions rises to the level of ineffective assistance of counsel. Additionally, defense counsel had the opportunity not only to hear these voir dire responses from the members of the venire, defense counsel also had the invaluable opportunity to observe the demeanor of these potential jurors, both when they were responding to questions, and when they were simply reacting to the events which unfolded in the courtroom during the voir dire examination.

The answers, or lack of answers, to the voir dire examination, regardless of who was asking the questions, all served the same purpose. Sylvester made no indication during the extensive questioning following her objectionable comments that in any way revealed she would be unable to be fair and impartial in deciding whether Havard was guilty or not guilty, and if found guilty, in deciding the appropriate sentence. Given the multiple opportunities Sylvester had to notify the court or the attorneys of

> any potential problems she may have had in sitting on the jury, we cannot find trial counsel's performance was so deficient that it prevented counsel from functioning as guaranteed by the Sixth Amendment. Any possible error on the part of counsel must have been so serious that it deprived the defendant of a fair trial with a reliable result. If any counsel error occurred at all during the voir dire examination of juror Sylvester, we cannot find that it rose to such a level so as to require us to judicially declare constitutional ineffectiveness on the part of Havard's trial counsel.
>
> We find counsel's performance was not deficient and that Havard's conviction and subsequent death sentence were not the result of a breakdown in the adversary process which rendered the result of Havard's trial unreliable. Therefore, we find this issue to be without merit.

Havard I, 928 So. 2d at 780–82.

2. Havard is not entitled to relief for Claim XI.

AEDPA's relitigation bar prevents Havard from obtaining relief for the IATC claim under Claim XI. Claim XI should be denied because the state supreme court's merits adjudication of that claim is entitled to AEPDA deference and correctly disposes of it. *Strickland v. Washington* was clearly established federal law that controlled Claim XI. The Mississippi Supreme Court correctly identified and applied *Strickland's* rule to Claim XI. Its application of *Strickland's* rule is entitled to considerable leeway in "'reaching outcomes in case–by–case determinations.'" *See Richter*, 562 U.S. at 101 (quoting *Alvarado*, 541 U.S. at 664). This Court's review of the Mississippi Supreme Court's resolution of the IATC claim under Claim XI is "doubly deferential" because of *Strickland's* requirement of "a 'highly deferential' look

at counsel's performance," and "the 'deferential lens of § 2254(d)[.]'" *Pinholster*, 563 U.S. at 190 (quoting *Knowles*, 556 U.S. at 121).

The question under this doubly deferential standard is: "[W]hether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Richter*, 562 U.S. at 105. To overcome AEDPA's relitgation bar, Havard must show that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See id.* at 103. Havard does not explain how the Mississippi Supreme Court's adjudication of this IATC meets either exception under section 2254(d). Nor does he explain how this IATC claim entitles him to relief. He cannot overcome AEDPA's relitigation bar or show he is entitled to relief for Claim XI. Because he cannot, Claim XI should be denied.

3. Havard's evidentiary hearing and record expansion request related to Claim XI should be denied.

Havard claims that, at the very least, this Court should permit him to develop the IATC claim under Claim XI during an evidentiary hearing. (Doc. 108 at 49, ¶ 12). The Court should refuse this request for two reasons. First, Havard cannot overcome AEDPA's relitigation bar under the applicable doubly deferential standard of review on the record before the Mississippi Supreme Court in *Havard I* as binding precedent demands. *See Pinholster*, 563 U.S. at 181

("review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits"). He must do so before he may proceed with further litigation of this claim. Second, Havard has not tried to meet section 2254(e)(2)'s stringent requirements for any evidence that would permit this Court to hold an evidentiary hearing, develop the record, and consider evidence that was not presented in state court. He must do so after overcoming AEDPA's relitigation bar and before this Court may conduct an evidentiary hearing. *See Shinn*, 142 S. Ct. at 1735; *see also Holland v. Jackson*, 542 U.S. 649, 653 (2004) (explaining "that § 2254(e)(2)'s "restrictions apply *a fortiori* when a prisoner seeks relief based on new evidence without an evidentiary hearing").

XII. Whether the biased jury claim under Claim XII overcomes AEDPA's relitigation bar and warrants relief.

Respondents deny the allegations under Claim XII of the Petition. (Doc. 108 at 49–50).

A. AEDPA bars Havard from obtaining relief for Claim XII.

Havard presented the IATC claim under Claim XII to the Mississippi Supreme Court on direct review in *Havard I*, 928 So. 2d at 787. In *Havard II*, he did not present this claim as a separate issue as he had during direct review. Instead, he lumped it in with the IATC claim under Claim X, *supra* (the IATC claim based on a failure to ask death-qualified questions during voir dire). *Havard II*, 988 So. 2d at 340–42.

1. The Mississippi Supreme Court's adjudications of Havard's biased jury claim under Claim XII.

The *Havard I* opinion relates the following:

> **III. WHETHER HAVARD WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BECAUSE OF THE SEATING OF A JUROR WHO SUPPORTS THE DEATH PENALTY IN ALL MURDER CASES AND THAT JUROR'S FAILURE TO ANSWER THE TRIAL COURT'S QUESTION ON THIS POINT**
>
> Havard also claims the seating of juror Thomas, as well as Thomas's failure to answer the trial court's "reverse-*Witherspoon*" questions, effectively deprived Havard of his right to a fair trial under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and their counterparts in the Mississippi constitution. The State counters with its analysis of M.R.A.P. 22, stating that because the record is devoid of any facts to substantiate Havard's claim, this Court cannot consider a post-conviction issue on direct appeal. This issue indeed does not raise claims of ineffective assistance of trial counsel. Although the former Rule 22 required an appellant with different counsel on direct appeal to raise certain issues on pain of waiver in subsequent PCR proceedings, Rule 22 does not require that all issues be heard on direct appeal. Havard has now raised these issues and cannot later be found to have waived them. Havard's avenue for seeking future relief has not been thwarted—he has preserved those issues for post-conviction proceedings. While the current Rule 22 was not in place when Havard's case was tried, the current Rule 22, its comments, and Branch and Hodges give guidance as to what purpose the rule should serve. Concerning this issue, we find that it cannot practically be raised without further development or investigation, which would be proper during future post-conviction relief proceedings. This issue is without merit on direct appeal as post-conviction proceedings are better tailored for the Court to consider it.

Havard I, 928 So. 2d at 787.

The *Havard II* opinion provides:

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

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

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

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

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

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

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

(Emphasis added).

The affidavit of Willie Thomas does not meet the exception to Rule 606(b), and it should again be excluded from our consideration.

Notwithstanding Rule 606(b), Thomas's affidavit does not offer merit to Havard's claim. Paragraphs three and four of Thomas's affidavit stated:

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

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

Havard also offers the affidavit of Natman Schaye, whom Havard asserts is a nationally recognized capital litigator. The summation of Mr. Schaye's affidavit is that he is of the opinion that Havard's defense counsel were deficient in failing to ask questions during voir dire to determine the opinions and attitudes of the venire regarding the death penalty. He further believes that Havard was prejudiced by counsel's deficient performance as evidenced by juror Willie Thomas's affidavit.

Our previous discussion *supra* regarding this issue reveals that both *Witherspoon* and "reverse-*Witherspoon*" questions were asked by the trial court. The trial court then instructed counsel for the state and the defense not to repeat questions already asked of the venire panel. This Court concluded that the panel was adequately questioned during the whole of the voir dire examination. Mr. Schaye's affidavit is not persuasive to the contrary. Havard's claim of ineffective assistance of counsel still does not pass the standard set forth in *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. This issue is without merit.

Havard II, 988 So. 2d at 340–342.

2. Havard is not entitled to relief for Claim XII.

AEDPA's relitigation bar prevents Havard from obtaining section 2254 relief for the biased jury claim under Claim XII. Claim XII should be denied because the state supreme court's merits adjudication of that claim is entitled to AEPDA deference and correctly disposes of it. Havard cites no clearly established Supreme Court precedent that the Mississippi Supreme Court supposedly misapplied or attempt to make this showing on the records before the state supreme court in *Havard I* and *Havard II*.

Further, the Mississippi Supreme Court's adjudication in *Havard II* was based on its interpretation of Mississippi Rule of Evidence 606(b). A state court's interpretation of its own state laws or rules does not provide a basis for federal habeas relief, as there is no federal constitutional question involved. *See Bronstein v. Wainwright*, 646 F.2d 1048, 1050 (5th Cir. 1981). A federal habeas court "takes the word of the state's highest court as to the interpretation if its law on criminal matters" and does not "sit to review" that interpretation. *See Young*, 356 F.3d at 628; *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus"); *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (stating that it is not the province of a federal habeas court to

reexamine state court determinations of state law questions); *Fuhrman v. Dretke*, 442 F.3d 893, 901 (5th Cir. 2006) (reaffirming the rule that a federal habeas court must defer to state court's interpretation of state law); *Johnson v. Cain*, 215 F.3d 489, 494 (5th Cir. 2000) (explaining that a federal habeas court may not review state court's interpretation of its own law); *Gibbs*, 154 F.3d at 259. This Court must "defer to [the] implicit conclusion and interpretation of state law" by the state court. *See Young*, 356 F.3d at 628.

3. Havard's evidentiary hearing or record expansion request related to Claim XII should be denied.

Havard claims this Court should permit him to develop the biased jury claim under Claim XII during an evidentiary hearing. (Doc. 108 at 50, ¶ 5). The Court should decline this request. First, Havard cannot overcome AEDPA's relitigation bar under the deferential standard of review on the record before the Mississippi Supreme Court in *Havard I*. *See Pinholster*, 563 U.S. at 181. He must do so before he may proceed with further litigation of this claim. Second, Havard has not tried to meet section 2254(e)(2)'s stringent requirements for any evidence that would permit this Court to hold an evidentiary hearing, develop the record, and consider evidence that was not presented in state court. He must do so after overcoming AEDPA's relitigtion bar and before this Court may conduct an evidentiary hearing or otherwise

supplement the state-court record. *See Shinn*, 142 S. Ct. at 1735; *see also Holland*, 542 U.S. at 653.

XIII. Whether the aggregate error claim under Claim XIII overcomes AEDPA's relitigation bar and warrants relief.

Respondents deny the allegations under Claim XIII of the Petition. (Doc. 108 at 51–52).

A. Claim XIII is technically exhausted.

In his Petition, Havard says he presented the aggregate error claim under Claim XIII in *Havard I*. (Doc. 108 at 52, § B). But the state-court record shows otherwise. As demonstrated below, Havard did not raise the aggregate error claim under Claim XIII to the Mississippi Supreme Court in *Havard I*.

"[F]or a claim to be exhausted, the state court system must have been presented with the same facts and legal theory upon which the petitioner bases his current assertions." *Ruiz*, 460 F.3d at 643 (citing *Picard*, 404 U.S. at 275–77). "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (internal citation omitted). "[W]here [the] petitioner advances in federal court an argument based on a legal theory distinct from that relied upon in state court, he fails to satisfy the exhaustion requirement." *Wilder v. Cockrell*, 274 F.3d 255, 259 (5th Cir. 2001).

Havard has modified the aggregate error claim under Claim XII. It is incapable of being fairly presented to the Mississippi Supreme Court in a manner consistent with state procedural law. As a result, Claim XIII is technically exhausted. The Court should "apply … the doctrine of procedural default" to Claim XIII. *See Shinn*, 142 S. Ct. at 1732 (citing *Davila*, 137 S. Ct. at 2064). "[T]o allow a state prisoner simply to ignore state procedure on the way to federal court would defeat the evident goal of the exhaustion rule." *Shinn*, 142 S. Ct. at 1732 (citing *Coleman*, 501 U.S. at 732). "Under that doctrine, federal courts generally decline to hear any federal claim that was not presented to the state courts 'consistent with the State's own procedural rules.'" *Id.* (quoting *Edwards*, 529 U.S. at 453).

Before the Court may consider Claim XIII, Havard provide an adequate reason to excuse the default that bars review. He must show good cause for the default and actual prejudice resulting from it. *See Shinn*, 142 S. Ct. at 1732 ("When a claim is procedurally defaulted, a federal court can forgive the default and adjudicate the claim if the prisoner provides an adequate excuse."). There is no cognizable allegation of cause or prejudice under Claim XIII. So federal review of Claim XIII must be barred.

A. AEDPA bars Havard from obtaining relief for Claim XIII.

Should the Court disagree, AEDPA bars Havard from relitigating Claim III in these proceedings. He presented an aggregate error to the Mississippi Supreme Court on direct review in *Havard I*. 928 So. 2d at 803.

1. The Mississippi Supreme Court's adjudication of Havard's aggregate error claim under Claim XIII.

The *Havard I* reads:

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

Havard I, 928 So. 2d at 803.

2. Havard is not entitled to relief for Claim XIII.

Claim XIII is entitled to AEDPA deference because the Mississippi Supreme Court adjudicated the merits of the aggregate error claim under Claim XIII. Havard cannot overcome AEDPA's relitigation bar because there is no clearly established federal law that controls this issue. *See Richter*, 562 U.S. at 101 ("'[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.'" (quoting *Knowles*, 556 U.S. at 122)). The Fifth Circuit has consistently recognized that the Supreme Court "has never squarely held that the cumulative error doctrine governs ineffective assistance of counsel claims." *Hill v. Davis*, 781 F.App'x 277, 280-81 (5th Cir. 2019). The Mississippi Supreme Court's adjudication of Havard's aggregate error claim under Claim XIII cannot be contrary to, or an unreasonable application of clearly established federal law that does not exist.

Besides that, Havard does not state how this aggregate error claim constitutes a constitutional claim for relief. Circuit precedent acknowledges that, in rare instances, cumulative error claims may warrant relief. "[F]ederal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors 'so

infected the entire trial that the resulting conviction violates due process.'" *Derden v. McNeel*, 978 F.2d 1453, 1454 (5th Cir. 1992) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). Circuit precedent also restricts habeas review of cumulative error claims. Cumulative error claims may be considered on habeas review but only those based on errors that "'infuse[ ] the trial with unfairness as to deny due process of law.'" *Perez v. Dretke*, 172 F.App'x 76, 82 (5th Cir. 2006) (quoting *Derden*, 978 F.2d at 1458). The individual allegations of ineffectiveness of a cumulative error claim must first be considered because meritless claims or claims that are not prejudicial cannot be cumulated, regardless of the number raised. *See United States v. Hall*, 455 F.3d at 520; *Sholes v. Cain*, 370 F.App'x 531, 535 (5th Cir. 2010). "Twenty times zero equals zero." *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987). When evaluating the cumulative effect of prejudicial errors to a set of facts, a federal court "review[s] the record as a whole to determine whether the errors more likely than not caused a suspect verdict." *Spence v. Johnson*, 80 F.3d 989, 1001 (5th Cir. 1996) (internal quotations omitted).

Several of Havard's claims are procedurally barred from consideration. They cannot be added into a cumulative error analysis. *See Derden*, 978 F.2d at 1454. Some of his claims are state law claims. "'[E]rrors of state law, including evidentiary errors, are not cognizable in habeas corpus.'" *Perez*, 172 F.App'x at 82 (quoting *Derden*, 978 F.2d at 1458). Others are procedurally defaulted and

barred from review. *See Derden*, 978 F.2d at 1454. As the Mississippi Supreme Court found in *Havard I*, Havard's aggregate error claim had no merit. There was no accumulation of error that could warrant relief. Based on the allegations under Claim XIII, Havard cannot show the aggregate effect of the alleged error capable of review 'so infected his capital-murder trial such that resulting guilty verdict violates due process. *See Derden*,978 F.2d at 1454. And so, Havard cannot show his cumulative error claims under Claim III (and the cumulative error claims under Claim XIV and Claim XV) were contrary to or an unreasonable application of clearly established federal law and that he is entitled to habeas relief for Claim XIII (or Claim XIV and Claim XV).

XIV. Whether the IATC claim under Claim XIV overcomes the procedural default doctrine, AEDPA's relitigation bar, and warrants relief.

Respondents deny the allegations under Claim XIV of the Petition. (Doc. 108 at 52–53).

B. Claim XIV is technically exhausted.

In his Petition, Havard presents an IATC claim based on the cumulative effect of trial counsel's unspecified failures at trial. (Doc. 108 at 52–53). He says that he raised this claim in *Havard II* and *Havard III*, and during the proceedings in his third state PCR proceedings. (Doc. 108 at 53 § B ¶¶ 1–3). But the state-court record shows otherwise. As demonstrated below, Havard

did not raise the IATC claim under Claim XIV in *Havard II*, *Havard III*, or during his third state PCR proceedings.

"[F]or a claim to be exhausted, the state court system must have been presented with the same facts and legal theory upon which the petitioner bases his current assertions." *Ruiz*, 460 F.3d at 643 (citing *Picard*, 404 U.S. at 275–77). "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson*, 459 U.S. at 6 (internal citation omitted). "[W]here [the] petitioner advances in federal court an argument based on a legal theory distinct from that relied upon in state court, he fails to satisfy the exhaustion requirement." *Wilder*, 274 F.3d at 259.

Claim XIV is technically exhausted. It is incapable of being fairly presented to the Mississippi Supreme Court in a manner consistent with state procedural law. So the Court should "apply … the doctrine of procedural default" to Claim XIV. *See Shinn*, 142 S. Ct. at 1732 (citing *Davila*, 137 S. Ct. at 2064). "[T]o allow a state prisoner simply to ignore state procedure on the way to federal court would defeat the evident goal of the exhaustion rule." *Shinn*, 142 S. Ct. at 1732 (citing *Coleman*, 501 U.S. at 732). "Under that doctrine, federal courts generally decline to hear any federal claim that was not presented to the state courts 'consistent with the State's own procedural rules.'" *Id.* (quoting *Edwards*, 529 U.S. at 453).

Before the Court may consider Claim XIV, Havard provide an adequate reason to excuse the default that bars review. He must show good cause for the default and actual prejudice resulting from it. *See Shinn*, 142 S. Ct. at 1732 ("When a claim is procedurally defaulted, a federal court can forgive the default and adjudicate the claim if the prisoner provides an adequate excuse."). There is no cognizable allegation of cause or prejudice under Claim XIV. So federal review of Claim XIV must be barred.

C. AEDPA bars Havard from obtaining relief for Claim XIV.

But if this Court disagrees, then AEDPA precludes Havard from relitigating the IATC claim under Claim XIV in these proceedings and bars him from obtaining relief for that claim.

1. The Mississippi Supreme Court's adjudications of the IATC claims raised in *Havard II*, *Havard III*, and his second successive PCR proceedings that are cited under Claim XIV.

Havard says the Mississippi Supreme Court denied him relief for this IATC claim during his initial PCR proceedings in *Havard II*. He cites paragraph 86 of the written opinion entered in *Havard II*. (Doc. 108 at 53, § B ¶ 1). Paragraph 86 is the final paragraph of the state supreme court's adjudication of Havard's claim that Robert E. Clark, one of the attorneys who represented him at trial, was incompetent to represent him. Turning to that portion of the *Havard II* opinion, the Court will find the following:

XIII. Competency of trial counsel.

In this next issue, Havard asserts that Robert E. Clark, one of Havard's defense attorneys, was incompetent to pursue legal relief on Havard's behalf. It is Havard's further assertion that Clark was intoxicated during Havard's trial, because in a newspaper clipping describing Clark's arrest, the Concordia Parish Sheriff, Randy Maxwell, stated, "We've been working on this a while." Wesley Steckler and Katie Stallcup, Attorney Arrested on Drug Charges, The Natchez Democrat, Jan. 16, 2007, at 1A and 3A.

Ironically, Havard states in his affidavit that he saw Clark use marijuana, ecstacy, and crack-cocaine the first time Havard met Clark around November of 2001. Between that time and the time Clark was appointed as Havard's counsel, Havard states that he went to Clark's home two or three more times to hang out and use drugs. The last time was two weeks before Havard was arrested. By Havard's own admission, he knew and believed his counsel to use drugs. Any concerns Havard may have had regarding his counsel's drug use was certainly capable of being raised at trial or on direct appeal, and the issue is procedurally barred. Miss. Code Ann. § 99–39–21(1) (Rev. 2007).

Notwithstanding the procedural bar, Havard's assertion that Clark was intoxicated during his trial is speculation at best and without merit. Havard states in his affidavit that he believes his family told the judge that he was not comfortable having Clark as his attorney "but I don't think they went into great detail as to why I felt that way. I do believe that is why Gus Sermos was appointed to represent me as well...." Havard further states that he was concerned drugs were affecting Clark's performance but did not say anything because he "was in enough trouble with the murder charge and was afraid that admitting I used drugs with Clark, might make my situation worse."

Havard has presented nothing to this Court thus far that has shown an indicia of unfairness or prejudice at Havard's trial. Additionally, Attorney Gus Sermos also represented Havard at trial. Finally, each and every claim of ineffective assistance of counsel, or otherwise, alleged by Havard on direct appeal and in these post-conviction proceedings, has been found to be without merit. This issue is, likewise, without merit.

Havard II, 988 So. 2d at 345–46.

Similarly, Havard states that he presented the IATC claim under Claim XIV twice in *Havard III*. (Doc. 108 at 53, § B ¶ 2 (citing *Havard III*, 86 So. 3d at ¶¶ 25–28, 44–53)). First, paragraphs 25–28 of the *Havard III* opinion read:

> **III. WHETHER HAVARD'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO UTILIZE REBECCA BRITT'S VIDEOTAPED STATEMENT.**
>
> As an alternative to Havard's *Brady* violation claim discussed first *supra*, Havard claims that his trial counsel were ineffective by failing to utilize the videotaped statement if the State did disclose or produce it. Specifically, Havard asserts that his "trial counsel were ineffective for (a) not informing Petitioner of the existence of the statement, (b) not utilizing the statement to support [Havard]'s defense to the charge of capital murder and the underlying felony of sexual battery, and (c) not utilizing the statement to cross-examine or impeach Rebecca Britt's trial testimony where it differed from what she told the investigators in the statement...."
>
> > "The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The test is two pronged: The defendant must demonstrate that his counsel's performance was deficient, and that the deficiency prejudiced the defense of the case. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064; *Washington v. State*, 620 So.2d 966 (Miss. 1993). "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Stringer v. State*, 454 So.2d 468, 477 (Miss. 1984), citing *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. at 2065; *State v. Tokman*, 564 So.2d 1339, 1343 (Miss. 1990).

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

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

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

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

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

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

Havard III, 86 So. 3d at 903–04.

Second, paragraphs 44–53 of the *Havard III* opinion state:

> **V. WHETHER NEWLY DISCOVERED EVIDENCE DEMONSTRATES THAT HAVARD'S TRIAL COUNSEL WERE INEFFECTIVE IN CHALLENGING THE UNDERLYING FELONY OF SEXUAL BATTERY.**
>
> Havard claims that the deposition testimony of Dr. Hayne, taken during discovery on federal habeas review, constitutes newly discovered evidence that supports his claim of ineffective assistance of counsel. Specifically, Havard claims that this newly discovered evidence "supports [his] prior claims of ineffective assistance of counsel with respect to trial counsel's efforts (or lack thereof) in challenging the underlying felony of sexual battery." He contends that those claims were central to the original post-conviction challenge.
>
> This claim is an attempt to rehabilitate failed claims that already have been addressed by this Court. On direct appeal, Havard claimed that his trial counsel were ineffective for failing to secure a pathologist to investigate the case and develop a defense strategy. *Havard*, 928 So.2d at 788. Havard's counsel did request an independent review of the autopsy report, but the trial court denied the motion, because no basis for need was shown when Dr. Hayne was available. *Id*. Havard argued that it was his attorneys' failure to present the trial court with a basis for the request that constituted ineffective assistance. *Id*. To support this claim, Havard relied on the affidavit of Dr. Lauridson and a medical journal article in an attempt to show the substantial need that he claimed his attorneys failed to show. *Id*. at 789. The Court refused to consider the documentation on direct appeal, because it was outside of the record. *Id*. Ultimately, the Court found that Havard's counsels' actions were not ineffective and that the trial court did not abuse its discretion by denying Havard's motion for an independent evaluation. *Id*.
>
> Subsequently, in his original post-conviction-relief motion, Havard again raised the issue that his counsel were ineffective in failing to secure an expert witness to aid in research and the development of a defense strategy. The Court reconsidered the issue, in light of

Dr. Lauridson's affidavit. Havard also submitted the affidavit of an attorney unrelated to Havard's case, who opined Havard's trial counsel were ineffective.

The Court considered, for the sake of argument, that even if Havard's counsel performed deficiently, meeting the first prong under *Strickland*, Havard could not show prejudice. *Havard*, 988 So.2d at 331. Although the Court's reasoning is more fully explained in that opinion, suffice it to state here that this Court found Dr. Lauridson's affidavit and reports did not contain evidence that would create a reasonable probability that the outcome of Havard's trial would have been different. *Id*. at 333.

In our discussion, we quoted Dr. Lauridson as follows:

> [e]xperienced medical examiners commonly encounter dilated anal sphincter's [sic] during post-mortem examinations. Experience as well as the medical literature recognizes that this finding does not imply anal sexual abuse. Studies of this phenomenon, in fact have shown that children who have died of brain injuries have an increased likelihood of having a dilated anus.
>
> Dr. Lauridson concluded his report stating, "Postmortem anal dilation in infants is a commonly recognized artifact that does not signify sexual abuse." However, as the state points out, Chloe's dilated anal sphincter was discovered while Chloe was in the emergency room and still alive.
>
> Further, Dr. Lauridson's conclusion was not only contrary to that of Dr. Hayne, it was contrary to the sworn testimony from experienced emergency-room doctors and nurses.

Id. at 332.

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

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

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

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

A: It can be, yes.

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

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

[objection made by the State]

Q: Go ahead, sir.

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

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

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

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

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

[Objection made by the State]

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

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

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

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

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

Havard now offers the deposition testimony of Dr. Hayne to show: a) that Dr. Hayne has an opinion in line with Dr. Lauridson's and b) that Havard's trial attorneys never interviewed Dr. Hayne prior to trial to learn of his opinion. In the original post-conviction-relief proceedings, Havard presented Dr. Lauridson's report and documentation in an attempt to show that his trial counsel were ineffective in their failure to secure an independent pathologist. This Court considered Dr. Lauridson's report and what it had to offer had it been introduced at trial. Havard's ineffective-assistance-of-counsel claim did not pass the standard set forth in *Strickland*. *Havard*, 988 So.2d at 333. Dr. Hayne's deposition testimony is that he does not remember meeting with Havard's trial counsel. However, even assuming that Dr. Hayne was not interviewed by Havard's trial counsel, the remainder of his deposition testimony that Havard seeks to have this Court consider is duplicative of Dr. Lauridson's report, which was considered and rejected in the original post-conviction proceeding. Furthermore, Havard offers no explanation as to why this information could not have been

> discovered prior to filing his original motion for post-conviction relief. This issue is procedurally barred. Notwithstanding the procedural bars, the issue is without merit.

Havard III, 86 So. 3d at 907–910.

Third, and finally, Havard tells the Court that he presented the IATC claim under Claim XIV a fourth time in his third PCR application. (Doc. 108 at 53 § B ¶ 3). But looking to page 39 of his Amended Third PCR Application, Claim 2 reads:

> **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**
>
> 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).
>
> A failure on the part of the government to disclose favorable evidence requires a new trial, or a new sentencing hearing, if disclosure of the evidence creates a reasonable probability of a different result. As the Supreme Court explained in *Kyles*, "the adjective is important," and "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434.
>
> In *Banks*, the Supreme Court considered the Fifth Circuit's use of a defendant due-diligence requirement to dismiss the defendant's *Brady* claim. The diligence question in *Banks* was whether the defendant "should have interviewed a witness who could have furnished the exculpatory evidence the prosecutor did not

disclose." *Banks*, 540 US at 688. The Supreme Court rejected this requirement in no uncertain terms. The Supreme Court stated:

> The state here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoners still has the burden to… discover the evidence," so long as the "potential existence" of a prosecutorial misconduct claim might have been detected. A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendant due process. "Ordinarily we presume that public officials have properly discharged their official duties." We have several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials." Courts, litigants, and juries properly anticipate that "obligations [to refrain from improper methods to secure a conviction]… which plainly rest upon the prosecuting attorney, will be faithfully observed." Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial appropriation.' *See Kyles*, 514 U.S. at 440 ("The prudence of the careful prosecutor should not . . . be discouraged.").

Id. at 696 (internal citations omitted).

In this case, the prosecutor was informed by Dr. Hayne that "he couldn't say a sexual assault took place." However, upon information and belief, this was never shared with Havard or his trial counsel prior to trial, despite the fact that it is clearly exculpatory. In a case in which sexual battery was the underlying felony (making the case both a capital murder case and one in which the death penalty was sought), information from the State's sole expert witness on forensic issues that he could not say that a sexual assault had occurred is clearly exculpatory. Further, such information had been explicitly requested. Thus, it is clear that Havard has a viable prima facie *Brady* claim to present to this Court.

In the alternative, if the Court determines that a Brady violation has not been articulated, 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).

Based upon the facts and law set forth above, Havard is entitled to relief from his conviction and sentence obtained in violation of *Brady*

> and its progeny *or, alternatively, because of ineffective assistance of counsel*. At the very least, this matter should be remanded to the trial court for discovery and an evidentiary hearing on this issue.

Amended Third PCR Application at 39–41, *Havard*, No. 2013-DR-01995-SCT (Miss. Sept. 3, 2014) (emphasis added).

The Mississippi Supreme Court denied Claim 2 in Havard's Amended Third PCR Application in a written Order, entered on April 2, 2015. The Order reads as follows:

> The Court finds no merit in Havard's assertion that the prosecution suppressed favorable evidence and, thereby, violated his due process rights. *See Brady v. Maryland*, 373 U.S. 83 (1963). Likewise, we find no merit in Havard's assertion that his counsel was ineffective for failing to interview Dr. Steven Hayne prior to trial. Accordingly, Havard is not granted leave to proceed in the trial court on those two claims.

Order, *Havard IV*, No. 2013-DR-01995-SCT.

2. Havard is not entitled to relief for Claim XIV.

Should the Court find Claim XIV properly before it, then Respondents submit that AEDPA's relitgation bar precludes Havard from relitigating Claim XIV in these proceedings. Claim XIV is entitled to AEDPA deference because the Mississippi Supreme Court adjudicated the merits of the cumulative error claim under Claim XIV. Havard cannot overcome AEDPA's relitigation bar because there is no clearly established federal law that controls this issue. *See Richter*, 562 U.S. at 101 ("'[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule

that has not been squarely established by this Court.'" (quoting *Knowles*, 556 U.S. at 122)). The Fifth Circuit has consistently recognized that the Supreme Court "has never squarely held that the cumulative error doctrine governs ineffective assistance of counsel claims." *Hill*, 781 F.App'x at 280-81. The Mississippi Supreme Court's adjudication of Havard's aggregate error claim under Claim XIV cannot be contrary to, or an unreasonable application of clearly established federal law that does not exist.

Additionally, Claim XIV has no merit. Havard does not state how this aggregate error claim constitutes a constitutional claim for relief. In rare instances, cumulative error claims may warrant relief. "[F]ederal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors 'so infected the entire trial that the resulting conviction violates due process.'" *Derden*, 978 F.2d at 1454 (quoting *Cupp*, 414 U.S. at 147). Cumulative error claims may be considered on habeas review but only those based on errors that "'infuse[ ] the trial with unfairness as to deny due process of law.'" *Perez*, 172 F.App'x at 82 (quoting *Derden*, 978 F.2d at 1458). The individual allegations of ineffectiveness of a cumulative error claim must first be considered because meritless claims or claims that are not prejudicial cannot be cumulated,

regardless of the number raised. *See Hall*, 455 F.3d at 520; *Sholes*, 370 F.App'x at 535. When evaluating the cumulative effect of prejudicial errors to a set of facts, a federal court "review[s] the record as a whole to determine whether the errors more likely than not caused a suspect verdict." *Spence*, 80 F.3d at 1001 (internal quotations omitted).

Several of Havard's claims are procedurally barred from consideration. They cannot be added into a cumulative error analysis. *See Derden*, 978 F.2d at 1454. Some of his claims are state law claims. "'[E]rrors of state law, including evidentiary errors, are not cognizable in habeas corpus.'" *Perez*, 172 F.App'x at 82 (quoting *Derden*, 978 F.2d at 1458). Others are procedurally defaulted and barred from review. *See Derden*, 978 F.2d at 1454. As the Mississippi Supreme Court found in *Havard II and Havard III*, his cumulative error claims had no merit. There was no error to cumulate or that would warrant relief. Based on the allegations under Claim XIV, Havard cannot show the cumulative effect of the alleged errors capable of review 'so infected his capital-murder trial such that resulting guilty verdict violates due process. *See Derden*,978 F.2d at 1454. He cannot show his cumulative error claim under Claim XIV (and the cumulative error claim under Claim XV) was contrary to or an unreasonable application of clearly established federal law and that he is entitled to habeas relief for Claim XIV (or Claim XV).

3. Havard's evidentiary hearing and record expansion request related to Claim XIV should be denied.

Havard claims this Court should permit him to develop the IATC claim under Claim XIV during an evidentiary hearing. (Doc. 108 at 53, § A ¶ 4). The Court should refuse his request for at least two reasons. First, Havard cannot overcome AEDPA's relitigation bar under the deferential standard of review on the record before the Mississippi Supreme Court in *Havard II* and *Havard III* and the information before it when deciding *Havard IV*. He must do so before litigating this claim in these proceedings. Second, Havard has made no attempt to meet section 2254(e)(2)'s stringent requirements for any evidence that would permit this Court to hold an evidentiary hearing, develop the record, and consider evidence that was not presented in state court. He must do so after overcoming AEDPA's relitigtion bar and before this Court may conduct an evidentiary hearing. *See Shinn*, 142 S. Ct. at 1735; *see also Holland*, 542 U.S. at 653.

XV. Whether the cumulative error claim under Claim XV overcomes the procedural default doctrine, AEDPA's relitigation bar, and warrants relief.

Respondents deny the allegations under Claim XV of the Petition. (Doc. 108 at 54–55).

A. Claim XV is technically exhausted.

Under Claim XV of his Petition, Havard raises a cumulative error claim that he did not present in state court. (Doc. 108 at 54–55). Like Claim XIV, Havard takes great liberty when he argues this cumulative error claim may be considered in these proceedings because he raised different cumulative error claims in *Havard I*, *Havard II*, *Havard III*, and *Havard IV*. (Doc. 108 at 54–55 § B ¶¶ 1–4). Havard did not submit the cumulative error claim under Claim XV at any time in state court. "[F]or a claim to be exhausted, the state court system must have been presented with the same facts and legal theory upon which the petitioner bases his current assertions." *Ruiz*, 460 F.3d at 643 (citing *Picard*, 404 U.S. at 275–77). "[F]or a claim to be exhausted, the state court system must have been presented with the same facts and legal theory upon which the petitioner bases his current assertions." *Id.* at 643 (citing *Picard*, 404 U.S. at 275–77). "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson*, 459 U.S. at 6. "[W]here [the] petitioner advances in federal court an argument based on a legal theory distinct from that relied upon in state court, he fails to satisfy the exhaustion requirement." *Wilder*, 274 F.3d at 259.

And because Havard cannot present Claim XV in a procedurally proper manner under state law, it is technically exhausted and must be considered

procedurally defaulted. "[T]o allow a state prisoner simply to ignore state procedure on the way to federal court would defeat the evident goal of the exhaustion rule." *Shinn*, 142 S. Ct. at 1732 (citing *Coleman*, 501 U.S. at 732). "Thus, federal habeas courts must apply … the doctrine of procedural default. *Id.* (citing *Davila*, 137 S. Ct. at 2064). "Under that doctrine, federal courts generally decline to hear any federal claim that was not presented to the state courts 'consistent with the State's own procedural rules.'" *Id.* (quoting *Edwards*, 529 U.S. at 453). "[F]or a claim to be exhausted, the state court system must have been presented with the same facts and legal theory upon which the petitioner bases his current assertions." *Ruiz*, 460 F.3d at 643 (citing *Picard*, 404 U.S. at 275–77). Claim XV is technically exhausted because it cannot be fairly presented under state procedural law. *See Shinn*, 142 S. Ct. at 1732; *Ruiz*, 460 F.3d at 642–43. Claim XV is procedurally defaulted.

And Havard is not entitled to another stay of these proceedings. *See id.* ("When a claim is procedurally defaulted, a federal court can forgive the default and adjudicate the claim if the prisoner provides an adequate excuse."). Havard must show good cause and actual prejudice for his default—a question that this Court should make based on the record before the state supreme court in *Havard I*, *Havard II*, *Havard III*, as well as the information before that court in his second successive PCR proceedings then that court disposed of his Amended Third PCR Application. He states no reason that would qualify as cause or state how he was

prejudiced for failing to raise the cumulative error claim under Claim XV in state court. Respondents thus submit that Havard cannot show cause and actual prejudice for the default that bars federal review of Claim XV.

B. AEDPA bars Havard from obtaining relief for Claim XV.

Even if this Court disagrees with Respondents' technically exhausted position, AEDPA precludes Havard from relitigating the cumulative error claim under Claim XV in these proceedings and bars him from obtaining relief for it.

1. The Mississippi Supreme Court's adjudications of Havard's cumulative error claims on direct review and during his PCR proceedings.

Havard says he raised the cumulative error claim under Claim XV during the proceedings in *Havard I*, *Havard II*, *Havard III*, and *Havard IV*. (Doc. 108 at 54–55, § B ¶¶ 1–4). A review of the state-court records and the opinions in those cases show otherwise, beginning with the written opinion entered in *Havard I*. Respondents quoted the aggregate error claim that Havard raised in *Havard I* under Claim XIII *supra* and will not do so here to avoid unnecessary repetition. *See* 928 So. 2d at 803. The aggregate error claim he raised on direct review is limited to the assignments of errors raised in *Havard I*, which necessarily makes that claim different from the cumulative error claim under Claim XV. At any rate, the Mississippi Supreme Court adjudicated that claim on the merits. *See id*.

As it concerns the cumulative error that Havard raised during his initial PCR proceedings, Havard selectively cites paragraph 89 of the *Havard II* opinion. (Doc. 108 at 54, § B ¶ 2). And yet, the opinion reads:

> **XIV. Cumulative error.**
>
> Havard makes a generic argument that the alleged preceding errors, in the aggregate, fatally compromised his constitutionally protected right to a fair trial. The standard for this Court's review of an appeal from a capital murder conviction and death sentence is clear. Convictions upon indictments for capital murder and sentences of death must be subjected to "heightened scrutiny." *Balfour v. State*, 598 So.2d 731, 739 (Miss. 1992) (citing *Smith v. State*, 499 So.2d 750, 756 (Miss. 1986); *West v. State*, 485 So.2d 681, 685 (Miss. 1985)). Under this standard of review, all doubts are to be resolved in favor of the accused because "what may be harmless error in a case with less at stake becomes reversible error when the penalty is death." *Id.* (quoting *Irving v. State*, 361 So.2d 1360, 1363 (Miss. 1978)). *See also Fisher v. State*, 481 So.2d 203, 211 (Miss. 1985).
>
> In *Byrom v. State*, 863 So.2d 836 (Miss. 2003), this Court held:
>
> > What we wish to clarify here today is that upon appellate review of cases in which we find harmless error or any error which is not specifically found to be reversible in and of itself, we shall have the discretion to determine, on a case-by-case basis, as to whether such error or errors, although not reversible when standing alone, may when considered cumulatively require reversal because of the resulting cumulative prejudicial effect.
>
> *Id.* at 846–47.
>
> In the case *sub judice*, the record supports no finding of error, harmless or otherwise, upon the part of the trial court. We thus find there is no prejudicial cumulative effect and no adverse impact upon Havard's constitutional right to fair trial. This issue is without merit.

Havard I, 928 So. 2d at 346. Like the aggregate error claim in *Havard I*, this cumulative error claim was limited to the errors raised in *Havard II*. *See* 988

So. 2d at 346 ("Havard makes a generic argument that the alleged preceding errors, in the aggregate, fatally compromised his constitutionally protected right to a fair trial."). This cumulative error claim is different from the aggregate error claim raised in *Havard I* and the cumulative error claim under Claim XV of his Petition.

Next, Havard says he raised "these issues" in his first successive PCR proceedings. (Doc. 108 at 54, § B ¶ 3). Here he provides only a general citation to the *Havard III* opinion. (Doc. 108 at 54, § B ¶ 3 (citing *Havard III*, 86 So. 3d 896)). There is no cumulative / aggregate error to be found at any point in the *Havard III* opinion because no cumulative error claim was raised in that case.

It is also significant that the Mississippi Supreme Court held Havard's first successive PCR application in *Havard III* subject to the state's time and successive-writ bars. *See Havard III*, 86 So. 3d at 910 ("Accordingly, for the reasons discussed, Havard's Motion for Relief From Judgment or For Leave to File Successive Petition for Post–Conviction Relief is denied as time-barred and as a successive writ. Miss. Code Ann. §§ 99-39-5(2)(b), 99-39-27(9) (Rev. 2007)."). Fifth Circuit caselaw recognizes Mississippi's time and successive writ bars are adequate and independent state law grounds that preclude federal review. *See Spicer*, 2021 WL 4465828, at *4–5. Havard does not provide good cause to excuse his procedural defaults or overcome the adequate and independent state procedural law ground doctrine. Because he does not, there

is no need to consider whether Havard suffered actual prejudice. *Sahir*, 956 F.2d 115. He cannot show the requisite cause or actual prejudice to overcome the procedural default that bars review of Claim XV.

Finally, Havard says that he presented "these issues" to the state supreme court during his second successive PCR proceedings. (Doc. 108 at 55, § B ¶ 4). Respondents quoted the entirety of Claim 2 in Havard's Amended Third PCR Application under Claim XIV *supra* and will not do so here to avoid unnecessary repetition. There is no cumulative error / aggregate error to be found at any point in the *Havard IV* opinion because that appeal concerned the trial court's determination of Havard's newly discovered evidence issues related to the Shaken Baby Syndrome medical diagnosis. Cumulative error was not one of the two claims raised in Havard's Amended Third PCR Application.

2. Havard is not entitled to relief for Claim XV.

The *Havard I* and *Havard II* opinions show the aggregate error claim in *Havard I* and the cumulative error claim in *Havard II* were different from the cumulative error claim under Claim XV. Further, the state-court records do not show any cumulative error claim being raised in *Havard III* or *Havard IV*. Claim XV is technically exhausted, procedurally defaulted, and barred from federal consideration.

But should the Court disagree, then AEDPA's relitigation bar prevents Havard from obtaining relief for the cumulative error claim under Claim XV. Claim XV should be denied because the state supreme court's merits adjudications of the "issues" under Claim XV are entitled to AEPDA deference and correctly disposes of each one. And Havard cannot overcome AEDPA's relitigation bar because there is no clearly established federal law that controls cumulative / aggregate error issues. This necessarily means that the cumulative error claim under Claim XV cannot be contrary to or an unreasonable application of clearly established federal law or based on an unreasonable factual determination. *See Richter*, 562 U.S. at 101 (quoting *Knowles*, 556 U.S. at 122). The Supreme Court "has never squarely held that the cumulative error doctrine governs ineffective assistance of counsel claims." *Hill*, 781 F.App'x at 280-81. The Mississippi Supreme Court's adjudication of Havard's aggregate error claim under Claim XV cannot be contrary to, or an unreasonable application of clearly established federal law that does not exist.

Additionally, Claim XV has no merit. Havard does not explain how this cumulative error claim constitutes a constitutional claim for relief. "[F]ederal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors 'so

infected the entire trial that the resulting conviction violates due process.'" *Derden*, 978 F.2d at 1454 (quoting *Cupp*, 414 U.S. at 147). Cumulative error claims may be considered on habeas review but only those based on errors that "'infuse[ ] the trial with unfairness as to deny due process of law.'" *Perez*, 172 F.App'x at 82 (quoting *Derden*, 978 F.2d at 1458). The individual claims of ineffectiveness must be considered, first. Meritless claims or claims that are not prejudicial cannot be cumulated, regardless of the number raised. *See Hall*, 455 F.3d at 520; *Sholes*, 370 F.App'x at 535. When evaluating the cumulative effect of prejudicial errors to a set of facts, a federal court "review[s] the record as a whole to determine whether the errors more likely than not caused a suspect verdict." *Spence*, 80 F.3d at 1001 (internal quotations omitted).

Several of Havard's claims are procedurally barred from consideration. They cannot be added into a cumulative error analysis. *See Derden*, 978 F.2d at 1454. Some of his claims are state law claims. "'[E]rrors of state law, including evidentiary errors, are not cognizable in habeas corpus.'" *Perez*, 172 F.App'x at 82 (quoting *Derden*, 978 F.2d at 1458). Others are procedurally defaulted and barred from review. *See Derden*, 978 F.2d at 1454. They too cannot be considered. As the state supreme court found, Havard's aggregate and cumulative error claims have no merit. Collectively asserting them does not change the result. Based on the allegations under Claim XV, Havard cannot show the cumulative effect of the alleged errors capable of review 'so infected his

capital-murder trial such that resulting guilty verdict violates due process. *See Derden*,978 F.2d at 1454. Based on the allegations in his Petition, Havard cannot show the cumulative error claim under Claim XV was contrary to or an unreasonable application of clearly established federal law or entitles him to habeas relief.

As was the case in state court, Havard fails to show any error at all under Claim XIII, Claim XIV, and Claim XV. He has done nothing more that proclaim the Mississippi Supreme Court was unreasonable in not finding aggregate error under Claim XV (and Claim XIII and Claim XIV). None of Havard's aggregate and cumulative error claims have merit. Each one should be denied.

3. Havard's evidentiary hearing and record expansion request to Claim XV should be denied.

Here too, Havard seeks permission to develop "this [cumulative error] issue" during an evidentiary hearing. (Doc. 108 at 54 § A ¶ 4). The Court should refuse his request for three reasons. First, Claim XV was not presented in state court. Second, and even if he had, Havard could not overcome AEDPA's relitigation when there is no clearly established Supreme Court precedent that addresses the cumulative error doctrine. He must overcome AEDPA's relitigation bar before he may be granted an evidentiary hearing to litigate Claim XV before this Court. And third, and assuming he could overcome AEDPA's relitigation bar, Havard does not claim that he can meet section

2254(e)(2)'s stringent requirements for any evidence that would permit this Court to hold an evidentiary hearing, develop the record, and consider evidence that was not presented in state court. He must do so after overcoming AEDPA's relitigtion bar and before this Court may conduct an evidentiary hearing. *See Shinn*, 142 S. Ct. at 1735; *see also Holland*, 542 U.S. at 653. Havard is not entitled to an evidentiary hearing or an opportunity to supplement Claim XV with factual information that was not fairly presented in state court.

XVI. Whether the *Naupe* claim under Claim XVI overcomes the procedural default and adequate and independent state law grounds doctrines, AEDPA's relitigation bar, and warrants relief.

Respondents deny the allegations under Claim XVI of the Petition. (Doc. 108 at 55–60).

A. Two adequate and independent state procedural law grounds bar review of Claim XVI.

In *Havard III*, the Mississippi Supreme Court found Havard's claim, that the State violated his constitutional rights to a fair trial and due process of law under *Naupe v. Illinois*, 360 U.S. 264 (1959), and related authority, procedurally barred by the statutory time bar at Miss. Code Ann. § 99-39-5(2)(b), the waiver bar at Miss. Code Ann. § 99-39-21(1) and the successive-writ bar under Miss. Code Ann. § 99-39-27(9). *See* 86 So. 3d at 903. The state supreme court also stated that "This claim would have been procedurally barred from consideration even if it had been raised in Havard's original

motion for post-conviction relief because it was capable of being raised at trial and/or on direct appeal." *Id.* at 901.

Fifth Circuit caselaw recognizes Mississippi's time and successive writ bars are adequate and independent state law grounds that preclude federal review. *See Spicer*, 2021 WL 4465828, at **4–5. And Havard does not identify any reason that might qualify as cause to excuse his procedural default or overcome the adequate and independent state procedural law ground doctrine. But because he makes no mention of cause, there is no need to consider whether he suffered actual prejudice. *Sahir*, 956 F.2d 115. Even so, he does not try to explain how he was prejudiced by the failure to present Claim XVI in state court. This Court should find both state procedural law grounds bar federal review and deny this claim.

B. AEDPA bars Havard from obtaining relief for Claim XVI.

Without waiving the previous argument, AEDPA precludes Havard from relitigating the false evidence claim under Claim XVI in these proceedings and bars him from obtaining relief for it.

1. The Mississippi Supreme Court's adjudication of the *Naupe* claim in *Havard III*.

The *Havard III* opinion states, in pertinent part, that:

> **II. WHETHER THE STATE VIOLATED HAVARD'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW AS GOVERNED BY *NAPUE v. ILLINOIS* AND RELATED AUTHORITY.**

Havard asserts that the State solicited testimony from Rebecca Britt at trial that it knew to be false. His contention is based on Britt's videotaped statement given the day after Chloe's murder at the Adam's County Sheriff's Office. Havard maintains that Britt's videotaped statement and her trial testimony differed and that the State allowed the disparity to go uncorrected.

It is Havard's contention in this successive motion for post-conviction relief that Britt's videotaped statement is "newly discovered evidence." As discussed above, trial counsel was aware of Britt's videotaped statement and viewed it prior to trial. Therefore, the videotaped statement is not newly discovered evidence. This claim would have been procedurally barred from consideration even if it had been raised in Havard's original motion for post-conviction relief because it was capable of being raised at trial and/or on direct appeal. Miss. Code Ann. § 99–39–21(1) (Rev. 2007). Likewise, because the videotaped statement is not newly discovered evidence, this issue is procedurally barred from consideration in Havard's successive motion for post-conviction relief. Miss. Code Ann. § 99–39–27(9) (Rev. 2007).

Assuming arguendo that Britt's videotaped statement was newly discovered evidence not reasonably discoverable at the time of trial, it would have to be "of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence." *Id.* Britt's videotaped statement does not meet that threshold.

This Court has held that

> "[a] new trial is required if the false testimony could have ... in any reasonable likelihood affected the judgment of the jury." *Manning v. State*, 884 So.2d 717, 726 (Miss. 2004) (quoting *Barrientes v. Johnson*, 221 F.3d 741, 756 (5th Cir. 2000) (citing *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Napue v. Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959))).

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

Havard claims that, in her videotaped statement to law enforcement officials, Britt expressed that Havard "was actively involved in the care of Chloe Britt before the night of her death; that Mr. Havard had

changed Chloe's diapers on prior occasions; and that Mr. Havard loved Chloe." He maintains that Britt's videotaped statement is in "stark contrast" to Britt's trial testimony, in which she testified as follows:

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

Britt further testified:

> Q: What was your reaction to Jeff giving the baby a bath?
>
> A: At first, you know, I thought it was nice, you know. Trying—you know—he was trying to help me out, and then it was surprising because he hadn't done anything like that before.

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

> Q: Becky, you know, I asked you last night. Do you know who may have done anything to your daughter?
>
> A: Jeff is the only one I can think of. He was the only one with her.
>
> Q: Is that—is that the only three—you can only think of Jeff, is—is that he was the only one that was with her. Is that what you're talking about?

A: He was—he was the only one there. I can't think of anybody else that would do that to her.

Q: Okay. Do you ever suspect that anything may have happened in the past by someone?

A: No.

Q: Is there anything else that you can tell me, Becky?

A: No. The only thing I can tell you is yesterday and the day before, she was irritable whenever he would want to hold her. And yesterday he was insistent on holding her when she was screaming, and she just screamed even more when he held her.

Q: Is there anything else that you would like to add that would help us in our investigation?

A: I don't know.

Q: I'm sorry?

A: I know he's got a violent temper. That's all I know.

Q: You're talking about Jeff?

A: Yes.

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

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

....

Q: How often did Jeff usually bathe the baby?

A: Never.

Q: He's never bathed her?

A: Never.

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

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

Q: Did he change diapers?

A: Sometimes.

Q: Sometimes. But he never bathed her before?

A: No.

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

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

When comparing Britt's videotaped statement with the portion of her trial testimony Havard claims is conflicting, the only discernable disparities are her responses regarding whether Havard had ever changed Chloe's diaper and whether she was surprised that Havard had bathed Chloe. In her videotaped statement, she told law enforcement officials that Havard sometimes had changed Chloe's diaper. Britt also responded "[n]ot really" to whether she found it strange Havard had bathed Chloe. At trial she testified that he had never changed Chloe's diaper and that she was surprised he had bathed Chloe. In all other aspects, the statement and the testimony appear consistent.

Havard asserts that Britt also testified differently regarding his interactions with Chloe. At trial, Britt was asked if Havard had "extensive interaction, playing with [Chloe], that sort of thing, for that length of time" to which Britt respond that he had not. Although not entirely clear from the record, from the context of the questioning, it appears that what the prosecutor meant by "... for that length of time" was a reference to the length of time that Britt was away running errands while Havard was home alone with Chloe the night she died. Nowhere in her videotaped statement was Britt asked about the length of time Havard had spent with the baby.

All indications from her videotaped statement are, however, that Havard did not spend great lengths of time with Chloe. Britt portrayed Havard as someone who was unemployed and slept most of the day while she was out job hunting. Chloe went to daycare during the day, which was paid for by Chloe's grandmother. In her videotaped statement, Britt told law enforcement officials that Havard was "always doing bottles for me or cleaning up while I'm taking care of her." She also told law enforcement that Havard would sigh or turn and walk away when Chloe was "fussy."

Other than Britt's trial testimony regarding whether Havard had ever changed Chloe's diapers and her reaction to Havard bathing Chloe, there is no disparity between Britt's videotaped statement to law

> enforcement and her testimony at trial. Regardless of her reaction and assuming her trial testimony that Havard did not change diapers was false, given all the evidence in this case, there is no reasonable likelihood that it affected the judgment of the jury.
>
> This issue is procedurally barred by time and the successive-writ bar. Miss. Code Ann. §§ 99–39–5(2)(b), 99–39–27(9) (Rev. 2007). Notwithstanding the procedural bars, this issue has no merit.

Havard III, 86 So. 3d at 900–03 (footnote omitted).

2. Havard is not entitled to relief for Claim XVI.

Along with the state procedural law grounds, AEDPA's relitigation bar prevents Havard from obtaining relief for the false evidence claim under Claim XVI. Claim XVI should be denied because the state supreme court's merits adjudication of the false evidence claim in *Havard III* is entitled to AEPDA deference and correctly disposes of that claim. *Naupe v. Illinois* and the line of cases applying it provide the clearly established federal law that controls the adjudication of this claim. The *Havard III* opinion shows the Mississippi Supreme Court correctly identified and applied *Naupe's* rule and correctly disposed of Havard's false evidence claim.

Havard does not specifically alleged the state court's adjudication of this claim was contrary to, inconsistent with *Naupe* and its progeny or contend its decision was based on an unreasonable determination of the facts. Nor does he explain how Claim XVI entitles him to relief. What Havard wants is another opportunity relitigate the *Naupe* claim in this Court. He may not do so when he cannot state, much less show, any exception to section 2254(d) applies to

Claim XVI. And because he cannot, AEDPA bars Havard from relitigating his claim and obtaining relief for it. Aside from that, Claim XVI has no merit and should be denied.

3. Havard's evidentiary hearing or record expansion request related to Claim XVI should be denied.

It is clear that Havard that desperately wishes to relitigate every adverse aspect of his trial proceedings. Once again, he asks the Court to grant him an opportunity to litigate this issue *de novo* in these proceedings without providing any reason for doing so. (Doc. 108 at 59, § A ¶ 14). The Court should refuse his request. First, Havard cannot overcome AEDPA's relitigation bar. He must do so before he may be granted an evidentiary hearing to litigate Claim XVI in these proceedings. Until he does, review of Claim XVI is limited to the record in *Havard III*. *See Pinholster*, 563 U.S. at 181.

Second, Havard cannot meet section 2254(e)(2)'s stringent requirements based on the allegations under Claim XVI. He must do so after overcoming AEDPA's relitigtion bar and before this Court may conduct an evidentiary hearing, expand the record, or consider evidence that was not presented in state court. *See Shinn*, 142 S. Ct. at 1735; *see also Holland*, 542 U.S. at 653. He is not entitled to an evidentiary hearing and has no right to expand the record and develop this claim in these proceedings unless he overcomes

AEDPA's relitigation bar and meets section 2254(e)(2)'s requirements. He can do neither.

XVII. Whether the *Brady* claim under Claim XVII overcomes the procedural default and adequate and independent state law grounds doctrines, AEDPA's relitigation bar, and warrants relief.

Respondents deny the allegations under Claim XVII of the Petition. (Doc. 108 at 60–64).

A. Two adequate and independent state procedural law grounds bar review of Claim XVII.

In *Havard III*, the Mississippi Supreme Court found Havard's first successive PCR application (and the claims in it) procedurally barred by the state's time bar at Miss. Code Ann. § 99-39-5(2)(b) and successive-writ bar under Miss. Code Ann. § 99-39-27(9). The *Havard III* opinion states: "Havard has failed to demonstrate an exception to the procedural bars. … Havard's Motion for Relief From Judgment or For Leave to File Successive Petition for Post–Conviction Relief is denied as time-barred and as a successive writ. Miss. Code Ann. §§ 99–39–5(2)(b), 99–39–27(9) (Rev. 2007)." *Havard III*, 86 So. 3d at 910.

Fifth Circuit caselaw recognizes both bars are adequate and independent state law grounds that preclude federal review. *See Spicer*, 2021 WL 4465828, at **4–5. And Havard does not identify any reason may supply the cause necessary for the Court to excuse his procedural default or that might overcome the adequate and independent state procedural law ground doctrine. Because

he makes no mention of cause, there is no need to consider whether he suffered actual prejudice. *Sahir*, 956 F.2d 115. Regardless, Havard does not try to explain how he was prejudiced by the failure to present Claim XVII in state court. This Court should deny Claim XVII because both state law grounds bar federal review.

B. AEDPA bars Havard from obtaining relief for Claim XVII.

If the Court disagrees, AEDPA precludes Havard from relitigating the *Brady* claim under Claim XVII in these proceedings and bars him from obtaining relief.

1. The Mississippi Supreme Court's adjudication of the *Brady v. Maryland* claim in *Havard III*.

As it concerns Claim XVII, the *Havard III* opinion relates:

> **I. WHETHER THE STATE WITHHELD EXCULPATORY INFORMATION IN VIOLATION OF *BRADY v. MARYLAND* AND ITS PROGENY.**
>
> Prior to trial, Rebecca Britt gave a videotaped statement to law enforcement officials. Havard claims that the video was uncovered during the discovery phase of his federal habeas corpus proceedings. Havard alleges that, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the prosecution withheld the videotape at trial despite his trial counsels' request for all exculpatory evidence.
>
> In *Brady*, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. In *King v. State*, 656 So.2d 1168, 1174 (Miss. 1995), this Court articulated a four-part test to assess whether a *Brady* violation had occurred. Under

> the test, it is the defendant's burden to prove: "(a) that the State possessed evidence favorable to the defendant (including impeachment evidence); (b) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (c) that the prosecution suppressed the favorable evidence; and (d) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Manning v. State*, 929 So.2d 885, 891 (Miss. 2006).
>
> Despite the State's argument that Havard fails all four prongs of this test, the Court need only look to the third prong to determine that this issue must fail. In its response, the State has provided an affidavit from Gus Sermos, Havard's lead trial counsel, in which he states that, prior to trial, he did watch the videotaped interview of Rebecca Britt that was conducted the day after Chloe's murder at the Adams County Sheriff's Office. Sermos also states that Tom Rosenblatt, the Assistant District Attorney who prosecuted Havard, along with Lt. Manley, were present at the time he watched Britt's videotaped interview.
>
> Corroborating Sermos's affidavit is the affidavit of Tom Rosenblatt, in which Rosenblatt states that he viewed the videotaped interview of Rebecca Britt conducted by the Adams County Sheriff's office while in the presence of Gus Sermos and Lt. Manley. Given the sworn affidavits from Havard's trial counsel and the prosecutor in his case, we find no merit in Havard's claim of a *Brady* violation, because he has not shown that the evidence was suppressed.

Havard III, 86 So. 3d at 900.

2. Havard is not entitled to relief for Claim XVII.

AEDPA's relitigation bar prevents Havard from obtaining relief for the suppressed-evidence claim under Claim XVII. The state supreme court's determination of this claim in *Havard III* is a merits adjudication. It is entitled to AEPDA deference. *Brady v. Maryland*, 373 U.S. 83 (1963) and the cases applying its rule provided the clearly established federal law that controlled the adjudication of this claim. The *Havard III* opinion shows the Mississippi

Supreme Court correctly identified and applied *Brady's* rule to the suppressed evidence claim under Claim XVII.

Havard does not explicitly state whether the Mississippi Supreme Court's adjudication of the suppressed evidence claim in *Havard III* was contrary to or inconsistent with *Brady* or was based on an unreasonable determination of the facts. Like most (if not all) of the claims in his Petition, the allegations under Claim XVII show Havard wants nothing more than to relitigate his suppressed evidence in this Court. He has no right to do so. *See Richter*, 562 U.S. at 102–03 ("Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal systems, not a substitute for ordinary error correction.") (citation omitted).

What's more, *Brady* rule did not apply in *Havard III*. *Brady* applies to "the discovery, after trial[,] of information which had been known to the prosecution but unknown to the defense." *United States v. Agurs*, 427 U.S. 97, 103 (1976); *see Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002). Gus Sermos, one of Havard's trial attorneys, stated under oath that he watched Britt's videotaped interview before trial. His sworn statement is proof that shows Rebecca Britt's videotaped interview not suppressed by the State. The State made fer videotaped statement available to the defense. When evidence is just as available to both the defense and the prosecution, the defendant must bear the responsibility of failing to conduct a diligent investigation. *Herrera v.*

Collins, 954 F.2d 1029, 1032 (5th Cir. 1992). And Havard suffered no prejudice because Mr. Sermos watched Rebecca Britt's videotaped interview before trial.

Havard cannot obtain relief for Claim XVII. State and federal law bars review of his *Brady* claim. Even if Claim XVII could be considered, Havard cannot obtain relief for Claim XVII. Havard's *Brady* claim lacks merit. It cannot be the basis for granting Havard relief. The Court should deny Claim XVII.

Briefly, Havard makes much about Mississippi Rule of Appellate Procedure 22. (Doc. 108 at 62, § A ¶¶ 6–7). Rule 22 is a state rule that was promulgated by the Mississippi Supreme Court. It is a matter of state, not federal law. The state supreme court's interpretation of own its rules does not provide a basis for habeas relief. *See Bronstein*, 646 F.2d at 1050. Aside from that, the Court does not "sit to review" the Mississippi Supreme Court's interpretation of its rules. This Court "takes the word of the state's highest court as to the interpretation if its law on criminal matters[.]" *See Young*, 356 F.3d at 628; *Bradshaw*, 546 U.S. at 76; *Estelle*, 502 U.S. at 67–68; *Fuhrman*, 442 F.3d at 901; *Johnson*, 215 F.3d at 494; *Gibbs*, 154 F.3d at 259.

3. Havard's evidentiary hearing and record expansion request related to Claim XVII should be denied.

Havard asks the Court to grant him an opportunity to litigate this issue in proceedings. (Doc. 108 at 63, § A ¶ 11). The Court should refuse this request. Havard must overcome AEDPA's relitigation bar before he may litigate Claim

XVII in these proceedings. Until he makes that showing, this Court's review is limited to the state-court record in *Havard III*. *See Pinholster*, 563 U.S. at 181. What's more, Havard has no right to an evidentiary hearing or to otherwise expand the record with information that was not fairly presented and developed in state court. Whether developing evidence necessary to establish good cause or a claim for relief, AEDPA requires him to satisfy section 2254(e)(2)'s requirements. *See Shinn*, 142 S. Ct. at 1735-39. And the Court must determine whether the evidence he hopes to develop could be considered and entitle him to relief. The Court only needlessly prolongs these proceedings by allowing factual development of evidence the Court cannot consider or prove allegations that would not entitle him to relief. *See Shinn*, 142 S. Ct. at 1739; *Holland*, 542 U.S. at 653. Considering the allegations under Claim XVII, should deny Havard's request for an evidentiary hearing. Granting his request will only needlessly prolong this case.

XVIII. Whether the IATC claim under Claim XVIII overcomes the procedural default and adequate and independent state law grounds doctrines, AEDPA's relitigation bar, and warrants relief.

Respondents deny the allegations under Claim XVIII of the Petition. (Doc. 108 at 64–65).

A. Two adequate and independent state procedural law grounds bar review of Claim XVIII.

In *Havard III*, the Mississippi Supreme Court found the IATC claim under Claim XVIII subject to the state's statutory time and successive-writ bars. *See* 86 So. 3d at 904 (ruling the alternative IATC claim related to Rebecca Britt's videotaped interview "procedurally barred because it fail[ed] to meet an exception to the time bar and successive-writ bar.") (citing Miss. Code Ann. §§ 99-33-5(2)(b), 99-39-27(9)). Both state bars are adequate and independent grounds that will preclude federal review. *See Spicer*, 2021 WL 4465828, at **4–5.

Looking to Claim XVIII, Havard does not identify any reason that might serve as cause to excuse his procedural default or overcome the adequate and independent state procedural law ground doctrine. So there is no need to consider whether he suffered actual prejudice. *Sahir*, 956 F.2d 115. That said, he does not attempt to explain how he was prejudiced for failing to fairly present Claim XVIII in state court. This Court should find both statutory bars preclude review of Claim XVIII. Claim XVIII should be denied.

B. AEDPA bars Havard from obtaining relief for Claim XVIII.

Along with the state law bars, AEDPA precludes Havard from relitigating the alternative IATC claim under Claim XVIII in these proceedings and bars him from obtaining relief for it.

1. The Mississippi Supreme Court's adjudication of the alternative IATC claim in *Havard III*.

As it concerns Claim XVIII, the *Havard III* opinion states:

> **II. WHETHER HAVARD'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO UTILIZE REBECCA BRITT'S VIDEOTAPED STATEMENT.**
>
> As an alternative to Havard's *Brady* violation claim discussed first supra, Havard claims that his trial counsel were ineffective by failing to utilize the videotaped statement if the State did disclose or produce it. Specifically, Havard asserts that his "trial counsel were ineffective for (a) not informing Petitioner of the existence of the statement, (b) not utilizing the statement to support [Havard]'s defense to the charge of capital murder and the underlying felony of sexual battery, and (c) not utilizing the statement to cross-examine or impeach Rebecca Britt's trial testimony where it differed from what she told the investigators in the statement...."
>
> > "The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The test is two pronged: The defendant must demonstrate that his counsel's performance was deficient, and that the deficiency prejudiced the defense of the case. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064; *Washington v. State*, 620 So.2d 966 (Miss. 1993). "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Stringer v. State*, 454 So.2d 468, 477 (Miss. 1984), citing *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. at 2065; *State v. Tokman*, 564 So.2d 1339, 1343 (Miss. 1990).
>
> *Foster v. State*, 687 So.2d 1124, 1129–30 (Miss. 1996) (emphasis removed).

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

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

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

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

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

Havard III, 86 So. 3d at 903–04.

2. Havard is not entitled to relief for Claim XVIII.

Without waiving the adequate and independent state procedural law grounds argument, AEDPA's relitigation bar prevents Havard from obtaining relief for the IATC claim under Claim XVIII. Claim XVIII should be denied because the state supreme court's merits adjudication of the alternative IATC claim under Claim XVIII is entitled to AEPDA deference and correctly disposes of that claim. *Strickland v. Washington* was the clearly established federal law that controlled the alternative IATC claim. The Mississippi Supreme Court correctly identified and applied *Strickland's* rule to the IATC claim under Claim XVIII. Its application of *Strickland's* rule is entitled to considerable leeway in "'reaching outcomes in case–by–case determinations.'" *See Richter*, 562 U.S. at 101 (quoting *Alvarado*, 541 U.S. at 664).

This Court's review of the Mississippi Supreme Court's resolution of this IATC claim is doubly deferential thanks to *Strickland's* "'highly deferential' look at counsel's performance," and "the 'deferential lens of § 2254(d)[.]'" *Pinholster*, 563 U.S. at 190 (quoting *Knowles*, 556 U.S. at 121). Under this extremely deferential standard, "the question is … whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Richter*, 562 U.S. at 105. To obtain relief, Havard must show that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded

disagreement." *See id.* at 103. The state court's factual findings are presumed correct unless Havard rebuts the presumption by clear and convincing evidence. *See Miller-El II*, 537 U.S. at 340. Review is limited to the record before the state supreme court in *Havard III*. *See Pinholster*, 563 U.S. at 181.

Havard does not explain how the Mississippi Supreme Court's adjudication of this IATC claim meets one of section 2254(d)'s exceptions. He does not state, and cannot show, that "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with" *Strickland*. And the alternative IATC claim under Claim XVIII has no merit. This is particularly true considering the facts before the *Havard III* court and its factual findings.

3. Havard's evidentiary hearing and record expansion request related to Claim XVIII should be denied.

Havard also seeks an opportunity to litigate this issue during an evidentiary hearing. (Doc. 108 at 65, § A ¶ 6). The Court should refuse his request. He cannot overcome AEDPA's relitigation bar based on the allegations under Claim XVIII. Until he makes that showing, this Court's review is limited to the state-court record in *Havard III*. *See Pinholster*, 563 U.S. at 181. Havard cannot meet section 2254(e)(2)'s requirements that would allow the Court to conduct an evidentiary, develop the record, or consider evidence that was not developed and presented in state court. Because he fails to meet the statutory requirements and

has no right to factual development in these proceedings, the Court should refuse his request for an evidentiary hearing or record expansion related to Claim XVIII. *See Shinn*, 142 S. Ct. at 1735; *see also Holland*, 542 U.S. at 653. Granting his request will only needlessly prolong this case. *See id.* at 1739.

XIX. Whether the actual innocence allegations under Claim XIX state a claim for habeas relief or, alternatively, one that overcomes AEDPA's relitigation bar and warrants relief.

Respondents deny the allegations under Claim XIX of the Petition. (Doc. 108 at 66–72). Havard states that Claim XIX is incomplete. (Doc. 108 at 71 § A ¶¶ 17–18). Respondents lack sufficient information necessary to answer this claim. For that reason, and to be certain, Respondents assert their affirmative defenses as much as possible and reserve the right to respond if Havard presents a fully-stated Claim XIX.

A. Claim XIX fails to state a claim for section 2254 relief.

Havard argues that he is actually innocent of the underlying felony of sexual battery and, in turn, capital murder under state law. (Doc. 108 at 66–71). But "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins*, 506 U.S. 390, 400 (1993); *see Graves*, 351 F.3d at 151; *Dowthitt*, 230 F.3d at 741. And the Fifth Circuit has refused to permit claims of actual innocence on habeas review. "[The *Herrera* Court] left open whether a truly

persuasive actual innocence claim may establish a constitutional violation sufficient to state a claim for habeas relief." *Graves*, 351 F.3d at 151. That court "has rejected this possibility and held that claims of actual innocence are not cognizable on federal habeas review." *See id.*; *Cantu v. Thaler*, 632 F.3d 157, 167 (5th Cir. 2011), *vacated on other grounds by* 566 U.S. 901 (2012) (Mem); *Foster v. Quarterman*, 466 F.3d 359, 367–68 (5th Cir. 2006); *Dowthitt*, 230 F.3d at 741.

An actual innocence claim is a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Dowthitt*, 230 F.3d at 741 (citations omitted). Claim XIX does not raise or even concern an independent substantive constitutional claim. Claim XIX is not cognizable on federal habeas review and provides no basis for granting Havard relief. The Court should refuse to consider it.

B. An adequate and independent state procedural law grounds bar review of Claim XIX.

Even if Claim XIX did set out a cognizable claim for relief, an adequate and independent state procedural law grounds bar its review. The Mississippi Supreme Court addressed the actual innocence claim under Ground XIX in *Havard III*. *See* 86 So. 3d at 904–07. It ruled, in part, that review of this claim was barred by the state's time and successive-writ bars. *See id.* at 907.

The state's "failure to cite" rule is an adequate and independent state law ground that will preclude federal review. *See Spicer*, 2021 WL 4465828, at **4–

5. Havard does not identify any reason that could serve as cause to excuse his procedural default or shows he can overcome the adequate and independent state procedural law ground doctrine. Because he makes no mention of cause, there is no need to consider whether he suffered actual prejudice. *Sahir*, 956 F.2d 115. To be sure, Havard does not try to explain how he was prejudiced by the failure to fairly present this actual innocence claim in state court.

As demonstrated below, Havard did not raise a claim of actual innocence related to the underlying felony of sexual battery at any point in his third state PCR proceedings. Even though he filed a Third PCR Application and an Amended Third PCR Application in his most recent post-conviction proceedings, Havard decided against presenting this actual innocence claim in those filings. Instead, he waited until the state supreme court granted him leave to prove unrelated issues related to the cause and manner of Chloe's death.

In the trial court, Havard tried to raise and support an actual innocence related to sexual battery contrary to the state supreme court's remand order. The trial court rejected his attempt because its jurisdiction was limited to the issues explicitly stated in the remand order. The trial court entered an order, which precluded Havard from raising claims beyond the scope of the remand order and refused to admit or consider evidence related to sexual battery. It repeatedly reminded the parties that issues and evidence related to the underlying sexual battery was not before the Court and would not be considered.

Havard appealed the trial court's decision to deny him a new guilty-phase trial and claimed the trial court erred in limiting the issues and evidence. The Mississippi Supreme Court reviewed his assignment of error and affirmed the trial court's decision in *Havard IV*. *See* 312 So. 3d at 339–41. In doing so, the state supreme court ruled Havard's challenge to the restriction on issues and evidence procedurally barred and without merit. Havard failed to support his assignment of error with legal authority. As a result, the state court applied its "failure to cite" rule to that claim. *See id.* at 341.

The "failure to cite" rule is an adequate and independent state procedural law ground. "When a state court declines to hear a prisoner's federal claims because the prisoner failed to fulfill a state procedural requirement, federal habeas is generally barred if the state procedural rule is independent and adequate to support the judgment." *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir. 2001). A state procedural rule satisfies the independence requirement if it is "independent of the merits of the federal claim." *See Lott v. Hargett*, 80 F.3d 161, 164 (5th Cir. 1996). The Mississippi Supreme Court's "failure to cite" rule meets the independence requirement. It's application is completely independent of the merits of federal law. Claims that are not accompanied by citations to legal authority on appeal are subject to the "failure to cite" rule.

And the "failure to cite" rule meets the adequacy requirement. A state procedural rule satisfies the adequacy requirement if the state supreme court

applies it "strictly or regularly … to the vast majority of similar claims." *See id.* at 634. The Mississippi Supreme Court regularly applies its "failure to cite" rule to the vast majority of similar claims and cases. *E.g.*, *Dickerson v. State*, So. 3d 344, 349 (Miss. 2020); *Keller v. State*, 138 So. 3d 817, 856, 860, 874 (Miss. 2014); *Batiste v. State*, 121 So. 3d 808, 861 (Miss. 2013); *Walker v. State*, 913 So. 2d 198, 246 (Miss. 2005); *Bell v. State*, 879 So. 2d 423, 434 (Miss. 2004); *Thorson v. State*, 895 So. 2d 85, 109, 110 (Miss. 2004); *Byrom v. State*, 863 So. 2d 836, 853 (Miss. 2003); *Simmons v. State*, 805 So. 2d 452, 487 (Miss. 2001); *Williams v. State*, 708 So. 2d 1358, 1362–63 (Miss. 1998).[4] The "failure to cite" rule is an adequate and independent state procedural law ground. And because the state supreme court's decision to deny Havard's claim explicitly rests on the rule, it bars federal review of Claim XIX. *See Sawyer v. Collins*, 986 F.2d 1493, 1499 (5th Cir. 1992).

Havard does not identify any reason that could serve as cause to excuse his default and gives no indication that he could overcome the adequate and independent state procedural law ground doctrine. Because he does not allege cause, there is no need to consider whether he suffered actual prejudice. *Sahir*, 956 F.2d 115. To be certain, Havard does not claim actual prejudice from the

[4] *Dickerson*, *Keller*, *Batiste*, *Walker*, *Bell*, *Thorson*, *Byrom*, *Simmons*, and *Williams* are appeals (on direct and collateral review) of state prisoners under sentence of death. These cases show the "failure to cite" is rule regularly and consistently applied to similar claims in similar cases and has been for at least a quarter century.

failure to present a legally supported claim. The "failure to cite" rule bars review of Claim XIX. The Court should deny Claim XIX.

C. AEDPA bars Havard from obtaining relief for Claim XIX.

Without waiving the previous arguments and assuming that Claim XIX is a cognizable claim for relief, AEDPA precludes Havard from relitigating that claim in these proceedings and bars him from obtaining relief.

1. The Mississippi Supreme Court's adjudication of the actual innocence claim in *Havard III*.

As it concerns Claim XIX, the *Havard III* opinion states:

> **IV. WHETHER NEWLY DISCOVERED EVIDENCE DEMONSTRATES THAT HAVARD IS INNOCENT OF THE UNDERLYING FELONY.**
>
> Pursuant to a discovery order entered in Havard's federal habeas corpus proceedings, Dr. Steven Hayne was deposed to explore his opinions regarding sexual battery in Havard's case. Havard contends that the deposition was ordered in light of concerns that were raised in the habeas petition regarding the sufficiency of the evidence supporting the State's allegation of sexual battery and the effectiveness of counsel in preparing a defense to the sexual-battery allegation. The latter of these two concerns will be discussed in Havard's next issue. Havard also contends that the deposition was ordered so that Dr. Hayne could elaborate on his signed declaration. It is Havard's claim that the declaration and deposition of Dr. Hayne demonstrate his innocence of the underlying felony, thus meaning that Havard cannot be guilty of capital murder.
>
> ***A. The Declaration of Dr. Hayne***
>
> In a document with the heading "Declaration of Dr. Steven T. Hayne" signed by Dr. Hayne and submitted in the federal court proceedings, Dr. Hayne stated that "[b]ased upon the autopsy evidence available regarding the death of Chloe Britt, I cannot include or exclude to a reasonable degree of medical certainty that she was sexually assaulted." He also stated that the contusion found on Chloe's anus

"could have a variety of causes, and is not sufficient in and of itself to determine that a sexual assault occurred." Dr. Hayne also stated that he found no tearing of Chloe's rectum, anus, anal sphincter, or perineum.

Havard puts the most emphasis, however, on Dr. Hayne's statement that "[d]ilated anal sphincters may be seen on persons who have died, as well as on a person prior to death without significant brain function. My experience as well as the medical literature recognizes that a dilated anal sphincter is not, on its own, evidence of anal sexual abuse, but must be supported by other evidence."

B. The Deposition of Dr. Hayne

In his deposition, Dr. Hayne acknowledged that, prior to conducting the autopsy of Chloe, he was specifically asked to determine whether a sexual assault had occurred. There is no mention of sexual battery in the Final Report of Autopsy, because Dr. Hayne "could not come to final conclusion as to that." Dr. Hayne stated: "There was one injury that I indicated would be consistent with the penetration of the anal area, but that, in and of itself, I didn't feel was enough to come to a conclusion that there was a sexual assault in this particular death." Dr. Hayne confirmed that he found no tearing of the rectum, anus, anal sphincter, or perineum and that he would have noted such tearing if it had been present. He also opined that such tearing could not have healed between the time Chloe was in the emergency room and her autopsy one day later.

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

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

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

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

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

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

The issue before this Court is whether Havard has newly discovered evidence that would exempt him from the procedural time-bar and the successive-writ bar. The new evidence must be "evidence, not

reasonably discoverable at the time of trial, that is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence." Miss. Code Ann. § 99–39–27(9) (Rev .2007). In this task, Havard fails.

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

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

Havard tries to compare his case to that of *Williams v. State*, 35 So.3d 480 (Miss. 2010), in which the defendant was convicted on two counts of sexual battery, one against each of his two daughters. Williams challenged the sufficiency of the evidence supporting the sexual-battery charge in Count II against his younger, ten-month-old daughter. This Court reversed Count II because the only evidence against the defendant on that count was the testimony of the doctor who examined the children. With regard to Count I, the older child, the doctor testified that the "injuries were 'definitely consistent' with someone who had been sexually abused 'to a reasonable degree of medical certainty.'" *Id.* at 486. As to the younger daughter, the doctor's testimony was that the child's injuries were "very consistent with anal penetration." *Id.* The Court stated: "[t]his physician couched his opinion in terms of suspicion of probability, which, standing alone, absent additional corroborating evidence, is insufficient in a criminal case." *Id.* at 486–87.

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

> Q: And Dr. Hayne, can you say from your autopsy evidence, and from the coroner's inquest, the medical records that you

reviewed, the photographs, and the laboratory findings, that this child, Miss Chloe Britt, was sexually assaulted?

A: I could not come to that final conclusion, Counselor. As I remember in trial testimony, I said that the contusion would be consistent with a sexual abuse, but I couldn't say that there was sexual abuse, and, basically, I deferred to the clinical examination conducted at the hospital.

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

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

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

Q: And you said you had wiped her down in her private area. Okay. Can you tell us how you wiped her down and what you done [sic].

A: I just took a normal wipe, just wiped her down between her legs like normal. Inside of her—inside of her buttocks, inside of buttocks [sic] to clean her out.

Q: And you said earlier that your finger may have slipped or you may have wiped her a little bit too hard?

A: It's possible. I was still upset and nervous and shaky.

Q: Okay. What do you mean by wiping her too hard?

A: Maybe I was too rough with her. Maybe I shook her too hard. I don't know.

Q: You say you wiped her too hard. What do you mean by that?

A: Maybe I went too far in on her when I was wiping her out, inside of her butt.

> There is no merit to Havard's claim that newly discovered evidence exists that supports his innocence. This issue is procedurally barred by time and as a successive writ. Miss. Code Ann §§ 99–39–5(2)(b), 99–39–27(9) (Rev. 2007).

Havard III, 86 So. 3d at 902–07.

Contrary to the Petition, Havard did not raise a newly discovered evidence claim of actual innocence that challenged the sexual battery felony in his Amended Third PCR Application or during his third state-court PCR proceedings. *See Havard IV*, 312 So. 3d at 341 (finding Havard's argument "that 'he sought to introduce evidence that there was no sexual battery *in support of the claims* that the Court remanded' … all but admits that the issue of sexual battery is separate and distinct from the claims the Court remanded," and emphasizing the fact that his Third Amended PCR Application "explicitly states that his claim for relief is based on '**newly-discovered evidence demonstrat[ing] that the cause and manner of death of Chloe Britt was not Shaken Baby Syndrome, as was testified to at Havard's Trial**'") (emphasis in the original).

2. Havard is not entitled to relief for Claim XIX.

First things first, he state supreme court's determinations of the jurisdiction and exclusion of evidence issues in *Havard IV* are not grounds for habeas relief. *See Bronstein*, 646 F.2d at 1050. Both are state law matters. The Court should defer to the state supreme court and accept its adjudications of those issues. *See Young*, 356 F.3d at 628; *Bradshaw*, 546 U.S. at 76; *Estelle*, 502 U.S.

at 67–68; *Fuhrman*, 442 F.3d at 901; *Johnson*, 215 F.3d at 494; *Gibbs*, 154 F.3d at 259.

That said, and assuming that Claim XIX is a cognizable claim, the adjudication of Havard's actual innocence claim in *Havard III* is entitled to AEDPA deference. To obtain relief, Havard must show an exception to section 2254(d) applies by demonstrating the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See Richter*, 562 U.S. at 103. The state supreme court's factual findings are presumed correct unless rebutted by clear and convincing evidence. *See Miller-El II*, 537 U.S. at 340. Review is limited to the record before the state supreme court in *Havard III*. *See Pinholster*, 563 U.S. at 181.

Havard does not explain how the Mississippi Supreme Court's adjudication of this actual innocence claim meets one of section 2254(d)'s exceptions. He does not state, and cannot show, that "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with" clearly established Supreme Court precedent because that precedent does not exist. "'[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by the [Supreme] Court.'" *See Richter*, 562 U.S. at 101 (quoting *Knowles*, 556 U.S. at 122)). AEDPA bars Havard from relitigating

Claim XIX in these proceedings. The Court should defer to the state supreme court's adjudication and deny Claim XIX. Havard is not entitled to relief for Claim XIX.

3. Havard's evidentiary hearing and record expansion request related to Claim XIX should be denied.

Havard argues that the Court may consider information he attached to his Amended Third PCR Application related to his actual innocence claim and "sexual battery issues" under Claim XIX even though he did not raise the actual innocence claim under Claim XIX during his third state post-conviction proceedings. (Doc. 108 at 72, § B ¶ 2). He is mistaken. Under AEDPA, a state prisoner must exhaust all available state-court remedies for each claim in his habeas petition. *See* 28 U.S.C. § 2254(b)(1)(A); *Shinn*, 142 S. Ct. at 1732. "[F]or a claim to be exhausted, the state court system must have been presented with *the same facts and legal theory* upon which the p[risoner] bases his *current assertions*." *Ruiz*, 460 F.3d at 643 (emphasis added). "It is *not* enough that all the facts necessary to support the federal claim were before the state courts…." *Anderson*, 459 U.S. at 6 (emphasis added).

When a prisoner meets AEDPA's exhaustion requirement, "a federal habeas court may hear his claim, but its review is highly circumscribed." *Shinn*, 142 S. Ct. at 1732. Federal review is limited to the state-court record before the last state court to decide the claim. *Id.*; *Pinholster*, 563 U.S. at 181.

The last state court to decide the actual innocence claim under Claim XIX was the Mississippi Supreme Court in *Havard III*. It denied that claim after ruling it was procedurally barred and concluding it had no merit.

Setting the procedural bars aside for the moment, this Court's review is limited to the record in *Havard III*, *see Pinholster*, 563 U.S. at 181. That Havard attached information related to underlying felony to a PCR pleading can hardly be characterized as fair presentation, particularly when he did not raise a sexual battery claim in that pleading. What Havard asks the Court to do is turn a blind to AEDPA's demanding standards. Havard's evidence of sexual battery, which both state courts refused to consider, is not necessary to this Court's adjudication of this case. The actual innocence claim under Claim XIX was adjudicated on the merits in *Havard III*. Review of legal claims is limited to the state court record in *Havard III* and factual findings are limited evidence presented in *Havard III*. *See Shoop v. Tywford*, 142 S. Ct. 2037, 2044 (2022).

Havard failed to develop the factual basis of Claim XIX in *Havard IV*. He did not raise an actual innocence claim related to sexual battery. He must show one of the exceptions under section 2254(e)(2)(A) applies. And he must satisfy section 2254(e)(2)(B). *See Shoop*, 142 S. Ct. at 2044. Before permitting factual development or record expansion, this Court must first decide whether his new evidence of sexual battery can be lawfully considered in this case under AEDPA's restrictions. *Id.* at 2044, 2045. The *Havard III* court was the last court

to adjudicate the actual innocence claim under Claim XIX. The sexual battery evidence attached to Havard's Amended Third PCR Application would be precluded in these proceedings under section 2254(d). *See id.* at 2045-46. And Havard's Petition does not indicate how this evidence would be admissible in give the adjudication in *Havard III*. *See id.* at 2046. The Petition does not state that Havard can meet section 2254(e)(2)'s requirements. *See id.* It does not indicate that Havard can excuse the default that bars this claim or how this new evidence may help him overcome his default in addition to proving the merits of a claim for relief. *See id.* "[I]f § 2254(e)(2) applies and the prisoner cannot meet the statute's standards for admitting new merits evidence, it serves no purpose to develop such evidence just to assess cause and prejudice. *See Shoop*, 142 S. Ct. at 2046 (citing *Shinn*, 142 S. Ct., at 1738).

The Court should refuse to admit and consider Havard's new sexual battery evidence. Actual innocence is not a claim for relief. He cannot obtain relief for Claim XIX. So granting his request only needlessly prolongs this case. This evidence is not necessary to this Court review and adjudication of the actual innocence claim in *Havard III*, which is limited to the state court record or the evidence presented in that case. Nor is it admissible given the *Havard III* adjudication, state court record, and evidence presented in that case because Havard cannot meet section 2254(e)(2)'s requirements. Given its statutory mandate, he must AEDPA's requirements to develop and admit his new

evidence. Havard cannot show this evidence is admissible or capable of being considered under AEDPA. Besides that, it is not necessary for this Court adjudication of Claim XIX. Granting his request requires the Court to ignore AEDPA's requirements, which control these proceedings, and needlessly prolong these proceedings. For these reasons, the Court should refuse to allow Havard to expand the record or develop evidence during an evidentiary hearing for Claim XIX or any other claim in his Petition.

XX. Whether the actual innocence allegations under Claim XX state a claim for habeas relief or, alternatively, one that overcomes AEDPA's relitigation bar and warrants relief.

Respondents deny the allegations under Claim XX of the Petition. (Doc. 108 at 72–75). Havard states that Claim XIX is incomplete. (Doc. 108 at 74, § A ¶ 8). Respondents lack the information necessary to answer the allegations under this claim. For that reason, and to be safe, Respondents assert their affirmative defenses to the extent they can and reserve the right to respond should Havard provide a completely-stated Claim XX.

A. Claim XX fails to state a claim for habeas relief.

Havard raises a second actual innocence claim under Claim XX. Here, he contends that he is actually innocent of capital murder under state law because Shaken Baby Syndrome (SBS) is only one potential cause of Chloe's death. (Doc. 108 at 72–74). Claim XX fails to state a claim for habeas relief. *See Herrera*, 506 U.S. at 400; *Graves*, 351 F.3d at 151; *Dowthitt*, 230 F.3d at 741.

The Fifth Circuit has refused to permit claims of actual innocence on habeas review. "[The *Herrera* Court] left open whether a truly persuasive actual innocence claim may establish a constitutional violation sufficient to state a claim for habeas relief." *Graves*, 351 F.3d at 151. The Fifth Circuit "has rejected this possibility and held that claims of actual innocence are not cognizable on federal habeas review." *See id.*; *Cantu*, 632 F.3d at 167; *Foster*, 466 F.3d at 367–68; *Dowthitt*, 230 F.3d at 741.

An actual innocence claim is a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Dowthitt*, 230 F.3d at 741 (citations omitted). On its face, Claim XX does not state a substantive constitutional claim upon which federal habeas relief may be granted. It should be denied.

B. AEDPA bars Havard from obtaining relief for Claim XX.

Without waiving the previous argument and assuming the Claim XX is cognizable, AEDPA precludes Havard from relitigating Claim XX in these proceedings and bars him from obtaining relief.

1. The Mississippi Supreme Court's adjudication of the newly discovered evidence claim concerning SBS in *Havard IV*.

As it concerns Claim XX, the *Havard IV* opinion says:

I. Did the circuit court err by not granting Havard a new trial based on the evidence presented?

"To succeed on a motion for a new trial based on newly discovered evidence, the petitioner must prove that new evidence has been discovered since the close of trial and that it could not have been discovered through due diligence before the trial began." *Crawford v. State*, 867 So. 2d 196, 203–04 (¶ 9) (Miss. 2003) (citing *Meeks v. State*, 781 So. 2d 109, 112 (¶ 8) (Miss. 2001). "In addition, the petitioner must show that the newly discovered evidence will probably produce a different result or induce a different verdict, if a new trial is granted." *Id*. at 204 (citing *Meeks*, 781 So. 2d at 112 (¶ 8)).

Havard argues that the trial judge erred when he determined the evidence presented would not produce a different result and when he determined the evidence was not new. Havard further posits that the State convicted him of capital murder based on the theory that he shook Chloe to death. He explains that "[i]f even one juror questioned Shaken-baby syndrome at the end of the trial, [he] would not have been *convicted* ...." (Emphasis added.) Throughout his evidentiary hearing and brief to the Court, Havard says that the evidence he presented "ha[s] bearing on [his] guilt/innocence and would dramatically alter the jury question if the case was tried again." Havard explains that "[t]he jury never heard experts say that Chloe's *death* could have been an *accident*." (Emphasis added.)

But as explained below, even assuming, *arguendo*, that Havard presented new evidence, it could not and would not "produce a different result or induce a different verdict," even if the Court granted a new trial. *Crawford*, 867 So. 2d at 203–04 (¶ 9) (citing *Meeks*, 781 So. 2d at 112 (¶ 8)). Accordingly, the evolution of shaken-baby syndrome versus impact and its relation to Chloe's cause and manner of death have no bearing on Havard's guilt or innocence.

In 2002, "a jury found Jeffrey Havard guilty of capital murder (killing during the commission of sexual battery) of six-month old Chloe Britt ...." *Havard I*, 928 So. 2d at 778 (¶ 1). Mississippi Code Section 97-3-19(2)(e) defines capital murder:

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> ....
>
> (e) *When done with or without any design to effect death*, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual

> battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;
>
> ....

Miss. Code Ann. § 97-3-19(2)(e) (Rev. 2014) (emphasis added).

Havard repeatedly argues that "[t]his case is focused on Shaken Baby Syndrome as it relates to *cause and manner* of death." (Emphasis added.) He is correct. Havard explains that if the Court granted him a new trial, his new "defense theory [would be] that Chloe died after being accidentally dropped." In other words, Havard's defense theory is that he did not intend to kill Chloe or effect her death. But no matter how Havard explains Chloe's cause and manner of death, one fact is undisputed: Havard effected Chloe's death. How Havard effected Chloe's death, in the context of determining guilt or innocence in a capital-murder trial, is irrelevant.

"When faced with the charge of capital murder, a defendant is not entitled to raise the defense of accident as to that charge." *Nelson v. State*, 995 So. 2d 799, 808 (¶ 29) (Miss. Ct. App. 2008) (holding that "[t]here is nothing about [Mississippi Code Section 97-3-19(2)(e)] which requires any intent to kill when a person is slain during the course of a [sexual battery]. It is no legal defense to claim accident, or that it was done without malice" (emphasis added) (citing *Griffin v. State*, 557 So. 2d 542, 549 (Miss. 1990)).

Even assuming *arguendo* that Havard's evidence is newly discovered, the ruling in *Nelson*, which derived authority from *Griffin v. State*, 557 So. 2d 542, 549 (Miss. 1990), and Section 97-3-19(2)(e) provide no route for Havard to prevail in a new trial. And Havard would not be entitled to raise his new defense theory that he accidentally killed Chloe. *Nelson*, 995 So. 2d at 808 (¶ 29). That said, Havard argues that his evidence would alter the jury question were the case tried again. We disagree.

We must reiterate the redundant nature of the evidence at hand. In the event of a new trial, the following jury question would remain: Did Havard effect Chloe's death while engaged in the commission of the crime of sexual battery? And no matter the jury's understanding—whether bolstered by newly discovered evidence or not—if the undisputed fact that Havard effected Chloe's death, while committing the underlying felony of sexual

> battery, he remains guilty of capital murder. *Havard I*, 928 So. 2d at 778 (¶ 1). Accordingly, we affirm.

Havard IV, 312 So. 3d at 336–38.

2. Havard is not entitled to relief for Claim XX.

Assuming, to be safe, that Claim XX is a cognizable claim, the Mississippi Supreme Court's adjudication of Havard's claim that he is actually innocent of capital murder in *Havard IV* is entitled to AEDPA deference. To obtain relief, Havard must show that one of the exceptions to section 2254(d) applies by showing that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See Richter*, 562 U.S. at 103. And he bears the burden of rebutting the state supreme court's factual findings by clear and convincing evidence. *See Miller-El II*, 537 U.S. at 340. And he must do so based on the record before the state supreme court in *Havard III*. *See Pinholster*, 563 U.S. at 181.

Havard does not explain how the Mississippi Supreme Court's adjudication of this actual innocence claim meets one of section 2254(d)'s exceptions. He does not state, and cannot show, that "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with" clearly established Supreme Court precedent because there is no such precedent. *Richter*, 562 U.S. at 102. For that reason, Havard cannot overcome AEDPA's relitigation bar because there is no clearly established federal law

that recognizes actual innocence as an independent substantive constitutional claim. "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by the [Supreme] Court.'" *See id.* at 101 (quoting *Knowles*, 556 U.S. at 122)). AEDPA bars Havard from relitigating Claim XIX in these proceedings and obtaining relief.

And as the *Havard IV* opinion shows, the Mississippi Supreme Court's adjudication of the actual innocence claim under Claim XX turned on its interpretation of a state statute. The state supreme court's adjudication provides no basis for granting Havard relief. *See Bronstein*, 646 F.2d at 1050. This Court "takes the word of the state's highest court as to the interpretation if its law on criminal matters" and does not "sit to review" that interpretation. *See Young*, 356 F.3d at 628; *Bradshaw*, 546 U.S. at 76; *Estelle*, 502 U.S. at 67–68; *Fuhrman*, 442 F.3d at 901; *Johnson*, 215 F.3d at 494; *Gibbs*, 154 F.3d at 259. Precedent requires that this Court "defer to [the] … conclusion and interpretation of" the Mississippi Supreme Court that there is no intent element in Mississippi's capital-murder statute for the offense Havard was charged with and convicted of committing. *See id.*

Additionally, this actual innocence has no merit. It must fail because, as the Mississippi Supreme Court stated in *Havard IV*: "[T]he evolution of shaken-baby syndrome versus impact and its relation to Chloe's cause and manner of death

have no bearing on Havard's guilt or innocence." 312 So. 3d at 337. Neither the cause nor manner of Chloe's death changes the fact that Chloe's died during the commission of a sexual battery. And under state law, a person commits felony capital murder if he kills a child under the age of 12 by any means or manner while engaged in the commission of sexual battery. *Id.* Whether the killing was intentional or accidental is irrelevant. Accident is not a defense to a felony capital murder charge under Miss. Code Ann. § 97-3-19(2)(e). *Id.*

Whether the jury heard Havard's new evidence related to SBS is irrelevant to his capital-murder conviction because the jury would still have to decide whether he effected Chloe's death while engaged in the commission of the crime of sexual battery. *See id.* at 338. So "[h]ow Havard effected Chloe's death, in the context of determining guilt or innocence in a capital-murder trial, is irrelevant." *Id.* The statute explicitly states "by any means or in any manner…" Miss. Code Ann. § 97-3-19(2)(e). Claim XX should be denied. Havard cannot prove actual innocence based on the evidence related to SBS that was presented in *Havard IV*. Further, a prisoner establishes actual innocence by proving factual innocence, not legal innocence. This evidence does not prove Havard is factually innocent. Havard's Petition makes this clear. In it he claims this evidence proves he lacked the requisite intent to be convicted of capital murder. Claim XX is not a factual innocence claim; it is a legal innocence. Havard argues he accidentally caused Chloe's death. Claim XX lacks merit. It should be denied.

3. Havard's evidentiary hearing and record expansion request related to Claim XX should be denied.

Respondents incorporate the arguments under § B, 3 of Claim XIX, *supra* here by reference. The Court should refuse Havard's request for an evidentiary hearing on the actual innocence claim under Claim XX or any request to develop the state-court record. Even if Havard developed the evidence related to SBS in these proceedings, he cannot obtain relief for Claim XX. "[A] federal court, 'in deciding whether to grant an evidentiary hearing, … must consider whether such a hearing could enable an applicant to prove … factual allegations that would entitle him to federal habeas relief.'" *Shinn*, 142 S. Ct. at 1739 (quoting *Schiro*, 550 U.S. at 474).

The Court must first determine whether the evidence Havard seeks to present would satisfy AEDPA's demanding standards needlessly prolongs these proceedings. *See id.* (quoting *Pinholster*, 563 U.S. at 208–09). New evidence not presented in state court would be inadmissible in these proceedings for the same reasons the evidence he asks the Court to consider under Claim XIX. Granting an evidentiary hearing or even allowing Havard to supplement or develop the evidence related to Claim XX can only needlessly prolong these proceedings. *See id.* (quoting *Schrirro*, 550 U.S. at 474). "[A] federal court may *never* 'needlessly prolong' a habeas case…." *Id.* (citing *Pinholster*, 563 U.S. at 209). And as state above, actual innocence is not a claim

for federal relief. For either reason, the Court should deny any request for factual development related to Claim XX.

XXI. Whether the *Brady* claim under Claim XXI overcomes AEDPA's relitigation bar and warrants relief.

Respondents deny the allegations under Claim XXI of the Petition. (Doc. 108 at 76–80).

A. AEDPA bars Havard from obtaining review and relief for Claim XX.

AEDPA precludes Havard from relitigating that claim in these proceedings and bars him from obtaining relief for his second *Brady* claim.

1. The Mississippi Supreme Court's adjudication of the *Brady* claim under Claim XXI.

The Mississippi Supreme Court adjudicated the merits of Havard's most recent *Brady* claim and denied it in a written order entered in his third state PCR proceedings. As it relates to Claim XXI, the state court's Order states, in its entirety, that: "The Court finds no merit in Havard's assertion that the prosecution suppressed favorable evidence and, thereby, violated his due process rights." Order, *Havard IV*, No. 2013-DR-01995-SCT (Miss. Apr. 5, 2015).

2. Havard is not entitled to relief for Claim XXI.

AEDPA's relitigation bar prevents Havard from review and relief for the *Brady* claim under Claim XXI. The state supreme court's determination of this claim is a merits adjudication. *See Richter*, 562 U.S. at 98 (explaining that AEDPA bars relitigation of any claim that was "'adjudicated on the merits'" but

does not require a state court to give its reasons for denying a claim to be a merits adjudication (quoting 28 U.S.C. § 2254(d)). The state court's adjudication of the *Brady* claim under Claim XXI is entitled to AEPDA deference.

Brady and the cases applying its rule control the adjudication of this claim. The Mississippi Supreme Court correctly identified and applied *Brady* to the suppressed evidence claim under Claim XXI. Havard does not state whether the Mississippi Supreme Court's adjudication of the suppressed evidence claim in *Havard III* was contrary to or inconsistent with *Brady* and cases applying it or based on an unreasonable determination of the facts. Based on the allegations under Claim XXI, Havard cannot show an exception to section 2254(d) applies to his second *Brady* claim based on the state court record before the Mississippi Supreme Court during his third state PCR proceedings. He cannot overcome AEDPA's relitigation bar.

Plus, *Brady's* rule is inapplicable to Claim XXI. *Brady* applies to "the discovery, after trial[,] of information which had been known to the prosecution but unknown to the defense." *Agurs*, 427 U.S. at 103; *see Kutzner*, 303 F.3d at 336. As Havard repeatedly states in his Petition, Dr. Hayne gave the testimony that Havard says was suppressed at trial. And the trial court informed Havard and his trial counsel that Dr. Hayne was available for questioning before trial. When evidence is just as available to both the defense and the prosecution, the

defendant must bear the responsibility of failing to conduct a diligent investigation. *Herrera*, 954 F.2d at 1032.

Havard is not entitled to relief for the *Brady* claim under Claim XXI or an opportunity to relitigate that claim in this Court. He cannot overcome AEDPA's relitigation bar. Claim XXI is frivolous and lacks merit, particularly given the facts before the Mississippi Supreme Court in Havard's third PCR proceedings. Claim XXI should be denied.

True to form, Havard, in a single sentence, alternatively claims trial counsel was ineffective for failing to interview Dr. Hayne before trial and refers the Court to Claim I. (Doc. 108 at 79, § A ¶ 8). Even if this sentence sufficiently states an IATC claim, AEDPA's relitigation bar precludes review and relief for Claim XXI. And this Court's review of the IATC claim is doubly deferential, *see Richter*, 562 U.S. at 102, and limited to the record before the Mississippi Supreme Court in Havard's third state PCR proceedings, *see Pinholster*, 563 U.S. at 181.

Havard's Petition says nothing about how the Mississippi Supreme Court's adjudication of this claim in his third PCR proceedings is contrary to or inconsistent with *Strickland* or based on an unreasonable determination of the facts before it. It makes no mention of deficient performance or actual prejudice. Because it does not, Havard cannot show ineffectiveness for any failure to speak with Dr. Hayne before trial. This alternative IATC sentence

only shows the *Brady* claim under Claim XXI is frivolous and without merit. After all, if the State suppressed evidence as Havard says (and it did not), then how could trial counsel have failed to obtain it? If this IATC statement shows anything, it shows Havard wants to relitigate decided issues that have no merit. Havard has no right to relitigate decided issues in these proceedings. And he is not entitled to relief for Claim XXI or any other claim in his Petition.

CONCLUSION

The Court should refuse to issue the Writ in this case. The Second Amended Petition for a Writ of Habeas Corpus should be denied because the claims in it do not warrant federal habeas relief and cannot support a decision to issue the Writ. So Respondents ask the Court to:

- *deny* the Second Amended Petition for a Writ of Habeas Corpus with prejudice;
- *deny* Havard's unwarranted and unspecified requests, including those for discovery and an evidentiary hearing;
- *deny* Havard a Certificate of Appealability to appeal this matter to the United States Court of Appeals for the Fifth Circuit on all claims; and
- *release* Respondents from the duty to answer.

THIS, the 6th day of January, 2023.

Respectfully submitted,

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by: /s/ *Brad A. Smith*

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CERTIFICATE OF SERVICE

This is to certify that, on this day, undersigned electronically filed this Answer in Opposition to Second Amended Petition for Writ of Habeas Corpus using the Court's ECF system, which sent notification to all counsel of record.

THIS, the 6th day of January, 2023.

by: /s/ *Brad A. Smith*
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