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

JEFFREY HAVARD **PETITIONER**

v. **Case No. 5:08-cv-275-DCB-BWR**

BURL CAIN et al. **RESPONDENTS**

REPORT AND RECOMMENDATION

BEFORE THE COURT is a Second Amended Petition [108] under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody filed by Petitioner Jeffrey Havard (Petitioner). Respondents Burl Cain and Lynn Fitch (collectively, Respondents) have filed an Answer [112]. Petitioner filed a Reply [114]. After a review of the parties' submissions, the record, and the relevant law, the undersigned recommends dismissing the Second Amended Petition [108] with prejudice.

I. BACKGROUND

On June 24, 2002, an Adams County grand jury indicted Petitioner for capital murder during the course of "sexual battery and/or felonious abuse and/or battery of" six-month-old Chloe Britt (Chloe). Ex. [116-1] at 11-12; Ex. [116-2] at 66. A jury convicted Petitioner of capital murder on December 18, 2002 and sentenced him to death the following day. Ex. [116-2] at 65-68; *Havard v. State* (*Havard I*), 928 So. 2d 771, 778 (Miss. 2006). Petitioner appealed his conviction and sentence to the Mississippi Supreme Court. *Havard I*, 928 So. 2d at 778. On February 9, 2006, the Mississippi Supreme Court affirmed Petitioner's conviction and sentence. *Id.* at 804. The Mississippi Supreme Court denied Petitioner's motion for rehearing on May 25,

2006. Ex. [117-1] at 310. Petitioner then filed a writ of certiorari. *Havard v. Mississippi*, 549 U.S. 1119 (2007). The United States Supreme Court denied Petitioner's writ. *Id.*

Petitioner filed an Application for Leave to Proceed in the Trial Court and Motion for Other Relief (PCR Motion) in the Mississippi Supreme Court on May 25, 2007. Ex. [117-2] at 45-51. The Mississippi Supreme Court denied this PCR Motion on May 22, 2008 and denied Petitioner's motion for rehearing on August 28, 2008. *Havard v. State* (*Havard II*), 988 So. 2d 322, 325 (Miss. 2008); Ex. [117-3] at 1.

On April 10, 2009, Petitioner filed a Petition for Writ of Habeas Corpus in this Court. Pet. [10]. On April 12, 2011, Petitioner motioned to stay the federal habeas proceedings and filed a second PCR Motion in the Mississippi Supreme Court. Pet'r's Mot. [49]; Ex. [118-1] at 1-54. This Court granted Petitioner's Motion to Stay on July 13, 2011. Order [54]. The Mississippi Supreme Court denied Petitioner's second PCR Motion on March 8, 2012. *Havard v. State* (*Havard III*), 86 So. 3d 896, 898 (Miss. 2012). This Court then unstayed Petitioner's federal habeas proceedings on June 28, 2012. Order [58].

On September 28, 2012, Petitioner filed an Amended Petition for Writ of Habeas Corpus. Am. Pet. [60]. Petitioner filed a third PCR Motion in the Mississippi Supreme Court and moved to stay his federal habeas proceedings on November 25, 2013. Pet'r's Mot. [85]; Ex. [119-1] at 12-54. This Court granted Petitioner's Motion to Stay on May 22, 2014. Order [96]. Petitioner later amended his third PCR Motion on September 3, 2014. Ex. [115-9] at 113-151; Ex. [115-10] at 2-11. On April 2, 2015

the Mississippi Supreme Court granted Petitioner leave to proceed in the trial court solely on the issue of newly discovered evidence that Petitioner presented in his third PCR Motion. Ex. [115-1] at 20-21. On August 14, 2017 the Circuit Court of Adams County conducted an evidentiary hearing on Petitioner's third PCR Motion. Ex. [115-13]; [115-14]; [115-15] at 1-126. The Circuit Court of Adams County vacated Petitioner's death sentence in favor of a life without parole sentence but upheld Petitioner's conviction. Ex. [115-12] at 90; Ex. [115-16] at 69-72.

Petitioner appealed this decision to the Mississippi Supreme Court and the Mississippi Supreme Court affirmed on December 17, 2020. *Havard v. State* (*Havard IV*), 312 So. 3d 326, 329 (Miss. 2020). This Court then lifted the stay on April 9, 2021. Order [99]. Petitioner filed a Second Amended Petition for Writ of Habeas Corpus on August 8, 2022. 2d Am. Pet. [108]. Petitioner raises 21 grounds for relief:

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 *Napue 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 newly-available objective medical evidence.

XXI. Petitioner'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.

Id. Petitioner concedes, and Respondents agree, that claims three through nine are now moot because Petitioner's death sentence has been vacated. *Id.* at 43-44; Answer [112] at 56-58. Petitioner asks that the Court remand his case for an evidentiary hearing on grounds one, ten, eleven, twelve, fourteen, fifteen, sixteen, seventeen, eighteen, and nineteen. 2d Am. Pet. [108] at 39, 47, 49-50, 53-54, 59, 63, 65, 71.

Respondents argue that Petitioner's grounds for relief are either technically exhausted, procedurally barred, or do not warrant federal habeas relief. Answer [112]. Respondents argue that Petitioner's grounds two, thirteen, fourteen, and fifteen are technically exhausted. *Id.* at 45-47, 82-83, 87-89, 103-05. Respondents

argue that Petitioner's grounds one, two, sixteen, seventeen, eighteen, and nineteen are procedurally barred. *Id.* at 23-25, 48-49, 112-13, 120-21, 126, 132-36. Respondents argue that Petitioner's actual innocence claims (grounds nineteen and twenty) do not state a claim for federal habeas relief. *Id.* at 131-32, 146-47. Respondents argue all of Petitioner's grounds for relief do not warrant federal habeas relief on the merits. *Id.* at 22-157.

II. DISCUSSION

1. Petitioner's grounds two, sixteen, seventeen, and eighteen are procedurally barred

a. Applicable law

Federal habeas review is governed by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. § 2254. Federal habeas review is procedurally barred "[i]f a state court clearly and expressly bases its dismissal of a prisoner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal." *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997) (first citing *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991); then *Harris v. Reed*, 489 U.S. 255, 262-63 (1989); and then *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977)).

A habeas petitioner may overcome the bar for a procedurally defaulted claim in two ways. First, the petitioner can overcome the procedural bar by showing cause for the default and actual prejudice resulting from the alleged violation of federal law. *Hughes v. Quarterman*, 530 F.3d 336, 341 (5th Cir. 2008) (quoting *Coleman*, 501 U.S.

at 750). For a finding of cause, there "must be something *external* to the petitioner, something that cannot fairly be attributed to him" that prevented him from raising and discussing the claims as grounds for relief in state court. *Coleman*, 501 U.S. at 753 (emphasis in original). To establish prejudice, a petitioner must show that, but for the alleged error, the outcome of the proceeding would have been different. *Pickney v. Cain*, 337 F.3d 542, 545 (5th Cir. 2003) (quoting *United States v. Guerra*, 94 F.3d 989, 994 (5th Cir. 1996)).

Second, the petitioner can overcome the procedural bar by showing that a fundamental miscarriage of justice would result if the procedural bar were applied. *Fairman v. Anderson*, 188 F.3d 635, 644 (5th Cir. 1999). To make this showing, a petitioner must prove "as a factual matter, that he did not commit the crime of conviction." *Id.* (first quoting *Ward v. Cain*, 53 F.3d 106, 108 (5th Cir. 1995); then citing *Corwin v. Johnson*, 150 F.3d 467, 473 (5th Cir. 1998)). Further, the petitioner must support his allegations with new, reliable evidence, that was not presented at trial, and must show that it was "more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

b. Analysis

Petitioner's grounds two, sixteen, seventeen, and eighteen are procedurally barred. In *Havard I*, the Mississippi Supreme Court held that Petitioner waived any challenge to the prosecutor's allegedly prejudicial statements during closing argument (ground two here) by failing to contemporaneously object. *See* 928 So. 2d at

791 (quoting *Carr v. State*, 873 So. 2d 991, 1004 (Miss. 2004)). The Fifth Circuit Court of Appeals has held that the failure to contemporaneously object procedural bar is an independent and adequate procedural ground for dismissal. *Smith v. Black*, 970 F.2d 1383, 1387 (5th Cir. 1992). Petitioner's ground two is procedurally barred.

As an alternative to Petitioner's prosecutorial misconduct argument in ground two, Petitioner argues that his trial counsel was ineffective for failure to object to the State's closing argument. 2d Am. Pet. [108] at 42. Petitioner has not raised this argument specifically in state court, so this argument is not exhausted. *Ruiz v. Quarterman*, 460 F.3d 638, 643 (5th Cir. 2006) (first citing *Picard v. Connor*, 404 U.S. 270, 275-77 (1971); then quoting *Wilder v. Cockrell*, 274 F.3d 255, 260 (5th Cir. 2001)); *see also* 28 U.S.C. § 2254(b)(1)(A); *Havard I*, 928 So. 2d at 791 ("Were [Petitioner] now alleging ineffective counsel for failure to object to this statement, our analysis here would be different."); *Havard II*, 988 So. 2d at 342-43 ("This Court noted that defense counsel failed to object and that [Petitioner] was not raising the issue under a claim of ineffective assistance of counsel for failing to object."). Petitioner did argue that "[i]f a procedural bar was even applicable to this claim, it would not be applicable to this case because of the clear ineffective assistance of counsel in failing to object to this argument" in his first PCR Motion. Ex. [117-2] at 127. But Petitioner only used the ineffective assistance of counsel argument as a tool to overcome a potential procedural bar and not as an alternative and independent argument, as Petitioner did here. Accordingly, this Court is procedurally barred from reviewing this ground. *Ruiz*, 460 F.3d at 642-43.

Regardless of whether Petitioner's ground two ineffective assistance of counsel argument is technically exhausted, the two-sentence argument is conclusory and should be dismissed for that reason alone.[1] *Green v. Johnson*, 160 F.3d 1029, 1042-43 (5th Cir. 1998) (first citing *Kinnamon v. Scott*, 40 F.3d 731, 735 (5th Cir. 1994); then *Anderson v. Collins*, 18 F.3d 1208, 1221 (5th Cir. 1994)) ("Mere conclusory allegations in support of a claim of ineffective assistance of counsel are insufficient to raise a constitutional issue."); *Roberts v. Lumpkin*, No. 20-10280, 2021 WL 4142387, at *1 (5th Cir. May 3, 2021) (citing *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000)).

In *Havard III*, the Mississippi Supreme Court held that the time bar and successive writ bar barred Petitioner's grounds sixteen, seventeen, and eighteen. 86 So. 3d at 900-04, 910. Both the time bar and successive writ bar are independent and adequate state procedural grounds for dismissal. *Spicer v. Cain*, No. 18-60791, 2021 WL 4465828, at *3 (5th Cir. Sept. 29, 2021); *Lyons v. King*, No. 3:19-cv-326-CWR-FKB, 2021 WL 6052578, at *9 (S.D. Miss. Nov. 3, 2021) (citing *Spicer*, 2021 WL 4465828, at *3), *R. & R. adopted*, 2021 WL 6051082 (S.D. Miss. Dec. 21, 2021). Petitioner's grounds sixteen, seventeen, and eighteen are thus procedurally barred.

Petitioner cannot demonstrate the applicability of an exception for any of his procedurally barred claims. Petitioner has not asserted that an external force prevented him from properly raising grounds two, sixteen, seventeen, or eighteen in

[1] This is the entire argument: "the failure of Petitioner's counsel to object to this improper and inflammatory argument constitutes prejudicial ineffective assistance of counsel. But for the deficient performance of Petitioner's trial counsel, there is a reasonable probability that the result of the proceedings would have been different." 2d Am. Pet. [108] at 42.

state court. Even if Petitioner had made such an assertion, Petitioner cannot show that if he had raised grounds two, sixteen, seventeen, or eighteen properly in state court, his outcome would have differed.

Petitioner raises two actual innocence claims in an attempt to overcome the applicable procedural bars. First, Petitioner argues that Dr. Steven Hayne's (Dr. Hayne) November 23, 2010 deposition testimony proves that Petitioner is actually innocent of his underlying felony of sexual battery, making Petitioner's conviction and sentence "null and void." 2d Am. Pet. [108] at 66-71; Ex. [60-1]. Dr. Hayne gave expert testimony on the causes of Chloe's death and injuries at Petitioner's trial. Ex. [115-17] at 5-32. His testimony on the sexual battery aspect of Petitioner's crime was limited. *Id.* Dr. Hayne stated that the injuries he observed to Chloe's "rectal area" were "consistent with penetration of the rectum with an object." *Id.* at 17. Petitioner's trial counsel cross-examined Dr. Hayne. *Id.* at 26-29.

With the November 23, 2010 deposition testimony, Petitioner emphasizes that Dr. Hayne stated that he could not conclude to a reasonable degree of medical certainty that Petitioner sexually assaulted Chloe. 2d Am. Pet. [108] at 67-71; Ex. [60-1]. Dr. Hayne further testified that Chloe's injuries alone did not evidence "anal sexual abuse." 2d Am. Pet. [108] at 68. Dr. Hayne testified that his deposition testimony was consistent with his trial testimony. Ex. [60-1] at 9.

The Mississippi Supreme Court reviewed Petitioner's actual innocence claim based on Dr. Hayne's November 23, 2010 deposition testimony in *Havard III*. 86 So. 3d at 904-07. The Mississippi Supreme Court had to determine whether the

November 23, 2010 deposition testimony was "newly discovered evidence." *Id.* at 906. The Mississippi Supreme Court found that it was not. *Id.* Absent any evidence that Dr. Hayne's deposition testimony "was undiscoverable at the time of trial," the Mississippi Supreme Court concluded there was no basis for finding that this evidence qualified as newly discovered. *Id.*

This finding was not an unreasonable application of the *Schlup v. Delo* actual innocence standard. As the Mississippi Supreme Court explained, Dr. Hayne testified at Petitioner's trial and Petitioner's counsel cross-examined Dr. Hayne at trial. *Id.*; Ex. [115-17] at 5-32. Dr. Hayne's November 23, 2010 deposition testimony, in Dr. Hayne's own words, is also consistent with his trial testimony. Ex. [60-1] at 7, 9 ("I said that the contusion would be consistent with a sexual abuse, but I couldn't say that there was sexual abuse."). The November 23, 2010 deposition testimony does not qualify as new evidence just because it is more detailed than Dr. Hayne's trial testimony. *Havard III*, 86 So. 3d at 906; *see also Hancock v. Davis*, 906 F.3d 387, 390 (5th Cir. 2018) (quoting *Moore v. Quarterman*, 534 F.3d 454, 465 (5th Cir. 2008)) ("Evidence does not qualify as 'new' under the *Schlup* actual-innocence standard if 'it was always within the reach of [petitioner's] personal knowledge or reasonable investigation.'"). Petitioner also does not show that it was "more likely than not that no reasonable juror would have convicted him in light of" the November 23, 2010 deposition testimony. *Fairman*, 188 F.3d at 644 (quoting *Schlup*, 513 U.S. at 327). The Mississippi Supreme Court explained that "numerous emergency-room personnel witnessed Chloe's physical condition and gave testimony at [Petitioner]'s

trial." *Havard III*, 86 So. 3d at 907 (citing *Havard II*, 988 So. 2d at 332). The Court observed Petitioner's admission to police that "[m]aybe I was too rough with her. Maybe I shook her too hard. I don't know. . . . Maybe I went too far in on her when I was wiping her out, inside of her butt." *Id.* Petitioner's first actual innocence claim fails.

Second, Petitioner argues actual innocence based on "the changes in science that have taken place from [Petitioner's] 2002 trial to the 2017 evidentiary hearing" regarding shaken baby syndrome. 2d Am. Pet. [108] at 72-75. Petitioner argues that in his trial, the jury never heard an expert testify that Chloe's death could have been an accident. *Id.* at 73. The Mississippi Supreme Court reviewed this argument as well, though not in the context of an actual innocence claim. *Havard IV*, 312 So. 3d at 336-38. The Mississippi Supreme Court began by assuming that the evidence Petitioner presented was newly discovered. *Id.* at 337. Even so, the Mississippi Supreme Court found that Petitioner's new shaken baby syndrome evidence would not have changed the trial's outcome. *Id.* at 337-38. As the court explained, Petitioner's capital murder conviction did not involve a question of intent. *Id.* (quoting MISS. CODE ANN. § 97-3-19(2)(e)). Any argument that Petitioner accidentally caused Chloe's death would not change the fact that Petitioner was guilty of capital murder under Mississippi state law. *Id.*

The Mississippi Supreme Court's decision does not contravene the *Schlup* actual innocence standard. Initially, the undersigned is doubtful of whether Petitioner's alleged "changes in science" since Petitioner's 2002 trial constitute newly

discovered evidence. 2d Am. Pet. [108] at 72-75; *Shelby v. Cain*, No. 1:21-cv-406-HSO-RPM, 2023 WL 2563229, at *1, *7 (S.D. Miss. Mar. 17, 2023) (finding that evidence regarding shaken baby syndrome was not "newly discovered" because it relied on science that "existed since the time of [the petitioner's] trial" in 2000). Aside from this issue, Petitioner was convicted of capital murder under Miss. Code Ann. § 97-3-19(2)(e). *Havard IV*, 312 So. 3d at 337; Ex. [116-1] at 11-12. Miss. Code Ann. § 97-3-19(2)(e) defines capital murder, as applicable to Petitioner, as a killing "done *with or without any design to effect death*, by any person engaged in the commission of the crime of . . . sexual battery." Even if Petitioner could prove that Chloe's death was accidental, Petitioner would still be guilty of capital murder under this definition. *Havard IV*, 312 So. 3d at 337-38; MISS. CODE ANN. § 97-3-19(2)(e). Any potential newly discovered scientific evidence about shaken baby syndrome showing that Petitioner accidentally caused Chloe's death would not change that Petitioner was guilty of his crime of conviction. MISS. CODE ANN. § 97-3-19(2)(e). Petitioner cannot show that no reasonable juror would have convicted him had they seen the alleged new evidence regarding shaken baby syndrome. *Fairman*, 188 F.3d at 644 (quoting *Schlup*, 513 U.S. at 327). Petitioner's second actual innocence claim also fails.

Since Petitioner does not have a valid actual innocence claim, Petitioner cannot overcome the procedural bar for grounds two, sixteen, seventeen, and eighteen. These grounds are barred from federal habeas review and should be dismissed.

2. Petitioner's ineffective assistance of counsel claims (grounds one, ten, eleven, and fourteen) do not merit federal habeas relief

a. Applicable law

The constitutional standard for ineffective assistance of counsel claims is set out in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a criminal defendant must show that counsel rendered deficient performance and that counsel's actions resulted in actual prejudice. 466 U.S. at 687. To demonstrate deficient performance, a party must show that their "counsel's representation fell below an objective standard of reasonableness" as measured by "prevailing professional norms." *Id*. at 687-88. There exists a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689. Counsel's strategic decisions must be given great deference. *Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir. 1993).

To demonstrate actual prejudice, a party must show that counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. The party must show to a reasonable probability that but for counsel's deficiencies, "the result of the proceeding would have been different." *Id*. at 694.

For relief on Petitioner's ineffective assistance of counsel claim, Petitioner must also adhere to 28 U.S.C. § 2254. With § 2254, when a state court has already rejected an ineffective assistance of counsel claim, the question becomes "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential

standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). This is different from the question of whether defendant's "counsel's performance fell below *Strickland*'s standard." *Id.* at 101. "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Id.* at 105 (internal quotations omitted) (first quoting *Strickland*, 466 U.S. at 689; then citing *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997); and then quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)).

When reviewing a § 2254 petition, the federal court looks to the state court's "last reasoned opinion." *Salts v. Epps*, 676 F.3d 468, 479 (5th Cir. 2012).

b. Analysis

i. Ground one

Petitioner's first ground for federal habeas relief is composed of several arguments. First, Petitioner argues that his trial counsel was ineffective for failure "to investigate or develop readily available evidence to refute the allegation of sexual battery." 2d Am. Pet. [108] at 19. As part of this argument, Petitioner posits that his trial counsel did not understand the medical/forensic issues in the case and "did not properly request independent expert assistance." *Id.* This allegedly led to the trial counsel's failure to object to, and "meaningfully cross-examine," Dr. Hayne and other witnesses. *Id.* at 19, 22. Petitioner supports this overarching failure to investigate argument through evidence that allegedly contradicts and/or weakens the expert testimony offered at trial. *Id.* at 32-38. This includes Dr. Hayne's November 23, 2010 deposition testimony and the affidavit of Dr. James Lauridson (Dr. Lauridson), an

independent pathologist that Petitioner's counsel consulted on direct appeal. *Id.* at 24-34. Petitioner also offers the affidavit of attorney Ross Parker Simons (Simons) in which Simons concludes that Petitioner's trial counsel was ineffective. *Id.* at 36. Finally, Petitioner argues that his trial counsel "failed to submit . . . a lesser-included offense jury instruction." *Id.* at 19.

To the extent Petitioner argues that his trial counsel was ineffective because of Dr. Hayne's November 23, 2010 deposition testimony and the post-trial testimony of other experts, the claim is procedurally barred. In *Havard III*, the Mississippi Supreme Court reviewed whether "newly discovered evidence" [2] proved that Petitioner's trial counsel was ineffective in challenging Petitioner's underlying sexual battery felony. 86 So. 3d at 907-10. The Mississippi Supreme Court held that the issue was procedurally barred under the time bar and successive writ bar. *Id.* at 910. Since both bars are independent and adequate, this portion of Petitioner's ground one is procedurally barred from this Court's AEDPA review. *Spicer*, 2021 WL 4465828, at *3; *Lyons*, 2021 WL 6052578, at *9 (citing *Spicer*, 2021 WL 4465828, at *3).

Additionally, Petitioner's argument that his trial counsel was ineffective for failure to object to "improper opinion testimony" is not exhausted. 2d Am. Pet. [108] at 22, 35, 38. The Court cannot locate any attempt at making a similar argument in Petitioner's state post-conviction proceedings nor does the Mississippi Supreme Court address a similar argument in its opinions addressing Petitioner's several PCR

[2] This evidence consisted of Dr. Hayne's November 23, 2010 deposition testimony and Dr. Lauridson's affidavit. *Havard III*, 86 So. 3d at 907-10; Ex. [7-3]; 2d Am. Pet. [108] at 25-34.

Motions. Ex. [117-2] at 58-140; Ex. [118-1] at 1-52; Ex. [119-1] at 12-54; Ex. [115-9] at 113-151; Ex. [115-10] at 2-11; *Havard I*, 928 So. 2d 771; *Havard II*, 988 So. 2d 322; *Havard III*, 86 So. 3d 896. Although Petitioner did discuss "improper opinion evidence" in his second PCR Motion, he did not argue that his trial counsel was ineffective for failure to object to such evidence. Ex. [118-1] at 30-34. Since Petitioner has not raised this argument specifically in state court, it is not exhausted. *Ruiz*, 460 F.3d at 643 (first citing *Picard*, 404 U.S. at 275-77; then quoting *Wilder*, 274 F.3d at 260); *see also* 28 U.S.C. § 2254(b)(1)(A). This Court is procedurally barred from reviewing this argument. *Ruiz*, 460 F.3d at 642-43.

As with Petitioner's other procedurally barred claims, Petitioner cannot demonstrate the applicability of an exception to the procedural bar for either of the above two arguments. Nor do Petitioner's actual innocence claims release Petitioner from the procedural bar. *See supra* at pp. 9-13.

For ground one, Petitioner is left with two ineffective assistance of counsel arguments. 2d Am. Pet. [108] at 19-39. The Mississippi Supreme Court addressed both in *Havard II*. 988 So. 2d at 327-33. First, Petitioner argues that his trial counsel was ineffective for failure to investigate/develop evidence to refute allegations of sexual battery. 2d Am. Pet. [108] at 19. The Mississippi Supreme Court broke this claim into two arguments: Petitioner's counsel was ineffective for (1) failing to obtain DNA evidence and (2) failing to secure a pathologist. *Havard II*, 988 So. 2d at 327-33. As to the DNA evidence argument, the court held that even if Petitioner's counsel hired a DNA expert and presented evidence that Petitioner's DNA was not found on

Chloe's body, Petitioner would not be innocent of sexual battery. *Id.* at 329-30. Miss. Code Ann. § 97-3-97 defines sexual battery as "sexual penetration," which is defined as the "insertion of any object into the genital or anal opening of another person's body." MISS. CODE ANN. § 97-3-97(a). The court concluded that "the absence of [Petitioner's] DNA does not exclude his use of 'any object.'" *Havard II*, 988 So. 2d at 330. Thus Petitioner could not show that if his trial counsel had obtained DNA evidence, the result of Petitioner's trial would have been different.[3] *See id.*

As to the failure to secure a pathologist argument, the court held that Petitioner's argument met neither of *Strickland*'s prongs. *Id.* at 331-33. At the trial level, Petitioner's counsel lacked funds to hire a pathologist and requested court assistance. *Id.* at 330. "The trial court denied the request." *Id.* The Mississippi Supreme Court noted that in *Havard I*, the Mississippi Supreme Court held that the trial court's decision was not an abuse of discretion and that Petitioner's trial "counsel's efforts did not rise 'to such a level so as to offend *Strickland*.'" *Id.* (citing *Havard I*, 928 So. 2d at 789). Next, the court considered an affidavit from Petitioner's trial counsel indicating that counsel consulted with a registered nurse before trial since he could not afford a pathologist. *Id.* The court also looked at Simons' affidavit. Simons opined that Petitioner's counsel was ineffective for not securing expert assistance. *Id.* at 330-31.

Overall, Petitioner's trial counsel tried to hire an expert with the court's help.

[3] Dr. Lauridson's affidavit did not change the court's conclusion on this point because his opinion, as relevant to this argument, was "that no semen was found in samples taken from the victim." *Havard II*, 988 So. 2d at 330.

The Mississippi Supreme Court held that the trial court's decision to deny Petitioner's trial counsel help was not an abuse of discretion. This led the Mississippi Supreme Court to hold that Petitioner could not show that his trial counsel's performance was deficient. *Id.* at 331 (citing *Foster v. State*, 687 So. 2d 1124, 1129-30 (Miss. 1996)).

The court continued its analysis assuming that Petitioner could meet *Strickland*'s first prong. *Id.* at 331-33. The court found that even if Petitioner presented testimony at trial that contradicted the opinion testimony that Petitioner sexually battered Chloe, Petitioner did not demonstrate a reasonable probability that the result of the trial would be different. *Id.* Petitioner cited Dr. Lauridson's affidavit as an example of contradictory testimony he might have presented. *Id.* But since multiple witnesses contradicted Dr. Lauridson's opinions and testified to the consistency of Chloe's condition with sexual abuse, the court concluded that Petitioner could not meet *Strickland*'s second prong.[4] *Id.* This holds true regardless of how many contradictory expert opinions Petitioner identifies. 2d Am. Pet. [108] at 34. The Mississippi Supreme Court reasonably applied *Strickland*.

Petitioner's remaining ground one argument is that his trial counsel failed to include a lesser offense instruction. *Id.* at 19. The Mississippi Supreme Court reviewed and rejected this argument for ineffective assistance of counsel. *Havard I*, 928 So. 2d at 789-91. The court found Petitioner's trial counsel's decision "not to be outside the realm of appropriate trial strategy." *Id.* at 790. The court reasoned that

[4] The court thought that "Dr. Lauridson's reports and affidavits do not contain evidence that would create a reasonable probability that, but for counsel's deficient performance, the outcome of [Petitioner]'s trial would have been different." *Havard II*, 988 So. 2d at 333.

"[b]ecause . . . counsel did not submit the lesser offense instructions, had the jury found that the State failed to prove [Petitioner] guilty of the underlying felony of sexual battery, the jury would have been required to find [Petitioner] not guilty of capital murder, thus rendering him a free man." *Id.* If Petitioner's trial counsel did submit the lesser offense instruction, the jury may not have convicted Petitioner of capital murder but the alternative would have been twenty years to life in prison. *Id.* at 790-91. The court concluded that "[t]rial counsel's decision not to submit lesser offense instructions, while it turned out to be unsuccessful, was appropriate trial strategy, and thus beyond the realm of serious consideration on a claim of ineffective assistance of counsel." *Id.* at 791.

Again, the Mississippi Supreme Court reasonably applied *Strickland*. *Harrington*, 562 U.S. at 105. Thus Petitioner's ground one does not merit federal habeas relief and should be dismissed.

ii. Ground ten

In Petitioner's ground ten, he argues that his trial counsel was ineffective for not asking "potential jurors any questions about their feelings about the death penalty or mitigating evidence." 2d Am. Pet. [108] at 45. Petitioner argues that this resulted in one of the jurors, Willie Thomas (Thomas), being unqualified to serve as a death penalty juror under the standard set forth in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). *Id.* at 46. In a post-trial affidavit, Thomas stated that "[i]f you take a life, a life is required" and that "[i]f people knew they would pay with their lives, there would be less killing." *Id.*; Ex. [117-2] at 232. Petitioner also offers the affidavit of a

capital litigator, Natman Schaye (Schaye), to support that Petitioner's counsel's performance was deficient. 2d Am. Pet. [108] at 46; Ex. [117-2] at 216-20.

The Mississippi Supreme Court last reviewed this argument in *Havard II* and held that it did not support a valid ineffective assistance of counsel claim. 988 So. 2d at 340-41. The court thought that Thomas' affidavit did not show "that Thomas would automatically vote for imposition of the death penalty in every case" and instead shows that Thomas supports the death penalty. *Id.* at 341. Since the affidavit did not show that Thomas would "arbitrarily impose the death penalty in every case regardless of the facts," the court found that it did not "add merit to" Petitioner's claim. *Id.*

Similarly, the court did not find Schaye's affidavit helpful to Petitioner. *Id.* In this affidavit, Schaye states that "he is of the opinion that [Petitioner]'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." *Id.* This affidavit was unhelpful because the trial judge did ask death-qualifying questions to the venire, including Thomas, and then asked Petitioner's trial counsel not to repeat any questions. *Id.* "The trial court . . . conducted both a '*Witherspoon*' examination and a 'reverse-*Witherspoon*' examination" and "the trial judge did strike at least nine venire members for cause at the request of the State based on *Witherspoon* considerations." *Id.* at 340 (quoting *Havard I*, 928 So. 2d at 786-87). Schaye's affidavit does not account for this. *Id.* at 341. The court therefore held that this claim did not meet *Strickland*'s standard. *Id.*

Under this Court's doubly-deferential review of *Strickland* claims, the undersigned cannot conclude that the Mississippi Supreme Court's holding on this claim was unreasonable. *Id.* at 340-41. This ground should be dismissed.

iii. Ground eleven

In ground eleven, Petitioner argues that his trial counsel was ineffective for failing to excuse a juror, Dorothy Sylvester (Sylvester), who allegedly stated that she could not be fair to Petitioner. 2d Am. Pet. [108] at 47-49. Sylvester stated "I don't know [Petitioner], but I had a niece to be raped—you know—I don't think I could be fair about it, too" during voir dire. *Id.*; Ex. [116-3] at 146. Sylvester was chosen as a juror. 2d Am. Pet. [108] at 48; Ex. [116-4] at 115-16. Petitioner's trial counsel allegedly did not use all peremptory challenges and "did not seek to excuse Sylvester." 2d Am. Pet. [108] at 49. Petitioner also asserts that the fact that Sylvester was a registered nurse for twenty years supplied additional reason to use a peremptory challenge on Sylvester. *Id.*

The Mississippi Supreme Court reviewed this argument on direct appeal in *Havard I*. 928 So. 2d at 780-82. In its review of the trial transcript, the court observed that questioning continued after Sylvester's initial statement. *Id.* at 781. "[T]he trial judge . . . repeatedly asked whether certain circumstances would make it difficult for [specific jurors] to be totally fair and impartial." *Id.* at 780. The State's counsel also "emphasized fairness in his questioning." *Id.* Petitioner's trial counsel stated that he would not repeat questions already asked. *Id.* After Sylvester's initial comment, the trial judge, counsel for Petitioner, and counsel for the State each asked "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." *Id.* at 781. Whether or not Petitioner's trial counsel asked specific fairness questions, the Mississippi Supreme Court explained that the many questions about the potential jurors' ability to be fair in Petitioner's trial ensured that each selected juror could be fair. *See id.* at 781-82. Furthermore, Sylvester never indicated, after her initial statement, that she would be unfair and impartial toward Petitioner during his trial. *Id.* at 782. The court concluded that "[g]iven 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." *Id.*

The Mississippi Supreme Court's decision presents a reasonable argument that Petitioner's trial counsel satisfied *Strickland*. The questioning throughout voir dire ensured Sylvester could participate as a fair and unbiased juror regardless of the comments she made and her experience as a registered nurse. This ground should be dismissed.

iv. Ground fourteen

In ground fourteen, Petitioner argues that the "cumulative effect" of his trial counsel's "many failures" violated Petitioner's right to effective assistance of counsel. 2d Am. Pet. [108] at 52-53. Although Petitioner alleges that he raised this ground in *Havard II*, *Havard III*, and in his third state post-conviction proceedings, the Court does not find any evidence that Petitioner raised this ground for relief in any

proceeding aside from *Havard II*. *Id.* at 53.

Petitioner's ground fourteen does not appear in *Havard III*. 86 So. 3d 896; Ex. [118-1] at 1-54. Petitioner alleges that ground fourteen appeared as claims 3 and 5 in *Havard III*. 2d Am. Pet. [108] at 53. Claims 3 and 5 in *Havard III* do not feature a "cumulative effect" argument similar to the one Petitioner makes in his Second Amended Petition. *Id.* at 52-53; *Havard III*, 86 So. 3d at 903-04, 907-10. Petitioner supports both claims 3 and 5 with specific arguments rather than a general "cumulative effect" argument. *Havard III*, 86 So. 3d at 903-04, 907-10. Claim 3 relies on Petitioner's trial counsel's failure to use certain evidence (ground eighteen in this Second Amended Petition). *Id.* at 903-04; 2d Am. Pet. [108] at 64-65. Claim 5 relies on Petitioner's trial counsel's failure to challenge the underlying felony of sexual battery (similar to ground one in this Second Amended Petition). *Havard III*, 86 So. 3d at 907-10; 2d Am. Pet. [108] at 15-39. Petitioner did not raise this ground in *Havard III*.

Petitioner alleges that he presented this issue for review in his third state post-conviction proceedings. 2d Am. Pet. [108] at 53. Petitioner did not raise this ground then. Ex. [115-9] at 113-151; Ex. [115-10] at 2-11; Ex. [119-1] at 12-54.

In *Havard II*, the Mississippi Supreme Court briefly analyzed Petitioner's cumulative error argument. *Havard II*, 988 So. 2d at 346. The court found "no prejudicial cumulative effect and no adverse impact upon [Petitioner's] constitutional right to fair trial" and held that the "issue is without merit." *Id.* The Mississippi Supreme Court's decision presents a reasonable argument that Petitioner's trial

counsel's allegedly deficient conduct was not prejudicial under *Strickland*. Petitioner does not contest this conclusion. This ground should be dismissed under this Court's doubly-deferential review of *Strickland* claims.

3. Petitioner's grounds two, twelve, thirteen, fifteen, sixteen, seventeen, eighteen nineteen, twenty, and twenty-one do not merit federal habeas relief

a. Applicable law

When addressing arguments that a state court reviewed on the merits, the focus in a federal habeas proceeding is not whether there was an error in applying state law but is instead whether there has been a denial of rights protected by the Constitution. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (first citing 28 U.S.C. § 2241; then *Rose v. Hodges*, 423 U.S. 19, 21 (1975)). Accordingly, under the AEDPA, a petitioner may not obtain federal habeas relief on any claim that was adjudicated on the merits in state court proceedings unless the adjudication of that claim either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, 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; *Cobb v. Thaler*, 682 F.3d 364, 372-73 (5th Cir. 2012) (quoting § 2254(d)); *Brown v. Payton*, 544 U.S. 133, 141 (2005).

Review under the AEDPA is "highly deferential" to the state court's decision. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh*, 521 U.S. at 333 n.7). This intentionally difficult standard "stops short of imposing a complete bar

on federal court relitigation of claims already rejected in state proceedings." *Harrington*, 562 U.S. at 102 (citing *Felker v. Turpin*, 518 U.S. 651, 664 (1996)). The AEDPA review exists only to "guard against extreme malfunctions in the state criminal justice systems." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (quoting *Harrington*, 562 U.S. at 102-03). "If this standard is difficult to meet, that is because it was meant to be." *Harrington*, 562 U.S. at 102.

b. Analysis

i. Ground two

Petitioner's ground two is procedurally barred but the undersigned will review this ground on its merits. *See supra* at pp. 7-13. This ground for relief is founded on the State's closing argument at Petitioner's trial. 2d Am. Pet. [108] at 40-43. Petitioner claims that this closing argument constituted "prosecutorial misconduct." *Id.* Alternatively, Petitioner argues that his trial counsel was ineffective for not objecting to the State's closing argument. *Id.* at 40-42. During closing argument, the State argued as follows:

> This baby was shaken to death having been sexually assaulted, and ladies and gentlemen, don't try to understand it. Don't try to figure out how it could have happened. Just know what did happen and render your verdict of guilty of capital murder because that's what this man is over there for doing that to this child. . . .
>
> The evidence in this case is more overwhelming that any I've ever been involved in. . . .
>
> If you use your good, God-given common sense and listen and listen to what's going on, it is an insult to your intelligence for him to expect you to believe what he just told you while ago. He must think y'all fell off some turnip truck out here on the street before you got up here. It's

> ludicrous for you to believe what he told you. I mean, the deputies, the coroner, everybody told you what was wrong with that child's rectum, her anus. And they told you what caused it. It's overwhelming. . . .
>
> Continue to lie and protect himself. Tell just enough to make the physical facts fit what he's going to try to say, but, folks he couldn't explain the sexual battery. They asked him over and over and over again in that tape, and he kept saying, "I can't explain it. I don't know. I just can't explain how that happened." There ain't no other way to explain it than to admit that he committed sexual battery, ladies and gentleman. No other way. I tell you I've been prosecuting up here for fifteen years, and I've seen confessions and statements. I have never seen a more incriminating statement from a person trying to deny that they committed a crime in my life. Never. . . .
>
> They ask him did he do it, and I couldn't believe this when I heard it. Says how do you explain the damage that was done to her rear end. He said, "I can't explain it. I don't know." Do you think you've done it. And he said and I quote, "I don't think I did it. I don't recollect doing it. I don't remember doing it." Folks, if you hadn't done that, you'd be saying, hell, no. I didn't do it. You wouldn't be not recollecting doing it or not remembering doing it or not thinking you did it. That ain't reasonable. That ain't common sense. Ladies and gentlemen, I submit to you what happened out there that night was very simple. Now, I'm not making any accusations. I don't know if anything had ever happened with that child before, but that night he got carried away or something, and he hurt that child more than he intended to in this sexual battery. He hurt her. You heard him talking about how she was injured in her rectal area, and what does a child do - - what's the only defense an infant baby has got when something like that happens to them? They scream. They don't just cry folks. They scream in pain. When they're in pain, they scream. And what's he going to do then? She's screaming. He's injured her. Stop her. I got to stop her from screaming. Well, he stopped her all right. She ain't screaming now. . . .
>
> Even the slightest penetration is sufficient to warrant a conviction. And my goodness, he [Petitioner's counsel] wants to ask you why they didn't look for a condom. Do y'all actually think that somebody that would commit this crime would take the time and safety to put on a condom to do it. That's an insult, folks. An insult to you. Reasonable. Common sense. It's not that hard.

Ex. [116-7] at 15, 24-29.

Petitioner argues that this argument contains improper "appeals to emotion and bias" that encouraged "the jury to not try to determine what happened." 2d Am. Pet. [108] at 41. Petitioner also argues that this argument "relied upon information that was not in the record." *Id.*

In *Havard II*, the Mississippi Supreme Court noted the *Havard I* court's finding that any possible prosecutorial misconduct during closing argument was "unquestionably harmless." 988 So. 2d at 342 (quoting *Havard I*, 928 So. 2d at 791). As the *Havard I* court explained, "the jury was properly instructed that comments from the attorneys were not to be regarded as evidence when the jury deliberated on its verdict." *Id.*

Petitioner, in conclusory fashion, states that the Mississippi Supreme Court's decision on the prosecutorial misconduct issue was "unreasonable." 2d Am. Pet. [108] at 40-43. While Petitioner may disagree with the Mississippi Supreme Court's finding on the State's closing argument, Petitioner does not show how its finding was based on an unreasonable determination of the facts. *Cobb*, 682 F.3d at 372-73. Nor does Petitioner show that the Mississippi Supreme Court's decision on this ground was contrary to clearly established federal law. *Brown*, 544 U.S. at 141. And the Mississippi Supreme Court's finding that any prosecutorial misconduct was "harmless" implicitly rejects Petitioner's ineffective assistance of counsel argument on *Strickland*'s prejudice prong. 466 U.S. at 687, 694. Again, Petitioner does not show that this rejection is unreasonable. *Harrington*, 562 U.S. at 105. This ground is meritless if not procedurally barred.

ii. Ground twelve

In Petitioner's ground twelve, Petitioner argues that his constitutional rights to a fair trial were violated because Thomas served as a juror and was biased against Petitioner. 2d Am. Pet. [108] at 49-50. Petitioner alleges that after the trial, Thomas stated that "he felt that the death penalty was the only appropriate punishment in murder cases." Petitioner bases this claim on Thomas' statement that "[i]f you take a life, a life is required." *Id.*; Ex. [117-2] at 232.

"Juror bias *vel non* is a finding of fact." *White v. Quarterman*, 275 Fed. App'x 380, 381 (5th Cir. 2008) (first citing *Virgil v. Dretke*, 446 F.3d 598, 610 n.52 (5th Cir. 2006); then *Patton v. Yount*, 467 U.S. 1025, 1036 (1984)). "[T]o succeed on his juror-bias claim, [Petitioner] must show 'the adjudication of the claim [on the merits in the State court proceeding] . . . 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.'" *Id.* (citing 28 U.S.C. § 2254(d)(2)).

In *Havard II*, the Mississippi Supreme Court reviewed this ground in the context of an ineffective assistance of counsel claim. 988 So. 2d at 341. The court found that Thomas was not biased and that "[n]othing in [Thomas'] 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." *Id.* The court continued, "[n]othing 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." *Id.* Petitioner does not argue and

cannot show that this was an unreasonable determination of the facts. *Cobb*, 682 F.3d at 373.

The court also held that Thomas' affidavit was not properly before it. *Havard II*, 988 So. 2d at 341 (citing MISS. R. EVID. 606(b)). At the time of *Havard II*, Miss. R. Evid. 606(b) stated:

> 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.*

Id. (emphasis in original) (quoting MISS. R. EVID. 606(b)). Applying Miss. R. Evid. 606(b), the court held that "[t]he affidavit of Willie Thomas does not meet the exception to Rule 606(b), and it should . . . be excluded from [the court's] consideration." *Id.* (citing MISS. R. EVID. 606(b)). Without Thomas' affidavit, Petitioner's juror bias claim is baseless. Petitioner does not argue that the Mississippi Supreme Court's application of state law is an unreasonable application of federal law. *Cobb*, 682 F.3d at 372-73.

Petitioner does not adequately challenge the Mississippi Supreme Court's adjudication of ground twelve. The undersigned recommends this ground's dismissal.

iii. Ground thirteen

In Petitioner's ground thirteen, Petitioner argues that the Mississippi

Supreme Court's aggregate error review in *Havard I* was inadequate and deprived Petitioner of his due process rights. 2d Am. Pet. [108] at 51-52. Petitioner claims that he raised this argument in *Havard I*. Petitioner could not have done so because Petitioner's ground thirteen challenges the Mississippi Supreme Court's aggregate error analysis in *Havard I*. *Id.*; *see also Havard I*, 928 So. 2d at 803. The Court cannot locate any prior challenge to the *Havard I* court's aggregate error analysis. Since Petitioner has not exhausted his state court remedies on this ground, this Court is procedurally barred from reviewing ground thirteen. *Ruiz*, 460 F.3d at 642-43; *see also* 28 U.S.C. § 2254(b)(1)(A).

Petitioner also makes a one sentence argument that there was insufficient evidence for his underlying felony of sexual battery. 2d Am. Pet. [108] at 51. If Petitioner is raising a sufficiency of the evidence challenge as an independent ground for federal habeas relief, then this ground is procedurally barred. Petitioner's only previous mention of a sufficiency of the evidence issue came in his second PCR Motion. Ex. [118-1] at 48-52. The Mississippi Supreme Court held that the time bar and successive writ bar both barred this PCR Motion. *Havard III*, 86 So. 3d at 910. Since both bars are independent and adequate, this portion of Petitioner's ground thirteen is procedurally barred from this Court's AEDPA review. *Spicer*, 2021 WL 4465828, at *3; *Lyons*, 2021 WL 6052578, at *9 (citing *Spicer*, 2021 WL 4465828, at *3).

As with Petitioner's other procedurally barred claims, Petitioner cannot demonstrate the applicability of an exception to the procedural bar for this ground.

Nor do Petitioner's actual innocence claims release Petitioner from the procedural bar. *See supra* at pp. 9-13.

iv. Ground fifteen

In Petitioner's ground fifteen, Petitioner argues that the cumulative effect of the errors at his trial entitle him to federal habeas relief. 2d Am. Pet. [108] at 54-55. The Mississippi Supreme Court last reviewed this argument in *Havard II* and denied Petitioner relief.[5] 988 So. 2d at 346. Although Petitioner argues that he raised this ground for relief in his PCR Motions for *Havard III* and *Havard IV*, the undersigned's review of Petitioner's briefing in these proceedings shows that Petitioner did not. 2d Am. Pet. [108] at 54-55; Ex. [118-1] at 1-54; Ex. [115-9] at 113-151; Ex. [115-10] at 2-11; Ex. [119-1] at 12-54.

In *Havard II*, the court briefly analyzed Petitioner's cumulative error argument and concluded that "the record supports no finding of error . . . upon the part of the trial court." 988 So. 2d at 346. The court found "no prejudicial cumulative effect and no adverse impact upon [Petitioner's] constitutional right to fair trial" and held that the "issue is without merit." *Id.*

Petitioner does not show that this ruling is contrary to, or involved an unreasonable application of, federal law. Petitioner also does not show that the

[5] The only time Petitioner raised a cumulative error argument in his state post-conviction proceedings was in ground fourteen of Petitioner's first PCR Motion. Ex. [117-2] at 139-40. The undersigned already addressed the Mississippi Supreme Court's adjudication of that argument in its discussion of ground fourteen of this Second Amended Petition [108]. Because Petitioner alleges two different cumulative error arguments here, one as an ineffective assistance of counsel claim and one as an overarching cumulative error claim, the undersigned addresses each individually. Each claim's outcome, however, relies on the Mississippi Supreme Court's analysis of Petitioner's ground fourteen in *Havard II*. 988 So. 2d at 346.

Mississippi Supreme Court's decision was based on an unreasonable determination of the facts in light of the evidence presented. Petitioner's fifteenth ground should be dismissed. *Cobb*, 682 F.3d at 372-73; *Brown*, 544 U.S. at 141.

v. Ground sixteen

Although Petitioner's ground sixteen is procedurally barred, the undersigned will review this ground on its merits. *See supra* at pp. 7-13. In Petitioner's ground sixteen, Petitioner argues that the State's failure to correct allegedly false testimony violated Petitioner's constitutional rights under *Napue v. Illinois*, 360 U.S. 264 (1959). 2d Am. Pet. [108] at 55-60.

Petitioner alleges several contradictions between Rebecca Britt's (Rebecca), Chloe's mother, pre-trial videotaped statement and Rebecca's trial testimony. For example, in the videotaped statement, Rebecca testified that it was "[n]ot really" strange that Petitioner bathed Chloe on the night of Chloe's death. *Id.* at 56-57. At trial, Rebecca testified that "it was surprising [that Petitioner bathed Chloe] because he hadn't done anything like that before." *Id.* at 56. Rebecca also stated in the videotaped statement that Petitioner "loved" Chloe and that he sometimes changed her diaper. *Id.* at 57. At trial, Rebecca testified that Petitioner did not have "extensive" interaction or playtime with Chloe. *Id.* at 56. Petitioner also seizes on Rebecca's trial testimony that she never contradicted her trial testimony in previous statements. *Id.* at 57.

Petitioner argues that the State "solicit[ed] testimony that contradicted the videotaped statement and" violated Petitioner's rights by "allowing such false

testimony to go uncorrected." *Id.* at 59. Petitioner also uses the alleged contradictions to argue that Rebecca "lacked credibility." *Id.* at 58. Petitioner argues the videotaped statement "negated the nefarious picture [of Petitioner] painted by the State" and "supports Petitioner's defense theory that he loved Chloe, cared for her, and her death was the result of an accident." *Id.*

In *Havard III*, the Mississippi Supreme Court held that this issue had no merit. The court thought that "[o]ther than [Rebecca]'s trial testimony regarding whether [Petitioner] had ever changed Chloe's diapers and her reaction to [Petitioner] bathing Chloe, there is no disparity between [Rebecca]'s videotaped statement . . . and her testimony at trial." *Havard III*, 86 So. 3d at 902-03. The court stated that "given all the evidence in this case, there is no reasonable likelihood that [these alleged contradictions and the State's failure to correct them] affected the judgment of the jury." *Id.* at 903.

As with many of Petitioner's other grounds for relief, Petitioner does not properly challenge the Mississippi Supreme Court's adjudication of this issue. 2d Am. Pet. [108] at 55-60. Petitioner shows neither how the Mississippi Supreme Court's decision was clearly contrary to federal law nor how it was based on an unreasonable determination of the facts. Petitioner merely disagrees with the Mississippi Supreme Court's interpretation of the facts and its outcome on this ground for relief. *Id.* This is not enough to merit federal habeas relief. *Cobb*, 682 F.3d at 372-73; *Brown*, 544 U.S. at 141. This ground for relief is procedurally barred and lacks merit.

vi. Grounds seventeen and eighteen

Petitioner's grounds seventeen and eighteen are also procedurally barred but the undersigned will review the merits of these claims as well. *See supra* at pp. 7-13. For ground seventeen, Petitioner argues that the State withheld Rebecca's videotaped statement in violation of Petitioner's rights under *Brady v. Maryland*, 373 U.S. 83 (1963). 2d Am. Pet. [108] at 60-64.

The Mississippi Supreme Court rejected this argument in *Havard III*. 86 So. 3d at 900. As Petitioner recognizes, Petitioner's lead trial counsel, Gus Sermos (Sermos), stated in an affidavit submitted in *Havard III* "that, prior to trial, he did watch the videotaped interview of Rebecca Britt that was conducted the day after Chloe's murder." *Id.*; 2d Am. Pet. [108] at 62. The assistant district attorney that prosecuted Petitioner, Tom Rosenblatt (Rosenblatt), corroborated Sermos' affidavit via Rosenblatt's own affidavit. *Havard III*, 86 So. 3d at 900. These two affidavits led the court to conclude that Rebecca's videotaped statement was not withheld and that this issue was meritless. *Id.*

Petitioner, instead of attacking the Mississippi Supreme Court's application of federal law and determination of facts, contests the veracity of Sermos' affidavit. 2d Am. Pet. [108] at 60-64. Petitioner alleges that Petitioner himself was not aware of Rebecca's videotaped statement until 2010. *Id.* at 61-62. Petitioner alleges that, despite general discovery requests, Petitioner did not receive the videotaped statement on direct appeal or in his original post-conviction proceedings. *Id.* at 62. Petitioner alleges that Mississippi Rule of Appellate Procedure (MRAP) 22 required

Sermos to turn over his complete case file, notes, and records related to Petitioner and that Sermos' statement in his affidavit was based on a review of Sermos' records and notes. *Id.* Since there is no indication of Rebecca's videotaped statement in Sermos' records and notes that he turned over, Petitioner alleges Sermos must have violated MRAP 22 by not turning over all of his records and notes related to Petitioner. *Id.*

Considering all the above arguments, Petitioner still cannot show that the Mississippi Supreme Court's reliance on Sermos' affidavit resulted in an unreasonable determination of the facts. The Mississippi Supreme Court was reasonable to rely on Sermos' affidavit, especially since Rosenblatt's affidavit corroborated Sermos' affidavit. *Havard III*, 86 So. 3d at 900. Because the Mississippi Supreme Court's reliance on Sermos' affidavit was reasonable and because Petitioner does not show that the court's application of *Brady* was erroneous, Petitioner's ground seventeen should be dismissed on its merits. *Cobb*, 682 F.3d at 372-73; *Brown*, 544 U.S. at 141.

As an alternative to ground seventeen, Petitioner argues in ground eighteen that Sermos was ineffective for failing to utilize Rebecca's videotaped statement. 2d Am. Pet. [108] at 64-65. The Mississippi Supreme Court reviewed and rejected this argument as well. *Havard III*, 86 So. 3d at 903-04. The court held that Sermos' decision not to use Rebecca's videotaped statement "clearly falls within the realm of trial strategy." *Id.* at 904. The court continued its analysis assuming that Sermos was deficient for not utilizing the videotaped evidence. *Id.* But Petitioner did "not explain

how the statement could have been used to support his defense." *Id.* As the court had already explained, there was "no reasonable likelihood that [Rebecca]'s testimony, if false, affected the judgment of the jury." *Id.* at 902-04.

The Mississippi Supreme Court's decision presents a reasonable argument that Petitioner's trial counsel satisfied *Strickland*. *Id.* Petitioner does not challenge the Mississippi Supreme Court's conclusion with anything more than conclusory allegations and does not show that it is unreasonable. 2d Am. Pet. [108] at 64-65; *Harrington*, 562 U.S. at 105. This ground should be dismissed.

Both Petitioner's grounds seventeen and eighteen are barred and meritless.

vii. Grounds nineteen and twenty

In Petitioner's grounds nineteen and twenty, Petitioner brings actual innocence claims. 2d Am. Pet. [108] at 66-76; Pet'r's Reply [114] at 8. "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins*, 506 U.S. 390, 400 (1993). An actual innocence claim is merely "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 404. Petitioner's actual innocence claims cannot lead to federal habeas relief alone. *Id.* at 400. Grounds nineteen and twenty should be dismissed.

viii. Ground twenty-one

In Petitioner's ground twenty-one, Petitioner argues that the State violated his *Brady* rights when it failed to disclose Dr. Hayne's pre-trial report that he could not

state that Petitioner committed a sexual battery. 2d Am. Pet. [108] at 76-80. To support this ground, Petitioner cites a newspaper article, which reads: "The pathologist said he informed prosecutors he couldn't say a sexual assault took place. The district attorney acknowledges Hayne was 'probably the weakest (prosecution) witness' on sexual assault but that doctors, nurses and law enforcement verified that sexual abuse had taken place." *Id.* at 77-78 (quoting Jerry Mitchell, *The Death of Chloe Britt: Capital Murder or Accidental Fall?*, THE CLARION-LEDGER (Jan. 19, 2014)).

The Mississippi Supreme Court rejected Petitioner's argument in an order partially granting Petitioner's third PCR Motion. Ex. [115-1] at 20-21. The court found "no merit in [Petitioner]'s assertion that the prosecution suppressed favorable evidence and, thereby, violated his due process rights." *Id.* (citing *Brady*, 373 U.S. 83). This was all the court said on the matter.

Petitioner claims that "the State never disclosed Dr. Hayne's pre-trial report . . . that he could not state that a sexual battery had occurred." 2d Am. Pet. [108] at 79. Regardless of disclosure, the information that Petitioner claims the State withheld was available to Petitioner. Petitioner alleges that "[t]he trial court suggested that Petitioner's counsel inquire with Dr. Hayne" before trial and that "Petitioner's counsel did not consult with Dr. Hayne." *Id.* at 20. This shows that Dr. Hayne's "pre-trial report" was available to Petitioner. *See id.* And "[w]hen evidence is available equally to the defense and the prosecution, the defendants must bear the responsibility for their failure to diligently seek its discovery." *Herrera v. Collins*, 954

F.2d 1029, 1032 (5th Cir. 1992) (quoting *United States v. McKenzie*, 768 F.2d 602, 608 (5th Cir. 1985)); *see also Prible v. Lumpkin*, 43 F.4th 501, 514 (5th Cir. 2022) (internal quotation marks omitted) (quoting *Guidry v. Lumpkin*, 2 F.4th 472, 487 (5th Cir. 2021)) ("A *Brady* claim fails if the suppressed evidence was discoverable through reasonable due diligence."). Petitioner cannot establish that the State violated his *Brady* rights.

Petitioner also does not argue that the Mississippi Supreme Court's ruling on Petitioner's *Brady* argument is contrary to, or involved an unreasonable application of, federal law. Nor does Petitioner argue that the court's decision was based on an unreasonable determination of the facts in light of the evidence presented. Therefore Petitioner's twenty-first ground should be dismissed. *Cobb*, 682 F.3d at 372-73; *Brown*, 544 U.S. at 141.

Alternatively, Petitioner argues that the fact that Petitioner's trial counsel did not speak to Dr. Hayne before trial to investigate Petitioner's case made Petitioner's trial counsel ineffective. 2d Am. Pet. [108] at 19-20, 79. This argument is composed of one sentence. *Id.* Petitioner makes an identical argument in ground one, so the Court's arguments here apply to Petitioner's argument in grounds one and twenty-one. *Id.* The Mississippi Supreme Court addressed this argument in its order partially granting Petitioner's third PCR Motion. Ex. [115-1] at 20-21. The court found "no merit in [Petitioner]'s assertion that his counsel was ineffective for failing to interview Dr. Steven Hayne prior to trial." *Id.* at 20.

"[T]o succeed on a claim for failure to investigate, a defendant 'must allege with

specificity what the investigation would have revealed and how it would have altered the outcome of the trial.'" *United States v. Bernard*, 762 F.3d 467, 477 (5th Cir. 2014) (quoting *Druery v. Thaler*, 647 F.3d 535, 541 (5th Cir. 2011)). Although Petitioner does explain what he believes a proper investigation would have revealed, Petitioner does not explain how the revealed information would have impacted the proceedings. Numerous other witnesses testified on the sexual assault allegations so it is not clear what impact it would have had if Petitioner's trial counsel had met with Dr. Hayne before trial. *See supra* at p. 19; *see also Havard II*, 988 So. 2d at 331-33. Petitioner's ground twenty-one should be dismissed under this Court's doubly-deferential review of *Strickland* claims.

4. Petitioner's grounds three through nine are moot

Petitioner concedes that grounds three through nine in his Second Amended Petition are moot because Petitioner's death sentence has been vacated. 2d Am. Pet. [108] at 43-44. The undersigned therefore recommends that Petitioner's grounds three through nine be dismissed.

5. Petitioner is not entitled to an evidentiary hearing

Petitioner asks that the Court remand his case for an evidentiary hearing on grounds one, ten, eleven, twelve, fourteen, fifteen, sixteen, seventeen, eighteen, and nineteen. 2d Am. Pet. [108] at 39, 47, 49, 50, 53, 54, 59, 63, 65, 71. Under 28 U.S.C. § 2254(e)(2), Petitioner is entitled to an evidentiary hearing only if Petitioner "has failed to develop the factual basis of a claim in State court proceedings" and

(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 factfinder would have found the applicant guilty of the underlying offense.

"By its own terms, amended section 2254(e)(2) only curtails evidentiary hearings." *Fuller v. Johnson*, 114 F.3d 491, 496 (5th Cir. 1997).

Petitioner does not allege that any of his arguments rely on a new rule of constitutional law that was previously unavailable. And even if Petitioner does raise a new "factual predicate," which the undersigned finds he does not, Petitioner has not demonstrated that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found" him guilty of the underlying offense. § 2254(e)(2). Thus Petitioner is not entitled to an evidentiary hearing. *Walton v. Banks*, No. 2:09-cv-117-KS-MTP, 2010 WL 4318831, at *1-2 (S.D. Miss. Oct. 27, 2010); *see also Murphy v. Johnson*, 205 F.3d 809, 816 (5th Cir. 2000) (citing *Ward v. Whitley*, 21 F.3d 1355, 1367 (5th Cir. 1994)) ("[A] petitioner is entitled to an evidentiary hearing only where a factual dispute, if resolved in his favor, would entitle him to relief, and not where a petitioner's allegations are merely conclusory allegations unsupported by specifics.").

III. RECOMMENDATION

For the reasons stated above, the undersigned United States Magistrate Judge recommends dismissing the Second Amended Petition [108] for Writ of Habeas Corpus with prejudice.

IV. NOTICE OF RIGHT TO APPEAL/OBJECT

Pursuant to Local Uniform Civil Rule 72(a)(3),

> After service of a copy of the magistrate judge's report and recommendations, each party has fourteen days to serve and file written objections to the report and recommendations. A party must file objections with the clerk of court and serve them upon the other parties and submit them to the assigned district judge. Within seven days of service of the objection, the opposing party or parties must either serve and file a response or notify the district judge that they do not intend to respond to the objection.

L.U. CIV. R. 72(a)(3); *see* 28 U.S.C. § 636(b)(1).

An objecting party must specifically identify the findings, conclusions, and recommendations to which he objects. The District Judge need not consider frivolous, conclusive, or general objections. A party who fails to file written objections to the proposed findings, conclusions, and recommendations within fourteen days of being served a copy shall be barred, except upon grounds of plain error, from attacking on appeal any proposed factual finding or legal conclusion adopted by the Court to which he did not object. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996).

SIGNED, this the 20th day of June 2024.

s/ Bradley W. Rath

BRADLEY W. RATH
UNITED STATES MAGISTRATE JUDGE