IN THE SUPREME COURT OF MISSISSIPPI

MICHELLE BYROM, *Petitioner*

versus **No. 2014-DR-00230-SCT**

STATE OF MISSISSIPPI, *Respondent*

RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO FILE SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF

COMES NOW the State of Mississippi, by and through counsel, and files this response in opposition to the motion for leave to file a second and successive petition for post-conviction relief in this case.

This matter is before the Court on motion for leave to file a successive petition for post-conviction relief pursuant to MISS. CODE ANN. 99-39-1, et seq. The State would assert Byrom is entitled to no post-conviction relief from her conviction of capital murder and resulting death sentence.

PROCEDURAL HISTORY

The petition at bar comes to this Court from a case originating in the Circuit Court of Tishomingo County, Mississippi, wherein Michelle Byrom was convicted of the crime of capital murder and sentenced to death for the murder of her husband, Edward Byrom, Sr. Byrom was indicted during a vacation term of the Tishomingo County Circuit Court on October 21, 1999, for violation of MISS. CODE ANN. § 97-3-19 (2)(d). A jury trial

commenced November 13, 2000, before the Circuit Court of Tishomingo County, Mississippi. On November 17, 2000, the jury returned a verdict of guilty of capital murder.

Thereafter, Byrom petitioned for a sentencing hearing before the judge, without a jury. The State agreed to this procedure in writing as is required by MISS. CODE ANN. § 99-19-101(1). The trial court conducted a hearing on this issue and questioned petitioner regarding the rights she was waiving. Being satisfied that Byrom actually desired to waive the sentencing jury the circuit court granted the motion for a bench trial. The trial court then conducted a sentencing hearing, without a jury, making the following findings:

> In considering the sentence to be imposed the Court considered those factors set out in Section 99-19-101 (7) MISS CODE ANN. 1972, and finds beyond a reasonable doubt that the Defendant intended that the killing of Edward Byrom, Sr., take place and that the defendant contemplated that lethal force would be employed in this crime.
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> The Court further considered the matter of mitigating and aggravating circumstances. Specifically, the Court found and does find beyond a reasonable doubt that the aggravating circumstance of the capital offense "having been committed for pecuniary gain" as provided for by Section 99-19-101 (5) (f) MISS CODE 1972 Ann. existed in this case at the time of the commission of the said capital murder.
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> Further, the Court considered as mitigating circumstances the fact that the Defendant, Michelle Byrom, had no history of prior criminal activity and whether or not the Defendant was acting under the influence of extreme mental or emotional disturbance at the time of the commission of the crime. The Court, having considered each of the mitigating factors suggested by the Defendant and all other mitigating circumstances concerning the Defendant's character and history and the circumstance of the offense which might be considered mitigating on behalf of the Defendant, and having weighed the aggravating factor against the mitigating factors finds that the mitigating factors do not outweigh or overcome the aggravating circumstances and that the death penalty should be imposed.

Petitioner's post-trial motions were denied February 7, 2001.

In her direct appeal to this Court she raised fifteen claims of error for consideration. This Court rejected Petitioner's claims and affirmed her conviction and sentence of death on October 16, 2003, rehearing was denied January 29, 2004. *See Byrom v. State*, 863 So.2d 836 (Miss. 2003). She then filed a petition for writ of certiorari with the United States Supreme Court challenging the state court decision.[1] The Supreme Court denied the petition for certiorari on October 4, 2004. *See Byrom v. Mississippi*, 543 U.S. 826 (2004). No petition for rehearing was filed.

Petitioner then filed an application for leave to file a motion for post-conviction relief with the trial court with this Court. In that application petitioner raised seven claims. On January 19, 2006, this Court denied the application for post-conviction and later denied a petition for rehearing on May 11, 2006. *See Byrom v. State*, 927 So.2d 709 (Miss. 2006). Petitioner again filed a petition for writ of certiorari with the United States Supreme Court seeking relief.[2] On November 27, 2006, this Court denied the petition for writ of certiorari. *See Byrom v. Mississippi*, 549 U.S. 1056 (2006). No petition for rehearing was filed.

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[1]One of the questions that was presented in that petition read:

> 2. Can a state court, consistent with the Sixth and Fourteenth Amendments to the Constitution of the United States, exclude reliable and material evidence based on an alleged Discovery Rule violation absent wilful misconduct by the defendant?
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> Petition for Certiorari at i.

[2]Two of the questions raised in the instant petition were presented as questions in that petition.

Prior to the denial of the petition for writ of certiorari after state post-conviction review, petitioner filed a petition for writ of habeas corpus with the United States District Court for the Northern District of Mississippi on September 8, 2006. Petitioner filed a motion for discovery on March 8, 2008, which was denied without prejudice on July 23, 2008. *See Byrom v. Epps*, 2008 WL 2902162 (N.D.Miss.,2008). Petitioner renewed her motion for discovery. On September 14, 2010, the district court denied the renewed motion for discovery. *See Byrom v. Epps*, 2010 WL 3716879 (N.D.Miss.,2010).

On July 5, 2011, the district court issued an opinion denying habeas relief. Petitioner then filed a motion to alter or amend on August 1, 2011. On August 22, 2011, the district court filed an amended opinion denying habeas relief. *See Byrom v. Epps*, 817 F.Supp.2d 868 (N.D.Miss.,2011). At the conclusion of the amended opinion the district court granted a COA on five claims. *See* 817 F.Supp.2d at 917-18. Petitioner filed a second motion to alter or amend, which was denied on August 29, 2011.

Petitioner then took an appeal to the United States Court of Appeals for the Fifth Circuit where she raised claims upon which COA had been granted and also filed a petition requesting the Fifth Circuit to expand the grant of COA to add two claims. These claims were:

> I. The trial court's exclusion of Edward Byrom, Jr.'s jailhouse confession letters violated Byrom's rights to confrontation and due process of law under the Sixth and Fourteenth Amendments.
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> II. In the alternative, trial counsel was ineffective for failing to produce Junior's letters during discovery when ordered to do so, and thereby causing

the letters to be excluded from evidence at trial.

Petitioner's Pet. Expand COA at 2.

On March 28, 2013, the Fifth Circuit rendered its unpublished per curium opinion denying the motion for expanded COA, affirming the judgment of the district court on the issues upon which COA had been granted and denying habeas relief. *See Byrom v. Epps*, 518 Fed.Appx. 243 (5th Cir. 2013). Petitioner's petition for rehearing *en banc* was denied on May 23, 2013.

Petitioner then filed yet another petition for writ of certiorari with the United States Supreme Court challenging the resolution of the habeas case by the Fifth Circuit. On February 24, 2014, the United States Supreme Court denied the petition for writ of certiorari. *See Byrom v. Epps*, ___ U.S. ___, 2014 WL 684161 (Feb. 24, 2014).

Petitioner has now filed a motion for leave to file a successive petition for post-conviction relief with this Court.

FACTUAL BACKGROUND

This case of murder for hire arises from the shooting death of Petitioner's husband, Edward Louis Byrom, Sr., who was killed in his Iuka, Mississippi, home June 4, 1999. The record indicates that, in late May and early June of 1999, Petitioner searched for someone to kill her husband. After attempting to hire at least one other person, Petitioner contracted with Joey Gillis to murder the victim. Petitioner Byrom and Gillis negotiated a price of fifteen thousand dollars ($15,000.00), which was to be paid from the victim's life insurance proceeds. The Byroms' son, Edward Byrom, Jr. (hereinafter "Junior"), assisted Petitioner in

finding a killer and was aware that Gillis had been selected.

After two unsuccessful attempts by Gillis, Petitioner determined that June 4, 1999, would be the day that the murder would be committed. She also instructed Junior to help Gillis. Petitioner then checked herself into a hospital that morning. That afternoon, Junior gave Gillis a .9 mm Luger from the Byrom home. Junior drove Gillis to a wooded area near the victim's house. After Gillis shot and killed the victim, Junior then picked Gillis up at a designated spot. Junior and Gillis then disposed of Gillis' shirt and the murder. Junior went to the hospital and told Petitioner it was done. He then returned home at her instruction and called 911. Shortly thereafter, Junior confessed, implicated Petitioner, and led the police to the shirt and the murder weapon. Petitioner confessed numerous times, and two of these confessions were admitted at trial.

Petitioner believed that her husband had one-hundred and fifty thousand dollars ($150,000.00) in life insurance and a policy that would pay off the debt on the Byrom home, should something happen to her husband. She intended to sell the family home and move to Florida, after she collected the insurance money. Petitioner Byrom felt that to get "started in life you got to have someplace, and you've got to have some money."

The facts of this case, as set forth by this Court, are more explicitly detailed in its direct appeal opinion. *See Byrom*, 863 So. 2d 836, 844-46, ¶¶ 2-8 (Miss. 2003). *See also Byrom v. State*, 927 So.2d 709, 711-713, ¶¶ 3-5 (Miss. 2006).

PRELIMINARY MATTER

Petitioner, herein, seeks successive post-conviction relief resting his claims on errors he alleges occurred at trial and on direct and initial post-conviction review. The Mississippi Uniform Post-conviction Relief Act, Section 99-39-1, *et seq*., reads:

> This act, by its express terms, was created to . . . revise, streamline, and clarify the rules and statutes pertaining to post-conviction collateral relief law and procedures, to resolve any conflicts therein and to provide the courts of this state with an exclusive and uniform procedure for the collateral review of convictions and sentences.
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> MISS. CODE ANN., § 99-39-1(1).

Byrom is bound totally by the terms of and prerequisite conditions contained in the PCR Act. This Court has held that "[r]ealistically, the act is a codification of the law existing in Mississippi for many years." *Evans v. State*, 485 So.2d 276, 280 (Miss. 1986); *Dufour v. State*, 483 So.2d 307, 308 (Miss. 1985). *See Neal v. State*, 525 So.2d 1279 (Miss. 1988); *Cabello v. State*, 524 So.2d 313 (Miss. 1988); *Wiley v. State*, 517 So.2d 1373 (Miss. 1987); *Johnson v. State*, 511 So.2d 1333 (Miss. 1987); *Johnson v. State*, 508 So.2d 1126 (Miss. 1987); *Irving v. State*, 498 So.2d 305 (Miss. 1986); *Stringer v. State*, 485 So.2d 274 (Miss. 1986); *Wilcher v. State*, 479 So.2d 710 (Miss. 1985); *Tokman v. State*, 475 So.2d 457 (Miss. 1985); *Leatherwood v. State*, 473 So.2d 964 (Miss. 1985); *Culberson v. State*, 456 So.2d 697 (Miss. 1984); *Johnson v. Thigpen*, 449 so.2d 1207 (Miss. 1984); *Gilliard v. State*, 446 so.2d 590 (Miss. 1984), *Pruett v. Thigpen*, 444 So.2d 819 590 (Miss. 1984); *Callahan v. State*, 426 So.2d 801 (Miss. 1983); *In re Evans*, 441 So.2d 520 (Miss. 1983); *Smith v. State*, 434 So.2d

486 (Miss. 1983); *Edwards v. State*, 433 So.2d 906 (Miss. 1983); *Wheat v. Thigpen*, 431 So.2d 486 (Miss. 1983); *Holloway v. State*, 261 So.2d 799 (Miss. 1979); *Auman v. State*, 285 So.2d 146 (Miss. 1973); *In re Broom's Petition*, 251 Miss. 25, 168 So.2d 44 (1964).

The Court stated in *Wiley v. State*, 517 So.2d 1373 (Miss. 1987):

> Issues E, F, H, I, J, K, L and M were assigned as error on direct appeal and decided adversely to Wiley's position. *This Court does not consider on a petition of this nature, issues raised and decided on the original appeal, even though theories for relief different from those urged at trial and on appeal are now asserted*. Miss. Code Ann. § 99-39-21(2), (3); *Johnson v. State*, 511 So.2d 1333, 1336, (Miss. 1987). *Dufour v. State*, 483 So.2d 307, 311 (Miss. 1985). . . . .
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> Because this Court has considered all these points on their merits on the direct appeals by Wiley, Wiley cannot now be allowed to relitigate the same issues. *Wilcher v. State*, 479 So.2d 710 (Miss. 1985); *Callahan v. State*, 426 So.2d 801 (Miss. 1983). The issues were decided against Wiley's position and he is not entitled to an evidentiary hearing on the same subject matter. On these points, the motion is denied as to Issues E, F, H, I, J, K, L, and M.
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> IV.
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> Issues C, D, G, N, O, P, Q and R were not raised on direct appeal or at the trial court. Thus, the claims are procedurally barred and not subject to further review by this Court, under Miss. Code Ann. § 99-39-21. Wilcher v. State, 479 So.2d 710 (Miss. 1985).
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> Additionally, claims which were available, but not previously asserted on direct appeal, are waived, and on this additional ground these claims are not subject to further review.
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> for the above reasons, the enumerated claims cannot be litigated; an evidentiary hearing on Issues C, D, G, N, O, P, Q, and R is denied.

517 So.2d 1373.

Finally, the Court held in *Cabello v. State*, 524 So.2d 313 (Miss. 1988):

In conclusion, the Court wishes to draw counsel's attention to Miss. Code Ann. § 99-39-3(2) (Supp. 1987), which reads:

> direct appeal shall be the principal means of reviewing all criminal convictions and sentences, ant the purpose of this chapter is to provide prisoners with a procedure, limited in nature, to review those objections, defenses claims, questions, issues or errors which in practical reality could not be and should not have been raised at trial or on direct appeal.
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> Although the Court is aware of counsel's responsibilities, especially given the sentence in this case, it is pointless to relitigate issues previously asserted or waived.

555 So.2d 323.

Further, this Court's decisions in *Wiley v. State*, 842 So.2d 1280 (Miss. 2003); *Woodward v. State*, 843 So.2d 1 (Miss. 2003), *McGilberry v. State*, 843 So.2d 21 (Miss. 2003) and *Brown v. State*, 798 So.2d 481 (Miss. 2001), reiterate that the Mississippi Uniform Post Conviction Collateral Relief Act, MISS. CODE ANN. §§ 99-39-1 to -29, applies with full force and effect to this successive post-conviction application. While lByrom contends that the procedural bars do not apply to her, the precedent of this Court is to the contrary. It is clear from the rulings of this Court that the Post-Conviction Collateral relief Act is constitutional and the procedural limitations found in §99-39-5(2), §99-39-27(9), §99-39-23(6) and § 99-39-21 (1), (2), & (3) apply with full force and effect to the claims raised in this successive petition.

Any and all claims of ineffective assistance of counsel raised in this case are to be decided under the precedent of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80

L.Ed.2d 674 (1984), adopted by this Court in *Stringer v. State*, 454 So.2d 468 (Miss. 1984). *See Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); 28 U.S.C. § 2254 (d)(1).[3]

The State asserts the claims presented in this petition fall into the category of second and successive claims, thus making this a second and successive petition for post-conviction relief which does not come with any exceptions to MISS. CODE ANN. § 99-39-27 (9), which reads:

> 9) *The dismissal or denial of an application under this section is a final judgment and shall be a bar to a second or successive application under this article*. Excepted from this prohibition is an application filed under Section 99-19-57(2), raising the issue of the offender's supervening mental illness before the execution of a sentence of death. A dismissal or denial of an application relating to mental illness under Section 99-19-57(2) shall be *res judicata* on the issue and shall likewise bar any second or successive applications on the issue. Likewise excepted from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States that would have actually adversely affected the outcome of his conviction or sentence or that he has 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. Likewise exempted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked.

The respondents assert that none of the petitioner's claims fall within any of the exceptions

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[3]This Court's decision on any federal claim properly preserved must be based on clearly established Federal law, as determined by the Supreme Court of the United States. Therefore, we would submit that only precedent, other than this Court's own precedent, to be considered is the precedent of the United States Supreme Court. Case law from other states or the various federal courts of appeal need only be given persuasive authority.

to the bar found in MISS. CODE ANN. § 99-39-27(9). Therefore, the claims are barred from consideration.

Further, the claims in this successive petition are barred by the statute of limitations contained in MISS. CODE ANN. § 99-39-5(2), and do not fall within the exceptions to that bar. That statute reads:

> 2) A motion for relief under this article shall be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction. Excepted from this three-year statute of limitations are those cases in which the petitioner can demonstrate either:
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> > (a)(I) That there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence; or
> >
> > (ii) That, even if the petitioner pled guilty or nolo contendere, or confessed or admitted to a crime, there exists biological evidence not tested, or, if previously tested, that can be subjected to additional DNA testing that would provide a reasonable likelihood of more probative results, and that testing would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution.
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> (b) Likewise excepted are those cases in which the petitioner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. Likewise excepted are filings for post-conviction relief in capital cases which shall be made within one (1) year after conviction.

The petitioner's claims also do not fall into any of the exemptions to the time bar. Her claims are therefore barred from consideration. Her claims are also barred pursuant to MISS. CODE ANN. § 99-39-23(6). *See Havard v. State*, 86 So.3d 896, 899 (Miss. 2012); *see also Knox v. State*, 75 So.3d 1030, 1036 (Miss. 2011); *Rowland v. State*, 42 So.3d 503, 507 (Miss. 2010)

The claims contained in this admittedly successive petition were either presented to the Court in the original post-conviction petition or could and should have been presented to the Court in the original petition. The petitioner has presented nothing to support the claims presented in this successive petition that could not have been obtained prior to the filing of the first post-conviction application. Therefore, petitioner's claims are barred from consideration by the statutory bars found in § 99-39-27(9) and (9)§ 99-39-5 (2) as well as § 99-39-23(6).

Further, other claims are barred by the doctrine of res judicata found in MISS. CODE ANN. § 99-39-21(3). This Court has held that it will not relitigate claims decided at trial, on appeal or in prior post-conviction petitions. Under the provisions of MISS. CODE ANN. § 99-39-21(3), some of petitioner's claims are res judicata and cannot be relitigated. Unlike the bars of waiver and different theories found in subsections 1 and 2 of this code section, the res judicata bar is not subject to the cause and actual prejudice test. *See Foster v. State*, 687 So.2d 1124, 1137 (Miss. 1996); *Gilliard v. State*, 614 So.2d 370, 375 (Miss. 1992). However, the Court has fashioned an exception to this bar that requires an appellate court to "suddenly" reverse itself on a settled question of constitutional dimension. *See Gilliard v.*

State, 614 So.2d 370, 375-76 (Miss. 1992). In order for this exception to allow a claim to be relitigated the sudden change in settled law would have to be a change that would be retroactively applied to cases pending on post-conviction review. *See Manning v. State*, 929 So.2d 885, 893-900, ¶¶ 22-42 (Miss. 2006); *Nixon v. State*, 641 So.2d 751, 754 (Miss. 1994); *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *Sawyer v. Smith*, 497 U.S. 227, 110 S.Ct. 2822, 11 L.Ed.2d 193 (1990). There has been no sudden change in settled law that was applied to this case.

The State recognizes that this Court has held that the ineffective assistance of post-conviction counsel can be raised in a petition such as this. *See Grayson v. State*, 118 So.3d 118 (Miss., 2013). However, while they may be raised, *Grayson* does not hold that any such claim is to be decided under any other standard than that found in *Strickland v. Washington, supra*. Therefore, petitioner must demonstrate both deficient performance and actual prejudice resulting from that deficient performance. The State would submit that petitioner cannot demonstrate both prongs of *Strickland* in this case.

The State asserts that petitioner has presented claims that are res judicata, claims that are not supported by evidence that was not previously presented to this Court, and cannot demonstrate both deficient performance and actual resulting prejudice. Petitioner's motion for leave to file a successive petition for post-conviction relief should be denied with prejudice and a date set for the execution of the death sentence in this case.

THE CLAIMS

CLAIM I: FAILURE TO DISCLOSE CUMULATIVE EVIDENCE THAT JUNIOR KILLED HIS FATHER DOES NOT REQUIRE REVERSAL OF THE CONVICTION OR THE DEATH SENTENCE IN THIS CASE.

Petitioner first contends that she is entitled to relief because it was not disclosed prior to trial that Junior "confessed" to the psychologist that he killed his father for his own reasons. Petitioner contends that had she known of this "confession" to Dr. Criss Lott, it would have shown that there was no murder for hire, therefore she could not have been convicted of capital murder. Petitioner is less than candid when she states that this issue has never been addressed. While it has not been addressed by this Court, it was fully addressed in both the opinion of the United States District Court and the Fifth Circuit. In those opinions, which will be quoted later in this opinion, both Courts give the reason that this was not a *Brady* violation.

First, it is clear that petitioner knew of Junior's statement to Dr. Lott, at the time of her direct appeal of this case, the article that was published in the paper regarding this fact was published in March 2001. In her direct appeal brief she stated:

> It has come to light since the trial of [Petitioner] that Dr. Lott revealed to counsel for Gillis that Junior confided in him that he (Junior) had shot [Edward]. (Obviously this new information is not in [Petitioner's] record but on remand would no doubt be of significant value in her defense. The information was obtained from Gillis' counsel)[.]".
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> Direct Appeal Brief at 9.

Later in the brief, petitioner stated:

> Although not part of the record in this case, a few months after the trial of [Petitioner], Dr. Lott divulged to Gillis' attorneys that Junior had confided

> to him that he had shot [Edward.] This revelation no doubt helps the cause of [Petitioner] and raises *Brady* issues (did the state not have copies of Junior's report prior to [Petitioner]'s trial?) since it is consistent with the physical evidence and the theory argued at trial by the defense. Nevertheless [,] this is merely fortuitous for [Petitioner] as it could have just as well occurred that something erroneous[ ] could have been divulged by Junior and then later, asked of [Petitioner] by Dr. Lott to which she may have given erroneous answers to protect her son with her response making its way into the report of Dr. Lott.
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> Direct Appeal Brief at 16.

During oral argument before this Court on December 4, 2002, counsel for the State informed the court, in response to a justice's inquiry as to whether Junior admitted killing his father, that "[t]here is some speculation of something that happened with Dr. Lott after the trial, . . . but I have nothing in the record. Therefore, the information from Dr. Lott was discussed in petitioner's direct appeal brief and during the oral argument in this case. This is not newly discovered evidence within the meaning of the PCR Act.

No claim was raised concerning statements made by Junior to Dr. Lott was presented to this Court on post-conviction review.

However, contrary to petitioner's assertion, this claim has been fully litigated. The claim was presented to the federal court during her habeas litigation. While the federal courts did hold some aspects of this claim barred from consideration it also alternatively addressed the merits of the claim and found them to be with out merit.

The United States District Court for the Northern District of Mississippi first discussed this issue in its opinion denying federal habeas relief. Looking to the district

court's opinion in *Byrom v. Epps*, 817 F.Supp.2d 868 (N.D.Miss.,2011), the district court held:

Actual Innocence

> Petitioner concedes that several of the claims raised in the petition might be procedurally defaulted. She argues, however, that this Court's failure to consider the otherwise procedurally defaulted claims raised in the petition would result in a fundamental miscarriage of justice, as she is actually innocent of the death penalty. *See Hughes v. Quarterman*, 530 F.3d 336, 341 (5th Cir.2008) (citing *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546). The law recognizes that the miscarriage of justice exception is implicated where a petitioner can demonstrate actual innocence of the substantive offense for which she was convicted or actual innocence of the death penalty under the applicable state law. *See Schlup v. Delo*, 513 U.S. 298, 326–27, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *Sawyer v. Whitley*, 505 U.S. 333, 340, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). The claim is not in and of itself a ground for habeas relief, but rather, it acts as a "gateway" that allows review of otherwise procedurally defaulted claims. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 404, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).[11] To raise a claim of actual innocence, Petitioner must first produce "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324, 115 S.Ct. 851. Then, she must show that it is "more likely than not, in light of the new evidence, no reasonable juror would find [her] guilty beyond a reasonable doubt." *House*, 547 U.S. at 538, 126 S.Ct. 2064; *see also Schlup*, 513 U.S. at 323–24, 115 S.Ct. 851. The exception is extremely narrow, applying only to those cases "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 495–96, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).
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> Petitioner maintains that newly discovered evidence demonstrates that Edward's death was not a murder-for-hire, inasmuch as Junior confessed to examining psychologist Dr. Lott that he alone killed his father while in a fit of rage. She maintains that the evidence supports her claim that the State suppressed Dr. Lott's report in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963),[12] and that this otherwise procedurally defaulted claim may be reviewed because proof now exists that she did not meet the condition of eligibility that elevated her crime to capital murder.

Because the murder was not "perpetrated by any person who [had] been offered or [had] received anything of value for committing the murder" as required under MISS. CODE ANN. § 97–3–19(2)(d), she argues, she cannot be guilty of murder-for-hire, and thus, capital murder, under Mississippi law.

Dr. Criss Lott was ordered by the trial court to conduct a psychiatric evaluation of Petitioner, Junior, and Gillis. (*See* SCP Vol. 1, 103–04). Although defense counsel objected to the same psychiatrist examining all three defendants, the trial judge stated that he had spoken to Dr. Lott and received his assurances that there would be no conflict in the separate examinations. (*Id*. at 107–08). The trial court ordered the reports sent to the court to be reviewed in camera, and ruled that the State would not be entitled to a copy of the reports absent the court's consent. (*Id*. at 95–98; 108–09). The examinations were scheduled to occur in July 2000, with Petitioner's examination scheduled first. (*See, e.g.*, SCP Vol. 1, 95–98; R. Memo Ex. B; Reply Ex. 3). Although it is not known when the reports were completed, the record indicates that Petitioner's examination was completed by August 11, 2000. (Trial Tr. Vol. 10, 5–6). Dr. Lott's report concerning Petitioner was ordered released to the State on October 18, 2000, but there is no indication in the current record that any release orders were entered in either Gillis' or Juniors' cases. (*See* Trial Tr. Vol. 10, 59–61; SCP Vol. 3, 428–29). To the Court's knowledge, Petitioner has never been granted access to Dr. Lott's report of his psychological evaluation of Junior.[13]

Petitioner apparently learned of Junior's alleged statements to Dr. Lott when two area newspapers cited the prosecutor's comments about the plea deal offered to Gillis in March 2001. The Tishomingo County News published the following on March 22, 2001:

> According to [the] Assist. District Attorney . . ., in his testimony against his mother, Byrom Jr. made some conflicting statements about what happened. Since then, in preparation for the Gillis trial, it was learned that he also made a conflicting statement to a psychologist.

(*See* Pet. Ex. 7–B). The Daily Corinthian attributed to the Assistant District Attorney that the prosecution learned "[w]hile preparing for the Gillis trial," that Junior made "another conflicting statement to his psychologist" and that those statements could have "seriously compromised' [Junior]'s future testimony against Gillis." (Pet. Ex. 7–A, March 16, 2001).

Habeas counsel submits to this Court that he spoke to Dr. Lott and Gillis' trial attorneys, and that the recollection of each was that Junior did confess to Dr. Lott that he murdered his father. (*See* Reply Ex. 4 & 5, Decls. of David L. Calder). Gillis' attorneys refused to make a declaration in the matter, however, and habeas counsel maintains that Dr. Lott, while initially agreeable to meeting with the purpose of discussing Junior's evaluation, refused to do so after Judge Gardner ordered him not to discuss the case without the trial court's approval. (*Id*.). Petitioner also notes that an attorney, Louwylnn Vanzetta Williams, and an investigator, Tomika Harris, both with the Mississippi Office of Post–Conviction Counsel, interviewed Gillis in November 2004. They report that he stated at that time that Petitioner did not hire him to kill her husband. (*See* Pet. Ex. 13, 14).

Petitioner argues that further evidence of the unreliable nature of Junior's testimony is found in the fact that on May 31, 2001, he repudiated the plea bargain he struck prior to testifying against his mother. She notes that Junior, not Gillis, had gunpowder on his palms. (Trial Tr. Vol. 15, 888–89, 91). She also argues that letters written from Junior to Petitioner, which were not allowed into evidence at trial because of defense's counsel failure to disclose them, contain Junior's admission that he killed his father in a fit of rage. (See Trial Tr. Vol. 14, 719–20; 740–45). Petitioner maintains that if the jury had considered Dr. Lott's report and/or testimony that Junior confessed to the murders, along with the letters Junior wrote confessing to the murders, it is probable that no reasonable jury would have found her guilty of capital murder.

Petitioner raised a claim of actual innocence on post-conviction review, and the Mississippi Supreme Court considered whether she could claim actual innocence and exempt the procedural default imposed against her claims. *Byrom II*, 927 So.2d at 729.[14] The court noted that Petitioner had attached only her own affidavit to the petition, and that she otherwise merely stated that the jury's findings were wrong. *Id*. The court rejected the claim as having no merit. *Id*.

The Court notes that while courts agree that a claim of actual innocence requires "new" evidence to be presented, they disagree as to whether the evidence must be "new" in the sense that it was not available or discoverable with due diligence at the time of trial, or whether it must be "newly presented." *See Wright v. Quarterman*, 470 F.3d 581, 591 (5th Cir.2006). While the Fifth Circuit has not conclusively determined the issue of "new" versus "newly

presented" evidence in this context, it has held that evidence will not meet the standard if "it was always within the reach of [the inmate's] personal knowledge or reasonable investigation." *Moore v. Quarterman*, 534 F.3d 454, 465 (5th Cir.2008). While Petitioner may not have been aware of Junior's alleged statements to Dr. Lott at the time of trial, she was certainly in possession of the knowledge at the time of her direct appeal and post-conviction review. She failed, however, to present the State court with a claim that the information was improperly suppressed.

The newspaper articles giving rise to Petitioner's claim were published in March 2001. The following excerpt appears in Petitioner's November 2001 appellate brief:

> It has come to light since the trial of [Petitioner] that Dr. Lott revealed to counsel for Gillis that Junior confided in him that he (Junior) had shot [Edward]. (Obviously this new information is not in [Petitioner's] record but on remand would no doubt be of significant value in her defense. The information was obtained from Gillis' counsel)[.]". (Pet. DA Brief 9).
>
> Although not part of the record in this case, a few months after the trial of [Petitioner], Dr. Lott divulged to Gillis' attorneys that Junior had confided to him that he had shot [Edward.] This revelation no doubt helps the cause of [Petitioner] and raises *Brady* issues (did the state not have copies of Junior's report prior to [Petitioner]'s trial?) since it is consistent with the physical evidence and the theory argued at trial by the defense. Nevertheless [,] this is merely fortuitous for [Petitioner] as it could have just as well occurred that something erroneous[ ] could have been divulged by Junior and then later, asked of [Petitioner] by Dr. Lott to which she may have given erroneous answers to protect her son with her response making its way into the report of Dr. Lott.

(Pet. Direct Appeal Br. 16).[15] During oral argument before the Mississippi Supreme Court on December 4, 2002, counsel for the State informed the court, in response to a justice's inquiry as to whether Junior admitted killing his father, that "[t]here is some speculation of something that happened with Dr. Lott after the trial, . . . but I have nothing in the record." (Pet. Ex. 15 at 37). Additionally, the Court notes that the information learned as a result of Gillis' November 19, 2004 interview was not presented on post-conviction review,

despite the fact that one of the interviewers, Ms. Harris, was one of the post-conviction attorneys and could have raised the issue of Gillis' statement when the petition for post-conviction relief was filed in February 2005. (See Pet. Ex. 14).

Aside from the issue of whether the evidence is sufficiently "new" to warrant relief, the Court is not persuaded that the evidence is of such a character that it is "more likely than not any reasonable juror would have reasonable doubt" if the evidence had been considered. *House*, 547 U.S. at 538, 126 S.Ct. 2064. A habeas court does not ask whether the evidence would have created reasonable doubt in the mind of one of the jurors, because there is no presumption of innocence in habeas proceedings. *Bosley v. Cain*, 409 F.3d 657, 664 (5th Cir.2005). Rather, the issue is whether it is more likely than not that "no reasonable juror" would have found her guilty. *Schlup*, 513 U.S. at 329, 115 S.Ct. 851. Petitioner fails to satisfy this exacting standard.

Petitioner's jury was presented with evidence that Junior had gunpowder residue on him, that Junior had been fighting with his father, and that Junior admitted to telling others that he shot his father. While defense counsel was not allowed to introduce into evidence the actual letters written from Junior to Petitioner while they were in jail awaiting trial, he was allowed to read from the letters and question Junior about the contents. Junior testified that he and his mother began to realize that their letters were being intercepted by law enforcement, and that they began fabricating details of the crime in the hopes of avoiding punishment. (Trial Tr. Vol. 14, 737–38, 750, Trial Tr. Vol. 15, 751–54). He maintained that when he wrote letters taking full responsibility for the murders, he was depressed and "ready to take the rap for everything to be able to free my mother and Joey." (Trial Tr. Vol. 15, 754). Junior admitted that he had told various lies about his involvement, and that the contents of the letters were not the truth. (*Id*.).

Moreover, Gillis refused to sign an affidavit attesting to the things reported in the affidavits of Ms. Williams and Ms. Harris, and Junior's contradictory statements indicate a lack of reliability that lessens the persuasiveness of Petitioner's argument. *See, e.g.*, *Moore*, 534 F.3d at 465. Both appellate and post-conviction counsel were aware that Junior had allegedly made statements implicating himself as the person who shot Edward and did not pursue this matter as a claim. Additionally, Petitioner confessed in great detail to facts of this crime, including the failed attempts, that are consistent with Junior's own account of the scheme. Even if Junior did make

inculpatory statements to Dr. Lott, such would be consistent with his trial testimony that he made self-incriminating admissions to others. Having considered the evidence presented to the Mississippi Supreme Court, as well as the evidence first presented in these proceedings, the Court finds that Petitioner has failed to demonstrate that no reasonable juror would have found her guilty of capital murder beyond a reasonable doubt if the juror had known of Dr. Lott's report of Junior. Therefore, Petitioner has failed to meet the high standard of actual innocence sufficient to obtain review of any defaulted claim raised in the petition, and the Court will not address Petitioner's allegations of actual innocence further in the opinion. Rather, the Court will consider any arguments of cause and prejudice asserted by Petitioner to secure review of any claims raised in her petition that are defaulted.

_____

11. The Court notes that, to the extent Petitioner's claim could be construed to raise a freestanding constitutional claim of actual innocence, it is not cognizable on habeas review. *See Herrera v. Collins*, 506 U.S. 390, 400, 417, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).

12. *Brady v. Maryland* requires that the prosecution disclose evidence that is 1) favorable to the accused; and 2) material either to guilt or to punishment. *United States v. Bagley*, 473 U.S. 667, 674, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

13. This Court twice denied Petitioner discovery relating to this issue.

14. The Mississippi Supreme Court also found that, to the extent Petitioner was seeking to argue that her conviction and/or sentence was against the weight or sufficiency of the evidence, the claim was barred. *Id*.

15. Counsel was not arguing the basis now raised, but rather, that the trial court erred in requiring Petitioner to submit to an evaluation by Dr. Lott and turn over her medical records to him. (See Pet. Direct Appeal Br. 15–17).

817 F.Supp.2d at 879-83.

Later in the district court's opinion we find the following:

IV. Suppression of Exculpatory Evidence

Petitioner maintains that Junior's confession to Dr. Lott is exculpatory evidence that was never disclosed to defense counsel, and that this evidence would have both refuted the State's theory of murder-for-hire and undermined Junior's credibility at trial. She also maintains that the State allowed Junior to testify falsely on the witness stand after knowing that he confessed to Dr. Lott. The prejudice that flowed from this violation is apparent, she argues, based upon the fact that the State offered Gillis a plea bargain rather than attempt to secure Gillis' conviction with Junior's unreliable testimony.[19] Petitioner concedes that she has not presented the State court with her claim that Dr. Lott's report was improperly withheld.

The trial court judge appointed the same psychologist to evaluate all three co-defendants and ordered the psychologist to submit all three evaluation reports to the trial court. While this procedure raises legal and factual concerns circuitously relevant to several of the allegations of error raised in the instant petition, its alleged prejudicial effect is directly relevant to the Court's consideration of this claim. However, this Court does not review allegations that were never presented to the State courts where Petitioner had the opportunity and the means to know of these issues during the State courts' proceedings. *See, e.g., Cullen v. Pinholster*, —– U.S. ––––, 131 S.Ct. 1388, 1401, 179 L.Ed.2d 557 (2011). Therefore, this claim is barred from federal habeas review. *See, e.g., Gray v. Netherland*, 518 U.S. 152, 166, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996); *Ogan v. Cockrell*, 297 F.3d 349, 358 (5th Cir.2002). As the Court has already determined that Petitioner's claim of innocence is insufficient to provide the Court with a gateway to review this claim, Petitioner must demonstrate the requisite cause and prejudice to obtain federal habeas review. *See id.*

Brady v. Maryland requires that the prosecution disclose evidence in its possession that is "materially favorable to the accused." *Youngblood v. West Virginia*, 547 U.S. 867, 869, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006); *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Petitioner's claim imputes knowledge to the State based upon a statement attributed to the Assistant District Attorney about the Gillis proceedings in March 2001. One newspaper quotes him as stating that the prosecution learned, "[w]hile preparing for the Gillis trial," that Junior made "another conflicting statement to his psychologist" and that those statements could have "'seriously compromised' [Junior]'s future testimony against Gillis." (Pet. Ex. 7–A). Another notes that he said that Junior had made "conflicting statements about what happened" when testifying against Petitioner, and that the State had

learned while preparing for Gillis' trial, "he also made a conflicting statement to a psychologist." (*See* Pet. Ex. 7–B). These statements not only acknowledge that Junior gave conflicting statements at trial, but the very language of the quotes indicate that the conflicting statements made by Junior to Dr. Lott were not made known until the prosecution began preparations for Gillis' trial. Given the trial judge's ruling in all three cases that the reports would be reviewed in camera and released to the State only upon court order, there is no reason for the Court to assume that the State was provided a complimentary copy of the report in Junior's case, much less Petitioner's case. (*See, e.g.*, SCP Vol. 1, 107). Rather, it would appear from the evidence presented that the prosecution became aware that Junior made statements to Dr. Lott only when Gillis' attorney informed the Assistant District Attorney of that fact in March 2001. (*See, e.g.*, Pet. Ex. 61–1, Ltr. from Atty. Thomas Comer, March 12, 2001).[20]

Also, Petitioner knew of the alleged statements Junior made to Dr. Lott during her direct appeal. Petitioner's direct appeal brief was filed on November 16, 2001, and it references the allegation. (*See* Pet. Direct Appeal Br. 9, 16). [21] The transcript of the oral argument held on Petitioner's appeal before the Mississippi Supreme Court on December 4, 2002, also references the parties' knowledge and the court's knowledge that Junior might have made an admission to Dr. Lott. (Pet. Ex. 15 at 37). That transcript also indicates the State's belief that Junior did not make the alleged statements until after Petitioner's trial.[22] Therefore, from the statements in front of the Court, it appears uncertain that the alleged statements were even made at the time of Petitioner's trial. Even if the alleged statements were made contemporaneously with preparations for Petitioner's trial, however, the record supports a determination that the State did not become aware of them until March 2001.

Moreover, this information was known at the time of Petitioner's direct appeal and post-conviction review, and yet Petitioner did not present this readily available evidence in support of her claim. Petitioner has failed to demonstrate cause for her failure to do so, and she has not shown prejudice. The Court makes no conclusion about what Dr. Lott's report concerning Junior contains or whether it should have been given to defense counsel if it was in existence at the time of her trial. However, Junior was confronted at trial with similar admissions that he made to various people, and he admitted that he told some people that he alone shot his father. (*See, e.g.*, Trial Tr. Vol. 14, 686–90, 748–50; Trial Tr. Vol. 15, 751–54). In order for evidence to be material under the *Brady* standard, the omitted evidence must create a reasonable doubt that

otherwise did not exist. *See Graves v. Cockrell*, 351 F.3d 143, 153–54 (5th Cir.2003) (citing *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)).[23]

Petitioner has also failed to demonstrate that the State allowed Junior to testify falsely. Both parties were aware that Junior had made contradictory statements, and he did not ultimately repudiate his trial testimony. When he did ultimately plead guilty, it was to the substance of what he testified to at Petitioner's trial. (*See* PCR Ex. 10). Petitioner has failed to demonstrate cause and prejudice for failing to present this claim to the State court for review. Additionally, even if Junior did confess prior to Petitioner's trial that he alone killed Edward, and even if the State was in possession of that knowledge and failed to disclose it to defense counsel, Petitioner has failed to demonstrate that it is evidence that would have created an otherwise nonexistent reasonable doubt as to her guilt. Petitioner is not entitled to relief on this claim.

_____

19. The Court notes that Gillis pled guilty to accessory after the fact to capital murder and conspiracy to commit capital murder. (Pet. Ex. 1).

20. In the letter, Comer states his intention to call Dr. Lott to testify that Junior stated that Junior killed his father and that Gillis helped him hide the gun.

21. The allegation was not raised as an independent claim. (*See* Pet. Direct Appeal Br. 15–17).

22. This would be consistent with what federal habeas counsel maintains is Dr. Lott's own recollection of the events, although habeas counsel argues that the orders in the consolidated pretrial proceedings in the case almost assure that the examinations of all three defendants were conducted simultaneously. (*See* Reply Ex. 5).

23. The Court notes that Petitioner must also demonstrate that the non-discovery of the allegedly impeaching or exculpatory evidence was not the result of a lack of due diligence. *See Graves*, 351 F.3d at 153–54. As the newspaper article giving rise to this claim was published in 2001, before Petitioner's direct appeal was filed, the basis of this claim was available during Petitioner's State court proceedings.

817 F.Supp.2d at 890-92.

The district court denied petitioner a certificate of appealability on this question. On appeal to the Fifth Circuit she filed a motion with the court of appeals to expand the grant of COA to include this claim. In *Byrom v. Epps*, 518 Fed.Appx. 243 (5th Cir. 2013), Fifth Circuit denied petitioner's request to expand the COA to include this claim and held:

> **III. Byrom's Remaining Claims**
>
> *A. Junior's Psychiatric Evaluation*
>
> Before Byrom's trial, the court ordered psychiatric evaluations for Byrom, Junior, and Gillis. The same doctor, Dr. Criss Lott, conducted each evaluation, and the results were transmitted to the trial court for in camera review. To date, Byrom has not seen Dr. Lott's evaluation of Junior. However, Byrom contends that Junior confessed sole responsibility for Edward's murder to Dr. Lott. Byrom makes this inference on the basis of information gleaned from two sources. First, in a newspaper article about Gillis's trial, an Assistant District Attorney purportedly stated that, while preparing to try Gillis, the government learned of statements Junior made to Dr. Lott that conflicted with his anticipated testimony. Second, Dr. Lott has apparently confirmed Junior's statement to Byrom's counsel. Dr. Lott was even preparing to share Junior's evaluation before the trial court forbade him from doing so. *However, Byrom was aware of Junior's alleged statement to Dr. Lott before her state court appeal and yet did not challenge the evidence's suppression*. Having failed to raise these claims previously, they are procedurally barred.
>
> Nevertheless, Byrom seeks discovery of Dr. Lott's report in order to establish three constitutional claims: (1) a Brady violation; (2) her actual innocence under *Schlup*; and (3) her ineligibility for the death sentence under *Sawyer*. Discovery is permitted only if good cause is found. *Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir.2000). Good cause may be found when a petition for habeas relief "establishes a prima facie claim for relief." *Id*. (quoting *Harris v. Nelson*, 394 U.S. 286, 290, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969)). As explained below, Byrom has not met this standard.
>
> *1. Brady Claim*.

"Under *Brady*, a defendant's due process rights may be violated when exculpatory or impeachment evidence, which is both favorable to the defendant and material to guilt or punishment, is concealed by the government." *Id*. In this context, "materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Rather, the defendant need only show a reasonable probability of a different result. *Id*. A *Brady* violation is established by "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. at 435.

Here, Byrom has not made a prima facie showing of a *Brady* violation because Dr. Lott's report does not create a reasonable probability of a different result at Byrom's trial. According to Byrom, Junior's evaluation would demonstrate that Junior took responsibility for Edward's death when interviewed by Dr. Lott. She seizes on this in order to claim that, had the report been produced before trial, it would have discredited Junior's testimony and aided Byrom's case. This may be true, but, through cross-examination concerning the jailhouse letters, Junior's testimony was already discredited at trial and in precisely the fashion Byrom describes here. While Byrom was restricted from showing Junior's letters to the jury, her attorney questioned Junior about the letters' contents and elicited testimony that undermined Junior's testimony broadly and his statements regarding his mother's role in the murder specifically. He has already admitted to giving multiple inconsistent statements regarding who was responsible for Edward's murder. The inclusion of one additional instance of such a statement thus does not create a reasonable probability of a different outcome. Dr. Lott's report would merely bolster Byrom's initial attempt at discrediting Junior's testimony; it would not "put the whole case in such a different light as to undermine confidence in the verdict." *Id*. Since this does not amount to good cause, we deny Byrom's claim.

2. Actual Innocence

As discussed previously, raising an actual innocence claim requires showing "that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Schlup*, 513 U.S. at 327, 115 S.Ct. 851 (quoting *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)). This test "does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no

reasonable juror would have found the defendant guilty." *Id.* at 329, 115 S.Ct. 851. Byrom characterizes the aforementioned *Brady* claim as the constitutional violation underpinning her actual innocence claim. However, for the same reasons discussed above, Dr. Lott's report does not establish a prima facie case of actual innocence. Byrom would have used Dr. Lott's report in precisely the way she used Junior's jailhouse letters. The effect of the report thus falls well short of the requisite standard. *See Schlup*, 513 U.S. at 327, 115 S.Ct. 851 (requiring that new evidence make it "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."). Having failed to show good cause, Byrom's claim is denied.

3. Eligibility for the Death Penalty

In order to contest her eligibility for the death penalty, Byrom must show, based on the evidence proffered and all record evidence, that there is a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of the facts which made her eligible for the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 346–47, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). Here, Byrom claims that the evidence produced at trial—taken together with Dr. Lott's report—would create a fair probability that no rational juror would have found her guilty of participating in a murder-for-hire scheme, the capital crime for which she was convicted. MISS. CODE ANN. § 97–3–19(2)(d).

Byrom has not, however, made the requisite showing. While Dr. Lott's report would have supported Byrom's theory of the case, in light of the other evidence produced at trial—including Byrom's own confessions—it cannot be said that a rational trier of fact would have entertained a reasonable doubt regarding the existence of a murder-for-hire scheme. According to Byrom, the parties planned to murder Edward. Junior implicated Byrom, Gillis, and himself; and Byrom separately implicated herself on more than one occasion. Even with Dr. Lott's report, it cannot be said that a rational trier of fact would harbor a reasonable doubt as to Byrom's guilt. Byrom has thus failed to show good cause, and we deny her claim accordingly.

Having disposed of Byrom's motion for an expanded COA and Byrom's motion for additional discovery, the Court will next address those issues for which the district court granted a COA.

518 Fed.Appx. at 253-54.

Clearly, the district court and the Fifth Circuit found that the failure to disclose the information from Dr. Lott, was not a violation which would cause the vacation of the conviction or sentence in this case as it did not show that petitioner was innocent of the death penalty.

Petitioner admits that she presented the same evidence that she is relying on in the instant petition to the federal courts. She has presented nothing new other than a statement by Dr. Lott. The federal courts assumed that Dr. Lott would say just what he as said in their analysis of the claim.

Petitioner contends that this is new evidence that allows her to overcome the time bar and the successive petition bar. However, the exceptions to these bars requires that the new evidence not have been reasonably discoverable at the time of trial. The state will submit that it was most likely not reasonably discoverable because of the order regarding who would receive the results of the mental evaluations by Dr. Lott. Petitioner places much emphasis on the fact that Dr. Lott would not give an affidavit to counsel prior to this time as grounds for showing that this evidence was not available. The alone is insufficient to show that it is newly discovered. Petitioner made no effort to obtain Dr. Lott's report by going to the trial court and asking that it be made available after Dr. Lott refused to give them the report. This was not an option that trial, appellate, post-conviction or habeas counsel explored. Therefore, the state would assert that due diligence was not employed in an attempt to obtain this information from Dr. Lott.

However, the alleged newly discovered evidence must be of "such nature that it would be *practically conclusive* that had such been introduced at trial it would have caused a different result in the conviction or sentence." § 99-39-5(2)(a)(1) & § 99-29-27(9). The state would submit, based on the decisions of the federal district court and the Fifth Circuit on this issue that this standard cannot be met by petitioner.

As pointed out above this issue was discussed by this Court in the direct appeal opinion. When discussing the exclusion of the physical letters because of a discovery violation by trial counsel, this Court stated the following in the majority opinion:

> ¶ 110. . . . She argues that the physical evidence suggested that Junior was the person who killed Byrom, Sr., and she asks the Court to remember that, after her trial, it became known that Junior had confided in Dr. Lott that he shot Byrom, Sr.
>
> 863 So.2d at 869.

Petitioner contends that the Court did not address this issue because it was not supported by the record. However, the majority did not make any statement that it was disregarding this assertion.

However, in the dissent, provided by Justice McRae, under the heading "Ineffective Assistance of Counsel" we find the following:

> Counsel failed to provide this Court with an adequate record. Though Byrom alleges to have sent a letter to Dr. Lott and the trial judge wherein she withdrew her consent for Dr. Lott's psychiatric examination of her, this letter was not made a part of the record. *Byrom also alleges that, after she was sentenced, Junior confided in Dr. Lott that he had shot Byrom, Sr. However, no affidavit from Dr. Lott or any other information to support this allegation is included in the record.*

> A reviewing court does not act upon innuendo and unsupported representation of fact, *Gerrard v. State*, 619 So.2d 212, 219 (Miss.1993), or upon assertions in briefs, but is bound by the matters contained in the official record. *Saucier v. State*, 328 So.2d 355, 357 (Miss.1976). Though we are not required to address these issues that are not argued or supported with authority or citations to the record in Byrom's brief, *Edwards v. State*, 800 So.2d 454, 468 (Miss.2001); *Gerrard v. State*, 619 So.2d 212, 219 (Miss.1993), I have done so where able because of the severity of the sentence imposed. However, Byrom's counsels' failure to provide the Court with a complete record or present meaningful argument on her behalf has made it impossible for us to fully review many of her issues.
>
> 863 So.2d 894-95. [Emphasis added.]

Therefore, there is no evidence that the Court disregarded this statement in the direct appeal brief in its analysis of the case.

The state, based on the decisions of the federal courts, contend "newly discovered" fails to support a granting of an exception to the time bar or the successive petition bar as it is not "practically conclusive" that this asserted new evidence would have caused a different result in the conviction or sentence in this case.

While petitioner has not clearly asserted the ineffective assistance of trial or post-conviction counsel for failing to raise a *Brady* claim related to this statement made to Dr. Lott, the state would assert that petitioner cannot meet both prongs of *Strickland* to show ineffective assistance of counsel. While petitioner may be able to demonstrate deficient performance, clearly she cannot demonstrate actual prejudice. The opinions of the district court and the Fifth Circuit make it clear that petitioner was not prejudice by not having this statement from Dr. Lott's report at trial or on appeal.

This claim is barred from consideration by the time bar and the successive petition bar as petitioner has failed to present evidence that would overcome the bar to the consideration of these claims at this late date. Further, she cannot demonstrate that counsel was ineffective in failing to obtain this information as she can show no prejudice. This claim should be denied as time barred and a successive claim. The motion for leave to file a successive petition for post-conviction relief should be denied.

CLAIM II: THE CLAIM THAT THE ISSUE REGARDING THE EXCLUDED LETTERS THAT WAS AFFIRMED BY THIS COURT ON DIRECT APPEAL IS BARRED FROM CONSIDERATION BY THE DOCTRINE OF RES JUDICATA FOUND IN MISS. CODE ANN. § 99-39-21(3).

The claim relating to the exclusion of the actual letters, but not their content, as a sanction for a discovery violation by petitioner was presented to this Court and decided on the merits on direct appeal by this Court. *See Byrom v. State*, 863 So.2d 836, 868-71, ¶¶ 103-118. Under the provisions of MISS. CODE ANN. § 99-39-21(3) and § 99-39-27(9), this claim is res judicata and cannot be relitigated. Unlike the bars of waiver and different theories found in subsections 1 and 2 of this code section, the res judicata bar is not subject to the cause and actual prejudice test. *See Foster v. State*, 687 So.2d 1124, 1137 (Miss. 1996); *Gilliard v. State*, 614 So.2d 370, 375 (Miss. 1992). However, the Court has fashioned an exception to this bar that requires an appellate court to "suddenly" reverse itself on a settled question of constitutional dimension. *See Gilliard v. State*, 614 So.2d 370, 375-76 (Miss. 1992). In order for this exception to allow a claim to be relitigated the sudden change in settled law would have to be a change that would be retroactively applied to cases pending

on post-conviction review. *See Manning v. State*, 929 So.2d 885, 893-900, ¶¶ 22-42 (Miss. 2006); *Nixon v. State*, 641 So.2d 751, 754 (Miss. 1994); *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *Sawyer v. Smith*, 497 U.S. 227, 110 S.Ct. 2822, 11 L.Ed.2d 193 (1990). There has been no sudden change in settled law that was applied to this case. This claim is barred by the doctrine of res judicata and cannot be relitigated in this successive petition for post-conviction relief.

Petitioner also contends that there has been an intervening decision that overcomes the bar to a time barred or successive petitions for post-conviction relief. She contends that *Ross v.State*, 954 So.2d 968 (Miss. 2007), is an intervening decision that should allow her to relitigate this claim. In order to avail herself of this exception the petitioner must demonstrate that there has been a decision of this Court or the United States Supreme Court which would have "actually adversely affected the outcome of his conviction or sentence." MISS. CODE ANN. § 99-39-5 (2). At first blush this seems to allow petitioner to avail herself of any decision rendered after the date her conviction or sentence became final. However, this is not the case. This Court held a distinction between the applicability of new rules of constitutional law to cases on direct review and post-conviction review "embraces a healthy and necessary respect for final judgments and good-faith interpretations of existing law." *See Manning, supra*; *Nixon, supra*.

Basically, petitioner's argument here is whether the Court erred in its direct appeal opinion in finding that trial counsel's failure to furnish the jail house letters to the state in

discovery was "wilful". The resolution of the discovery claim in the case at bar and in *Ross* rested on the discrete facts of each case and not the application of principles of constitutional law. *Ross* is not an intervening decision within the meaning of the precedent of this Court.

In *Ross*, the trial court refused to allow him to impeach a witness, Jones, with prior inconsistent statements made in her statement to an investigator. The trial court refused to admit the statement into evidence. In resolving the claim in *Ross* this Court held:

> Nothing in the record indicates that defense counsel deliberately attempted to ambush the State with new evidence. The trial court did not find that the introduction of the statement was motivated by a desire to gain a tactical advantage. The State cannot claim that the introduction of the statement caught it unaware, since the statement was given by its own witness.
>
> 954 So.2d at 1000.

The Court also found that the "Jones' testimony was the only direct evidence linking Ross to the crime." *Id.* at 1001. The trial court did not follow the procedures set forth in *Box v. State*, 437 So.2d 19, 23–26 (Miss.1983). The Court found prejudice and reversed on this and other grounds. The Court concluded that it was reversing on the basis of independent and cumulative errors.

Id. at 119.

In the case at bar we have a totally different factual scenario. First, we would point out that trial counsel was told by the trial court prior to trial to turn over all impeachment discovery, trial counsel did not do so. After the attempt to introduce the first letter, the trial court again told trial counsel to turn over any similar discovery. Trial counsel did not do so.

Trial counsel clearly informed the trial court that his actions were to gain a strategic trial advantage. Trial counsel's actions were clearly wilful. Looking to the direct appeal opinion we find the Court relating what defense counsel stated to the trial court. This Court's opinion reads:

This Court stated:

> Yet, this is exactly what Byrom's defense attorney attempted to do—ambush the State. Byrom's attorney admitted that these two letters were *intentionally* withheld from the prosecution during the discovery process because of defense *counsel's intention to "impeach the daylights" out of Junior* because "[t]hat's my job."
>
> 863 So.2d at 870.

After discussing the requirements set forth in *Box v. State*, 437 So.2d 19, 23–26 (Miss.1983) (Robertson, J., concurring), now codified as URCC 9.04(I), the Court held:.

> ¶ 116. Byrom sought to introduce the letters during trial. Therefore, according to Rule 9.04, the trial court was required to follow the *Box* procedure. After Byrom sought to introduce the letters, the court recessed until the next morning. During the interim, the trial judge allowed the State, over Byrom's objection, to discuss the contents of the letters with Junior. Thus, the State was given a chance to prepare to meet this evidence and arguably allowed to remedy the effects of any prejudice that would have resulted from its introduction.
>
> ¶ 117. When trial resumed, the State argued that had it known these letters existed, it might not have made a deal with Junior and probably would not have put him on the stand. In essence, the State argued that introducing the letters would unfairly prejudice the prosecution and cause a miscarriage of justice. However, the State did not request a mistrial or a continuance as mandated by Rule 9.04; rather, it stated: "[i]n this case, of course, we want to go forward with it." The State cited *De La Beckwith v. State*, 707 So.2d 547 (Miss.1997), wherein this Court held that if:

> the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, 'it would be entirely appropriate to exclude the witness' testimony . . . [a]lthough a continuance admittedly would have allowed the prosecution to retrieve [another witness] we find that regardless of whether prejudice to the prosecution could have been avoided in this particular case, it is plain that the case fits into the category of willful misconduct in which the severest sanction is appropriate.
>
> *Id*. at 575 (quoting *Taylor v. Illinois*, 484 U.S. 400, 413–15, 108 S.Ct. 646, 655, 98 L.Ed.2d 798, 814 (1988)). The State argued the failure to produce the letters was a deliberate attempt to gain a tactical advantage in violation of the discovery rules. *It pointed to Byrom's counsel's statement that "[w]e have withheld this evidence purposely with the intent to use it to the fullest advantage of [our] client*."
>
> ¶ 118. *We conclude that the failure to disclose in the case at bar did warrant complete exclusion of the letters*. Byrom was not prejudiced by the exclusion of these letters. Byrom's counsel was allowed to ask Junior if he remembered writing every statement in the letters and if he admitted writing letters to his mother in which he told her that there was no conspiracy and that he alone killed his father. Specifically, Junior admitted having previously stated that, once arrested, he gave the authorities "one bulls [expletive omitted]t story after another ... to save [his] own ass." Junior also admitted having said that he was so scared, confused, and high that he just said the first thing that came out of his mouth. He further admitted having said that there was no conspiracy; that the crime had nothing to do with money; and, that it was just Junior, who had gotten mad at his father and killed him. Though he denied making some of the statements, the ultimate fact that Byrom sought to prove through their introduction, that Junior wrote his mother that he personally killed his father, was admitted by Junior in open court. Thus, the excluded evidence was before the jury. Therefore, this issue is without merit.
>
> 863 So.2d at 871-72. [Emphasis added.]

Further, it must be remembered that, unlike the *Ross* case, there was other direct evidence of petitioner's involvement in the murder in this case – petitioner's own confessions. *Ross*

simply is not an intervening decision that meets the test of being a decision which "actually adversely affected the outcome of h[er] conviction or sentence."

This Court has held in order for an intervening decision announcing a new rule of constitutional law to apply the decision must be a decision held to apply retroactively to cases pending on post-conviction review. *See Manning, supra*; *Nixon, supra*. The test for determining the applicability of an intervening decision to a post-conviction case adopted by this Court is the same as that announced by the United States Supreme Court in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *See Manning, supra*.

Byrom cannot demonstrate actual prejudice as defined by this Court in *Nixon, supra,* The Court held that in order for a post-conviction petitioner to show actual prejudice he must fall within one of the two exceptions set forth in Teague v. Lane.[4] The *Teague* court had held in order for a new rule of constitutional law to be applied retroactively it must, (1) "place a category of primary conduct beyond the reach of the criminal law [] [or] prohibit the punishment for a class of defendants"; or (2) be a new "watershed rule of criminal procedure" or a "bedrock procedural element" of criminal procedure." *See Nixon v. State*, 641 So.2d 751, 755 (Miss. 1992) (citing to *Teague v. Lane*, 489 U.S. at 311, 109 S.Ct. At 1075-76, 103 L.Ed.2d at 356.). In sum, in order for a petitioner to avail himself of a newly announced rule of constitutional law he must show he did not have the tools at his disposal to preserve or raise the claim of error at trial or on direct review and his claim must fall into

[4]Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

one of the two limited categories of excepted from the non-retroactivity doctrine applied to new rules of constitutional law. Without both showings this Court will not apply an new rule of constitutional law retroactively to a post-conviction claim that has otherwise been barred or is res judicata. That said, *Ross* did not announce a new rule of constitutional law or procedure in this state. Therefore, it does not represent an intervening decision which would give petitioner relief. *See Lockett v. State*, 656 So.2d 68, 72-72 (Miss. 1995) (Intervening decision exception to time and successive petition bar discussed in same context as sudden change in law exception to res judicata bar.) *Ross* offers petitioner no relief as it is not an intervening decision within the meaning of the statute or this Court's precedent.

Byrom raised this claim again in her first post-conviction petition and this Court held the claim to be barred as res judicata and alternatively found them to be without merit. *See Byrom v. State*, 927 So.2d 709, 726, ¶ 53 (Miss. 2006).

Further, this claim was presented by petitioner in her federal habeas corpus petition and was decided on the merits. The district court held:

> **II. Exclusion of Junior's Jailhouse Confession Letter**
>
> Petitioner argues that the trial court denied her right to present a meaningful defense, effectively cross-examine witnesses, and rebut the State's case when it excluded from evidence letters written by Junior to Petitioner in which he confessed that he alone killed Edward. She maintains that in rejecting this claim, the Mississippi Supreme Court unreasonably determined facts in light of the actual trial testimony, inconsistently applied its own rules concerning the appropriate remedy for a discovery violation, and unreasonably failed to apply clearly established federal law that requires courts to consider the impact of the excluded evidence on the truth-finding process.

As previously discussed, Junior and Petitioner exchanged letters while they were in jail. The letters that Petitioner alleges were erroneously excluded from trial were letters written from Junior to Petitioner that were not intercepted by law enforcement officials. Petitioner apparently turned these letters over to defense counsel at some point prior to trial. At a pretrial hearing held on October 18, 2000, defense counsel informed the court that he had impeachment material to use in the event that Junior testified consistently with the prosecution's theory of the case. (*See* Trial Tr. Vol. 10, 36). After hearing arguments from both the prosecution and the defense as to whether the information should be disclosed, defense counsel was told to produce the material or risk it being objectionable at trial. (*Id*. at 37–40).

At trial, Junior testified that Edward was killed as part of a murder-for-hire scheme, which was consistent with the State's theory of the case. During his cross-examination of Junior, defense counsel Wood produced a letter written by Junior to Petitioner while they were both being housed in the Tishomingo County Jail. (*See, e.g*., Trial Tr. Vol. 14, 714). Counsel attempted to introduce this letter, in which Junior stated that he alone killed Edward. (See *id*.; Def. Tr. Ex. 72). The prosecution objected, as the letter had not been previously disclosed, and the trial court took up the issue outside of the jury's presence. (*Id*. at 713). Defense counsel argued that the material was intended solely for impeachment purposes and did not have to be disclosed under the rules, while the prosecution argued that the rules prohibited the intentional withholding of evidence in order to ambush opposing counsel. (*Id*. at 714–15). After recessing the jury for the evening, the trial court granted the prosecution's request for permission to question Junior about the letters, and it asked defense counsel if there was other evidence that had not been discovered. (*Id*. at 717–19). Counsel Wood stated that he had "other impeachment evidence" with which he intended to "impeach the daylights" out of Junior. (*Id*. at 719). The court cautioned Wood that nondisclosure would get the evidence excluded altogether or would delay the trial of the case, and that such nondisclosure would be at Wood's "own peril." (*Id*.).

After hearing argument regarding the letter's admissibility the following day, the trial court found that the evidence outlined the substantive theory of the defense's case and should be excluded in light of defense counsel's deliberate discovery violation. (*See id*. at 723–31) (referencing holding of *Coates v. State*, 495 So.2d 464 (1986)). In what the court acknowledged as hair splitting, it ruled that defense counsel could ask Junior about the contents of the letter, but that counsel could not handle the letter or otherwise make

reference to existence of the letter. (*Id*. at 730–33). Later in his cross-examination of Junior, counsel attempted to ask Junior about another letter he wrote to Petitioner, and the proceedings were again recessed so that the trial court could determine the admissibility of the letter. (*See id.* at 740–41). The trial court again ruled that defense counsel could ask Junior if he made the statements, but that he could not refer to the existence of a letter. (*See id*. at 741–45).

Throughout the course of cross-examination, defense counsel was allowed to read directly from the letters. Junior admitted that he had told different stories about his involvement in his father's death, and he admitted that he wrote his mother a letter stating that he killed his father. (*Id*. at 740, 746). He admitted that he had told others that there was no conspiracy, and that he alone shot his father after he had gotten mad at him. (*Id*. at 748–49). He denied making some statements in the letter, such as the fact that he told Gillis to hide the gun after he shot his father while Edward was asleep. (*Id*. at 747–48). However, he ultimately denied that he alone killed his father. (*Id*. at 749).

On redirect examination, the prosecutor elicited from Junior that he and his mother realized at some point after their arrest that their letters were being intercepted, and that they began to write letters with the specific intent that they be intercepted by law enforcement officers. (*Id*. at 750). He admitted that some of the letters outlined different schemes that they intended to use to avoid punishment for what they had done. (*Id*.). Junior stated that the letters defense counsel asked him about were part of the scheme. (Trial Tr. Vol. 15, 751–54). Junior stated that when he wrote the letters taking full responsibility for the murders, he was depressed and "ready to take the rap for everything to be able to free [Petitioner] and Joey." (*Id*. at 754). Junior stated that the contents of the letter were not the truth, and that he had never told the District Attorney or the State that he killed his father. (*Id*.). He admitted that he approached Gillis at his mother's request and discussed with him the amount of money Gillis wanted in exchange for his participation in the murder. (*Id*. at 767–68).

On direct appeal, the Mississippi Supreme Court rejected Petitioner's claim that the trial court improperly excluded the evidence, as the trial court followed the proper procedure to determine the sanction for defense counsel's deliberate discovery violation of substantive evidence. *See Byrom I*, 863 So.2d at 868–71 (Miss.2004).[18] It also found that Petitioner was not prejudiced by the sanction since she was able to elicit from Junior testimony

favorable to the defense theory. *See id.* at 870–71. Three justices dissented, finding that they would reverse based upon the exclusion of the letters. **See id.** at 885 (Pittman, C.J., dissenting, joined by McRae, P.J. and Graves, J.). On post-conviction review, the court found the issue barred and otherwise without merit. *Byrom II*, 927 So.2d at 726.

States have the authority to interpret their own statutes, and absent an attempt to evade a federal issue, this Court is bound by that interpretation. *See, e.g., Jordan v. Watkins*, 681 F.2d 1067, 1079–80 (5th Cir.1982); *see also Castillo v. Johnson*, 141 F.3d 218, 222 (5th Cir.1998) (holding that absent an error that constitutes a denial of fundamental fairness, a habeas court does not interfere with the evidentiary rulings of a state court). Regardless of whether defense counsel honestly believed that he did not have to disclose the letters because they were evidence intended for impeachment, the fact remains that he was warned prior to trial that this failure to properly disclose evidence could result in the exclusion of the evidence. Defense counsel Wood's own statements leave no doubt that he deliberately withheld the evidence in order to surprise the State at trial, and Petitioner has not demonstrated unreasonableness in the Mississippi Supreme Court's rejection of this claim. *See Taylor v. Illinois*, 484 U.S. 400, 415, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) (finding that exclusion of evidence proper where counsel's explanation for intentionally failing to disclose evidence was "motivated by a desire to obtain a tactical advantage" that would "minimize the effectiveness" of the other party's examination and their ability to adduce evidence in rebuttal). The Court notes that Petitioner's argument, while relying on the Mississippi Supreme Court's citation to *Taylor*, involves whether Petitioner was provided an opportunity to effectively cross-examine Junior. The Court would observe that Petitioner's right under the Confrontation Clause of the Sixth Amendment is to the " *opportunity* for effective cross-examination." *See United States v. Whitfield*, 590 F.3d 325, 363 (5th Cir.2009) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)) (emphasis in original). To the extent that Petitioner's opportunity was at all curtailed, it was because of the decision of the defense not to heed the court's warnings or otherwise follow the discovery rules.

The Court also finds that, even if it was error to exclude the letters, the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). While he did deny making some statements where he gave details as to how the murder transpired, Junior

admitted telling his mother and others that there was no conspiracy and that he committed the murder. He also admitted that the letters referenced by defense counsel were some of the letters that were written with the intent that they be intercepted by law enforcement officials in hopes of keeping his mother from being charged with a crime. Despite admitting that he had told lies to various people, Junior stated that he had never told law enforcement officials or the State that he shot his father. The trial court allowed the defense a remedy for its discovery violation that still allowed it to present its theory, and it allowed the defense to question Junior extensively from the letters in order to provide the defense with the opportunity to present its theory of the murder. In fact, trial counsel read exact quotes from the letters in many instances. The introduction of the actual letters themselves into evidence at most raises a possibility that a juror could have been influenced by reading them. *See, e.g., Woods v. Johnson*, 75 F.3d 1017, 1026 (5th Cir.1996) (noting that a trial error does not entitle one to habeas relief "unless there is more than a mere reasonable possibility that it contributed to the verdict").

Finally, the Court notes that Petitioner has never presented a State court with the argument that trial counsel performed ineffectively in failing to properly follow the rules. Under the exhaustion doctrine, she was required to argue counsel's ineffectiveness to the State court before attempting to introduce it here as additional grounds to prevail on her claim. *See Wilder v. Cockrell*, 274 F.3d 255, 259 (5th Cir.2001) ("[W]here petitioner advances in federal court an argument based on a legal theory distinct from that relied upon in the state court, he fails to satisfy the exhaustion requirement."). Therefore, the Court will not consider the claim.

Petitioner has failed to demonstrate that the decision of the Mississippi Supreme Court with regard to this issue involves an unreasonable application of law or determination of fact, and this claim will be dismissed.

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18. The procedure followed by the court used the guidelines in *Box v. State*, 437 So.2d 19, 23–26 (Miss.1983), which is now codified in URCC 9.04(I). That provision provides rules for a trial court faced with one party's objection to the other party's attempt to introduce evidence that has not been disclosed. It provides, in part, that the court should grant time for the non-moving party to review the evidence, and if the non-moving party claims "unfair surprise or undue prejudice and seeks a continuance or mistrial, the court shall, in the interest of justice and absent unusual circumstances, exclude the evidence or grant a continuance ... or grant a mistrial." *See* URCC 9.04(I).

817 F.Supp.2d at 885-88.

Thus, the district court found no error in this Court's decision on this question. The district court denied petitioner's request for a certificate of appealability on this claim. Petitioner then requested the Fifth Circuit to expand the grant of COA to include this claim and a claim of ineffective assistance of counsel based on the substantive claim on appeal. In denying petitioner's request for COA on these questions the Fifth Circuit held:

> **B. Exclusion of the Jailhouse Letters**
>
> Byrom received at least two letters from Junior while they were both incarcerated. In these letters, which were purportedly written with the intention that law enforcement intercept them, Junior took full responsibility for Edward's murder and disclaimed the existence of a murder-for-hire scheme. These letters were given to Byrom's attorney, who intended to use the letters as impeachment evidence if Junior testified consistently with the prosecution's theory of the case against Byrom.
>
> Before trial began, the court warned Byrom's counsel to disclose impeachment evidence to the prosecution or risk discovery sanctions at trial. Disregarding the court's admonition, counsel withheld the letters until they were unveiled during Junior's cross-examination. Counsel did so for strategic surprise, as well as to ensure that Junior would remain a key prosecution witness. Byrom's attorney also believed that his tactic was permissible under the relevant rule, a claim the court did not accept.[6] As a sanction, the trial court barred counsel from referencing or handling the letters in front of the jury. Nevertheless, counsel was permitted to question Junior about the letters and to read directly from the letters while questioning him. During cross-examination, Junior admitted to offering different accounts of the murder to different people, including previous statements taking complete responsibility for the murder. Junior did, however, ultimately deny direct responsibility for his father's death. On re-direct, Junior said he took responsibility for the murder in the letters because they were written during a time of deep depression and that he did so to exonerate Byrom and Gillis.

The Mississippi Supreme Court, on direct appeal, rejected Byrom's claim that the letters' exclusion was improper. *Byrom v. State*, 863 So.2d 836, 869–71 (Miss.2003). The court analyzed the relevant state discovery rule and determined that the trial court followed the correct procedure and reached an appropriate outcome. *Id*. at 868–71. That same court also rejected Byrom's assertion that the exclusion was prejudicial since Byrom's counsel was nevertheless able to elicit testimony from Junior that favored Byrom's theory of the case using the letters' contents. *Id*. at 871.

On review, the district court deferred to the state court's interpretation of its own evidentiary rules since it did not appear that the court was attempting to evade a federal issue. *Byrom v. Epps*, 817 F.Supp.2d 868, 887 (N.D.Miss.2011). The district court found that it was not improper to exclude direct references to the jailhouse letters as a sanction for willfully withholding them prior to trial. *Id*. Further, the sanction was carefully crafted to let defense counsel "question Junior extensively from the letters in order to provide the defense with the opportunity to present its theory of the murder." *Id*. at 887–88. In fact, trial counsel read portions of the letters verbatim. *Id*. at 888. Because trial counsel's discovery violation was a willful, strategic tactic, and because the sanction itself deprived Byrom's defense of very little, the district court denied habeas relief. *Id*.

Byrom bases her motion for an expanded COA on *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988), an attempted murder case in which the trial court excluded a defense witness because of trial counsel's willful failure to disclose the witness prior to trial. 484 U.S. at 401–02, 108 S.Ct. 646. In *Taylor*, the defendant's attorney did not disclose the existence of a witness until the second day of trial, despite the prosecution's pre-trial request for a list of all defense witnesses and an amendment defense counsel made to his witness list on the first day of trial—an amendment that did not include the withheld witness. *Id*. at 403–04, 108 S.Ct. 646. When asked about the failure to disclose his witness, defense counsel claimed to have only recently located the witness. *Id*. at 404, 108 S.Ct. 646. This, however, was not true. Before determining whether the new witness could testify, the court conducted its own examination of the witness. *Id*. During that colloquy, the witness disclosed that he and the attorney had first met months before, and that counsel visited him around a week before trial began. *Id*. at 405, 108 S.Ct. 646. The witness also made statements suggesting he had not actually witnessed the altercation at issue. *Id*. at 404–05, 108 S.Ct. 646. The trial judge concluded that complete exclusion of the witness's testimony was the

appropriate sanction in light of the attorney's deliberately misleading statements and the likelihood that the witness had not in fact witnessed the altercation that gave rise to the case. *Id*. at 405, 108 S.Ct. 646.

In upholding the sanction, the Supreme Court rejected both parties' extreme positions: "Petitioner's claim that the Sixth Amendment creates an absolute bar to the preclusion of the testimony of a surprise witness is just as extreme and just as unacceptable as the State's position that the Amendment is simply irrelevant." *Id*. at 410, 108 S.Ct. 646. Instead, the Court decided that a complete evidentiary exclusion was an acceptable sanction in certain situations, though it declined to enumerate a definitive test. *Id*. at 414–16, 108 S.Ct. 646. Given the nature of the violation in *Taylor*, the Court found "the inference that [counsel] was deliberately seeking a tactical advantage ... inescapable." *Id*. at 417, 108 S.Ct. 646. Because counsel's violation was "willful and blatant," complete exclusion was appropriate, regardless whether "prejudice to the prosecution could have been avoided." *Id*. at 416–17, 108 S.Ct. 646.

Here, Byrom attempts to distinguish the facts of *Taylor* in order to undermine the validity of the trial court's discovery sanction, which Byrom views as identical to the sanction levied in *Taylor*. Byrom characterizes the sanction here as a complete exclusion and claims that it was inappropriate because *Taylor* was not a capital murder case and the attorney in *Taylor* went so far as to deliberately mislead the court. Here, Byrom's attorney believed withholding Junior's letters fell within the letter of the law, and Byrom never misled the court. These points are well taken, but Byrom fails to appreciate how the sanction in *Taylor* differs from this case. Whereas *Taylor* involved the complete exclusion of a defense witness, the trial court here only partially restricted the extent to which counsel could use Junior's jailhouse letters.

In fact, Byrom's trial counsel was able to read directly from the letters while questioning Junior, and Junior acknowledged many of the key points counsel sought to establish. He acknowledged making inconsistent statements concerning his role in the murder and the existence of a murder-for-hire plot; and he admitted writing Byrom a letter stating that he killed his father. The trial court merely precluded counsel from handling the letters in front of the jury and from specifically referring to their existence. That is, trial counsel was able to explore their theory of the case, though in a more limited capacity than originally planned. Counsel could not impeach Junior using the letters, but he nevertheless acknowledged giving inconsistent stories and claiming

responsibility for the murder, points defense counsel specifically sought to elicit for the sake of undermining Junior's credibility and supporting their theory of the case.

Here, the sanction fit the violation and fell well within Byrom's Sixth Amendment rights. As the district court noted, "[Byrom's] right under the Confrontation Clause of the Sixth Amendment is to the "*opportunity* for effective cross-examination." " *Byrom*, 817 F.Supp.2d at 887 (quoting *United States v. Whitfield*, 590 F.3d 325, 363 (5th Cir.2009)) (emphasis original). To the extent Byrom's opportunity was limited, it was due to the deliberate actions of her attorney. When counsel engages in willful discovery omissions for purely tactical reasons, the Sixth Amendment is not offended by the imposition of proportionate sanctions. *See Taylor v. Illinois*, 484 U.S. 400, 415, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988).

For these reasons, reasonable jurists could not find the district court's assessment of Byrom's constitutional claim debatable or wrong. *Michael Williams v. Taylor*, 529 U.S. 420, 424, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). While the discovery violation in this case was not as egregious as the one in *Taylor*, neither was the sanction. As the district court stated:

> [t]he trial court allowed the defense a remedy for its discovery violation that still allowed it to present its theory, and it allowed the defense to question Junior extensively from the letters in order to provide the defense with the opportunity to present its theory of the murder. In fact, trial counsel read exact quotes from the letters in many instances.

Byrom, 817 F.Supp.2d at 888. Contrary to Byrom's representations, the trial court did not use the discovery violation to freely exclude defense evidence with little regard for the impact on Byrom's constitutional rights. Rather, the court evaluated defense counsel's discovery violation in light of the circumstances of the case and fashioned a remedy that addressed the violation while still affording Byrom wide latitude to present her theory of the case. Moreover, counsel was able to elicit much of what it wanted from Junior. *See Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (denying federal habeas relief for trial error unless the error "had substantial and injurious effect or influence in determining the jury's verdict."). Reasonable jurists could not find the district court's assessment of this issue debatable or wrong. Therefore, the Court denies Byrom's motion for an expanded COA on whether the exclusion of Junior's jailhouse letters amounted

to a violation of Byrom's rights.

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6. In Mississippi, a reciprocal discovery rule required that defense counsel disclose "the contents of any statement, written, recorded or otherwise preserved" for "all witnesses in chief which the defendant may offer at trial[.]" URCCC 9.04(C)(1). Byrom contended that this rule did not require disclosure of Junior's letters because "they were to be offered for impeachment purposes only and not as substantive evidence in her case-in-chief." *Byrom*, 863 So.2d at 868. Based on prior precedent, the Mississippi Supreme Court rejected Byrom's claim because the relevant rule is concerned with discouraging the sort of "trial by ambush" that counsel had attempted. *Id*. at 869 (quoting *Coates v. State*, 495 So.2d 464, 467 (Miss.1986)).

518 Fed.Appx. at 247-51. [Emphasis added.]

The Fifth Circuit found that the exclusion of the physical letters was a proper sanction for the wilful discovery violation in this case. Further, while the Fifth Circuit agreed with the district court the ineffective assistance of counsel claim based on the failure to produce the letters to the state in discovery was procedurally barred, it alternatively found that any such claim would be without merit as allowing counsel to handle the letters would not have changed the outcome of the trial.

Petitioner discussed the ineffective assistance of counsel with regard to this issue briefly under this assertion. Since petitioner has devoted other sections of her motion to this and other claims of ineffective assistance the State would invite the Court to the arguments there as the answer to any ineffective assistance of counsel claims stated in this assignment.

Because the substantive issue related to the exclusion of the letters is res judicata the claim is barred from consideration. MISS. CODE ANN. § 99-39-21(3). Because the case of

Ross v.State, supra, is not an intervening decision that would actually adversely affected the conviction or sentence in this case petitioner's petition is time barred by MISS. CODE ANN. § 99-39-5(2). Because *Ross, supra*, is not an intervening decision this claim is barred as a successive petition under the provisions of MISS. CODE ANN. § 99-39-27(9). Petitioner is not entitled to relitigate this issue in this successive petition. Relief should be denied.

CLAIM III: INEFFECTIVE ASSISTANCE OF COUNSEL WITH THE EXCLUDED LETTERS, BYROM'S CONFESSION AND OTHER ISSUES.

Petitioner next contends that trial and post-conviction counsel were ineffective in failing to raise certain claims. Petitioner has divided this claim in to several parts.

A/C. Counsel was ineffective in failing to produce the letters in discovery.

This claim was not presented in the first post-conviction petition and the state would assert that it has no merit here. However, the claim was presented during the habeas litigation. Petitioner is correct when she states that the federal courts held the claim to be barred because it had not been presented to this Court on post-conviction review. However, the Fifth Circuit, while holding the claim to be barred, briefly addressed the merits of the ineffective assistance of counsel claim in its opinion. The Fifth Circuit held:

C. Ineffective Assistance of Counsel

> Byrom also seeks an expanded COA to argue that trial counsel's refusal to disclose Junior's jailhouse letters prior to trial constituted ineffective assistance of counsel since counsel's willful discovery violations resulted in the sanctions discussed immediately above. However, the district court refused to consider this claim because Byrom "has never presented a State court with the argument that trial counsel performed ineffectively in failing to properly

follow the rules." *Byrom*, 817 F.Supp.2d at 888. Because reasonable jurists would not find the district court's assessment debatable or wrong, we deny Byrom's motion. *Michael Williams v. Taylor*, 529 U.S. 420, 424, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000).

Before state prisoners may seek habeas relief in federal courts, they must first exhaust available state remedies so as to give the state courts an opportunity to correct alleged violations of federal rights. 28 U.S.C. § 2254(b)(1)(A); *Baldwin v. Reese*, 541 U.S. 27, 29, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004). In order to provide the "opportunity" required, the prisoner must "fairly present" her claim "in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim." *Baldwin*, 541 U.S. at 29, 124 S.Ct. 1347 (quoting *Duncan v. Henry*, 513 U.S. 364, 365–66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) (per curiam); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999)). *See also Smith v. Quarterman*, 515 F.3d 392, 402 (5th Cir.2008) ("The exhaustion of state remedies, codified in § 2254(b)(1), requires a petitioner to provide the highest court of the state a fair opportunity to apply the controlling federal constitutional principles to the same factual allegations before a federal court may review any alleged errors."). If a prisoner fails to exhaust her claim, it becomes procedurally barred.

Here, Byrom has not previously claimed ineffective assistance of counsel based on trial counsel's intentional withholding of evidence. In her motion before this Court, Byrom makes two statements in response to the district court's ruling. First, Byrom claims that, "[i]n post-conviction proceedings, Byrom claimed that she was denied her constitutional right to a fair trial when the trial court excluded Junior's letters." This may be true, but such a claim does not contain an ineffective assistance of counsel claim within it. This Court addressed Byrom's claims regarding the exclusion of Junior's letters in Part II.B, *supra*.

Second, Byrom claims that, she "asserted that her trial and appellate counsel were ineffective for failing to raise this claim as raised in her post-conviction petition." It is not clear, however, that "this claim" refers to an ineffective assistance of counsel claim arising out of a willful discovery violation. This conclusion is underscored by the block quote Byrom uses to illustrate the Mississippi Supreme Court's holding. The text Byrom relies on pertains to the Mississippi Supreme Court's refusal to re-examine whether the

exclusion of Junior's jailhouse letters denied Byrom a fair trial. *See Byrom*, 927 So.2d at 726. No portion of that text, nor any part of the opinion more broadly, even mentions the ineffective assistance of counsel claim asserted here. Furthermore, a review of Byrom's briefs before the Mississippi Supreme Court failed to reveal even a trace of the specific ineffective assistance of counsel claim put forth here.

By contrast, Byrom in fact presented four specific ineffective assistance of counsel claims while seeking post-conviction relief in the state court. She asserted ineffective assistance of counsel claims premised on counsel's (1) failure to pursue a change of venue; (2) general failure to investigate Byrom's case; (3) failure to adequately investigate at both the guilt and sentencing phases; and (4) failure to object to comments made by the prosecution during closing arguments. *Id*. at 715–22. Byrom did not claim, however, that counsel was ineffective in willfully violating discovery rules, causing the exclusion of Junior's letters. Byrom has attempted to shift her ineffective assistance of counsel claims to substantive areas not previously considered by the state courts. *See Smith*, 515 F.3d at 402 (finding a claim unexhausted when a federal claim is shifted to substantive areas not previously raised in state court). Therefore, this claim is procedurally barred.

In the alternative, Byrom contends that her procedural default should be excused because she has demonstrated a "manifest injustice." That is, Byrom claims that her underlying innocence excuses her default since failure to consider the claim would constitute a manifest injustice. Under the applicable precedent, Byrom must meet the "probably resulted" standard when raising a claim of actual innocence to avoid a procedural bar. *Schlup v. Delo*, 513 U.S. 298, 326–27, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). That is, she must "show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Id*. at 327, 115 S.Ct. 851 (quoting *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)). This test is more difficult to meet than a showing of prejudice. Manifest injustice "does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Id*. at 329, 115 S.Ct. 851.

Apart from cursorily raising this contention, Byrom has offered no argumentation on point. Nevertheless, it is clear that Byrom cannot meet this standard with regard to counsel's failure to produce Junior's letters and their subsequent exclusion. As discussed above, the trial court crafted a narrow

> *sanction in response to counsel's conduct. That sanction still allowed counsel to question Junior regarding the letters. The substance of the sanction did not alter the outcome of the trial. Allowing Byrom's trial counsel to handle Junior's letters in front of the jury would not have caused all reasonable jurors to find Byrom not guilty.* Therefore, we deny Byrom's request for an expanded COA to pursue her ineffective assistance of counsel claim.

518 Fed.Appx. at 251-53. [Emphasis added.]

The Fifth Circuit clearly held that the failure of Byrom's trial counsel to handle the letters in front of the jury would not have altered the outcome of the trial. Therefore, while petitioner may be able to demonstrate deficient performance, she cannot demonstrate prejudice. *Strickland* requires a showing of both and that has not been made here.

While petitioner has made the ineffective assistance of post-conviction counsel a separate subsection under this section of her motion, it is more readily discussed in conjunction with this portion of the claim. Therefore, the state will address that portion of subsection C of this claim here.

Petitioner asserts that post-conviction counsel was ineffective in failing to charge trial counsel with ineffective assistance of counsel for failing to produce the letters in discovery. Under this Court's decision in *Grayson*, petitioner can claim the ineffective assistance of post-conviction counsel, however with respect to this claim petitioner cannot demonstrate that she suffered both deficient performance and resulting prejudice as is required by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). While trial counsel may have rendered deficient performance in failing to produce the letters to the state prior to trial, she can not demonstrate resulting prejudice. The underlying substantive claim

was held to be without merit on direct appeal, on post-conviction review, by the United States District Court and by the Fifth Circuit.[5]

The State would submit that post-conviction counsel did not render deficient performance and petitioner was not prejudiced by the failure to raise a claim of ineffective assistance of trial counsel on post-conviction review on the exclusion of the letters. Faced with this Court's decision on direct appeal holding the underlying substantive claim to be without merit it was a reasonable decision to forego a claim of ineffective assistance of counsel based on this substantive issue on post-conviction review. Even if deficient performance of post-conviction counsel exists, clearly this Court had held the merits of the underlying claim to be without merit. That being so post-conviction counsel could not demonstrate the required prejudice to sustain a claim of ineffective assistance of counsel based on this substantive issue based on *Strickland*. The State would submit that petitioner can not demonstrate either deficient performance and resulting prejudice from the action of post-conviction counsel's failure to raise an ineffective assistance of counsel claim based on this issue. The failure to demonstrate both prongs of the *Strickland* test defeats a claim of ineffective assistance of counsel. Petitioner is entitled to no relief on this claim of ineffective assistance of counsel.

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[5]We would note that the underlying substantive claim was presented to the United States Supreme Court in petitioner's petition for writ of certiorari after direct appeal and again in the petition from the Fifth Circuit's decision. In both instances certiorari was denied.

In discussing a claim of ineffective assistance of post-conviction counsel in *Grayson, supra*, this Court held:

> ¶ 43. On direct appeal, we considered Grayson's arguments regarding his statements and rejected them. *Grayson I*, 806 So.2d at 247–49. We again rejected similar arguments in Grayson's first PCR proceedings. *Grayson II*, 879 So.2d at 1012–13. Grayson is attempting to recast his argument on direct appeal under a different legal theory-ineffective assistance of counsel. This claim is procedurally barred. MISS. CODE ANN. § 99–39–21(2) (Rev.2007).
>
> ¶ 44. Without waiving the procedural bar, Grayson is not entitled to relief. Grayson asserts in his motion that, after he requested counsel, he did not initiate contact with the police sufficient to waive his invocation of the right to counsel. He contends that, when he requested to speak to officers, it was for very limited purposes and was not a waiver of his request for counsel. However, Grayson fails to offer sufficient evidence in support of his assertions. In fact, his own affidavit offered in support of his motion does not even mention the facts surrounding his statements to police. Upon a thorough review of the direct-appeal record, the prior PCR pleadings and the exhibits offered by Grayson in support of his current post-conviction motion, it is clear that Grayson has failed to show that counsel's performance was deficient or that any such deficiency prejudiced his case. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *Walker v. State*, 863 So.2d 1, 17 (Miss.2003).
>
> ¶ 45. Since this claim lacks merit, Ryan's failure to raise this claim in the original PCR proceedings did not prejudice Grayson. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. This claim does not meet an exception to the procedural bars and should be dismissed.
>
> 118 So.3d at 135.

As was the case in *Grayson*, petitioner's underlying substantive claim was addressed and decided against petitioner on direct appeal and on post-conviction review as well as on habeas review. Byrom is simply trying to recast this claim under the different legal theory of ineffective assistance of counsel. Therefore, this claim is procedurally barred from

consideration. As this Court held in *Grayson*, *supra*, this is simply an attempt to recast on direct appeal under a different legal theory – ineffective assistance of counsel. The claim is procedurally barred under MISS. CODE ANN. § 99–39–21(2).

Further, since the claim was decided on the merits against petitioner on direct appeal and again on post-conviction review she cannot show that post-conviction counsel rendered deficient performance in failing to raise a claim of ineffective assistance of counsel based on this claim on post-conviction review. Finally, because petitioner can not demonstrate both deficient performance and resulting prejudice she is not entitled to relief on the ground of ineffective assistance of either trial counsel or post-conviction counsel under *Strickland*. Petitioner is entitled to no relief on this claim.

B/C. Counsel were ineffective is failing to present evidence of the circumstances surrounding Byrom's confession that would have shown it was unreliable.

Next Byrom presents a claim that counsel were ineffective in failing to present evidence concerning the circumstances of Byrom's confession. She contends that had this information been presented it would have cast doubt on the circumstances of the confession. On direct appeal petitioner raised two claims challenging the admission of her confessions.

> VI. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT BYROM'S AMENDED MOTION TO SUPPRESS AND TO COMPEL DISCOVERY.
>
> VII. WHETHER THE TRIAL COURT ERRED IN REFUSING TO REOPEN THE SUPPRESSION HEARING ON MOTION OF THE DEFENDANT TO TAKE THE TESTIMONY OF EDWARD BYROM, JR., AND IN HAVING EX PARTE COMMUNICATIONS WITH THE ATTORNEY FOR

This Court addressed both of these claims on the merits and denied relief. *See* 863 So.2d at 852-63, ¶¶ 31-82; 863 So.2d at 863-64, ¶¶ 85-91. This Court spent nearly twelve pages of the direct appeal opinion discussing the suppression issue and found no merit to petitioner's claim. As with the last claim we will discuss the claim of ineffective assistance of trial and post-conviction counsel under this subsection.

The claim regarding the suppression of the confession was again presented to the United States District Court on habeas review. The district court held:

> **V. Involuntary Statements & Privilege Against Self Incrimination**
>
> Following her husband's murder, Petitioner gave statements to police at (1) 8:38 p.m. on June 4; (2) 10:47 p.m. on June 4; (3) 6:53 a.m. on June 5; (4) 9:00 a.m. on June 6; and (5) 3:03 p.m. on June 7. Petitioner incriminated herself in her husband's murder in the last four statements, and all of the statements, with the exception of the last one, were taken while Petitioner was hospitalized. The trial court held a suppression hearing to determine whether the prosecution would be allowed to introduce the incriminating statements, and while the court found Petitioner's first two self-incriminating statements inadmissible because of law enforcement's failure to adequately inform Petitioner of her Miranda[24] rights, it ultimately found the last two statements admissible. (Trial Tr. Vol. 11, 278–82). Petitioner argues that all of the statements should have been suppressed as (1) the police coercion in her initial statements carried over and rendered the subsequent statements involuntary; and (2) even voluntarily made, the subsequent statements were not admissible because the initial interrogation in the absence of valid Miranda warnings prevented the later warnings from operating effectively.
>
> According to the report of Dr. Keith A. Caruso, the psychiatric expert defense counsel obtained at trial, and the affidavit of Dr. Anthony J. Verlangieri, a professor of pharmacology and toxicology who was asked by federal habeas counsel to review records in this case, Petitioner was receiving twelve different medications at the time she was interrogated at 10:47 p.m. on

June 4, 1999. These medications included sleeping pills, muscle relaxers, and pain medication. (Pet. Ex. 9, Aff. of Dr. Verlangieri; Reply Ex. 6, Decl. of Dr. Caruso). She had also been given an injection of Librium at 4:50 p.m., and the nurses were under orders to administer the injection every four hours if Petitioner needed it.[25] (*See* ECF No. 64–1)[26]. Dr. Caruso evaluated Petitioner in October 2000 in anticipation of trial, and his report states that Petitioner suffered from recurrent and severe depression, alcohol dependence, Munchausen's Syndrome, an adult history of physical abuse, lupus, pneumonia, anemia, Factor X deficiency, hypertension, fibromyalgia, and chronic headaches and back pain at the time of the offense. (*See, e.g.*, Reply Ex. 6, Ex. C).

At 8:38 p.m. on June 4, Officer Ricky Marlar interviewed Petitioner, who was not then a suspect, regarding her knowledge of firearms in the home. (*See* Trial Tr. Vol. 10, 136–150; Trial Tr. Vol. 11, 151–53). Officer Marlar also wanted to question Petitioner about the relationship between her husband and her son, as he suspected that Junior was involved in the murder. (Trial Tr. Vol. 10, 138). Before he spoke to Petitioner, he spoke to Anna Southward, the registered nurse on duty at the time, regarding whether Petitioner was medicated in a manner that would affect her understanding. (*Id*. at 148). Nurse Southward was also present when Petitioner was being questioned, and Officer Marlar did not think that Petitioner's ability to understand was inhibited during the interview. (*Id*. at 139; Trial Tr. Vol. 11, 153). Officer Marlar read Petitioner her *Miranda* rights off of a wallet card. (*Id*. at 140). He advised Petitioner:

> Before we ask you any questions you must understand your rights. You have the right to remain silent. Anything you say can and will be used against you in a court or other proceedings. You have the right to have an attorney present during any interrogation. If you cannot afford an attorney and so desire, one will be appointed for you prior to any questions. Do you understand these rights? Do you wish to talk to us at this time?

(*Id*. at 140). After satisfying himself that Petitioner understood the rights and obtaining a waiver from her, he proceeded to question her. (*Id*. at 140–41). He wrote out the statement she gave, and she signed it. (*Id*. at 138–39).

On the same evening, Junior was taken from the Byrom home by law enforcement officers. First, he was taken for a gunpowder residue test, and

then he was taken to the Sheriff's Department to wait until Sheriff Smith arrived to question him. The Court notes that there is inconsistency in the reports of the law enforcement officials as to whether Junior was interviewed before Petitioner was interviewed. Officer Marlar's written report suggests that Junior was interviewed first, but that as he did not consider her a suspect at the time, Junior obviously did not implicate Petitioner in the crime during that initial interview. (*See, e.g.*, Trial Tr. Vol. 10, 142–43). However, Deputy Edmondson and Sheriff Smith interviewed Junior at the Sheriff's Office on June 4, and both men state that Junior indicated his mother's involvement in the crime prior to them interviewing her at 10:47 p.m. on June 4. (Trial Tr. Vol. 11, 155, 161–62, 241–44).[27] The transcript on the 10:47 p.m. interrogation contains references to facts Sheriff Smith would not have known absent having spoken to someone with knowledge of the family, however, so it is reasonable to conclude that Junior was, in fact, interviewed first. (*See, e.g.*, SCP Vol. 3, 338). Although there was testimony that the officers believed that Junior's interview was being tape recorded, no actual recording was made. (*See* Trial Tr. Vol. 11, 172).[28]

After speaking to Junior, Sheriff Smith and Deputy Edmondson went to the hospital and conducted an interview with Petitioner at 10:47 p.m. *Sheriff Smith stated at the suppression hearing that Dr. Kitchens indicated that Petitioner's medications would not prevent her from understanding questions or responding appropriately thereto*. (*Id*. at 159). *Dr. Kitchens and Nurse Southward were present during the interview*. (*See id*.). Sheriff Smith first inquired whether Petitioner had her rights read to her previously that day. (*See* SCP Vol. 3, 338). Petitioner stated that she had been previously read her rights.[29] Sheriff Smith informed her:

> DS: Ok. I'm going to say them to you again. You have the right to remain silent. Anything you say can and will be held against you in a court of law. If [y]ou can't afford an [a]ttorney, one will be appointed for you. If you decide that you do want to answer questions, you do have the right to stop at any time. Do you understand your [r]ights?
>
> MB: Yes.

(SCP Vol. 3, 338). Almost immediately thereafter, Sheriff Smith told her that there was "a problem" and that Junior "went ahead and told [Sheriff Smith] everything." (SCP Vol. 3, 338). When Petitioner asked what Junior said, Sheriff Smith told her that Junior stated that he and his mother were tired of

the regular beatings, the last of which occurred when Petitioner and Edward came home from the Key West Inn, and that she told Junior to find someone to "send" to her. (*Id*. at 338). He additionally said that Junior confessed that he sent two or three people, but that Junior did not know which person Petitioner hired. (*Id*.). Sheriff Smith said that he had already gotten a statement from Junior, and that Petitioner should not "let him be out here by himself on this." (*Id*.). When Petitioner continued to deny any knowledge of what Sheriff Smith was talking about, Smith said that she was "trying to leave [Junior] out there by himself." (*Id*. at 339). Sheriff Smith told her that he knew it would be the most difficult thing that she had ever done, but that she needed to identify the other "boys" involved so that Petitioner and Junior would not be in danger. (*Id*. at 340). Immediately thereafter, Petitioner told the officers that she had talked to a "boy named Joey." (*Id*.). Sheriff Smith again indicated that Petitioner was being evasive, as Junior had already talked, and that Junior told them that about a week prior to the murder that Petitioner stated that "it was fixing to happen." (*Id*.). When she denied telling Junior that, Sheriff Smith told her that they would be able to pull together enough statements to prosecute and not to leave Junior "to bite the big bullet" by himself. (*Id*.). Petitioner said that she would not let that happen, and that she would take full responsibility. (*Id*.).

Sheriff Smith reminded her that she would be in danger if law enforcement failed to arrest the triggerman. (*Id*. at 341). After more questioning, Sheriff Smith stated that she was leaving out details, and that her cooperation would matter when he spoke to the judge. (*Id*. at 344). Sheriff Smith told her that he would have to tell the judge that Petitioner had memory lapses and they had to "pick it out of her," which the judge would not like. (*Id*.). Within a few more questions, she identified the person she had hired, which was Gillis. (*Id*. at 345). By the time that Sheriff Smith concluded the interview at 11:13 p.m., Petitioner had been placed in custody. (*See id*. at 346–47).

Sheriff Smith stated that he believed that Petitioner understood her rights and voluntarily waived them, particularly as they had been read earlier by Officer Marlar. (Trial Tr. Vol. 11, 159–60). He admitted that, as part of his strategy to get Petitioner to talk, he told her not to leave Junior "to bite the big bullet" and that the judge would ask whether she cooperated. (*Id*. at 165–66). At the suppression hearing, Sheriff Smith said he gave Petitioner Miranda warnings from memory, and that he inadvertently omitted from the warnings her right to an attorney before and during questioning. (Trial Tr. Vol. 11, 164;

see also SCP Vol. 3, 338).

Petitioner's third interview occurred at 6:53 a.m. on June 5. Sheriff Smith questioned Petitioner to determine her knowledge of how the crime was actually committed. (*See, e.g.*, State Trial Ex. 4; SCP Vol. 3, 348–351).[30] Petitioner's Miranda rights were not read to her before questioning began. At the conclusion of the eleven minute interview, Smith asked her whether her rights had been read to her previously. (*See id.*). At the suppression hearing, Sheriff Smith stated he felt at the time as though Petitioner knew and understood her rights. (Id. at 186–87).

On June 6, 1999, Petitioner was once again questioned by Sheriff Smith. (*See* State Trial Ex. 5). At the beginning of the interview, Smith stated:

> DS: Before we ask you any questions, you must understand your rights: You have the right to remain silent. Anything you can and will be used against you in a court or other proceedings. You have the right to have an attorney present during any interrogation. If you cannot afford an attorney,[ ] and so desire, one will be appointed for you prior to any questioning. If you choose to answer questions or make a statement, the right to stop at any time. Do you understand your rights?
>
> MB: I understand.
>
> DS: Are you willing to go ahead and talk to us again?
>
> MB: Oh, yes.

(SCP Vol. 3, 352; see also Trial Tr. Vol. 11, 187). In this interview, Petitioner was again questioned about her knowledge of anyone else's involvement in the crime. She provided the officers details about how she intended to pay Gillis, along with details of the prior failed attempts to shoot Edward. (*See id.*).[31]

Petitioner's final interview was conducted by Ralph Dance, a criminal investigator with the District Attorney's office, at 3:03 p.m. on June 7, 1999, at the Tishomingo County Sheriff's Department. (*See* SCP Vol. 3, 369; State Trial Ex. 6).[32] The transcript states:

> [RD:] Ms. Byrom, we are here to ask you a few questions, but before

we do, I know your rights have been read to [you] on several occasion[s], I[am] sure, since all of this took place, is that correct?

MB: Yes.

RD: I'm going to read them to you again. Before we ask you any questions, you must understand your rights: You have the right to remain silent. Anything you say can and will be used against you in a court or other proceedings. You have the right to have an attorney present during any interrogation. If you cannot afford an attorney, and so desire, one will be appointed for you prior to any questioning. If you choose to answer questions or make any statement, you have the right to stop at any time. It says, I, Michelle Byrom, have had read to me my rights and I fully understand my rights. Do you understand everything I've read to you there?

MB: Yes.

RD: I'm going to go ahead and read to you a Waiver of Rights. [T]his is saying you agree to talk to us at this time. To my understand you've already talked to them.

MB: At anytime I'm allowed to bring in my attorney?

RD: That's your options. I will read this to you and it will explain it to you. It says ... [that Michelle Byrom has been informed of the above cited rights]. I fully understand those rights. I wish to waive those rights and agree to answer questions and/or make a statement. I do voluntarily. There have been no promises or threats made to me. This you can do at your own free will, do you understand all that? Do you want to talk to us at this time?

MB: Yes.

RD: Are you willing to talk to us at this time?

MB: Yes.

(SCP Vol. 3, 369; State Trial Ex. 6). Petitioner executed the waiver of rights and gave a statement recounting her knowledge of the plan to murder Edward,

as well as the physical and sexual abuse Edward inflicted upon her. (*See id*.). Investigator Dance testified at the suppression hearing that he believed that she fully understood what was happening and was fully competent at the time. (Trial Tr. Vol. 11, 212). Petitioner testified at the suppression hearing that she did not remember much of anything about the interviews, as she was under the influence of numerous medications at the time she was hospitalized. (*See* Trial Tr. Vol. 11, 225–227).

The trial court ultimately found the June 4 statement inadmissible because of defective *Miranda* warnings and the June 5 statement inadmissible because of the absence of the warnings. (Trial Tr. Vol. 11, 278). It found that the rights as stated by Sheriff Smith on June 6, however, sufficiently advised Petitioner of her rights. (*Id*. at 281–82). The court noted that Petitioner had been read her rights on two previous occasions, one of which was the "classic, standard" *Miranda* advice, such that she was not operating "in a total vacuum" at the time the rights were read by Sheriff Smith on June 6. (*Id*.). The trial court also rejected Petitioner's challenge to the June 7 statement, finding that Investigator Dance's recitation involved the classic warning. (*Id*. at 282–84). At trial, Petitioner's statements on June 6 and June 7, 1999, were played for the jury. (*See, e.g*., Trial Tr. Vol. 15, 852, 878). The jury was later instructed on how to view any discrepancies between the tapes and the transcripts. (*See id*. at 878).

On direct appeal, Petitioner argued that the trial court erred in failing to grant her motion to suppress the statements she gave to law enforcement officials on June 6 and June 7, 1999. *See Byrom I*, 863 So.2d at 855–861. She maintained that the June 6 statement was inadmissible due to the defective *Miranda* warnings given, and that the June 7 statement was not freely and voluntarily given. *See id*. at 855–56.[33] The court rejected Petitioner's claim, finding that Petitioner could not have misunderstood her rights during the June 6 interview, and that the statement was merely cumulative of the June 7 statement in which she was given the classic warnings and executed a written waiver of rights. *Id*. at 858. Any error that stemmed from the admission of the June 6 statement was harmless, the court found, as some variation of rights had been given to Petitioner twice prior to the June 6 warnings. *Id*.

Relying upon the Supreme Court case of *Oregon v. Elstad*, 470 U.S. 298, 316–18, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), the court also rejected Petitioner's claim that the prior unconstitutional interrogations affected the admissibility of the properly warned statements, as well as her claim that

Sheriff Smith threatened and deceived her during interrogations. *Id*. at 858–61. The court found that Petitioner had failed to demonstrate that the June 6 and June 7 statements were obtained by any exploitation of the earlier statements, and that the evidence showed that she knowingly waived her rights after being clearly advised of them. *See id.* at 859. The court noted Petitioner's argument that Sheriff Smith made statements threatening Junior with prosecution and promising leniency to her if she cooperated with law enforcement, but determined that these statements were of no consequence, as the sheriff's comments were made in statements that were excluded. *Id*. at 860. It otherwise found no prejudice to Petitioner as a result, as she had already confessed her involvement and Junior's involvement in the crime prior to the comments. *Id*. at 861. Additionally, the court noted that the questioning produced no result, as Petitioner did not reveal the identity of anyone else that might have been with Gillis at the time of the murder, which is what the questioning was intended to produce. *Id*.

The Court first considers Petitioner's claim that the absence of valid *Miranda* warnings in her initial interrogation prevented the subsequent warnings from being effective. She argues that the Mississippi Supreme Court failed to apply the correct precedent to her claim, and that it otherwise applied the law in an unreasonable manner, such that she is entitled to relief on this claim. The Court's consideration of this claim is particularly guided by two Supreme Court cases, *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985) and *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). In these cases, the United States Supreme Court addressed situations where a suspect in custody confessed without having received a *Miranda* warning and then, after being given a *Miranda* warning, confessed again. In *Elstad*, a suspect made a self-incriminating statement while at his home during a robbery investigation, and once he was taken to the police station and given *Miranda* warnings, he made a second statement. *See* 470 U.S. at 300–01, 105 S.Ct. 1285. He attempted to suppress the postwarning confession. The Court found that "there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary." *Id*. at 318, 105 S.Ct. 1285.

In *Seibert*, the police followed a departmental policy of deliberately withholding *Miranda* warnings in order to elicit a confession from the suspect, and then giving the warnings and obtaining a waiver prior to eliciting a second confession. *Seibert*, 542 U.S. at 609–10, 124 S.Ct. 2601. The plurality found that the issue is whether the midstream *Miranda* warning allowed it to

effectively function, which required that the warning serve to advise the suspect that he had a real choice as whether to give a statement. *See id.* at 611–12, 124 S.Ct. 2601. Justice Kennedy, who wrote a concurrence and provided the fifth vote in the case, determined that the statements from the second interrogation are inadmissible if "the two step interrogation was used in a calculated way to undermine the *Miranda* warning." *Id*. at 622, 124 S.Ct. 2601 (Kennedy, J., concurring).

There is a federal circuit split regarding whether the plurality test or the "deliberate two-step strategy" test in Justice Kennedy's concurrence controls. *See, e.g.*, *United States v. Capers*, 627 F.3d 470, 476 (2nd Cir.2010) (noting that the Second, Third, Fifth, Ninth, and Eleventh Circuits apply Justice Kennedy's approach in *Seibert*). The Fifth Circuit follows the Kennedy approach. *See United States v. Nunez–Sanchez*, 478 F.3d 663, 668 n. 1 (5th Cir.2007) (finding *Seibert's* holding in Kennedy's concurrence as it provided the fifth vote for the plurality and was decided on narrower grounds); *United States v. Courtney*, 463 F.3d 333, 338–39 (5th Cir.2006) (adopting concurring opinion in *Seibert*). Therefore, in the absence of evidence that a two-step strategy was deliberately employed, the *Elstad* rule applies, which provides that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." 470 U.S. at 318, 105 S.Ct. 1285.

There is no reason to assume that law enforcement acted with a nefarious intent and deliberately withheld effective *Miranda* warnings in this case. On June 4, *Sheriff Smith consulted Petitioner's physician prior to questioning her, and he had Dr. Kitchens and a nurse present for the questioning itself.* Moreover, Petitioner was classically advised of her rights by Officer Marlar a few hours before Sheriff Smith asked her if she had been read her rights. Though she answered affirmatively, Sheriff Smith attempted to administer the rights a second time prior to asking her any questions. The fact that he omitted from his recitation her right to consult counsel prior to questioning, in light of all of the other circumstances, demonstrates inadvertence more than it does an attempt to deliberately bypass Petitioner's rights. Sheriff Smith states in the transcript of the June 5 interrogation that he forgot to administer the warnings at the beginning of the interview, and Petitioner indicates that her rights had previously been read to her. In the June 6 and June 7 statements, Petitioner was immediately given *Miranda* warnings before any questioning began. Moreover, Petitioner was questioned on

subsequent days as the investigation progressed, and not immediately properly warned after she made her first incriminating statement with absent or improper warnings. Petitioner has not demonstrated that law enforcement officials deliberately withheld *Miranda* warnings to gain a tactical advantage. Therefore, the Court does not find that the Mississippi Supreme Court's decision failed to identity and apply the proper standard, which is the voluntariness rule of *Elstad*. *See Nunez–Sanchez*, 478 F.3d at 668 (where two-step strategy is not used, admissibility of postwarning statements governed by *Elstad*).

Petitioner maintains that the coercion present in the initial interrogations deprived her of any real choice as to whether to continue speaking to police during the later interrogations, thereby rendering the subsequent confessions involuntary. She argues that the Mississippi Supreme Court unreasonably applied *Elstad* in determining that it was moot to argue that the sheriff's remarks in the improperly warned interrogation influenced Petitioner's remarks in the subsequent interviews. The Mississippi Supreme Court also found that Petitioner failed to "prove that the admitted statements were obtained by exploiting the excluded statements. Rather, it is clear from the totality of the circumstances that [Petitioner] was advised of her rights on numerous occasions and that she understood and knowingly waived those rights." *Byrom I*, 863 So.2d at 859. Under *Elstad*, there is no requirement that the trial court exclude Petitioner's properly warned confessions if there was no police coercion in the initial interrogations that carried over into the subsequent confessions. *See Elstad*, 470 U.S. at 318, 105 S.Ct. 1285 ("There is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary.").

Whether a confession was obtained in violation of a defendant's rights under the Due Process Clause is an inquiry courts consider under the totality of the circumstances. *See Withrow v. Williams*, 507 U.S. 680, 693, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993). While factors such as "the length of the interrogation, its location, its continuity, the defendant's maturity, education, physical condition, and mental health" are all relevant, "coercive police activity is a necessary predicate" of a determination that a confession was not voluntary. *Id.; Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Petitioner argues that her initial statements were coerced because at the June 4 interview (1) *she was hospitalized with double pneumonia and heavily medicated*; (2) the sheriff urged her to confess to protect her son from prosecution; (3) the sheriff falsely told her that Junior had

already confessed; and (4) the sheriff indicated her level of cooperation would be communicated to the trial judge. Additionally, she maintains that the sheriff followed up on some of Petitioner's statements in his June 5 interview, and that he began suggesting that she intended to use life insurance proceeds to pay Gillis, thereby fishing for aggravating factors to support the death penalty. She argues that the court's decision failed to properly apply the law on voluntariness, and it unreasonably determined facts in light of the evidence.

The Court's inquiry is whether the inculpatory statements made by Petitioner on June 4 and June 5 were the product of police coercion. If they were not, then under *Elstad*, there is no reason for the Court to presume a coercive effect with regard to the properly warned statements. *See Elstad*, 470 U.S. at 318, 105 S.Ct. 1285. If they were the result of police coercion, the Court must consider whether the coercion carried over into the June 6 and June 7 statements. *See, e.g., Elstad*, 470 U.S. at 310, 105 S.Ct. 1285 (whether second confession insulated from earlier, tainted confession depends on a number of factors). After considering the totality of the circumstances in this case, the Court finds that Petitioner has not demonstrated that the decision of the Mississippi Supreme Court warrants relief.

Petitioner's claim that her physical condition and medication regimen at the time she was questioned resulted in involuntary statements is, to the extent it is independently raised, barred from federal habeas review because it was never presented to the State courts. See Whitehead v. Johnson, 157 F.3d 384, 387 (5th Cir.1998) (the claim made in federal habeas must be the "'substantial equivalent' of one presented to the state court to satisfy the "fairly presented" requirement). However, the circumstances of Petitioner's confession, which includes that she was hospitalized with double pneumonia and medicated at the time of the obtained statements, are relevant to whether the statements were voluntarily given. See, e.g., Withrow, 507 U.S. at 693–94, 113 S.Ct. 1745. Sometime subsequent to the initiation of her habeas proceedings, Petitioner secured the assistance of Dr. Verlangieri to review various medical and trial records in her case. (See Pet. Ex. 9). Dr. Verlangieri opines that there is a reasonable probability that Petitioner's decision-making abilities were impaired at the time she gave a statement to law enforcement. (See id.). However, law enforcement officials in this case consulted with Petitioner's own personal physician on June 4 and received his clinical opinion that Petitioner's ability to understand and answer would not be adversely effected by the medications she had been given. At the suppression hearing, Sheriff Smith, Deputy Edmondson, and Officer Marlar

all testified that Petitioner appeared coherent and appeared to understand what was transpiring during the interviews on June 4. (See Trial Tr. Vol. 10, 139; Trial Tr. Vol. 11, 153, 159, 250–51). The record evidence supports a determination that all of the law enforcement officers present, as well as Petitioner's physician and the nurse on duty, believed her to be able to freely understand and comprehend the inquiries posed to her on June 4, 1999. Dr. Verlangieri's conclusion, on the other hand, comes years after the fact and is based solely upon his review of documents.

Petitioner has failed to demonstrate that Sheriff Smith falsely told Petitioner during the June 4 interview that Junior had already confessed. First, the Court notes that even if Petitioner could demonstrate that the sheriff misled her, a misrepresentation of the evidence is insufficient to make an otherwise voluntary confession inadmissible. *Frazier v. Cupp*, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) (holding interrogator's misrepresentation to suspect that his co-suspect had already confessed did not render suspect's subsequent confession involuntary). Moreover, there is sufficient record evidence to make it a reasonable conclusion that Junior did in fact give an inculpatory statement to law enforcement prior to Petitioner's 10:47 p.m. interview on June 4. Sheriff Smith testified at the suppression hearing that he spoke to Junior first, and that Junior told him that his mother would know who murdered his father. (*See* Trial Tr. Vol. 11, 161–62). Deputy Edmondson testified to the same. (*Id*. at 242–43). As stated earlier, the information relayed from Sheriff Smith to Petitioner during the June 4 interview regarding what Junior said suggests that Smith had spoken to Junior prior to his interview with Petitioner. (*See, e.g*., SCP Vol. 3, 338).

Additionally, Petitioner's allegation that the June 5 interrogation was instigated in order for the sheriff to gather facts in support of an aggravating factor, *i.e*., that she was going to pay Gillis for the murder, is not a reasonable conclusion from a review of the transcripts. Sheriff Smith learned during the June 4 interview that Petitioner offered Gillis money so that he could go to Florida in exchange for Edward's murder. (*See* SCP Vol. 3, 342–43). While Petitioner may have denied at that time that she was going to get the money out of the life insurance proceeds, it does not change the character of the exchange, which was a murder in exchange for something Gillis wanted. By the end of the interview on June 4, Petitioner had confessed that she had hired Gillis to kill her husband. The subsequent interrogations did not significantly alter any facts relevant to her guilt, but rather, fleshed out more details of the planning and execution of the crime. (*See* SCP Vol. 3, 348–85).

The bulk of Petitioner's argument against the voluntariness of her later confessions is her allegation that Sheriff Smith coerced her first inculpatory statement on June 4 by urging her to admit her own involvement in the crime in order to protect Junior. Specifically, she notes that the Sheriff told her no less than three times during the interview that she was leaving Junior "by himself" and that he would "bite the big bullet" unless she confessed her involvement. (*See, e.g.*, SCP Vol. 3, 339–40). Petitioner argues that the facts of her case are like those in *Lynumn v. Illinois*, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963), where the Supreme Court found involuntary the confession of a suspect who was told she would lose her welfare benefits and custody of her children if she did not confess. However, Petitioner's circumstances were markedly different than the situation in *Lynumn*. In *Lynumn*, the suspect was being threatened with the loss of rights and benefits that the police had no authority to restrict and that were unrelated to the crime for which she was being questioned. *See id.* at 534, 83 S.Ct. 917. The record demonstrates that when the interview with Petitioner began on June 4, Sheriff Smith identified the persons present, administered the *Miranda* warnings previously noted, and then told Petitioner what Junior had said about the murder. (*See* SCP Vol. 3, 338). By the time Petitioner was interviewed, Junior had already informed law enforcement of his own involvement in the murder and told them that a third person was involved. (*See id.*). In short, Sheriff Smith confronted Petitioner with the facts as police understood them up to that point in the investigation rather than misrepresent his authority to act in an attempt to invoke in Petitioner some otherwise unwarranted fear.[34]

Additionally, the Court does not find that it was unreasonable to determine that the Sheriff's remarks about Petitioner's perceived level of cooperation were not prejudicial. By the time Sheriff Smith alluded to the fact that Petitioner might receive some benefit for cooperating, she had already confessed that she offered a boy named Joey some money to kill her husband. (*See* SCP Vol. 3, 344). Therefore, Petitioner has not demonstrated that the sheriff's comment, even if improper, resulted in her confession. *See Hopkins v. Cockrell*, 325 F.3d 579, 584 (5th Cir.2003) (finding there must be a link between the coercive conduct and the confession in order to demonstrate that a confession was involuntary).

The Mississippi Supreme Court found that "it is clear from the totality of the circumstances that [Petitioner] was advised of her rights on numerous occasions and that she understood and knowingly waived those rights." *Byrom I*, 863 So.2d at 859. Petitioner has failed to demonstrate that, under the totality

of the circumstances, her statements were involuntary. Petitioner was undisputedly properly given *Miranda* warnings by Officer Marlar approximately two hours before Sheriff Smith interrogated Petitioner on June 4. *Sheriff Smith spoke with Petitioner's doctor prior to questioning her, and her doctor was present in the room for questioning.* After giving an introductory statement as to who was present, the date, and the time, Sheriff Smith immediately informed Petitioner that (1) she had a right to remain silent; (2) failure to exercise that right would result in what she said being used against her in court; (3) that an attorney would be appointed for her if she could not afford one; and (4) she had the right to stop the interview if she decided that she did not want to answer questions. There is evidence that Junior had confessed his own involvement in a murder-for-hire scheme and implicated his mother's involvement prior to the initial interview with Petitioner. Additionally, while Sheriff Smith did imply that it would benefit Petitioner if she cooperated, he did so at the point in the interview where she had already confessed that she had offered to pay someone to kill her husband. The fact that Petitioner was confronted with facts evidencing her role in her husband's murder, and that it was her son who gave police that information, does not render questioning about the matter inherently coercive. *See Colorado v. Connelly*, 479 U.S. 157, 169–70, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) (issue with voluntariness is coercion, not whether product of suspect's abstract free will).

Petitioner has failed to demonstrate that the statements given on June 4 and June 5 were involuntarily given, or that it was unreasonable to conclude that June 6 and 7 statements, which were in compliance with the mandates of *Miranda*, were properly admitted. Therefore, the Court denies relief on this claim, and it will be dismissed.

_____

24. In *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Supreme Court held that the privilege against self-incrimination requires that law enforcement officials inform a suspect in custody of his (1) right to remain silent; (2) that any statement he makes may be used against him in court; and (3) that he has the right to retained or, if he cannot afford to retain, appointed counsel present before being questioned. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). A statement made during a custodial interrogation that lacks these warnings must be suppressed. *Oregon v. Elstad*, 470 U.S. at 307, 105 S.Ct. 1285. These rights may be waived if the waiver was knowing, intelligent, and voluntary under the totality of the circumstances. *Miranda*, 384 U.S. at 475, 86 S.Ct.

1602.

25. Librium is generally prescribed to relieve anxiety and to control agitation caused by alcohol withdrawal. *See, e.g.*, Harold L. Kaplan & Benjamin J. Sadock, Synopsis of Psychiatry: Behavioral Sciences/Clinical Psychiatry 399 (8th ed. 1998).

26. The Court notes that, although records from Dr. Kitchens were filed as a trial exhibit by the defense in this case, there are no records from June 1999 in the trial record. The Court has since expanded the record in this case to include Petitioner's June 1999 medical records. (*See* ECF No. 65).

27. The Court found only one indication in the reports as to the timeline of events. Deputy Pannell's statement indicates that the officers did not leave the crime scene to return to the Sheriff's Office until approximately 10:10 p.m. on June 4. (*See* SCP Vol. 3, 418–19). It is clear from the reports that Officer Edmondson and Officer Marlar took Junior to have a gunpowder residue test performed on his hands. (*See id*. at 415, 417, 418). Edmondson then transported Junior to the Sheriff's Office and sat with him until Sheriff Smith arrived. (*See, e.g.*, *id*. at 417).

28. Sheriff Smith again spoke to Junior after the 10:47 p.m. interview with Petitioner. (*See* Trial Tr. Vol. 11, 258). Junior also gave a subsequent statement to police which was recorded and transcribed. (*See* State Trial Ex. 69).

29. One transcript of this interview contains a typographical error as confirmed by Petitioner's audible responses on the tape recording. The transcript should read that she confirmed that her rights had been read to her previously. (*See* Trial Tr. Vol. 11, 157–58).

30. Officers Rodney Pannell and Donnie Edmondson were also present.

31. Deputy Edmondson testified that he was present during the interview. (*See* Trial Tr. Vol. 11, 252–53).

32. Officers Pannell and Bobby Flynt were also present during the interview. (*See* State Trial Ex. 6)

33. Petitioner also made an argument concerning the burden of proof at the

> suppression hearing on direct appeal, which she does not make here. *See id.* at 857–58. She also argued that the letters written between Junior and her should have been excluded as the fruit of the poisonous tree, which she does not assert in federal habeas. *Id*. at 859–860.
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> 34. Petitioner also claimed that the Mississippi Supreme Court made an unreasonable determination of facts in finding that Petitioner had already implicated herself and Gillis by the time Sheriff Smith told her on June 6 that Junior was being left to "bite the big ole bullet" unless she identified the other party involved. (*See* SCP Vol. 3, 365). As the Mississippi Supreme Court considered only the statements admitted at trial, Petitioner had already implicated herself and Gillis by the time the June 6 statement was made. Regardless of the court's failure to discuss the issue, it does not change this Court's conclusion as to the reasonableness of the decision reached on direct appeal. *See, e.g., Fields v. Thaler*, 588 F.3d 270, 279 (5th Cir.2009)
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> 817 F.Supp.2d at 892-902. [Emphasis added.]

The district court clearly addressed, in detail, the claims that petitioner presents here. Including the medication claim. It must be remembered that petitioner's personal doctor was consulted before the interrogation and was in the room during one of them.

The confession question was also one of the claims that the Fifth Circuit discussed on the merits in its opinion. The Fifth Circuit held:

> **C. Coerced Statements**
>
> In the wake of Edward's murder, the police interviewed Byrom on five separate occasions: (1) 8:38 p.m. on June 4; (2) 10:47 p.m. on June 4; (3) 6:53 a.m. on June 5; (4) 9:00 a.m. on June 6; and (5) 3:03 p.m. on June 7. The first four interviews took place while Byrom was still hospitalized, and Byrom implicated herself in interviews two through five. At trial, the court excluded interviews two and three because of defective *Miranda* warnings. It permitted the introduction of interviews four and five, however, against Byrom's objection. Byrom now claims that the trial court erred when it admitted these two interviews because interviews two and three were the product of coercion and that coercion carried over, thus marring her subsequent statements.

The Mississippi Supreme Court dismissed this argument as moot because the trial court excluded the interviews during which coercive conduct allegedly occurred, *i.e*., interviews two and three. *Byrom v. State*, 863 So.2d 836, 861 (Miss.2003) ("This argument is moot because the statements were excluded.... The remedy for coercive interrogation practices is exclusion of the statements in which the coercion was present. It does not require the exclusion of all subsequent interrogations that are preceded by proper *Miranda* warnings and are not coercive."). The Supreme Court has made clear, however, that coercive tactics can indeed carry over to subsequent interviews, implicating Fifth Amendment concerns, regardless of whether earlier interviews are suppressed. *Oregon v. Elstad*, 470 U.S. 298, 309–10, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). Indeed, the Supreme Court has enumerated factors for determining whether coercion taints subsequent interrogations. *See id.* at 310, 105 S.Ct. 1285 ("When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession."). As explained below, since neither AEDPA exception applies to the Mississippi Supreme Court's determination on the merits, Byrom's claim fails. *Cf. Richter*, 131 S.Ct. at 787, 131 S.Ct. 770 ("And if the state court denies the claim on the merits, the claim is barred in federal court unless one of the exceptions to § 2254(d) set out in §§ 2254(d)(1) and (2) applies.").

In order to validly waive the Fifth Amendment privilege against self-incrimination, an individual's waiver "must be voluntary in that it was not the product of intimidation, coercion, or deception." *Hopkins v. Cockrell*, 325 F.3d 579, 583 (5th Cir.2003). Proving that a confession was coerced requires showing that the confession "resulted from coercive police conduct and it is essential that there be a link between the coercive conduct of the police and the confession of the defendant." *Id*. at 584. Such conduct includes official overreach and direct coercion, as well as promises and inducements. *See United States v. Blake*, 481 Fed.Appx. 961, 962 (5th Cir.2012) (unpublished) (per curiam). Trickery or deceit only constitutes coercion "to the extent [the defendant is deprived] of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Hopkins*, 325 F.3d at 584. "Neither mere emotionalism and confusion, nor mere trickery will alone necessarily a confession." *Self v. Collins*, 973 F.2d 1198, 1205 (5th Cir.1992) (internal quotations marks omitted). For instance, this Court found that coercion occurred when a defendant confessed to a murder after being assured by police that the conversation was confidential. *Hopkins*, 325 F.3d

at 584–85. The defendant had been isolated for fifteen days and was even interviewed by a close friend in order to help elicit a confession. *Id*. at 584. Likewise, coercion was found when a mother confessed only after police threatened to cut off her state financial aid and take custody of her children. *Lynumn v. Illinois*, 372 U.S. 528, 534, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963). Here, Byrom alleges that the police coerced the confessions she gave during interviews two and three—the two interviews that were suppressed for *Miranda* reasons—and that the coercion carried over into the subsequent two interviews during which she further implicated herself. Byrom focuses her claim on a handful of statements made to her during the course of interviews two and three, as well as the fact that she was heavily medicated while in the hospital.[8]

At the beginning of her second interview, the sheriff told Byrom that Junior had already confessed and warned Byrom against letting Junior bear the full weight of Edward's murder on his own: "He's already given us a statement on this. Don't let him be out here by himself on this." The sheriff reiterated the point later when he told Byrom that she was "trying to leave him out there by himself." The sheriff also told Byrom that she and Junior would be in danger as long as the triggerman remained free. Finally, the sheriff warned Byrom that he would tell the judge whether and to what extent Byrom cooperated: "There are [sic] stuff you are leaving out here. Now I'm going to tell you. Once we get to the point where we have to talk to the Judge and everything. All that's going to matter. He's going to ask me how did she cooperate? ... Well I'm gonna have to tell him that you had a memory lapse on some 'stuff,' we had to pick it out of her. Now the Judge ain't going to like it." Byrom claims that these statements deceived her and exploited her emotions, thereby constituting coercion that tainted her subsequent confessions.

Having reviewed the transcripts of these interviews, it is clear that Byrom's confessions were not coerced. While the sheriff's statements were certainly intended to cajole Byrom into confessing using her emotions and a measure of deception, they did not constitute coercion. Byrom first implicated herself after the sheriff implored Byrom to not leave Junior "hanging out there to bite the big bullet." The sheriff made that statement early during the interview, after a series of denials from Byrom. While the statement certainly suggested that Junior was facing serious legal consequences regarding Edward's murder, the police did not make any threats, promises, or other coercive statements. Insofar as the sheriff made other, subsequent statements,

> Byrom had already confessed and continued to do so. In any event, Byrom was not promised leniency and she was not threatened in any capacity. The sheriff merely utilized an appeal to emotion and urged her to confess to spare Junior harsher legal consequences, a permissible tactic since Byrom was not thereby deprived of knowledge essential to an understanding of her rights and the consequences of waiving them. *Hopkins*, 325 F.3d at 584.
>
> Byrom relies on cases like *Lynumn* to claim that law enforcement threats regarding relatives, especially one's children, are particularly coercive. In *Lynumn*, the police made serious threats regarding unrelated matters, such as the defendant's access to welfare benefits and custody of her children, and they did so in a way that left the defendant with "no reason not to believe that the police had ample power to carry out their threats." 372 U.S. at 534, 83 S.Ct. 917 ("These threats were made while she was encircled in her apartment by three police officers and a twice convicted felon who had purportedly 'set her up.' There was no friend or adviser to whom she might turn."). However, no comparable conduct occurred here. The sheriff told Byrom that she and Junior were at risk as long as the triggerman remained free and stated that Junior's confession meant he was facing serious repercussions. The sheriff's statements implicated Byrom's son, but only because he was in fact a suspect. It was not incorrect to tell Byrom that admitting her role in the plot could spare Junior a harsher punishment. Junior was not threatened with physical harm, and Byrom was not threatened by the sheriff. Byrom was in a safe setting and was not encircled by law enforcement officials. There was no official overreach or direct coercion. Since neither AEDPA exception applies, we deny Byrom's claim. *See Richter*, 131 S.Ct. at 787.
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> _____
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> 8. *The doctors treating Byrom told law enforcement officers that Byrom's medications would not interfere with her ability to be interviewed*. In any event, such a claim is procedurally barred for failure to adequately present it in prior proceedings.
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> 518 Fed.Appx. at 256-58. [Emphasis added.]

Again, the Fifth Circuit pointed out that petitioner's doctor was consulted prior to the interrogations.

No claim of ineffective assistance of counsel was presented based on the suppression

issue in the first post-conviction petition. Petitioner now contends counsel was ineffective in failing to present more regarding the circumstances surrounding the confessions which petitioner gave.

If we can glean from the rambling accusations against counsel under this section it appears that petitioner is contending trial counsel failed to investigate the fact that the first confession was given without *Miranda* warnings, the effect of the medications petitioner was receiving while in the hospital, and failed to investigate the circumstances of the first interrogation where she was urged to protect her son as a reason to confess. What puzzles counsel for the state is that these are the exact issues that were raised in the direct appeal. Petitioner gave five (5) statements, this Court excluded two of these statements.

In petitioner's direct appeal brief she argued:

> The trial court was presented with three reasons he should have suppressed all of Ms Byrom;s statements or dismissed the case against her entirely. They are first, defective *Miranda* warnings; second, threats and unconstitutionally deceitful conduct by law enforcement when taking Ms. Byrom's statements in the hospital; thirdly, intentional deception of law enforcement of "losing" the tapes of the initial interviews with Junior even though they were presumably with all the other tapes and intentionally typing false transcripts of Ms. Byrom's statements to be provided to Ms. Byrom's counsel that added entire mirands [sic] warning that were not given.
>
> Pet. DA Brf. at 24.

Therefore, the grounds stated in her direct appeal were the same presented to the trial court: (1) Defective Miranda Warnings (*Id.* at 24); (2) Threats and Deceitful Conduct (*Id.* at 29); (3) Intentional Misconduct by Law Enforcement (*Id.* at 31). Those portions of this claim are

nothing more than an attempt to relitigate this claim under the guise of ineffective assistance of counsel. It must be remembered that two of the statements were suppressed by the trial court. This Court discussed them in the overall context of the confession, but held that since they were suppressed that any claim relating to them specifically was moot. Petitioner's claim of ineffective assistance of counsel must fail as the underlying merits of the claim were held to be without merit and petitioner cannot now relitigate them under the different theory of ineffective assistance of counsel. *See* MISS. CODE ANN. § 99-39-21(2); *Graysoin, supra*. This claim is without merit. Just as the claim against trial counsel is without merit so is any claim that post-conviction counsel was ineffective in failing to raise a claim of ineffective assistance on this ground.

The other part of the claim was that counsel did not investigate how the medication that petitioner was taking at the time of the confessions impacted the validity of the confession.

First, the state would point out that the record reflects that Byrom's treating doctor, Dr. Kitchens, was consulted by the law enforcement officers regarding her ability to understand and participate in the questioning. *See* Tr. 159. Dr. Kitchens informed the law enforcement officers that her medications would not prevent her from understanding questions or responding appropriately thereto. *Id.* It is also clear that trial counsel had investigated further and discussed this question with Dr. Caruso, another of petitioner's doctors. *See* Tr. 129, 223, 277, 285, 286.

Petitioner hangs her hat on an affidavit prepared for federal habeas litigation by Dr. Anthony Verlangieri, a professor of pharmacology, at the University of Mississippi dated September 6, 2006. He was asked to review various various medical and trial records in petitioner's case. Dr. Verlangieri asserted that there is a reasonable probability that petitioner's decision-making abilities were impaired at the time she gave a statement to law enforcement. Dr. Verlangieri gave this affidavit years after the fact based only on his review of documents. Further, Dr. Verlangieri did not assert that all of the drugs he found in the records that he reviewed were part of her medications at the time of the crime or confessions.

The district court addressed this assertion in its review of the confession question on habeas review. The district court found:

> Petitioner's claim that her physical condition and medication regimen at the time she was questioned resulted in involuntary statements is, to the extent it is independently raised, barred from federal habeas review because it was never presented to the State courts. *See Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir.1998) (the claim made in federal habeas must be the " 'substantial equivalent' of one presented to the state court to satisfy the "fairly presented" requirement). However, the circumstances of Petitioner's confession, which includes that she was hospitalized with double pneumonia and medicated at the time of the obtained statements, are relevant to whether the statements were voluntarily given. *See, e.g., Withrow*, 507 U.S. at 693–94, 113 S.Ct. 1745. Sometime subsequent to the initiation of her habeas proceedings, Petitioner secured the assistance of Dr. Verlangieri to review various medical and trial records in her case. (*See* Pet. Ex. 9). Dr. Verlangieri opines that there is a reasonable probability that Petitioner's decision-making abilities were impaired at the time she gave a statement to law enforcement. (*See id*.). *However, law enforcement officials in this case consulted with Petitioner's own personal physician on June 4 and received his clinical opinion that Petitioner's ability to understand and answer would not be adversely effected by the medications she had been given*. At the suppression hearing, Sheriff Smith, Deputy Edmondson, and Officer Marlar all testified

> that Petitioner appeared coherent and appeared to understand what was transpiring during the interviews on June 4. (*See* Trial Tr. Vol. 10, 139; Trial Tr. Vol. 11, 153, 159, 250–51). *The record evidence supports a determination that all of the law enforcement officers present, as well as Petitioner's physician and the nurse on duty, believed her to be able to freely understand and comprehend the inquiries posed to her on June 4, 1999. Dr. Verlangieri's conclusion, on the other hand, comes years after the fact and is based solely upon his review of documents.*
>
> 871 F.Supp. at 900.

The district court credited the doctor who was present and attending Byrom over the affidavit that was prepared some years later from a review of records only.

Looking to petitioner's direct appeal brief we find this statement:

> . . . It was essentially the state's position that Ms. Byrom had been Mirandized earlier in the day and it was unnecessary to Mirandize her again. The state then offered Sheriff David Smith who, over objection, was permitted to testify that Ms. Byrom's physician told him Ms. Byorm's medications "shouldn't affect anything she had to say." (Vol. 11, T-159, ln 3-21) Later, Ms. Byrom was not permitted to call Dr. Keith Caruso to testify on this issue *but since the trial court suppressed Ms. Byrom's statements 1 & 2 that will not be argued on appeal. The trial court's ruling addressed the lack of necessity to hear from Dr. Caruso anyway*. (Vol 11, T-278, ln 1-22)
>
> *The issue on appeal is whether the trial court erred in not suppressing statement 3 and 4 and the subsequent "jailhouse" letters as a result of the earlier more significant Miranda violations and the State's failure to prove any intelligent and uncoerced waiver had taken place*.
>
> Pet. DA Brf. at 26-27. [Emphasis added.]

Therefore, there is no failure to investigate that petitioner can lay at the feet of trial counsel. Trial counsel had investigated the matter and wanted to call Dr. Caruso to testify during the suppression hearing, but was not allowed to by the trial court.

Faced with the testimony of the treating doctor that her medications would not impair her ability to understand and answer questions counsel was not deficient in their performance.

Likewise post-conviction counsel being faced with this Court's opinion upholding the admission of two of the confessions did not perform deficiently in failing to raise a claim that counsel did not investigate the medical condition. The record simply refutes this.

As stated before this is simply an effort to relitigate a claim that was decided on direct appeal as a claim of ineffective assistance of counsel. The merits of the confession question were decided by this Court on direct appeal, and fully explored by the federal courts on habeas review. This claim cannot be relitigated under new theories at this point. The claim is barred by § 99-39-21(2), and § 99-39-21(3) as res judicata.

This claim is also barred by the time bar and the successive petition bars found in § 99-39-5(2) and 99-39-27(9). Petitioner is entitled to no relief under this claim.

The substantive claim was litigated on direct appeal and found to be without merit. Because the underlying claim was held to be without merit the claim of ineffective assistance of counsel fails because petitioner cannot show prejudice. This is simply an attempt to relitigate the suppression issue under another theory – ineffective assistance of counsel. This claim is barred. *See Grayson, supra*.

C. Ineffective assistance of post-conviction counsel.

The state has addressed the claims of ineffective assistance of counsel involved with the two previous issues in the argument for each of those. Petitioner has also raised the claim of ineffective assistance of counsel related to the exclusion of the jail house letters once again. The state would invite the Court to our earlier argument regarding that issue.

D & E. Claim is barred and petitioner is not entitled to an evidentiary hearing.

In the final two subsections petitioner attempts to show how her claim is not barred from relitigation and how she is entitled to an evidentiary hearing. None of her arguments are on point. She argues that she is entitled to them because of ineffective assistance of counsel but as the state has shown her ineffective assistance of counsel claims under this assignment are without merit. Further, she has not demonstrated what would be shown at an evidentiary hearing that is not already before the Court.

These claims are barred and without merit and further she is not entitled to an evidentiary hearing. This successive petition should be denied.

CLAIM IV: INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING THE INVESTIGATION FOR AND PRESENTATION OF MITIGATION EVIDENCE.

Petitioner next contends that counsel was ineffective in their investigation for and presentation of mitigation evidence. This claim was presented to this Court in the original

post-conviction review petitioner and was decided against petition. *See* 927 So.2d at 717-721, ¶¶ 118-36. This claim is res judicata. *See* § 99-39-21(3). Therefore, the claim is also time barred and also successive petition barred.

Further, the claim was presented to the federal district court and the Fifth Circuit. The district court was presented with this claim of ineffective assistance of counsel and held:

> **X. Ineffective Assistance of Counsel in Presenting Mitigating Evidence**
>
> Petitioner maintains that trial counsel rendered ineffective assistance in prematurely abandoning their investigation of possible mitigating evidence and in failing to present any witnesses at the sentencing phase of trial, despite the fact that numerous witnesses could have testified as to the physical and sexual abuse Petitioner had allegedly endured at the hands of both her stepfather and her husband. While trial counsel did present the medical reports of Dr. Kitchens and Dr. Caruso, Petitioner argues that additional witnesses could have confronted the State's argument that the neither her doctors nor Dr. Lott's report corroborated the information she had given them. (*See, e.g.*, Trial Tr. Vol. 16, 1006, 1020; Trial Ex. 88, 89, 90). Dr. Caruso's report of his pretrial evaluation of Petitioner describes her extensive history of physical, emotional, and sexual abuse as a child, as well as a long history of sexual, emotional and physical abuse inflicted by Edward. (Reply Ex. 6). His diagnostic impressions were that she suffered from Borderline Personality Disorder, depression, alcohol dependence, and Factious Disorder. (*See id.*). However, Petitioner's attorneys did not provide Dr. Caruso with information from collateral sources. Petitioner notes that defense counsel argued in closing argument that Petitioner's actions were that of an extremely scarred and troubled woman who was afraid to leave her husband, and in response, the State argued that the reports had no corroboration. (*See* Trial Tr. Vol. 16, 1013–16, 1020).
>
> Petitioner argues that numerous family members were available to corroborate the information contained in Dr. Caruso's report. She presented the State court with affidavits from her brothers, Kenneth and Louis Dimitro; her mother, Betty Postalwait; her sister-in-law, Doranna Dimitro; her niece, Leighanne Bundy; and her sister, Helen Garnett. (*See* PCR Ex. 4, 6, 7, 8, 17, 18). These affidavits affirm Petitioner's contention that she grew up with a stepfather who was both verbally and physically abusive to the children and

their mother. (*See id*.). They note that Petitioner became withdrawn shortly after her mother married her stepfather, and that after she ran away from home at the age of fifteen, Petitioner confided to her brother that their stepfather had been sexually abusing her. (*See* PCR Ex. 4, Aff. of Kenneth Dimitro). She maintains that these witnesses could have also testified that Petitioner was the victim of Edward's physical abuse, the results of which she tried to hide from friends and family. (*See, e.g*., PCR Ex. 8, Aff. of Louis Dimitro; PCR Ex. 7, Aff. of Doranna Dimitro; PCR Ex. 17, Aff. of Leighanne Bundy). Petitioner's sister, Helen Marie Garnett, attests that she could have told the jury that Edward once sexually assaulted Garnett at the Byrom home while Petitioner was in the shower. (*See* PCR Ex. 18, Aff. of Helen Garnett). Petitioner notes that the family could have testified that Edward was a drunk who was particularly controlling and abusive when he consumed alcohol. (*See, e.g.*, PCR Ex. 17; Reply Ex. 7, Decl. of Louis Dimitro; Reply Ex. 8, Decl. of Kenneth Dimitro). Additionally, she argues, Dr. Caruso could have explained that Petitioner's emotional and mental disorders are entirely consistent of someone with a background of extreme abuse, and he could have given an explanation as to why it is difficult for such women to leave an abusive spouse. (*See* Reply Ex. 6).

Petitioner maintains that instead of offering this evidence, trial counsel determined that it was better strategy not to present witnesses in mitigation so that the state would be unaware of the mitigation testimony to be offered at the retrial, which they were certain would occur. (*See* Pet. Ex. 6, Aff. of Terry Wood; Pet. Ex. 7, Aff. of Sunny Phillips; Pet. Ex. 15). She notes that Dr. Caruso states that he believed that he was going to testify in the case, and that he was present the day that the sentencing hearing began. (*See* Reply Ex. 6). She maintains that the evidentiary picture would have been dramatically different from the one actually presented if Dr. Caruso and Byrom's family members had testified.

Petitioner presented a claim that counsel rendered ineffective assistance at the sentencing phase on post-conviction review, and while it found defense counsel's failure to call any witnesses "admittedly perplexing" and their explanation as to why unhelpful, the Mississippi Supreme Court nonetheless denied relief on the claim. *Byrom II*, 927 So.2d at 717–21. The court noted that "[t]he gist of the family members' testimony from the affidavits was that [Petitioner] was a good person who had lived a difficult life and that whatever she did was because she was sick and in a terrible situation." *Id*. at 721. The

court found that the doctors' reports that were considered by the trial court the information that Petitioner states her family members could have offered, and that it is speculative whether hearing the live witnesses give information already known to the court would have been persuasive. *Id*.[39]

Respondents maintain that the affidavits presented to the State court contain mostly hearsay statements and speculation about what the individuals believe happened based solely on what Petitioner had confided to them in the past. (*See, e.g.*, PCR Ex. 4, 6, 7, 8, 18).[40] They also maintain that the affidavits demonstrate that, contrary to Petitioner's assertions, the attorneys did communicate with Petitioner's family members. (*See, e.g.*, PCR Ex. 7, 8, 17, 18; Pet. Ex. 5, 6). Respondents argue that, in light of the evidence introduced by counsel at the sentencing phase of trial, the admissible portions of these affidavits do not create a reasonable probability that Petitioner would have received a different sentence if the additional information had been introduced.

Initially, the Court considers Petitioner's claim that the Mississippi Supreme Court unreasonably applied the principles of *Strickland* in assuming the trial counsel's investigation of potential mitigation evidence was adequate. Petitioner primarily relies upon the Supreme Court's decisions in *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) and *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) to support her claim that "some investigation" is not sufficient to establish that counsel has performed an adequate investigation in light of prevailing professional norms. She argues that the information contained in Dr. Caruso's resort would have alerted any reasonably competent attorney to investigate further. This is particularly true, she maintains, when the potentially mitigating evidence includes mental health problems or a difficult or impoverished childhood.

The Court, however, finds that it is not unreasonable to conclude that counsel adequately investigated Petitioner's background. In early October, 2000, defense counsel sought and obtained an order compelling the trial attendance of five out-of-state witnesses, as well as an order allowing for the costs associated with their attendance at trial. (*See* SCP Vol. 2, 168–73). On October 17, 2000, defense counsel tendered a witness list to the State that identified nine defense witnesses for trial. (SCP Vol. 2, 235). The anticipated witness list was mostly comprised of out-of-state family members who could confirm the history of abuse in the family. (*See* Trial Tr. Vol. 10, 32–35). At a hearing on October 18, 2000, defense counsel Wood stated that he did not

provide the prosecution with a definite conclusion about their testimonies because the information learned was primarily that Petitioner and Junior were abused by Edward, and that there was "just not a lot to tell" from the "fairly generic" information obtained. (*See id*. at 34). He otherwise informed the court that the family members did not have much contact, and that they did not know information relevant to the offense itself. (*See id*.). The trial court ordered defense counsel to provide the prosecution with specific statements about the testimony to be offered by the witnesses at trial. (*See id*. at 35).

On October 20, 2000, defense counsel provided the prosecution with a summary of information obtained from eight witnesses the defense anticipated calling to give testimony in its case-in-chief. (*See* SCP Vol. 2, 271–73). Included in the witness list were Petitioner's niece, Leighanne Garnett; her brother, Louis Dimitro; and her sisters, Renee Copeland and Helen Garnett. (*See id*.). The letter recounts their knowledge of the physical and sexual abuse in the Byrom home, as well as their perceptions of Petitioner's despondency and hopelessness. (*See id*.). These family members were in Iuka for Petitioner's trial, as the trial court authorized hotel and meal allowances for them. (*See, e.g*., SCP Vol. 5, 652–669). Additionally, Petitioner's brother, Kenneth Dimitro, and her sister-in-law, Doranna Dimitro, were present in Iuka for trial. (*See* PCR Ex. 4; PCR Ex. 7). Dr. Caruso, the psychiatric expert obtained by the defense, was also present to testify at trial and was prepared to testify at the sentencing phase. (*See* SCP Vol. 5, 623; Reply Ex. 6).

The affidavit of Petitioner's mother, Betty Postalwait, states that she did not attend trial and was not contacted by her daughter's attorneys. (*See* PCR Ex. 6). However, the Court notes that Ms. Postalwait lived with Louis and Doranna Dimitro, who were present in Iuka at the time of trial, and that Louis' affidavit references his correspondence with Petitioner's attorneys prior to trial. (*See id*.; PCR Ex. 7, 8). The affidavits also reference the family's communication with the attorneys during trial, such as Doranna Dimitro's statement that defense counsel Phillips told the family to stay at the hotel rather than attend trial and not to buy a newspaper. (*See, e.g*., PCR Ex. 7). After compelling the family's attendance in Mississippi for trial, it is most reasonable to conclude that defense counsel wanted to keep the family from the trial in order to preserve them as potential witnesses. Petitioner's attorneys took steps to obtain information from her family members, compel their attendance at trial, and sought and obtained a psychiatric expert to provide assistance in the defense. The majority of the information Petitioner has

presented in support of her assertion that counsel's investigation was unreasonably limited was in the knowledge of the people that were present for her trial. Therefore, the Court determines that Petitioner has not shown that it is unreasonable to conclude that counsel's investigation into potential mitigating circumstances was not ineffective.

However, the Court's conclusion regarding counsel's investigation does not determine whether it is unreasonable to conclude that counsel rendered effective assistance in the presentation of mitigating evidence. Petitioner argues that had the evidence presented to this Court been presented through live witness testimony at trial, the trial court would have had no legitimate basis for refusing to consider her history of abuse. She maintains that the evidence would have also supported the argument that Petitioner was attempting to escape an abusive marriage, thereby weakening the aggravating factor of pecuniary gain. Additionally, she argues that the court failed to evaluate the strength of the competing evidence in determining whether Petitioner would not have been sentenced to death if available mitigating evidence had been presented. Maintaining that a reasonable probability exists that she would not have been sentenced to death if this evidence had been presented, she argues that the Mississippi Supreme Court's conclusion on this issue is based upon an unreasonable application of governing law.

This Court has reviewed all of the statements given by Petitioner's friends and family members in this case, and it determines that Petitioner has failed to demonstrate that the Mississippi Supreme Court unreasonably applied the governing principles of *Strickland* and its progeny to Petitioner's claim. *See, e.g., Richter*, 131 S.Ct. at 788 (holding that inquiry on habeas is "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard"). Counsel's failure to present live mitigation testimony in this case was not the result of a limited investigation, but rather, a strategic decision. Counsel made this decision despite securing funds to hire a psychiatric expert, compelling the trial attendance of Petitioner's family members from Michigan and Alabama, and securing paid witness expenses for these individuals. The Court assumes, without deciding, that counsel's failure to call readily available witnesses at the sentencing phase of a capital murder trial in order to preserve the testimony for a hypothetical retrial is an unreasonable strategic decision. *See, e.g., Moore v. Johnson*, 194 F.3d 586, 615 (5th Cir.1999) (holding that courts defer to strategic decisions intended to yield benefit or avoid harm where that decision is based on sound legal reasoning).

Despite the Court's assumption that counsel's performance was deficient, relief is not warranted on this claim as Petitioner has not demonstrated that it was unreasonable to conclude that Petitioner was not prejudiced by counsel's failure. *See, e.g., Moawad v. Anderson*, 143 F.3d 942, 946 (5th Cir.1998) (holding that a claim that does not satisfy both prongs of *Strickland* must be rejected). Petitioner was not sentenced by a jury. She was sentenced by a trial judge who was aware throughout trial of Petitioner's allegations of physical and sexual abuse at Edward's hands. Prior to closing arguments at sentencing, the trial judge reviewed Petitioner's medical records, and he reviewed Dr. Caruso's detailed report chronicling Petitioner's background, her relationship with the victim, as well as her mental and medical impairments. (*See* Def. Trial Ex. 89, 90). Additionally, the judge reviewed Dr. Lott's report, which outlined many of the same details of abuse as noted in Dr. Caruso's report. (*See* State Trial Ex. 88). The information Petitioner claims her family members could have offered add nothing particularly compelling to the information already before the trial court. *See Wong v. Belmontes*, ––– U.S. ––––, 130 S.Ct. 383, 388, 175 L.Ed.2d 328 (2009) (finding no prejudice where new "humanizing evidence" was mostly cumulative of that presented at sentencing). As the omitted testimony "would barely have altered the sentencing profile presented to the sentencing judge," Petitioner has failed to demonstrate that it was unreasonable to conclude that she was not prejudiced by trial counsel's failure to present live mitigation testimony. *Strickland*, 466 U.S. at 700, 104 S.Ct. 2052. This claim will be dismissed.

_____

39. In a dissent by Justice Dickinson that was joined in part by Justices Graves and Cobb, Justice Dickinson noted the "overwhelming" mitigating circumstances in this case, combined with counsel's choice to waive jury sentencing, resulted in the ineffective assistance of counsel. *See id.* at 732. (Dickinson, J., dissenting, joined in part by Cobb, P.J. and Graves, J.). He further stated that he was unable "to conjure up ... a more egregious case of ineffective assistance of counsel during the sentencing phase of a capital case." *Id*.

40. Respondents also argue that all of the affidavits filed by Petitioner's family members were signed and sworn to in Tennessee or Michigan before a Mississippi Notary and otherwise do not comply with the statutory requirements. *See, e.g.*, MISS.CODE ANN. § 99–39–9(1)(e). The Court notes that the supplemental declarations filed by Louis and Kenneth Dimitro in these proceedings are not notarized. (*See, e.g.*, Reply Ex. 7, 8). For purposes of

simplicity, the Court refers to all of the statements as "affidavits."

817 F.Supp.2d at 812-18.

Clearly, the district court found that there was an adequate investigation, assumed that trial counsel rendered deficient performance, but that the deficient performance did not prejudice petitioner. The holding was that this Court's earlier decision was not an unreasonable application of *Strickland*.

Petitioner appealed this decision to the Fifth Circuit which decided the claim on the merits. The Fifth Circuit held:

> **E. Ineffective Counsel Regarding Mitigating Evidence**
>
> Byrom's last claim alleges that she received ineffective assistance of counsel because her trial attorneys failed to adequately investigate and present mitigating evidence at the penalty phase of the trial. In order to make an ineffective assistance of counsel claim, Byrom must show that her attorneys' performance "fell below an objective standard of reasonableness" and that the deficient performance prejudiced her case. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The attorneys' representation must fall below an objective standard of reasonableness such that "counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." *Feldman v. Thaler*, 695 F.3d 372, 377–78 (5th Cir.2012) (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052). Byrom "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id*. at 378 (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052).
>
> Further, under AEDPA, the crucial question is whether the state court unreasonably applied *Strickland*. *Harrington v. Richter*, ––-U.S. ––––, 131 S.Ct. 770, 785, 178 L.Ed.2d 624 (2011); *Williams v. Thaler*, 684 F.3d 597, 604 (5th Cir.2012). When considering a habeas petition, our inquiry focuses on "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Richter*, 131 S.Ct. at 788. "[A] habeas court must determine what arguments or theories supported or, as here, could have

supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id*. at 786.

Prejudice is shown when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. In the sentencing context, Byrom must establish "a reasonable probability that a competent attorney, aware of [the mitigating evidence available], would have introduced it at sentencing," and that there is a reasonable probability that the sentence would have been different as a result. *Wong v. Belmontes*, 558 U.S. 15, 130 S.Ct. 383, 386, 175 L.Ed.2d 328 (2009) (quoting *Wiggins v. Smith*, 539 U.S. 510, 535, 536, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)) (alteration in original). "[T]he question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Cullen v. Pinholster*, ––– U.S. ––––, 131 S.Ct. 1388, 1408, 179 L.Ed.2d 557 (2011) (alteration in original) (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052).

Byrom claims that she received ineffective assistance of counsel because her trial attorneys failed to adequately investigate potential mitigating evidence before sentencing and failed to present mitigating evidence at sentencing. Counsel interviewed a number of Byrom's family members, but Byrom claims counsel should have pursued further leads after uncovering evidence of persistent abuse in Byrom's childhood and adult life. Moreover, at sentencing, Byrom's trial counsel only offered psychiatric reports and medical evaluations detailing Byrom's abuse and the numerous mental and physical ailments she has suffered from. As the record makes clear, Byrom suffered a childhood of mental, physical, and sexual abuse at the hands of her stepfather, and yet more abuse at the hands of Edward. Despite the availability of at least six family members able and willing to personally attest to the violence Byrom was subjected to, trial counsel did not present a single live witness at sentencing. Instead, trial counsel relied on psychiatric reports and medical records, supposedly because of a tactical decision to withhold witness testimony in anticipation of a new trial. Byrom has pressed these ineffective assistance of counsel claims at each stage of review. Because the Supreme Court of Mississippi issued a reasoned opinion on point, it is that decision we review in applying the standard of review provided by AEDPA. *Jackson v. Johnson*, 194 F.3d 641, 651 (5th Cir.1999).

A divided Mississippi Supreme Court decided that Byrom had not received ineffective assistance of counsel at her sentencing. Despite finding that Byrom's trial counsel made a "perplexing" choice by not presenting live mitigating evidence, the majority opinion nevertheless held as "speculative" the proposition that testimony already known to the trial judge would have "been any more convincing or persuasive if presented through witness testimony." *Byrom v. State*, 927 So.2d 709, 720–21 (Miss.2006). On the other hand, the dissent struggled to find "a more egregious case of ineffective assistance of counsel during the sentencing phase of a capital case." *Id*. at 732 (Dickinson, J., dissenting). For the reasons that follow, applying § 2254(d)(1), the Mississippi Supreme Court did not unreasonably apply *Strickland* to Byrom's claim of failure to investigate or to her claim of failure to present mitigating evidence.

1. Investigation of mitigating evidence.

Byrom claims that her trial counsel were aware of her extensive history as a victim of abuse, but that they entirely failed to investigate potential evidence on point. However, trial counsel clearly stated that they interviewed potential witnesses, including members of Byrom's family. In fact, counsel went so far as to make arrangements so that out-of-state family members could be in Iuka, Mississippi for Byrom's trial. Indeed, in October 2000, one of Byrom's attorneys furnished a list of nine witnesses for trial, most of whom were family members who could confirm Byrom's history as a victim of abuse. In support of her claim, Byrom primarily relies on the fact that her trial attorneys could not recall the specific names of which family members they interviewed in anticipation of trial. She also points to statements from family members claiming that they were not contacted by trial counsel. Nevertheless, other family members capable of providing further corroboration of abuse suffered were both interviewed by counsel and present in Iuka for the trial. Byrom has not identified what additional information would have been uncovered had her trial counsel interviewed additional family members. While those who were interviewed presented a picture of abuse, their accounts largely overlap and cover nearly identical details. Such claims thus do not demonstrate that the state court's application of *Strickland* was unreasonable or contrary to established federal law. Fairminded jurists could not disagree with the Mississippi Supreme Court's determination that Byrom's attorney conducted a reasonable investigation under *Strickland*. Accordingly, we deny Byrom's claim. *Richter,* 131 S.Ct. at 786.

2. Presentation of mitigating evidence.

At sentencing, Byrom's attorneys declined to present witness testimony regarding Byrom's history of abuse, and instead opted to present two psychiatric reports detailing Byrom's claims of abuse and the various maladies diagnosed, as well as a medical evaluation detailing Byrom's many other illnesses. There are at least six family members Byrom's attorneys could have presented at sentencing, some of whom had directly witnessed the abuse Byrom suffered at the hands of both her stepfather and husband. These witnesses would have substantiated claims regarding the alcoholism of Edward and Byrom's stepfather, as well as both men's verbal, physical, and sexual abuse of Byrom. The psychiatric reports presented at sentencing nevertheless covered much of the same information; and Byrom's history as a victim of abuse was addressed at trial as well.

Despite acknowledging that Byrom's attorneys made a "perplexing" decision in their refusal to present witness testimony at sentencing, the Mississippi Supreme Court held that the witnesses' potential testimony, of which the trial judge was already aware, would not likely have been any more persuasive if presented through live witness testimony. *Byrom v. State*, 927 So.2d 709, 721 (Miss.2006). The state court viewed this decision as a strategic one; Byrom's attorneys sought to reserve the family members' testimony in the event of a new trial. Further, the Mississippi Supreme Court held that Byrom's claim of prejudice was speculative at best. *Id*. As explained below, the Mississippi Supreme Court did not unreasonably apply *Strickland*.

"[E]vidence about a defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). The right to have mitigating evidence presented means little, however, if counsel fails to present a case for mitigation at sentencing. *Strickland v. Washington*, 466 U.S. 668, 706, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring) (citing *Helen Gredd, Comment, Washington v. Strickland: Defining Effective Assistance of Counsel at Capital Sentencing*, 83 Colum. L.Rev. 1544, 1549 (1983)). That said, *Strickland* does not "require defense counsel to present mitigating evidence at sentencing in every case." *Wiggins v. Smith*, 539 U.S. 510, 533, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). A petitioner challenging the adequacy of counsel's

conduct must show that counsel's conduct fell below the standard guarantee by the Sixth Amendment, as well as prejudice: a reasonable probability that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Id*. at 534, 123 S.Ct. 2527. Here, Byrom's counsel made the unusual decision to withhold mitigating witness testimony at sentencing in hopes of reserving said testimony for an anticipated retrial. Counsel instead elected to rely on a series of medical reports detailing Byrom's abuse and the various illnesses she suffered as a result of the abuse. However, even assuming arguendo that counsel's strategic decision fell below the standard required by *Strickland*, it cannot be said that Byrom was prejudiced.

In order to find prejudice here, there must exist a reasonable probability that Byrom would not have received a death sentence had counsel introduced the live testimony of Byrom's family members. The Supreme Court has instructed that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. In *Wiggins*, the Supreme Court found prejudice where the petitioner's attorney had failed to investigate and present substantial mitigating evidence at the petitioner's jury sentencing. 539 U.S. at 534–36, 123 S.Ct. 2527. The omitted mitigating evidence included would-be accounts of substantial abuse and neglect at the hands of the petitioner's mother and repeated instances of abuse, molestation, and rape suffered at various foster homes throughout Wiggins's childhood. *Id*. at 516–17, 123 S.Ct. 2527. However, while Wiggins and Byrom each suffered substantial abuse prior to committing their respective crimes, their cases are otherwise distinguishable.

Wiggins's counsel failed to present to the sentencing jury substantial mitigating evidence that the jury had no other access to. On that basis, the Supreme Court found that at least one juror would have voted differently had the jury been presented with Wiggins's "excruciating life history." *Id*. at 537, 123 S.Ct. 2527. Byrom, on the other hand, was sentenced by the same judge that conducted her trial, and the mitigating evidence at issue was substantively addressed both at trial and sentencing. In other words, to the extent the judge that sentenced Byrom was not already aware of Byrom's mitigating evidence from trial, he was certainly made aware of Byrom's history of abuse by virtue of the mitigating evidence presented at sentencing. The trial judge reviewed Byrom's medical records, which included details of the abuse Byrom had suffered, before closing arguments at sentencing. The live testimony withheld by counsel would thus have added little to the judge's sentencing decision. It cannot be said that there exists a reasonable probability that the outcome of

> Byrom's sentencing would have been different had counsel introduced the testimony of Byrom's family members. In considering Byrom's claim, the Mississippi Supreme Court reasoned that
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> > [t]he gist of the family members' testimony from the affidavits was that Byrom was a good person who had lived a difficult life and that whatever she did was because she was sick and in a terrible situation. However, to argue that this testimony, which was already known to the trial judge, would have been any more convincing or persuasive if presented through witness testimony, is, at best, speculative.
>
> *Byrom v. State*, 927 So.2d 709, 721 (Miss.2006). In light of the reasoning above, it cannot be said that the state court unreasonably applied *Strickland*. *See Richter*, 131 S.Ct. at 786 ("[A] habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."). Therefore, we deny Byrom's claim.
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> 518 Fed.Appx. at 259-63.

Unlike the district court the Fifth Circuit did not find deficient performance by trial counsel and also found that there was not prejudice to petitioner.

Petitioner has actually presented nothing new presented nothing new to support this claim.[6] Other than these three new cumulative exhibits, the exhibits that she has presented

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[6]She presents the affidavits of her brothers Louis and Kenneth who both furnished affidavits to post-counsel that were presented to this Court in the original post-conviction petition in support of this claim. These new affidavits are basically the same as the first one submitted, while there is more detail to them they still contain rank hearsay. She also presented an affidavit of Dr. Caruso that was not available to this Court during the original petition. However, it is simply a summary of what was contained in his report that was furnished to the trial court during the sentence phase. He does state a few legal opinions that are irrelevant as he is not a lawyer. *See Loden v. State*, 43 So.3d 365, 394, n. 10 (Miss. 2010).

in support of this claim are the same as those presented to this Court in the original post-conviction petition. One only has to look at the dates of these affidavits to see they were all obtained in preparation of the original post-conviction petition.[7] She appears to simply be asking this Court to look at the same evidence and reach a new result. This ineffective assistance claim was decided on the merits in the original post-conviction petition and is now res judicata under § 99-39-21(3). There has been no unexpected change in the law since the original decision of this issue in 2006. This claim is barred and cannot be relitigated.

This ineffective assistance of counsel claim was presented to this Court in the original post-conviction petition and decided against petitioner. To the extent that she attempts to relitigate it under new legal or factual theories, the claim is barred from consideration. *See* § 99-39-21(2); *Grayson, supra.*

Finally this claim of ineffective assistance of counsel cannot survive the time bar or the successive petition bar. Petitioner has not demonstrated that there has been an intervening that "actually adversely affected the outcome of his conviction or sentence." Further, there has been no newly discovered evidence that would be "practically conclusive" that the outcome of the conviction or sentence would have been different. This claim is barred by § 99-39-5(2) (time bar) and § 99-39-27(9)(successive petition bar).

Petitioner is entitled to no relief on this claim. The motion for leave to file a

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[7]Of course one only need look at the exhibits to the original post-conviction petition to see that they are the same affidavits. We use the term affidavit loosely as most are either not noterized or are noterized by a Mississippi notary with headings from other states.

successive petition should be denied.

CLAIM V: INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL

In this final assignment petitioner simply rehashes all that has gone before and contends that post-conviction counsel was ineffective in every instance. This in the face of the decision of this Court and the federal courts. There is actually no argument to respond to other than to state that the state has answered each and every aspect of this claim under the previous individual arguments.

Post-conviction counsel did not render ineffective of counsel – for the most part the claims are nothing more than an attempt to relitigate claims that were previously decided on the merits by varying the legal theory from the substantive claim to that of ineffective assistance of counsel a ploy that is forbidden by § 99-39-21(2). *See Grayson, supra*. Further, the claim alleging ineffective assistance of counsel in the investigation and presentation of mitigation evidence was presented and decided on the merits in the original post-conviction petition and is now res judicata. *See* § 99-39-21(3). Further, the attempt to vary the factual scenario with cumulative affidavits is not allowed by the prohibition against different theories found in § 99-39-21(2). *See Grayson, supra.*

The state would submit that this claim fails because petitioner cannot demonstrated deficient performance and actual prejudice in the actions of post-conviction counsel. Even if deficient performance is found, petitioner cannot demonstrate *Strickland* prejudice and therefore the claim fails. This claim is without merit and post-conviction relief should be

denied.

CONCLUSION

For the above and foregoing reasons the State respectfully submits that the motion for leave to file a successive petition for post-conviction relief should be denied and the previously filed motion to set an execution date should be granted and an execution date be set forthwith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Marvin White, Special Assistant Attorney General for the State of Mississippi, have electronically filed, this **RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO FILE SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF** to the following:

Davis L. Calder, Esquire
P.O. Box 1799
Oxford, Mississippi 38655

This, the 3rd day of March, 2014.

Respectfully submitted,

s/ *Marvin L. White, Jr.*
SPECIAL ASSISTANT ATTORNEY GENERAL
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