IN THE SUPREME COURT OF MISSISSIPPI

HOWARD DEAN GOODIN, *Petitioner/Appellant*

versus **NO. 2007-CA-00972-SCT**

STATE OF MISSISSIPPI, Respondent/App

BRIEF FOR RESPONDENT/APPELLEE

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STATE OF MISSISSIPPI, *Respondent/Appellee*

BRIEF FOR RESPONDENT/APPELLEE

The case at bar is an appeal from the denial of relief after a post-conviction evidentiary hearing ordered by this Court to determine whether trial counsel was ineffective in failing to investigate whether he was mentally ill and whether petitioner was mentally retarded within the meaning of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). *See Goodin v. State*, 856 So.2d 267, 282, ¶ 40, 283, ¶ 45, 275, ¶ 58 (Miss. 2003).

STATEMENT OF THE CASE

The case at bar arises from the denial of post-conviction relief by the Circuit Court of Newton County after an evidentiary hearing. The evidentiary hearing was held pursuant to the dictates of this Court in its post-conviction opinion issued on August 7, 2003. *See Goodin v. State*, 856 So.2d 267 (Miss. 2003). The Court identified two issues to be considered in the evidentiary hearing: (1) whether trial counsel was ineffective in failing to investigate whether petitioner was mentally ill and competent to stand trial and (2) whether petitioner is mentally retarded within the meaning of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

Petitioner, Howard Goodin, was tried on a change of venue from Newton to Lamar County May 17-19, 1999. He was convicted and sentenced to death on the capital murder for the murder of Willis Rigdon during the commission of a kidnapping. Specifically, the jury made the following findings, with regard to sentence:

> We, the Jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder:
>
> That the Defendant actually killed Willis Rigdon; that the Defendant attempted to kill Willis Rigdon; that the Defendant intended that the killing of Willis Rigdon take place; that the Defendant contemplated that lethal force would be employed;
>
> Next, We, the Jury, unanimously find that the aggravating circumstance(s) of:
>
> The capital offense was committed while the Defendant was engaged in the commission of kidnapping;
>
> The capital offense was committed while the Defendant was engaged in the commission of robbery;
>
> The Defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person;
>
> are sufficient to impose the death penalty, and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances, and we further find unanimously that the Defendant should suffer death.
>
> /s/Larry Faris
> Foreman of the Jury

(C.P. at 212). Additionally, Goodin was sentenced to life in prison without parole (as an habitual offender) on the armed robbery charge.

Goodin took his automatic direct appeal to this Court and raised eight claims of error.

On May 17, 2001, this Court affirmed Goodin's conviction and sentence of death. *See Goodin v. State*, 787 So.2d 639 (Miss. 2001). Thereafter, Goodin filed a petition for writ of certiorari with the United States Supreme Court. The Supreme Court of the United States denied certiorari April 15, 2002. *See Goodin v. Mississippi*, 535 U.S. 996, 122 S.Ct. 1558, 152 L.Ed.2d 481 (2002).

Goodin then filed a petition for post-conviction and raises the following issues[1] for this Court's consideration:

I. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNTIED STATES CONSTITUTION AND ARTICLE THREE, SECTIONS 24, 26, 28, AND 29 OF THE MISSISSIPPI CONSTITUTION WERE VIOLATED BY NUMEROUS INSTANCES OF PROSECUTORIAL MISCONDUCT?

   A. WHETHER THE PROSECUTION CHARACTERIZED PETITIONER AS A LIAR?

   B. WHETHER THE PROSECUTION MADE IMPERMISSIBLE ARGUMENTS IN CLOSING COMPARING THE RIGHTS OF THE VICTIM TO THE RIGHTS OF THE PETITIONER?

   C. WHETHER PETITIONER WAS DENIED HIS RIGHTS TO A FAIR TRIAL BY THE WILLFUL AND REPEATED ACTIONS OF THE PROSECUTION IN THIS CASE TO COMMENT UNFAIRLY ON PETITIONER'S CONSTITUTIONAL RIGHTS?

II. WHETHER THE EXECUTION OF THE MENTALLY RETARDED SHOULD BE PROHIBITED UNDER THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION AS WELL AS ARTICLE THREE, SECTION 28, OF THE MISSISSIPPI CONSTITUTION?

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[1]These issues are numbered 4-9 in the Petitioner's Brief. The are renumbered I-VI herein.

III. WHETHER THE TRIAL COUNSEL FOR PETITIONER WERE INEFFECTIVE AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, DEPRIVING HIM OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COMPETENT COUNSEL, AND HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHT TO HAVE MITIGATING EVIDENCE PRESENTED TO THE JURY, AS WELL AS HIS RIGHT TO COUNSEL UNDER ARTICLE III, SECTION 26, OF THE MISSISSIPPI CONSTITUTION?

A. WHETHER COUNSEL FAILED TO INVESTIGATE MENTAL RETARDATION?

B. WHETHER COUNSEL FAILED TO INVESTIGATE MENTAL ILLNESS?

C. WHETHER COUNSEL FAILED TO INVESTIGATE COMPETENCY?

IV. WHETHER PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ITS MISSISSIPPI CONSTITUTIONAL COROLLARY DUE TO THE CUMULATIVE EFFECT OF ERRORS AT BOTH THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL?

V. WHETHER PETITIONER WAS DENIED THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL?

VI. WHETHER THE TRIAL COURT ERRED IN ADMITTING AN IRRELEVANT DYING DECLARATION IN VIOLATION OF M.R.E. 401, 402, 403 AS WELL AS PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE CONSTITUTION OF THE UNTIED STATES AND ITS MISSISSIPPI CONSTITUTIONAL COROLLARIES?

On August 7, 2003, this Court rendered an opinion denying post-conviction relief in part and granting petitioner an evidentiary hearing on the two above stated grounds. *See Goodin v. State*, 856 So.2d 267 (Miss. 2003).

Petitioner filed a petition for writ of certiorari from the post-conviction decision of this Court. On March 22, 2004, the United States Supreme Court denied the petition for writ of certiorari. *See Goodin v. Mississippi*, 541 U.S. 947, 124 S.Ct. 1681, 158 L.Ed.2d 375 (2004).

The Circuit Court held an evidentiary hearing on October 24, 2004. At the close of petitioner's testimony the State moved for a directed verdict based on the fact that petitioner has adduced no evidence in compliance with the dictates of *Chase v. State*, 873 So.2d 1013, 1029, ¶¶ 74-78 (Miss. 2004). The trial court granted the State's motion and memoralized this ruling in a written opinion on October 14, 2004. C.P. 667-70.

Petitioner perfected this appeal from the denial of post-conviction relief by the trial court.

STATEMENT OF FACTS

The facts giving rise to the capital murder conviction in this case were fully set forth in the direct appeal opinion of this case. *See Goodin v. State*, 787 So.2d 639, 642-43, ¶¶ 2-10 (Miss. 2001). The Court repeated these facts in the post-conviction opinion. *See Goodin v. State*, 856 So.2d 267, 269-71, ¶¶ 2-3 (Miss. 2003).

SUMMARY OF THE ARGUMENT

The claims relating to the failure to grant and ex parte hearing on petitioner's motions for funds for experts and the motion to grant expert assistance was decided by this Court in its decision on petitioner's Petition for Review from the denial of these request. This Court in an order dated August 11, 2004, found both of these claims "not well taken and should be

denied." C.P. 611-12.

There is no constitutional right for counsel to be present during a mental health examination, so long as petitioner and counsel know of the purpose and extent of the examination in order that they can confer prior to the examination. Petitioner and counsel were given notice of the purpose of the evaluation that was to be done by the forensic staff at the State Hospital and had ample time to confer prior to that examination.

The trial court did not err in failing to conduct a *Daubert* hearing with regards to the members of the forensic staff from the State Hospital. None of these expert witnesses were called to testify during the evidentiary hearing, therefore there was no basis on which a *Daubert* hearing could be held.

The trial court did not err in granting the State's motion for directed verdict at the conclusion of petitioner's case because petitioner utterly failed to establish petitioner's mental retardation under the dictates of *Chase v. State*, 873 So.2d 1013, 1029, ¶¶ 74-78 (Miss. 2004). Petitioner call no mental health expert to testify that petitioner was mentally retarded and rested after putting on a single lay witness, petitioner's sister. Petitioner failed to meet his burden of proof, therefore the trial court did not err in granting the motion for directed verdict.

The trial court did not err in holding that petitioner's claim of ineffective assistance of counsel was "moot and overruled." As stated previously, petitioner called no witnesses to testify, other than petitioner's sister. Petitioner did not call his trial counsel to testify nor did he call any of the witnesses he had stated that he may call in his motion for continuance.

Petitioner failed to establish by a preponderance of the evidence that counsel's performance was deficient and the deficient performance resulted in prejudice as required by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Having failed to adduce any proof on the question of ineffective assistance of counsel his claim was truly moot. The trial court properly denied relief on this portion of the claim.

ARGUMENTS

I. THE TRIAL COURT DID NOT ERR IN DENYING AN EX PARTE HEARING ON HIS MOTION FOR EXPERT FUNDS.

Goodin contends the trial court erred in denying him an ex parte hearing on his motion for funds to hire an expert in the field of mental health. The State would assert that this claim has already been decided by this Court and therefore is res judicata. On June 30, 2004, the circuit court entered an order denying Goodin's motion for and ex parte hearing and motion for expert assistance. CP. 544-45. On July 12, 2004, Goodin filed with this Court a Petition for Review of Lower Court's Order Denying Petitioner's Motions for Expert Assistance; Motion for Stay. CP. 546-601. The first sentence of petitioner's petition for review reads:

> COMES NOW the petitioner HOWARD DEAN GOODIN (GOODEN), by and through the Mississippi Office of Capital Post-Conviction Counsel, petitioner's counsel of record, requesting that this Court vacate the Order of the Circuit Court of Newton County, Mississippi, denying petitioner the *right to proceed ex parte on h is motion for funding to retain mental health experts and the Order dated June 30, 2008, and filed July 2, 2004, denying his motion for expert assistance.*
>
> C.P. 547.

On July 14, 2004, this Court entered an Order requiring the State to respond to the petition

for review and stay filed by petitioner by noon on July 16, 2004. CP. 603. The State filed its response with this Court on July 15, 2004. On August 11, this Court entered an Order which reads, in part:

> . . . After due consideration the panel finds first that the evidentiary hearing in question has been postponed until October 12, 2004, and the request for a stay is moot. *The panel further finds that the remainder of the relief requested by Goodin in the Petition is not well taken and should be denied.*
>
> IT IS THEREFORE ORDERED that the Petition for Review of Lower Court's Order Denying Petitioner's Motion for Expert Assistance; Motion for Stay filed by counsel for Howard Dean Goodin be and the same is hereby dismissed as moot in part and denied in part.
>
> C.P. 611-12.

The State would assert that petitioner is simply attempting to relitigate a claim that has already been decided by this Court. The State would assert that this claim has already been decided and therefore is not properly before the Court in this direct appeal.

Because this issue has already been decided by this Court in the petition for review filed by petitioner the State would assert that petitioner is entitled to no relief on this claim.

II. THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER A MENTAL HEALTH EXPERT OF HIS OWN CHOOSING.

The State would submit that this claim has already been decided by this Court and therefore is res judicata. On June 30, 2004, the circuit court entered an order denying Goodin's motion for expert assistance. CP. 544-45. On July 12, 2004, Goodin filed with this Court a Petition for Review of Lower Court's Order Denying Petitioner's Motions for Expert Assistance; Motion for Stay. CP. 546-601. On July 14, 2004, this Court entered an Order

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> C.P. 611-12.

Petitioner is simply attempting to relitigate a claim that has already been decided by this Court. The State would assert that this claim has already been decided and therefore is not properly before the Court in this direct appeal.

Without waiving the any other bar to presenting this claim in this appeal, the State would briefly and alternatively, address the issue raised. The State would assert that the trial court appointed experts to examine petitioner in an order entered October 1, 2003. C.P. 36-42. This Order reads, in part:

> The staff shall determine:
>
> (A) whether Goodin has substantial limitations in present functioning, manifested before age eighteen (18) years, characterized by significantly sub-average intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics,

leisure and work;

(B) whether Goodin has a mental disease, disorder, defect or suffers from organic brain damage;

(C) Whether Goodin has sufficient present ability to wihdraw his application for leave to seek post-conviction relief and has a rational, as well as, factual understanding of the nature and object of the legal proceedings; and

(D) Goodin has capacity to understand and to knowingly, intelligently and voluntarily waive or assert his constitutional rights.

C.P. 36-37.

After the testing and evaluation the forensic staff at the State Hospital issued a in a report dated March 22, 2004. C.P. 128-242. In this report the forensic staff at the State Hospital concluded:

> **FORENSIC OPINIONS:** We are unanimous in our opinion that Mr. Goodin is not mentally retarded as contemplated by the United States Supreme Court Decision in *Atkins v. Virginia*, 536 U.S. 304 (2002).
>
> We also are unanimous in our opinion that Mr. Goodin has the sufficient present ability to consult with his attorneys with a reasonable degree of rational understanding in the preparation of this post-convcition relief, and that he has a rational, as well a factual understanding of the nature and object of these legal proceedings.
>
> It is also our unanimous opinion that Mr. Goodin has the present capicity to understand and knowingly, intelligently, and voluntarily to waive or assert his constitutional rights.
>
> **DISCUSSION:** Although we are aware that Mr. Goodin has performed in the mentally retarded range on psychological testing in the past, it is our opinion that he was exaggerating his intellectual limitations on these occasions. In our opinion, Mr. Goodin's use of language both at his trial and during the course of this evaluation is incompatible with mental retardation. He also has

> demonstrated an ability to learn basic legal concepts and to apply thes concepts to his specific legal situation which, in our opinion, is beyond the capablitiy of one who genuinely mentally retarded.
>
> Mr. Goodin has demonstrated limitation in many areas of adaptive skills while in the community, but these do not appear to be based upon significantly subaverage intellectual functioning.
>
> C.P. 169-70.

Goodin being dissatisfied with those conclusions requested additional examination by mental health experts of his own choosing from the circuit court.

As an initial, matter this Court has held a criminal defendant *does not* have the right to a mental health expert of his choice or to receive funds to hire one of his choice; rather he has a right only to a competent one. The Court has further held that where the defendant is examined by an expert appointed by the court he has no right to an independent examination. *Byrom v. State*, 863 So.2d 836, 852, ¶ 33 (Miss. 2003); *Manning v. State*, 726 So.2d 1152, 1190-91, ¶¶ 157-61 (Miss. 1998); *Woodward v. State*, 726 So.2d 524, 528-29, ¶¶ 14-20 (Miss. 1997); *Butler v. State*, 608 So.2d 314, 321 (Miss. 1992); *Willie v. State*, 585 So.2d 660, 671 (Miss. 1991). Also, this Court has held that an examination at the Mississippi State Hospital meets the constitutional mandates of *Ake v. Oklahoma, supra. Willie*, 585 So.2d at 671. *See Woodward v. State*, 726 So.2d 524, 528-29, ¶¶ 14-20 (Miss. 1997); *Butler v. State*, 608 So.2d 314, 321 (Miss. 1992); *Cole v. State*, 666 So.2d 767, 781 (Miss. 1995); *Lanier v. State*, 533 So.2d 473, 480-81 (Miss. 1988).

This Court has further held, a trial court is not required to grant multiple psychiatric or psychological examinations in efforts by the defendant to secure an expert who will testify

favorably for him. *Willie v. State*, 585 So.2d 660, 671 (Miss. 1991); *Hill v. State*, 432 So.2d 427, 437-38 (Miss. 1983). The State would assert that this is just what Goodin was attempting to do in the filing he submitted to the circuit court.

Further, Goodin appears to argue that the staff at the State Hospital are the "State's" experts. Contrary to petitioner's assertion the trial court appointed the forensic staff at the State Hospital at Whitfield as the court's experts. The fact that the court's experts did not find petitioner to suffer from mental retardation does not make those experts the State's experts. Albeit, the State was certainly ready to call those experts to testify in the evidentiary hearing of this case. Additionally, the fact that the State Hospital obtained the assistance of Dr. Paul Deal[2] to aid in the evaluation of Goodin does not entitle him to an independent evaluation. Goodin seems to make the argument that since Whitfield called in an outside expert to assist in their evaluation that he is also entitled to an outside expert. Other than to assert that this is totally without foundation in any law this attorney has read, the State Hospital is free to obtain any such assistance they need in fulfilling the order to the circuit

[2]Dr. Paul Deal is a psychologist specializing in mental retardation and was associated by the staff State Hospital to assist in their evaluation of Goodin. He was also associated in the Mack Wells case by the State Hospital. He was employed by the Mississippi Department of Mental Health and assigned to the North Mississippi Regional Center [formerly the North Mississippi Retardation Center] in Oxford. Further, all of the employees of the State Hospital are employees of the Mississippi Department of Mental Health. Thus, Whitfield did not actually obtain an "independent expert" to assist in the evaluation of petitioner. They only obtained assistance from an employee of the same department assigned to a different facility.

Next Goodin argues that the trial court erred in denying his motion to be present at the evaluation by the forensic staff at the State Hospital at Whitfield. While Goodin certainly has a right to his attorney at any and all hearings held in this matter, he does not have a constitutional right to the presence of counsel during the evaluations conducted by mental health professionals charged with making the determination of whether he is mentally retarded, mentally ill and/or competent.

In fact, the pertinent authority on this question is to the contrary. In *Smith v. Estelle*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981),[4] the United States Supreme Court, in considering instances where mental health information is used against a capital defendant to secure a sentence of death. In *Smith*, the defendant was examined without notice to counsel and without any type warning that the information obtained in the examination would be used against him during the sentence phase of the trial on the question of future dangerousness. The Supreme Court spoke to both the Fifth and Sixth Amendment aspects of this claim. In deciding the Fifth Amendment, the Court held that the mental health professional examining the defendant must give the defendant warnings similar to those announced in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), prior to the examination. The Court held:

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. Because respondent did not voluntarily consent to the

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[4]The State realizes that Goodin relies almost solely on *Estelle*, however petitioner misreads the application of *Estelle* to the claim at bar.

> pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to Dr. Grigson to establish his future dangerousness. If, upon being adequately warned, respondent had indicated that he would not answer Dr. Grigson's questions, the validly ordered competency examination nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose. In such circumstances, the proper conduct and use of competency and sanity examinations are not frustrated, but the State must make its case on future dangerousness in some other way.
>
> "Volunteered statements . . . are not barred by the Fifth Amendment," but under *Miranda v. Arizona, supra*, we must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not "given freely and voluntarily without any compelling influences" and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them. *Id.*, at 478, 86 S.Ct., at 1630. These safeguards of the Fifth Amendment privilege were not afforded respondent and, thus, his death sentence cannot stand. [FN13]
>
> ---
>
> 13. Of course, we do not hold that the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination.
>
> 451 U.S. at 468-469.

Of course, Goodin filed a petition contending that he is mentally retarded, mentally ill and not competent so he has placed his mental status in play in this case.

In deciding the Sixth amendment aspect of *Smith*, the Supreme Court held that once counsel has been appointed for a capital defendant, counsel must be given notice that the defendant will be examined by a mental health professional on behalf of the state and the purpose of that examination. The basis of this requirement is so counsel may confer with the defendant *prior* to the examination. The Court held:

> Here, respondent's Sixth Amendment right to counsel clearly had

attached when Dr. Grigson examined him at the Dallas County Jail,[14] and their interview proved to be a "critical stage" of the aggregate proceedings against respondent. *See Coleman v. Alabama*, 399 U.S. 1, 7-10, 90 S.Ct. 1999, 2002-2004, 26 L.Ed.2d 387 (1970) (plurality opinion); *Powell v. Alabama, supra*, 287 U.S., at 57, 53 S.Ct., at 60. Defense counsel, however, were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness,[15] and respondent was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed.

Because "[a] layman may not be aware of the precise scope, the nuances, and the boundaries of his Fifth Amendment privilege," the assertion of that right "often depends upon legal advise from someone who is trained and skilled in the subject matter." *Maness v. Meyers*, 419 U.S. 449, 466, 95 S.Ct. 584, 595, 42 L.Ed.2d 574 (1975). As the Court of Appeals observed, the decision to be made regarding the proposed psychiatric evaluation is "literally a life or death matter" and is "difficult . . . even for an attorney" because it requires "a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of possible alternative strategies at the sentencing hearing." 602 F.2d, at 708. It follows logically from our precedents that a defendant should not be forced to resolve such an important issue without "the guiding hand of counsel." *Powell v. Alabama, supra*, 287 U.S., at 69, 53 S.Ct., at 64.

Therefore, in addition to Fifth Amendment considerations, the death penalty was improperly imposed on respondent because the psychiatric examination on which Dr. Grigson testified at the penalty phase proceeded in violation of respondent's Sixth Amendment right to the assistance of counsel.[16]

451 U.S. at 470-471. [Footnotes omitted.]

The *Smith* Court further pointed out:

Our holding based on the Fifth and Sixth Amendments will not prevent the State in capital cases from proving the defendant's future dangerousness as required by statute. A defendant may request or consent to a psychiatric examination concerning future dangerousness in the hope of escaping the death penalty. In addition, a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase. *See* n. 10, *supra*.

451 U.S. at 472.

Looking back to footnote 10 of *Smith*, we find that the Court stating:

> 10. On the same theory, the Court of Appeals here carefully left open "the possibility that a defendant who wishes to use psychiatric evidence in his own behalf [on the issue of future dangerousness] can be precluded from using it unless he is [also] willing to be examined by a psychiatrist nominated by the state." 602 F.2d, at 705.

451 U.S. at 466.

The high court did discuss the exact claim presented here in footnote 14. The Court noted:

> 14. Because psychiatric examinations of the type at issue here are conducted after adversary proceedings have been instituted, we are not concerned in this case with the limited right to the appointment and presence of counsel recognized as a Fifth Amendment safeguard in *Miranda v. Arizona*, 384 U.S. 436, 471-473, 86 S.Ct. 1602, 1626-1627, 16 L.Ed.2d 694 (1966). *See Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378. Rather, the issue before us is whether a defendant's Sixth Amendment right to the assistance of counsel is abridged when the defendant is not given prior opportunity to consult with counsel about his participation in the psychiatric examination. *But cf.* n. 15, *infra.*
>
> Respondent does not assert, and the *Court of Appeals did not find, any constitutional right to have counsel actually present during the examination. In fact, the Court of Appeals recognized that "an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination."* 602 F.2d at 708. *Cf. Thornton v. Corcoran*, 132 U.S.App.D.C. 232, 242, 248, 407 F.2d 695, 705, 711 (1969) (opinion concurring in part and dissenting in part).

451 U.S. at 471 -471. [Emphasis added.]

Looking to what the Fifth Circuit held regarding this question we turn to *Estelle v. Smith*, 602 F.2d 694 (5th Cir. 1979). The Fifth Circuit held:

> We also agree with Judge Porter's holding that a defendant has no constitutional right to have an attorney present during a psychiatric evaluation of his dangerousness. Here Judge Porter followed *United States v. Cohen*, 530 F.2d 43 (5th Cir. 1976), which held that there was no right to have an attorney present when the examination was to decide if the defendant was sane. *See id.* at 48. Judge Porter reasoned, as we had in *Cohen, that an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination. See id. In this he was correct.*
>
> 602 F.2d at 708. [Emphasis added.]

Thus, the Supreme Court noted, with apparent approval, the decision of the Fifth Circuit on this point. Since the decision in *United States v. Cohen*, 530 F.2d 43 (5th Cir. 1976), the Fifth Circuit has consistently held there is no right to counsel during the actual testing and examination of a criminal defendant. *See United States v. Bondurant*, 689 F.2d 1246 (5th Cir. 1982) and *Hernandez v. Johnson*, 248 F.3d 344 (5th Cir. 2001); *Gholson v. Estelle*, 675 F.2d 734, 743, n. 10 (5th Cir. 1982). Other circuit courts of appeals have held the same. *See Gruning v. DiPaolo*, 311 F.3d 69, 71, n. 5 (1st Cir. 2002); *United States v. Byers*, 740 F.2d 1104, 1118-19 (D.C. Cir. 1984); *Woomer v. Aiken*, 388 F.2d 719, 726 (4th Cir. 1968). There is no constitutional right for counsel to be present during a mental evaluation.[5]

All a defendant is constitutionally entitled to is notice in order that he can confer with counsel and warnings that would allow him to refuse to cooperate with the evaluation and the resulting consequences of that refusal. *See Smith, supra.* Goodin and his counsel were given notice that he was going to be examined and the focus of that examination. He was

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[5]This Court was recently faced with this same question in the interlocutory appeal filed in *Wells v. State*, No. 2003-M-1865-SCT. This Court denied Wells' interlocutory appeal on this question on September 26, 2003.

given notice of when the examination was going to take place. Thus petitioner had sufficient notice of the focus of this examination and counsel had sufficient time to confer with counsel regarding whether to cooperate prior to the examination. That is all that all that is constitutionally required. The trial court did not err in Xxxxx

IV. THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER A *DAUBERT* HEARING REGARDING THE RESPONDENTS PROPOSED EXPERTS.

Petitioner next contends that the trial court erred in failing to conduct a hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 589, 113 S.Ct 2686 (1993), with regard to the "respondents" proposed witnesses. First, while petitioner continues to characterize the forensic staff from the State Hospital at Whitfield as "respondents" experts, witnesses, these witnesses were appointed by the trial court as the court's experts.

More importantly the trial court did not deny petitioner a *Daubert* hearing with regards to the court's experts. The trial court clearly stated:

> BY THE COURT: Well, I think you gentlemen are making issues right now that's out of place. Uh – I'm familiar with the Wiley case and I'm familiar with the Chase case. Uh – I'm also familiar with the Daubert case. Now the Daubert case is – uh – is to question the qualifications of the – uh – experts and whether or not they use the proper methodology and so forth. But you're asking me to conduct a Daubert hearing when I have no idea of what these witnesses are going to say, what their testimony will be, how they will express themselves with reference to reliability and – and so forth. I have no idea who – uh – State will call as their expert witnesses. I'll reserve my ruling on whether or not there will be a Daubert decision after I've heart that testimony, but I'm not going to try that case before I get into the issues that's really in this case and the real issue right at this time is that you have the burden of proof and you must invoke – uh – Wiley and you invoke Chase. Chase is where they got into court on an affidavit, but that was changed by Wiley. Wiley says you've got to come into court with expert testimony before

you can raise the issue to even reach the preponderance of the evidence rule. Therefore – uh – this Court's ready to receive your evidence. You have the burden fo proof of going forward. I'll hear you witness.

Tr. 36-37.

Clearly, the trial court did not deny petitioner a *Daubert* hearing. The trial court merely stated that it would take that matter up when the State called an expert witness to testify.

Petitioner only called one lay witness to testify, petitioner's sister. Petitioner called no expert witnesses to testify. When petitioner rested, the State moved for a directed verdict because petitioner had not met the burden required by *Chase v. State*, 873 So.2d 1013, 1029, ¶¶ 74-78 (Miss. 2004). The trial court heard arguments and then granted the State's motion.

The purpose of *Daubert* is to keep "junk science" from being presented to the trier of fact. In the case at bar, no expert witness was called to testify, therefore there could be no error in failing to hold a *Daubert* hearing.

The State would assert that petitioner has failed to demonstrate that the trial court erred in holding a *Daubert* hearing where no expert testimony was presented at trial. The decision of the trial court should be affirmed.

V. THE TRIAL COURT DID NOT ERR IN GRANTING THE STATE'S MOTION FOR SUMMARY JUDGMENT.

Petitioner contends that the trial court erred in granting the State's motion for summary judgment/directed verdict at the conclusion of petitioner's case. The State would assert that petitioner did meet the test set forth in this Court's decision in *Chase v. State*, 873 So.2d 1013 (Miss. 2004). In *Chase*, this Court held:

¶ 74. We hold that no defendant may be adjudged mentally retarded for purposes of the Eighth Amendment, unless such defendant produces, at a minimum, an expert who expresses an opinion, to a reasonable degree of certainty, that:

1. The defendant is mentally retarded, as that term is defined by the American Association on Mental Retardation and/or The American Psychiatric Association;

2. The defendant has completed the Minnesota Multi phasic Personality Inventory-II (MMPI-II) and/or other similar tests, and the defendant is not malingering.

¶ 75. Such expert must be a licensed psychologist or psychiatrist, qualified as an expert in the field of assessing mental retardation, and further qualified as an expert in the administration and interpretation of tests, and in the evaluation of persons, for purposes of determining mental retardation.

¶ 76. Upon meeting this initial requirement to go forward, the defendant may present such other opinions and evidence as the trial court may allow pursuant to the Mississippi Rules of Evidence.

¶ 77. Thereafter, the State may offer evidence, and the matter should proceed as other evidentiary hearings on motions.

¶ 78. At the conclusion of the hearing, the trial court must determine whether the defendant has established, by a preponderance of the evidence, that the defendant is mentally retarded. The factors to be considered by the trial court are the expert opinions offered by the parties, and other evidence if limitations, or lack thereof, in the adaptive skill areas listed in the definitions of mental retardation approved in *Atkins*, and discussed above. Upon making such determination, the trial court shall place in the record its finding and the factual basis therefor.

873 So.2d at 1029.

It is clear from the record that petitioner did not produce an expert who expressed an opinion, to a reasonable degree of certainty that Goodin is mentally retarded, as that term is defined by the American Association on Mental Retardation and/or The American Psychiatric

Association, nor did he show that the defendant had completed the Minnesota Multi phasic Personality Inventory-II (MMPI-II) and/or other similar tests, and the defendant is not malingering.[6]

The State would assert that while criminal in nature this was a civil proceeding and this Court has set forth the manner in which a claim attacking a directed verdict will be assessed on appeal. The standard this Court uses for determining whether a directed verdict should have been granted is the same as that employed for a motion for judgment not withstanding the verdict. In *Twin County Electric Power Ass'n v. McKenzie*, 823 So.2d 464, 468 (Miss. 2002), this Court held:

> Under this standard, this Court will consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render. On the other hand if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required. The above standards of review, however, are predicated on the fact that the trial judge applied the correct law. (citing *Alpha Gulf Coast, Inc. v. Jackson*, 801 So.2d 709, 720 (Miss.2001)).
>
> 823 So.2d at 468.

Since there was no evidence that remotely approached the test for proving mental retardation set forth in *Chase* it cannot be said that the trial court's decision was clearly erroneous. Petitioner failed to sustain his burden of proof under *Chase*.

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[6]While petitioner did not meet the "initial requirement to go forward" of putting on an expert, the trial court allowed petitioner to put on the testimony of his sister, Ada Reese.

Even if the standard for granting a directed verdict in this case is that found in criminal cases that test was recently set forth in *Boone v. State*, 973 So.2d 237 (Miss. 2008). There the Court held:

> ¶ 18. The aforementioned issues presented by Boone have been combined, as their standards of review are overlapping. A motion for a directed verdict and a motion for a judgment notwithstanding the verdict challenge the sufficiency of the evidence. *Bush v. State*, 895 So.2d 836, 843 (Miss.2005). When reviewing a case for sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). The evidence must show "beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." *Id.* (quoting *Carr v. State*, 208 So.2d 886, 889 (Miss.1968)). If, keeping in mind the reasonable-doubt standard, "reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense," the evidence will be deemed to have been sufficient. *Id.* (quoting *Edwards v. State*, 469 So.2d 68, 70 (Miss.1985)).
>
> 973 So.2d at 241-42.

Even viewing the evidence adduced by petitioner in a light most favorable to petitioner it cannot be said that he produced sufficient evidence to sustain a finding that he was mentally retarded under *Chase*.

The State would assert that the decision of the trial court in granting the State's motion for directed verdict was not clearly erroneous and the decision of the trial court must be affirmed.

VI. THE TRIAL COURT DID NOT ERR IN HOLDING THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM WAS WITHOUT MERIT.

Petitioner next contends that the trial court erred in holding that the ineffective assistance of counsel claim was irrelevant upon the finding that petitioner was not mentally retarded. This Court remanded the question of whether trial counsel were ineffective in failing to conduct an investigation in to whether petitioner was mentally ill and as to his competency to the trial court for an evidentiary hearing. The purpose this evidentiary hearing was so that a petitioner can put on what ever witnesses he desired to show that trial counsel were ineffective in these two areas. Petitioner put on a single witness, petitioner's sister and rested.

Respondents would assert that the trial court's order correctly states the proper conclusion in this case. The trial court's order reads:

> **IT IS ORDERED AND ADJUDGED** that the claims of ineffective assistance of counsel are rendered moot and overruled.
>
> CP. 670.

This is not a finding that the ineffective assistance of counsel claim is irrelevant, it is a finding that petitioner failed to present any evidence to support the claim. The simple reason for the trial court's finding is that petitioner put on no evidence at the evidentiary hearing in an attempt to show that trial counsel were ineffective. He failed to call either of trial counsel to testify or any other witness to testify on the question of ineffective assistance of counsel.[7]

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[7]In a petitioner's motion filed on April 8, 2004, with the trial court petitioner sought a continuance of the scheduled April 26, 2004, evidentiary hearing in this matter. C.P. 244-

Because petitioner failed to call a single witness on the question of ineffective assistance of counsel it can only be presumed that the witnesses he could have called would not have been favorable to him.

Further, petitioner failed to call a single mental health professional although there were six mental health professionals, the court's experts, sitting in the courtroom during the hearing.[8] The question then becomes why did petitioner not call one of these witnesses to testify as to his alleged mental illness or competency? The only inference that can be drawn from the failure to call these witnesses or any of the other witnesses to testify regarding

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60. Petitioner attached a list of the witnesses he proposed to call at the evidentiary hearing to this motion for continuance. C.P. 258-60. Among those people petitioner listed as proposed witnesses relating to the claim of ineffective assistance of counsel. These proposed witnesses were: Ken Truner, the District Attorney at the time of petitioner's trial; Mark Duncan, an Assistant District Attorney at the time of petitioner's trial; Judy T. Martin, Special Assistant Attorney General, one of the State's attorneys in this case, Edmund J. Phillips, Jr., petitioner's appellate counsel; Robert N. Brooks, one of petitioner's trial attorneys; and Shawn Harris, one of petitioner's trial counsel. C.P. 59-60. None of these witnesses was called to testify regarding the claim of ineffective assistance of counsel.

[8]The mental health professionals in the courtroom were: Dr. Reb McMichael, Chief of Forensic Services at Whitfield, a psychiatrist; Dr. John Montgomery, a psychiatrist from Whitfield; Dr. John Deal, a psychologist with the North Mississippi Mental Retardation Center; Dr. Charles Harris, a psychologist from Whitfield, Dr. Shirley Beall, a psychologist from Whitfield, and Ms. Beth Ann Killary, a psychometrist.

In addition, petitioner did not call any of the other mental health professionals listed in his April 7, 2004, motion for continuance. These mental health professionals were: Dr. McMichael and Dr. Montgomery, psychiatrist from Whitfield; Dr. C. Gerald O'Brien, a psychologist who had examined petitioner prior to trial and furnished a post-conviction affidavit; Dr. David D. Powers, a clinical psychologist, who had examined petitioner in 1998; Dr. Michael Whelan, a psychologist who had examined petitioner in 1998; Dr. Thomas E. Welsh, a medical doctor, who examined petitioner in 1998; and Cindy Adams, with the Weems Mental Health Center who did an intake interview with petitioner in 1998. *See* C.P. 259.

petitioner's alleged mental illness and competency is that their testimony would not have been favorable to petitioner's case.

As stated above, the only witness petitioner called to the stand was petitioner's sister, Ada Reese, who related information regarding petitioner during his early years growing up.[9] However, Ms. Reese, stated that she had only seen him only seen her brother three or four times in the last thirty years. Tr. 66.

At the conclusion of Ms. Reese's testimony, petitioner made the following announcement:

Your Honor, at this time the Petitioner would rest.

Tr. 91.

Having failed to present any evidence on the ineffective assistance of counsel question that would show that trial counsel were ineffective the claim became moot.

The State would assert that the failure to call trial counsel and/or other witnesses on the subject of ineffective assistance of counsel at the evidentiary hearing ordered by this Court can only be viewed as creating a presumption that such testimony would not have proved counsel's assertion. While counsel for the State has been unable to find a case in our state which is directly on point counsel did find the following in 78 A.L.R.4th 571, §§ 2 & 15.

§ 2. Summary and comment

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[9]Petitioner also listed ten other family members or former girl friends in his motion for continuance filed on April 8, 2004. *See* C.P. 258.

It is an established rule of evidence that the failure to call an available witness who is within one party's control and has knowledge pertaining to a material issue may, if not satisfactorily explained, lead to an inference or presumption[4] that the witness' testimony would have been adverse to that party (Am. Jur. 2d, Evidence § 180),[5] and a similar inference may result from the failure to question a witness who is present on a particular point (Am. Jur. 2d, Evidence § 185).

A brief review of the general requirements for drawing the missing witness inference will be helpful before considering its function in the modern cases involving a party's failure to present testimony from that party's attorney. The rule by its terms provides a great deal of latitude in determining whether an adverse inference is warranted under a given set of circumstances. First, the absent witness must have been "available" and within the "control" of the party against whom the inference is applied, factors that for practical purposes are largely interchangeable, and relate essentially to the party's superiority of access to the witness. Among the considerations frequently entertained in this regard are the witness' competence to testify, the existence of a privilege preventing the witness from being compelled to testify (a factor of particular importance in this annotation, since the attorney-client privilege may affect counsel's availability to testify for the opponent of his or her client), the party's ability to obtain the witness' presence in court or at a deposition by the exercise of reasonable diligence, the party's opportunity for advance knowledge of the substance of the witness' testimony, and the likelihood of bias on the part of the witness. If the parties stand on an equal footing with regard to such factors, then the adverse inference is either not applicable, or else it applies to both parties (Am. Jur. 2d, Evidence § 180).

The testimony that the absent witness could have given must also be "material." This factor may be seen as including not only the relevance of the testimony but also its general importance to the party's case. In this respect, courts have considered whether the burden of proof lies with the party failing to call the witness, the significance of the issue that would have been affected by the missing testimony, the strength of the opposing evidence, and whether the absent witness' testimony would have been merely cumulative of other evidence, rather than providing the only proof on a particular issue or needed corroboration on a disputed point (see Am. Jur. 2d, Evidence § 186).

The third significant consideration affecting the application of the missing witness rule is whether the party has a satisfactory excuse for failing to call the witness; usually, the explanation will pertain to one of the factors

mentioned above.

It should be noted that the requirements for drawing the missing witness inference may be construed more or less strictly, not only in different jurisdictions but also in different procedural contexts. The missing witness rule is a frequently requested subject of jury instructions, in which case a relatively strong showing of justifying circumstances is required (Am. Jur. 2d, Trial § 771); it is often the basis of argument by counsel, in which event greater latitude is generally permitted (Am. Jur. 2d, Trial § 245); and it may also be utilized by the courts in evaluating the sufficiency of the evidence on a given point. For purposes of classifying the results of the cases discussed in the following sections no attempt has been made to differentiate systematically among these various situations; the sections are subdivided according to whether the inference was warranted under the circumstances of the particular case, which are reflected in the discussion of each case to the extent that they were specified in the court's opinion (§§ 3- 15).

The existence of a confidential professional relationship between a party and a witness, such as the attorney-client relationship, may be considered a significant factor indicating that the witness is more "available" or within the "control" of the party for purposes of the missing witness rule (Am. Jur. 2d, Evidence § 184). Although in general an attorney is a competent witness for a client, except as to privileged matters (Am. Jur. 2d, Witnesses § 97), ethical considerations may hinder an attorney who is currently representing a party from testifying on that party's behalf. In most courts it is considered improper for an attorney to be a witness in a case that he or she is handling, and in order to testify the attorney may be required to withdraw from the case (Am. Jur. 2d, Witnesses §§ 98, 98.5, 99). However, at least in some circumstances, counsel may be permitted to take the stand and then return to the role of advocate,[6] and in several civil cases courts have held trial counsel "available" as a witness for the party that the attorney was representing, without discussing whether counsel would have to withdraw in order to testify (§§ 5, 9).

The results of the cases discussed in the sections to follow demonstrate that courts have been quite interested in hearing relevant testimony from a party's attorney, and ready to invoke an adverse inference from the attorney's absence if the prerequisites of the missing witness rule are satisfied. Civil cases are covered in §§ 3- 10, and criminal cases in §§ 11-15; each section deals with the propriety of basing a negative inference on a party's failure to present testimony from the parti's attorney on particular matters.

On issues pertaining to attorney's fees or the settlement of litigation, two areas in which counsel are especially likely to have intimate knowledge of relevant facts, the courts have held that counsel's failure to testify gave rise to an adverse inference (§ 3), and the same conclusion has been reached in cases where a party's attorney did not give testimony regarding estate, trust, or tax matters (§ 4), or regarding family law matters (§ 5). In a landlord-tenant dispute, the court held that no inference was warranted by the lessee's failure to call its attorney to the stand (§ 6). Divided results have been reached as to the propriety of a missing witness inference based on the failure of a party's attorney to testify on issues arising during negotiations for the repayment of debt (§ 7), personal injury litigation (§ 8), and real-estate transactions (§ 9), and on questions regarding patents (§ 10).

The decisions upholding the propriety of the inference in these civil cases have generally been grounded on the courts' conclusions, explicit or implicit, that the attorney witness was in the control of the client and was in a position to give testimony that should have been presented (§§ 3- 5, 7[a], 8[a], 9[a], 10[a]). The civil cases holding the inference unwarranted have involved a variety of factors, including the inadmissibility of the attorney's testimony due to the attorney-client privilege (§ 6) or other evidentiary restriction (§ 10[b]), the fact that the attorney had little knowledge of the matter in question or that other witnesses could give better testimony (§ 8[b]), and the failure of the party seeking the inference to demonstrate the attorney's availability (§ 7[b]). It has also been held that a party's attorney was equally available to testify for the other party, where the attorney was no longer associated with the firm representing the party against whom the inference was sought (§ 9[b]), where the attorney had been deposed by the other party (§ 10[b]), and even where no such special circumstances were present (§ 7[b]).

Rather surprisingly, in all of the modern criminal cases the missing witness inference has been held to have been warranted by a party's failure to present testimony from counsel. As to matters occurring before the defendant's arrest, it has been held that an adverse inference was created by the defendant's failure to call the attorney who he claimed had advised him that the transactions for which he was being prosecuted were legal (§ 11), and it has apparently been held that the state was subject to such an inference for failing to call a district attorney, as well as another witness, to explain some inconsistencies in the evidence regarding the state's dealings with an informer (§ 12). In cases reviewing petitions for postconviction relief from guilty pleas, or from convictions entered after failed negotiations for a plea bargain, the courts have held that an unfavorable inference arose from a petitioner's failure

to call counsel who advised, or allegedly failed to advise, the petitioner at the time the plea was entered or the plea bargain negotiated (§ 13). The same result has been reached where the petitioner or defendant alleged prejudice arising during pretrial proceedings that did not concern a guilty plea or plea bargaining, and yet did not call counsel to corroborate such allegations (§ 14). *In postconviction proceedings raising issues regarding the petitioner's representation at trial, the courts have approved the imposition of an inference against the petitioner, where trial counsel's testimony was not presented (§ 15).*

It is significant that the majority of these criminal cases involved proceedings for postconviction relief in which the petitioner bore the burden of proof, as opposed to the usual situation in criminal prosecutions where the burden is on the state, making it much less likely that the defendant would be subject to any inference for failing to call witnesses. Moreover, none of the criminal cases within the scope of the annotation involved the failure to call an attorney who was currently involved in the proceedings. *It is also noteworthy that a defendant who raised the advice of his attorney as a defense was held to have thereby waived the attorney-client privilege, thus opening himself up to the missing witness inference when he did not obtain corroboration from the attorney (§ 11).*

In conclusion, it can be said that despite the attorney-client privilege, and the ethical complications involved when current counsel becomes a witness for the client, in modern cases the missing witness rule has been applied to parties' failure to present testimony from their attorneys in much the same fashion as it has in cases involving other types of absent witnesses. As in such other cases, a great variety of factual and legal circumstances may affect the propriety of drawing the missing witness inference, but in general the most important consideration is whether the situation at hand fits with the rationale underlying the missing witness rule — that is, *whether it appears that the client would have called the attorney to testify, except that the client either knew or feared that counsel's testimony would have been unfavorable.*

. . .

§ 15. Representation at trial

The courts in the following cases in which a petitioner sought postconviction relief held that an adverse presumption or inference was warranted by the petitioner's failure to call trial counsel to testify on an issue

pertaining to the representation provided to the petitioner during trial.

In *Bell v State* (1968) 243 Ark 839, 422 SW2d 668, a proceeding for postconviction relief brought by a petitioner who was convicted of first degree murder, *the court held that where the petitioner failed to call the court-appointed counsel who represented him both at trial and at the postconviction hearing to corroborate his contention that he had asked for certain witnesses to be brought in to testify for him at trial, a presumption was created that the attorney's testimony, if produced, would have been unfavorable*. The petitioner claimed that the witnesses (whom he did not name) would have testified that the victim had no money, eliminating any motive for robbery. The court noted that the petitioner's testimony was the only evidence supporting his contention that he had asked for these witnesses, and that the petitioner could have called the trial judge as well as his attorney to testify, since if there was any truth in his allegation those officers would have been aware of it. The court affirmed the denial of relief to the petitioner.

In *Lenoir v State* (1977) 267 Ind 212, 368 NE2d 1356, *a proceeding for postconviction relief in which the petitioner argued that his trial counsel had been incompetent in failing to call certain witnesses, the court held that not only was the petitioner required to overcome a presumption of competency on the part of his counsel, but also since no effort was made to produce either the testimony or an affidavit of trial counsel, it could be inferred that the attorney would not have corroborated the petitioner's allegations of incompetency.* The court affirmed the denial of relief.

The court upheld a denial of postconviction relief that was sought on the ground of ineffective assistance of counsel at trial, in *Cobbs v State* (1982, Ind) 434 NE2d 883, *holding that the judge at the postconviction hearing could infer that the petitioner's trial counsel would not have corroborated the allegations of his incompetency, where the petitioner made no effort to produce counsel's testimony or his affidavit.* The petitioner, who was convicted of kidnapping and rape, claimed that his counsel had been inadequately prepared for trial, failed to call an alibi witness, and failed to make a sufficient effort to suppress the victim's identifications of the petitioner before and at trial. The court pointed out that the petitioner did not call his trial counsel to testify at the hearing, although it was shown that the attorney was available and still engaged in the practice of law. The petitioner's claims of ineffective assistance were both uncorroborated and contradicted by evidence showing that his trial counsel had rendered adequate assistance, concluded the court.

Where the *petitioner did not call his trial counsel as a witness at the hearing on his petition for postconviction relief, it could be inferred that counsel would not have corroborated the petitioner's allegation that he was denied effective assistance of counsel at trial*, held the court, in *Cochran v State* (1983, Ind) 445 NE2d 974. Not only were the petitioner's complaints, which included counsel's refusal to call certain witnesses, matters of trial strategy and thus insufficient to establish ineffective representation, said the court, but he did not provide testimony from trial counsel as to the manner in which counsel had handled the potential witnesses or any other decision he had made during the petitioner's trial. The petitioner acknowledged that he had not known the whereabouts of the witness he most wanted to call at the time of his trial, observed the court, and he gave only his word that he had insisted that certain people be called as witnesses and that they would have testified as he now claimed. The court affirmed the denial of relief from the petitioner's murder conviction.

The court *held that where the petitioner's trial counsel did not testify at the hearing on the petition for postconviction relief, the judge was justified in inferring that the attorney would not have corroborated the petitioner's allegations of inadequate representation at trial*, in *Davis v State* (1983, Ind) 446 NE2d 1317. The petitioner, who pled guilty to a rape charge and was convicted of kidnapping after a trial, claimed that his trial counsel was ineffective for failing to interview certain witnesses, being ill during trial, failing to move for a competency hearing, failing to object to a visibility problem regarding certain charts used at trial, and failing to keep the petitioner advised of the progress of the direct appeal from his kidnapping conviction. However, observed the court, the only evidence on these issues was the petitioner's own uncorroborated testimony. In addition to the inference arising from the absence of supporting testimony from trial counsel, the court pointed out that the record showed that counsel had been well prepared and that the trial as a whole was not a mockery of justice. The court affirmed the denial of relief from the kidnapping conviction, although it ordered that the petitioner's plea of guilty to the rape charge be vacated, on unrelated grounds.

In *Owens v State* (1984, Ind) 464 NE2d 1277, the court *affirmed the denial of postconviction relief to a petitioner who had been convicted of three counts of armed robbery, holding that where, as here, a petitioner does not call trial counsel as a witness in postconviction proceedings challenging the effectiveness of that counsel, there is a justifiable inference that counsel would not have corroborated the allegations of ineffectiveness*, which in this case included failure to object to and move to strike key witnesses' identification

testimony, failure to obtain the testimony of the petitioner's wife, and failure to consult with the petitioner about the propriety of requesting a certain jury instruction.

Affirming a denial of postconviction relief from a robbery sentence, the court *held that the petitioner's failure to present testimony from his trial counsel permitted the inference that counsel would not have corroborated the petitioner's allegations of incompetent assistance of counsel*, in *Van Evey v State* (1986, Ind) 499 NE2d 245. The petitioner's claims that his counsel had refused to permit him to testify, and had threatened to "walk out" if the petitioner did so, were serious accusations, said the court, but it pointed out that there was no testimony from trial counsel as to these alleged discussions and decisions that occurred during the trial. In cases where no effort is made to produce either the testimony of trial counsel or counsel's affidavit, the judge at the postconviction hearing may infer that counsel would not have corroborated the allegations of incompetency, the court stated, concluding that the judge here properly decided that the petitioner's testimony was insufficient to overcome the presumption of his attorney's competency.

The court held that the *judge at the petitioner's postconviction hearing could infer that the petitioner's trial counsel would not have corroborated some of the petitioner's allegations of ineffective representation at trial, where the petitioner did not present his trial counsel as a witness in support of his claims*, in *Dickson v State* (1989, Ind) 533 NE2d 586, a proceeding in which the petitioner sought relief from a conviction of commission of a felony (robbery) while armed. The petitioner claimed, among other things, that his attorney at trial had misled him into waiving a jury trial, and had failed to discuss possible defenses. Noting the adverse inference that could be drawn from the petitioner's failure to procure the testimony of trial counsel as to these matters, the court stated that these were credibility issues to be determined by the judge below, whose judgment would not be disturbed. The court affirmed the denial of the petition.

78 A.L.R.4th 571. [Emphasis added.]

The State would assert that petitioner's failure to call any witnesses to testify on the subject of ineffective assistance of counsel the trial court was correct in holding the claims to be moot.

Petitioner appears to argue that he did not have to present any evidence because this Court remanded the case for an evidentiary hearing on this subject. The reason the Court remanded these claims for an evidentiary hearing was in order that petitioner could put on proof to substantiate his claim. Petitioner failed to put on any proof of deficient performance or of resulting prejudice. Further, petitioner appears to argue that the trial court had to consider the affidavits, which were presented to this Court in the application for post-conviction relief as his proof. If that were the case, this Court could have decided the issue without remanding the case for an evidentiary hearing.

Petitioner also argues that the trial court did not address the questions of whether petitioner suffered from some mental illness or whether he was competent. Those two issues were remanded for a hearing in the context of ineffective assistance of counsel, not as stand alone substantive claims. Petitioner failed to adduce any proof on what actions trial counsel took in its investigation or the reason for investigating or not investigating any subject, much less these topics. Simply put petitioner failed to call any witnesses to testify on the subject of ineffective assistance of counsel, although he had listed many in his April 7, 2004, motion for continuance in this case. He made no attempt to show that any of his proposed witnesses were unavailable as witnesses. He simply put on a single witness, petitioner's sister, and rested. Petitioner failed to carry his burden of proof to demonstrate that counsel was ineffective by showing both deficient performance and resulting prejudice as required by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The Court recently reiterated the standard by which a circuit court's decision on a

claim of ineffective assistance of counsel is to be assessed on an appeal of the denial of post-conviction relief in *Loden v. State*, 971 So.2d 548 (Miss. 2007). There the Court held:

> ¶ 61. "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. In evaluating counsel's performance:
>
> > *[F]irst, the defendant must show that counsel's performance was deficient.* This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, *the defendant must show that the deficient performance prejudiced the defense.* This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.*
>
> *Id.* at 687, 104 S.Ct. 2052 (emphasis added). "[T]here is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697, 104 S.Ct. 2052. *This Court finds that the circuit court was not "clearly erroneous" in finding that counsel's performance was not deficient. Brown*, 731 So.2d at 598.
>
> 971 So.2d at 573-574. [Emphasis added.]

In *Brown v. State*, 731 So.2d 595 (Miss. 1999), this Court held:

> ¶ 6. *When reviewing a lower court's decision to deny a petition for post conviction relief this Court will not disturb the trial court's factual findings unless they are found to be clearly erroneous. Bank of Mississippi v. Southern Mem'l Park, Inc.*, 677 So.2d 186, 191 (Miss.1996). However, where questions of law are raised the applicable standard of review is *de novo. Id.*
>
> 731 So.2d at 598. [Emphasis added.]

In *Holland v. State*, 587 So.2d 848 (Miss. 1991), this Court held that mixed questions of law and fact are to be assessed as follows:

> . . . In other words: (1) if the judge based his finding upon appropriate principles of law; (2) and the finding is supported by the facts (*i.e.*, by substantial evidence); (3) then this Court may not reverse. *Schmitt v. State*, k560 So.2d 148, 151 (Miss.1990) . . .
>
> 587 So.2d at 860.

Respondents would assert that the trial court's order holding that the ineffective assistance of counsel claim was "moot and overruled" is not clearly erroneous based on the evidence presented at the evidentiary hearing in this case. The ruling of the trial court should be affirmed.

CONCLUSION

For the above and foregoing reasons the State would respectfully submit that the decision of the circuit court denying post-conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mail, first-class postage prepaid, a true and correct copy of the foregoing **BRIEF FOR APPELLEE** to the following:

Glenn Swartzfager, Esquire
Louwlynn Vanzetta Williams, Esquire
Mississippi Office of Capital Post-Conviction Counsel
Post Office Box 23786
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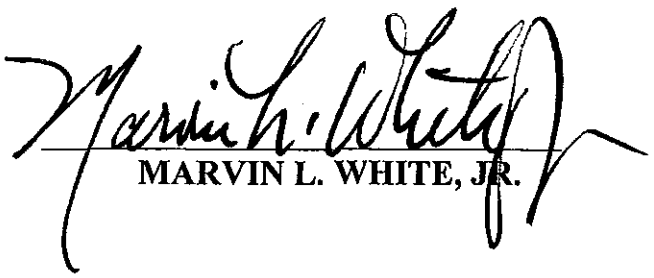
Honorable Marcus D. Gordon
Circuit Court Judge
P.O. Box 220
Decatur, Mississippi 39327

Honorable Mark Duncan
District Attorney
P.O. Box 603
Philadelphia, Mississippi 39350

This the 7th day of March, 2008.



MARVIN L. WHITE, JR.