IN THE SUPREME COURT OF MISSISSIPPI

HOWARD DEAN GOODIN, *Petitioner/Appellant*

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

STATE OF MISSISSIPPI, Respondent/App

SUPPLEMENTAL BRIEF FOR RESPONDENT/APPELLEE

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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). The present brief is the response to the supplemental brief on appeal allowed by this Court in this case.

STATEMENT OF THE CASE

The State fully set for the procedural history of this case on pages 1-5 of original Brief for Respondent/Appellee filed with Court on March 7, 2008. The State would adopt that statement as the statement of the case in the instant brief as if it were reproduced here in full.

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).

ARGUMENTS

I. THE RECORD IN THIS CASE DOES NOT ESTABLISH THAT PETITIONER IS MENTALLY RETARDED.

At the outset the State would point out that this is a direct appeal from the denial of post-conviction relief not an application or motion for post-conviction relief. Appellant has included two affidavits from psychologist in the appellant's record excerpts filed in this case that were not presented to the trial court. First, he includes yet another affidavit from Dr. C. Gerald O'Brien that is dated August 5, 2008. *See* P.R.Exc. at 99-100. Second, he includes the affidavit of Dr. W. Criss Lott, dated August 7, 2008. *See* P.R.Exc. at 143-45. Neither of these affidavits could have been presented to the trial court in this case as the evidentiary hearing was held on October 12, 2004. The trial court's opinion was rendered on October 13, 2004. Therefore, neither of these affidavits were presented to the trial court and are not a part of the record in this case.

In *Brown v. State*, 965 So.2d 1023 (Miss. 2007), this Court held:

> ¶ 12. "This Court will not consider matters that do not appear in the record, and it must confine its review to what appears in the record." *Pulphus v. State*, 782 So.2d 1220, 1224 (Miss.2001) (citing *Robinson v. State*, 662 So.2d 1100, 1104 (Miss.1995)). This Court has stated, "we have on many occasions held that we must decide each case by the facts shown in the record, not assertions in the brief, however sincere counsel may be in those assertions." *Robinson*, 662 So.2d at 1104. Asserted error grounded in facts outside the record may not be presented on direct appeal, but is more appropriately presented in a petition for post-conviction relief. We grant the

> State's motion to strike, and we must disregard all improperly-included evidence in making today's findings.
>
> 965 So.2d at 1027.

See also Shelton v. Kindred, 279 So.2d 642, 644 (Miss.1973); *Willenbrock v. Brown*, 239 So.2d 922, 925 (Miss.1970); *Legg v. Legg*, 251 Miss. 12, 24, 168 So.2d 58, 63 (1964).

The instant case before the Court is a direct appeal, therefore evidence outside the record cannot be considered in this appeal. The latest affidavit of Dr. O'Brien and the affidavit of Dr. Lott should not be considered in this appeal. Even though this case is the direct appeal of denial of post-conviction relief, it is still a direct appeal and therefore matters outside the record are not properly before the Court.[1]

Moving on to the claim that is properly before the Court which is whether the trial court erred when it held that petitioner was not mentally retarded. Petitioner contends that the consistent findings both before and after the murder in this case "establish beyond any serious dispute that Howard Goodin is mentally retarded." Petitioner first begins by questioning on what basis the trial court changed its opinion of what petitioner's IQ was. They refer to the Report of the Trial Judge Where Death Penalty is Imposed filed with this Court with the original record. *See* Pet. Supp. Rec. Excerpts at 138-42. Petitioner notes that in response to question 7 – Intelligence Level – the trial court checked the box indicating that petitioner's IQ was below 70. *See* Pet. Supp. Rec. Ex. at 138. The trial court, in its 1999

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[1]The State has by separate motion moved to strike these two affidavits from the record in this case.

report, was clearly based on the report of Dr. Gerald O'Brien who evaluated petitioner prior to trial and filed a report stating that he obtained a Full Scale IQ Score of 60 on the intelligence test he gave at that time.[2] Petitioner contends that the trial court gave no explanation why he stated that petitioner's IQ was between 70-75 in its opinion denying post-conviction relief on the mental retardation issue. While petitioner has cited to the order of the trial judge he evidentially did not read what the trial judge found. The order reads:

> 6. The court ordered evaluation was conducted at the Mississippi State Hospital at Whitfield on March 22, 2004. The forensic opinion establishes the Petitioner's intelligence quotient (IQ) as 70-75, and diagnosed the Petitioner as malingering. The opinion, further ruled out psychotic and personality disorders and found that the Petitioner is not mentally retarded as contemplated by *Atkins*.
>
> CP. 699.

This is a clear explanation of why he made the decision. The decision is based on the forty-two report of the forensic staff from the State Hospital. *See* CP. 128-70. That report concludes as follows:

> PROVISIONAL DIAGNOSES:
>
> | | |
> |---|---|
> | Axis I: | 1)Malingering (fabricating or exaggerating symptoms of psychosis and cognitive deficits)
2) Polysubstance Abuse, prior history
3) Rule Out Psychotic Disorder, Not Otherwise Specified |
> | Axis II: | Personality Disorder, Not Otherwise Specified, with Antisocial Features |
> | Axis III: | No Diagnosis |
> | Axis IV: | Currently residing on death row, facing possible execution |

[2]*See Goodin v. State*, 856 So.2d 267, 281, ¶ 39 (Miss. 2003).

Axis V: *Global Assessment of Functioning: 70-75*

NATURE OF EVALUATION: After reviewing the considerable information provided to us, including copies of Mr. Goodin's previous psychological evaluations, we interviewed Mr. Goodin for approximately 1 hour and 45 minutes. Doctoral level staff present at that interview included Dr. McMichael, Dr. Paul Deal, Dr. John Montgomery, and Dr. Charles Harris. Mr. Goodin also again received psychological testing.

FORENSIC OPINIONS: We are unanimous in our opinion that Mr. Goodin is not mentally retarded as contemplated by the United States Supreme Court 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 and a reasonable degree of rational understanding in the preparation of this post-conviction relief, and that he has a rational, as well as a factual understanding of the nature and object of these legal proceedings.

It also is our unanimous opinion that Mr. Goodin has the present capacity 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 those 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 these concepts to his specific legal situation which, again in our opinion, is beyond the capability of one who genuinely is mentally retarded.

Mr. Goodin has demonstrated limitations in many areas of adaptive skills while in the community, but these do not appear to be based upon significantly subaverage intellectual functioning.

CP. at 169-70. [Emphasis added.]

The trial court stated in his opinion that he was relying on the report from the State Hospital

and that report states that petitioner is functioning at a level of 70-75. *See* CP. 169. Clearly, the trial court found the 70-75 language in the State Hospital report.

Petitioner then attacks the trial court for not explaining how it could find petitioner was not retarded when he had substantial deficits in adaptive functioning. However, petitioner fails again to read the report from the State Hospital. That report recognizes the adaptive deficits, but states that they "do not appear to be based upon significantly subaverage intellectual functioning." CP. 170.

In actuality petitioner is attacking the report from the State Hospital, not the trial judges findings. He contends that the forensic staff at the State Hospital did not consider the history of low IQ scores. This is untrue as one only has to look at the list of the things that the forensic staff reviewed in reaching their conclusions. C.P. at 132. Further, the report of the State Hospital reviews, in some detail, each of the prior evaluations which petitioner underwent. *See* C.P. at 134-161. He next contends that the forensic staff ignored its own test findings of "no malingering," and assumed petitioner was malingering based on no evidence. Petitioner's own exhibit refutes this claim. Looking to the document entitled "Addendum to Outpatient Evaluation Results of Psychological Testing" we find that the diagnosis of malingering is fully substantiated. *See* P.R.Exc. at 85-92. Looking to the "Test Results" section of this document we find a discussion of petitioner's performance on the WAIS-III. The testing results obtained found petitioner with a full scale IQ score of 52. However, the test administrator made several observations regarding the testing, first we find:

> Overall, it seems likely that these IQ scores grossly understate the patient's current level of intellectual functioning.
>
> P.R.Exc. at 87.

The report goes on in some detail about how behavior during the test and "smirking" and "smiling" at the tester when he gave wrong answers. *See* P.R.Exc. at 87-88.

Looking to the results on the VABS (Vineland Adaptive Behavior Scale)[3] it was found that Goodin could write advanced letters, correctly address envelopes, give complex directions, dress himself and clean, his own living area and make telephone calls. It also showed that petitioner had friends growing up and initiates conversations of interest with others. P.R.Exc. at 88. From Deputy Warden Harris from the penitentiary it was found that petitioner could read and had read his trial transcript and reads his own letters from his attorney. P.R.Exc. at 88-89. It was also reported that he had several magazines in his cell that he reads with no difficulty. P.R.Exc. at 89.

Petitioner was given the WRAT-3 to a measure of academic achievement on which he scored very low. The test administrator also details Goodin's behavior during this test and then makes this statement:

> It is interesting to note that Mr. Goodin was also given the WRAT-3 in 1999. At that time he obtained a Spelling standard score of 81, placing him at the 7th grade level. At that time, he was able to correctly spell words such as "material, advice, surprise, believe, brief, reasonable, recognize, opportunity, and possession." His score of 81 is 33 points higher than the scores he

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[3]The VABS was administered to his sister, Ms. Dennis, with whom petitioner often lived when he was not in jail or prison.

> obtained on the Spelling section during this evaluation, and falls in low average range and is likely a more accurate estimate of actual ability in this area. Also, it is inconsistent with the intelligence scores he obtained during this and past evaluations and, if those scores were accurate, it would suggest that his achievement is much greater than he has the actual capacity to perform.
>
> P.R.Exc. at 89.

The report from the State Hospital regarding petitioner's behavior during the intelligence and achievement test and prior performance on the WRAT-3 strongly suggest that Goodin was malingering his intellectual ability.

Looking to the section of the report which specifically discusses malingering we find that on the M-FAST petitioner obtained a score that "he was malingering psychotic symptoms." P.R.Exc. at 89-90. On the Victoria Symptom Validity Test, a test to determine wether someone is malingering cognitive impairments, the testing showed that "there is a high probability that the respondent deliberately chose incorrect answers on this portion of the VSVT." P.R.Exc. at 90. On the Easy and Difficult Response Latency the forensic staff found that petitioner's score

> . . . exceeds even the values that fall within the 95% confidence interval for invalid or below chance protocols. The Difficult Response Latency score falls within the 95% confidence interval for invalid or below chance protocols. These scores provide further evidence that the respondent's VSVT performance is most consistent with the performance of individuals feigning impairment. The Right-Left Preference score is found to be near 0, thus failing to provide evidence suggesting that an attentional or sensory-motor impairment accounts for the respondent's poor performance.
>
> P.R.Exc. at 90-91.

In fact, the scoring on the test indicated that there was "an 82% to 84% likelihood that petitioner was exaggerating or fabricating cognitive deficits." P.R.Exc. at 91.

Petitioner hangs his entire claim that the forensic staff ignored its own testing on the results on the TOMM. The TOMM is a instrument to differentiate between bona fide memory-impaired patients and malingerers. The staff concluded that "[w]hile this score is questionable, it is not low enough to indicate that he was feigning memory problems." P.R.Exc. at 90. At best this test showed that petitioner was not malingering memory problems. This does not indicate that he was not malingering cognitive deficits. However, as pointed out the testers had some question as to whether the score was valid. *Id.*

Looking to the pertinent part of the summary of the testing we find the following:

> Mr. Goodin displayed a poor level of effort and motivation throughout most of the testing period. Therefore, these test results are not believed to accurately reflect his true abilities. *Results further indicate that he attempted to malinger psychotic symptoms as well as cognitive deficits.* Results of cognitive testing would indicate that Mr. Goodin is currently functioning in the range of Mild to Moderate Mental Retardation. However, these scores are believed to be a gross underestimation of his overall cognitive abilities and are inconsistent with the Spelling score he obtained on a WRAT-3 given to him in 1999, where he scored in the low average range.
>
> P.R.Exc. at 91-92. [Emphasis added.]

Petitioner's unsupported assertion that the forensic staff ignored their own testing regarding malingering is without basis in the record. Petitioner's assertion is without merit.

Petitioner appears to contend that Dr. O'Brien's 1999 report absolutely demonstrates that petitioner in mentally retarded. Evidentially petitioner has either failed to read the

complete report or has chosen to ignore the portions of the report that Dr. O'Brien himself highlighted. Looking to the report we find that Dr. O'Brien we find:

> On the Wechsler Adult Intelligence Scale-Revised (WAIS-R), he achieved a Verbal IQ of 65, a Performance IQ of 60, for a Full Scale IQ of 60, placing him intellectually in the mildly retarded ranged, if taken at face value. However, his degree of apparent effort and motivation *strongly suggest these scores underestimate his level of functioning.*
>
> On the Shipley, he obtained an estimated (WAIS-R) IQ of 50, which also falls within the mildly retarded range. However, similar cautions – as with the WAIS-R – apply in interpreting these results.
>
> On the Wide Range Achievement Test-Revision 3, his scores were as follows' reading standard score 53, grade score 2nd; Spelling standard score 81, grade score 7th; Arithmetic standard score <45, grade score 1st. The spelling score is in particular is much higher than would be expected based only on his current intellectual scores, but more consistent with clinical observations and reported history.
>
> On the Stroop Neuropsychological Screening Test he obtained a score of 39 (of 112) which places his performance at <2nd percentile. On the Trailmaking Test he required more than 5 minutes with 5 error on A, and more than 5 minutes with 4 errors on B. On the Luria-Nebraska Screening Test, he obtained a score of 25 which not only falls in the "abnormal" range (8=), but is a quite improbable result even for an individual with below average intellectual abilities. *Results on all these task must be viewed with caution as they are confounded with his questionable effort and motivation.*
>
> In summary, this is a 44 year old individual whose intellectual functioning, despite lower test scores, probably falls at least in the borderline to low average range and who actually performs better on a spelling task. His failure to put forth a reasonable effort also affected the results of the neuropsychological screening test. Therefore, it is my opinion that generally there is no substantial evidence of significant neuropsychological problems in the current test results or reported history. Instead, *ability test results tend to underestimate his overall intellectual functioning and reflect his level of motivation and cooperation.*

P.R.Exc. at 94.

When this is read we find that Dr. O'Brien was basically stating that petitioner was malingering during the pre-trial evaluation conducted in 1999. That is not the end to Dr. O'Brien's opinions regarding petitioner's malingering. Regarding the 15 Item Test, Dr. O'Brien states that his score "is *strongly suggestive of dissimulation*, similar to his performance on ability test." P.R.Exc. at 95. [Emphasis in the original.] Dr. O'Brien found the results on the Carlson Psychological Survey was invalid because Goodin "admitted to so many psychological difficulties that his "thought disturbance' and 'self-depreciation' scales were at the 99th percentile level." *Id.* On the 21 Word Test, another measure of motivation and dissimulation, petitioner obtained a score of 7 out of 21. Dr. O'Brien stated in his report that "less than 12 correct suggest the possibility of malingering." *Id.* On the SIRS an instrument designed to detect deliberate distortions in reported symptoms petitioner "produced a markedly elevated score on the 'rare symptoms' scale, and an elevated score on the 'blatant symptoms' scale. *This pattern is characteristic of individuals who are feigning a mental disorder, and is rarely seen in those responding truthfully.*" *Id.* [Emphasis in the original.]

When discussing the mental status portion of the evaluation Dr. O'Brien report reads in pertinent part:

> He was alert, but less than cooperative with the interview. For example, he would think for a moment then give a slightly incorrect response to an arithmetic question, or refuse to respond when asked a question which should have been well within his apparent ability range.

Id.

Dr. O'Brien's conclusion contains the following:

> Howard Goodin is a 44 year old African American male *whose intellectual functioning falls at least in the borderline range, and whose test scores underestimate his intellectual functioning.* Generally there is no substantial evidence of significant neuropsychological problems. *His performance on ability test and his approach to other task reflect his level of motivation and cooperation, which is strongly suggestive of intentional distortion and feigning psychological and emotional difficulties.*
>
> P.R.Exc. at 96.

In 2002, Dr. O'Brien filed another affidavit, stating that had he know that petitioner had a past diagnosis of chronic paranoid schizophrenia he may have reached a different conclusion in 1999. P.R.Exc. at 97-98. Dr. O'Brien did not say that petitioner was retarded in this affidavit only that he should be reevaluated. He was reevaluated at the State Hospital and the results were much the same as those obtained during the first evaluation by Dr. O'Brien. Basically that petitioner was malingering both his intellectual deficits as well as his mental illness. *Id.* This affidavit formed part of the basis of this Court's grant of the evidentiary hearing in this case.

We also note that petitioner contends that Dr. Michael Whelan found petitioner was mentally retarded. However this is not the case. Dr. Whelan's report for disability determination dated May 13, 1998, states:

> MENTAL STATUS: I think the patient probably has an IQ in the mid-70'. He able to answer questions of simple arithmetic such as adding 4 + 5 and totaling 6 quarters. He says $7.50 from $18 is $11.50. He can repeat only 5 digits forward and 3 in reverse though so his concentration is poor. He is able to

> answer questions from the WAIS-R Similarities subtest but he dose so very concretely. He seems to be unable to reason abstractly and therefore an IQ in the mid-70's is estimated with such an IQ level being consistent with his measured reading and math abilities at 5th grade level.
>
> C.P. at 158.

Of course Dr. Whelan is the doctor who found that he was a chronic paranoid schizophrenic. Certainly, he would have taken that into consideration when estimating petitioner's IQ and thereby seemingly refuting Dr. O'Brien's supposition that this condition would have made his scores on the test administered by him lower.

Petitioner contends that the trial court did not explain any possible basis for concluding that Goodin was not mentally retarded. However, when we read the trial court's order we find the following language:

> **IT IS FURTHER ORDERED AND ADJUDGED** that all motions, pleadings, *reports, including the reports of the Mississippi State Hospital*, and case law cited concerning the alleged mental retardation of the Petitioner be incorporated into this Judgment.
>
> C.P. at 670. [Emphasis added.]

This seems to answer petitioner's claim that the trial court did not consider the evidence in the already in the record of this case. It must be remembered that all of petitioner's prior mental evaluations, his records from the Mississippi Department of Corrections, are reviewed in the report of the forensic staff at the State Hospital. In addition these documents are all contained in the court papers on file with this Court. Petitioner's claim that the trial court did not consider the evidence on record in this case is specious.

Petitioner continues to harp on the scores on the test that petitioner received, however, as pointed out above, both the forensic staff at the State Hospital and Dr. O'Brien were of the opinion that petitioner was not putting forth the effort to do well on these test, both stated that in their opinion that the test scores underestimated his actual intellectual ability. Petitioner's reliance on the test scores alone is misplaced because neither the forensic staff nor Dr. O'Brien felt that they were a valid indicator of petitioner's intelligence.

As stated in our original brief, the evidentiary hearing was for petitioner to come forward with evidence of petitioner's mental retardation. The burden was on petitioner to produce the evidence required by *Chase v. State*, 873 So.2d 1013, 1029, ¶¶ 74-78 (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. [Emphasis added.]

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,[4] and the defendant is not malingering. Even though petitioner failed to produce an expert to testify as to his mental retardation the trial court allowed petitioner to put on the testimony of his sister, Ada Reese. At that point petitioner rested. On the basis of the failure to meet the test set forth in *Chase*

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[4]The State is aware of the decision in *Lynch v. State*, which makes it clear that no only the MMPI-II has to be given to determine whether the petitioner is malingering. The MMPI-II was not given by the forensic staff at the State Hospital and it was discontinued by Dr. O'Brien because of petitioner's actions in refusing to answer the questions with a simple true or false response. However, other test for malingering were given that indicated that petitioner was malingering.

the State moved for a directed verdict.

Because petitioner put on no evidence that comports with *Chase* at the evidentiary hearing and the evidence of record in the case supports the trial court's decision, the trial court did not err in granting the State's motion for directed verdict. The decision of the trial court finding that petitioner is not mentally retarded within the meaning of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), should be affirmed.

II. PETITIONER WAS NOT DENIED THE RIGHT TO DUE PROCESS, ACCESS TO THE COURTS, NOR WAS HE ENTITLED TO THE EFFECTIVE ASSISTANCE OF COUNSEL TO PURSUE HIS POST-CONVICTION CLAIM OF MENTAL RETARDATION.

Petitioner next presents a hydra-headed claim of error many of which were not presented to the trial court and therefore are not properly before the Court on the direct appeal of the claim that he is mentally retarded. Other claims under this heading have already been addressed and will be addressed in the context of any new argument raised that is different from that found in the original brief for appellant.

A. Petitioner was not denied any constitutional right to the effective assistance of counsel because there is not such constitutional entitlement on post-conviction review nor was any right to the effective assistance of counsel created in *Jackson v. State*, 732 So.2d 187 (Miss. 1999).

Petitioner next contends that he was denied the effective assistance of post-conviction counsel. First, petitioner did not present this claim to the circuit court in any manner. Therefore, it is barred from consideration on this direct appeal from the denial of post-conviction relief on the mental retardation claim. In *Culberson v. State*, 456 So.2d 697

(Miss. 1984), the petitioner was granted a evidentiary hearing in the circuit court on a single question. When petitioner filed his petitioner in the circuit court he included all of the claims that had been presented to this Court in the original petition. The circuit court refused to consider those claims as it was outside the mandate of this Court on remand. On appeal petitioner again presented these claims and contended the circuit court erred in refusing to consider those claims. This Court held:

> On the appeal, appellant propounds numerous assignments of error alleged to have been committed by the lower court, the first being "Culberson was unconstitutionally denied the right to testify."
>
> We consider only this assignment of error for the following reason: Under this Court's order granting permission to file the Petition for Writ of Error Coram Nobis, the court at that time fully considered all reasons for requesting the petition and found that only one question could or should be considered by the trial court under the petition. This was, as hereinbefore stated and as stated in the first assignment of error now before us, that Culberson was allegedly refused permission to testify at his trial.
>
> All of the other assignments of error now presented in this appeal either previously have been disposed of by this Court or all are procedurally barred, except the question granted as to whether or not Culberson was refused permission to testify. A careful study of the opinions heretofore cited confirms these statements.
>
> 456 So.2d at 698.

See Davis v. State, 897 So.2d 960, 971, ¶ 34 (Miss. 2004); *Burns v. State*, 879 So.2d 1000, 1003, ¶¶ 7-9 (Miss. 2004); *Neal v. State*, 687 So.2d 1180, 1182 (Miss. 1996); *Billiot v. State*, 655 So.2d 1, 18 (Miss. 1995).

This claim was included in the remand to the circuit court and therefore it is not

properly before this Court in this direct appeal from the decision of that court on the mental retardation issue. This claim cannot be considered in this appeal.

Further, petitioner evidentially fails to understand that he is not constitutionally entitled to counsel to pursue post-conviction relief. In *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987) the United States Supreme Court held "[O]ur cases establish that the right to appointed counsel extends to the first appeal of right, and no further." Where there is no right to counsel, there is no unconstitutional denial of the effective assistance of counsel. *See Coleman v. Thompson*, 501 U.S. at 752, 111 S. Ct. at 2566 501 U.S. 722, 752, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1991)(criminal defendant is not entitled to counsel on state post-conviction review and therefore not entitled to effective assistance of counsel at that stage of the proceeding); *Murray v. Giarratano*, 492 U.S. 1, 10, 109 S.Ct. 2765, 2770-71 (1989)(same); *Wainwright v. Torna*, 455 U.S. 586, 587-88, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982); *see also* 28 U.S.C. § 2254 (I) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a group for relief in a proceeding arising under section 2254."). Likewise, this Court held in *Moore v. State*, 587 So.2d 1193 (Miss. 1991):

> In any event, a criminal defendant has neither a state nor federal constitutional right to appointed counsel in post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); *Neal v. State*, 422 So.2d 747 (Miss.1982); *King v. State*, 423 So.2d 121 (Miss.1982).
>
> 587 So.2d at 1195.

See Brown v. State, 948 So.2d 405, 413, ¶ 33 (Miss. 2006); *Wiley v. State*, 842 So.2d 1280, 1283, ¶¶ 13-15 (Miss. 2003); *Sheffield v. State*, 881 So.2d 249, 255, ¶¶ 23-24 (Miss.App.,2003).

In addition the United States Court of Appeals for the Fifth Circuit has upheld this Court's holding that an inmate is not constitutionally entitled to the effective assistance of counsel on state post-conviction review. *See Bell v. Mississippi Department of Corrections*, 290 Fed.Appx. 649, 656 (5th Cir. 2008); *Bishop v. Epps*, 288 Fed.Appx. 146, 149 (5th Cir. 2009); *Bishop v. Epps*, 265 Fed.Appx. 285, 289-90 (5th Cir. 2008).

Since petitioner has no right to constitutionally effective counsel on post-conviction review the various claims of ineffective assistance of counsel are without merit.

Petitioner bases his entire argument on the language found in *Jackson v. State*, 732 So.2d 187 (Miss. 1999), however, this Court did not hold that a death sentenced petitioner was entitled to the effective assistance of counsel on post-conviction review. Petitioner hangs this argument on a phrase in the *Jackson* opinion which reads:

> . . . Though this Court treats this statutory classification with respect, it is obvious that actions under the UPCCRA, which collaterally attack criminal convictions, are a unique kind of civil action. *See Johnson v. State*, 623 So.2d 265 (Miss.1993)(claimant appealing from denial of post-conviction relief may proceed in forma pauperis in contrast to other civil appeals). *The reality is that post-conviction efforts, though collateral, have become an appendage, or part, of the death penalty appeal process at the state level.* The importance of state post-conviction remedies is heightened by the requirement that, with few exceptions, state remedies must be exhausted before relief can be sought through federal habeas corpus. *See* 28 U.S.C. § 2254(b)(1994); *Coleman v. Thompson*, 501 U.S. 722, 731, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

732 So.2d at 190. [Emphasis added.]

Petitioner contends that this Court by making this statement has made the post-conviction process a part of the direct appeal process and thereby created a constitutional right to the effective assistance of counsel.[5] Petitioner also contends that language in this Court's decision in *Puckett v. State*, 834 So.2d 676 (Miss. 2003), reaffirms his contention that *Jackson* created a right to the effective assistance of counsel on post-conviction review. In *Puckett*, the Court was faced with an interpretation of the one-year statute of limitations found in MISS. CODE ANN. § 99-39-5(2), in addressing that question this Court held:

> ¶ 4. To address the issues raised, the Court must consider the proper construction of the recently amended statute of limitations for filing applications for leave to seek post-conviction relief in death penalty cases, and must apply that statute to the facts of this case. MISS. CODE ANN. § 99-39-5(2) (Supp.2002) was amended effective July 1, 2000, to provide that a motion for post-conviction relief in capital cases is to be "filed within one year after conviction."[1] This amendment which was adopted as part of a package of legislation which created the Office of Capital Post-Conviction Counsel and established new procedures for post-conviction proceedings in cases where the petitioner is under a sentence of death. *Recognizing that death eligible inmates are, under these statutes and under Jackson v. State, 732 So.2d 187 (Miss.1999), assured competent counsel*, the Legislature found it appropriate to limit the time for filing such applications to one year, as opposed to three years allowed in non-death eligible cases where counsel is not provided.
>
> 834 So.2d at 677.

First, this comment is dicta as it is not necessary to the decision of when the statute of

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[5]This is not the first time this claim has been raised as it is usually seen in successive petitions for post-conviction relief filed shortly prior to execution and has therefore not been addressed.

limitations runs in cases under § 99-39-5(2). Further, if the Court was talking about competence of counsel the State would submit that the Court was referring to the provisions of M.R.A.P Rule 22(d), which deals with the standards and qualifications for attorneys appointed or retained to represent those under a sentence of death in post-conviction proceedings before this Court and the trial courts. The State would assert that the Court was not speaking of competency of counsel in the constitutional sense. Clearly, *Puckett* represented a case in which counsel that was appointed by the Mississippi Office of Post-Conviction Counsel stopped working on the case, refused to return the case file and refused to communicate with the office. That is not the case presented in the case at bar.

In any event, since the decision in *Jackson* and *Puckett* this Court has twice spoken to this issue of *Jackson* and the right to counsel on post-conviction review. First, in *Wiley v. State*, 842 So.2d 1280, 1283, ¶¶ 13-15 (Miss. 2003), where the Court made clear that *Jackson* did not create a right to the effective assistance of post-conviction counsel. Further, in *Brown v. State*, 948 So.2d 405, 413, ¶ 33 (Miss. 2006), petitioner cited numerous ineffective assistance of counsel cases and other United States Supreme Court cases along with *Jackson* to contend that he was entitled to the effective assistance of post-conviction counsel. However, this Court stated:

> Furthermore, Brown fails to show how the cases he has cited allow him to disregard the procedural bars *or guarantees him the right to effective post conviction relief counsel*. Therefore, Brown's claims under issue two also fail.
>
> 948 So.2d at 413. [Emphasis added.]

This Court has never held that there is a right to the effective assistance of counsel in pursuing state post-conviction relief. Petitioner's attempt to read into *Jackson* and *Puckett* is feeble at best and has been supplanted by the holdings in *Wiley* and *Brown*.

Recently, the United States District Court for the Southern District of Mississippi addressed this claim in the case of *Gray v. Epps*, 2008 WL 4793796 (S.D.Miss. 2008), and held:

> Gray also maintains that deficiencies in Mississippi's Office of Post-Conviction Counsel should excuse him from exhausting all of his issues in state court. Gray argues that the State of Mississippi, through its opinion in *Jackson v. State*, 732 So.2d 187 (Miss.1999), established a right to post-conviction representation for inmates sentenced to death. That right is particularly important in Gray's case, he contends, because his trial and appellate counsel were the same. Thus, the first time that ineffectiveness issues could be raised was during the post-conviction process, which, for that purpose, functioned as a direct appeal. By providing post-conviction counsel who were too overworked to give his case adequate consideration, the State denied him a procedure for adequate and effective appellate review.
>
> The law on this issues is well settled. There is no constitutional right to counsel beyond the direct appeal. *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987) ("Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further."). That rule applies equally to death penalty cases. *Murray v. Giarratano*, 492 U.S. 1, 10, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989). Since there is no constitutional right to counsel in post-conviction proceedings, there is generally no concomitant right that post-conviction counsel be effective, *Coleman*, 501 U.S. at 755-56; *Ruiz v. Quarterman*, 504 F.3d 523, 531 (5th Cir.2007); *Sheffield v. State*, 881 So.2d 249, 255 (Miss.Ct.App.2004), even if the claims that were defaulted were necessarily raised for the first time during the post-conviction process. *Martinez v. Johnson*, 255 F.3d 229, 241 (5th Cir.2001); *see also Henderson v. Cockrell*, 333 F.3d 592, 606 (5th Cir.2003); *Bishop v. Epps*, 265 Fed. Appx. 285 (5th Cir.2008); *see also Matchett v. Dretke*, 380 F.3d 844, 849 (5th Cir.2004) (reaching the same result when a claim is brought as a due process violation); *Ogan v. Cockrell*, 297 F.3d 349,

357 (5th Cir.2002).

In *Ruiz v. Quarterman*, 460 F.3d 638, 644 (5th Cir.2006), the petitioner argued that the state had obstructed his efforts to earlier exhaust his claims by providing him incompetent counsel, "effectively making his state remedy illusory. . . ." *Id.* The court denied relief, holding:

> [T]he law of this Court is clear, ineffective state habeas corpus counsel does not excuse failure to raise claims in state habeas corpus proceedings. Where the state has provided a habeas corpus remedy, the petitioner must pursue it before filing in federal court, even if the state provides ineffective habeas counsel.

Id.[13] Gray's failure to exhaust is not excused, and he is procedurally barred from raising any ineffectiveness claim that was not addressed in his post-conviction pleadings.

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13. Later, the Fifth Circuit granted relief based on Fed.R.Civ.P. 60(b). Relief was not granted on grounds that the prior opinion was in error; in fact, the court referred to its earlier opinion on the issue of ineffectiveness of post-conviction counsel. Instead, the court granted relief on grounds that, after the first opinion was issued, the state court ruled on the merits, thereby eliminating the issue of exhaustion. *Ruiz*, 504 F.3d at 531.

2008 WL 4793796 at 38 -39. [Emphasis added.]

Likewise in *Stevens v. Epps*, 2008 WL 4283528 (S.D.Miss. 2008), the United States District Court extensively addressed this same question and held:

> . . . Stevens's claim is a little different, in that he alleges that the problems in the Office of Post-Conviction Counsel deprived him of the right to seek post-conviction relief and denied him due process.
>
> Capital habeas litigants in other states have tried to argue that their state's system of appointing post-conviction counsel failed to provide them due process protection, thus excusing procedural defaults committed when that counsel did not raise viable issues in state courts. That argument appears to have been foreclosed by the Supreme Court's opinion in *Finley*, where it held, "*States have no obligation to provide this [post-conviction] avenue of relief,*

and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well." 481 U.S. at 557. The Ninth Circuit has specifically held that a petitioner cannot avoid prior decisions that there is no entitlement to effective assistance of post-conviction counsel by couching his claim as a due process, rather than a Sixth Amendment, violation. *Moran v. McDaniel*, 80 F.3d 1261, 1271 (9th Cir.1996). The Eighth Circuit has reached the same conclusion. *Simpson v. Norris*, 490 F.3d 1029, 1034 (8th Cir.2007).

The Fifth Circuit has written extensively on this issue in the context of Texas law, and it has held on several occasions that ineffectiveness of post-conviction counsel cannot be the grounds for habeas relief. *Martinez v. Johnson*, 255 F.3d 229, 241 (5th Cir.2001). This is so even if the claims that were defaulted were necessarily raised for the first time during the post-conviction process. *Id.*; *see also Henderson v. Cockrell*, 333 F.3d 592, 606 (5th Cir.2003). The result has been the *same when the claim has been made as a due process violation. Matchett v. Dretke*, 380 F.3d 844, 849 (5th Cir.2004); *Ogan v. Cockrell*, 297 F.3d 349, 357 (5th Cir.2002). The court has similarly rejected arguments that the State's post-conviction review system suffered from such a structural deficiency that it was "absent" or "ineffective to protect his rights." *Ruiz v. Quarterman*, 460 F.3d 638, 644 (5th Cir.2006). Ruiz argued that the state had obstructed his efforts to earlier exhaust his claims by providing him incompetent counsel, "effectively making his state remedy illusory. . . ." *Id.* However, the court denied relief, holding, "[T]he law of this Court is clear, ineffective state habeas counsel does not excuse failure to raise claims in state habeas proceedings. Where the state has provided a habeas remedy, the petitioner must pursue it before filing in federal court, even if the state provides ineffective habeas counsel." *Id.* In its later opinion on this case, the Fifth Circuit granted relief based on Fed.R.Civ.P. 60(b). *Ruiz v. Quarterman*, 504 F.3d 523 (5th Cir.2007). Relief was not granted on grounds that the prior opinion was in error; in fact, the court referred to its earlier opinion on the issue of ineffectiveness of post-conviction counsel. *Instead, the court granted relief on grounds that, after the first opinion was issued, the state court ruled on the merits, thereby eliminating the issue of exhaustion.* 504 F.3d at 531.

In the context of Mississippi law, Stevens contends that the issue is more complex, since he is not arguing that a single attorney was ineffective, but that the entire process has suffered from systemic problems generated by the State. *Additionally, he asserts that the Mississippi Supreme Court*

recognized post-conviction proceedings as part of the appellate process in death penalty cases in Jackson. However, since that decision, the Mississippi Supreme Court has twice spoken on the issue of whether a litigant is entitled to effective assistance of counsel at the post-conviction stage, and, on both occasions, the court has held that there is no such entitlement. In *Wiley v. State*, 842 So.2d 1280 (Miss.2003), the prisoner sought the appointment of an attorney not employed by the Office of Capital Post-Conviction Counsel, who had been serving pro bono. The court held that its previous holding in *Jackson "does not specifically establish a constitutional right to compensated counsel," nor did it create a liberty interest in post-conviction counsel. Id.* at 1285. In *Brown v. State*, 948 So.2d 405 (Miss.2006), the prisoner had not alleged ineffectiveness of trial counsel on appeal, but attempted to raise it as grounds for post-conviction relief. He argued that *Jackson* had set "new legal standards" that included a fundamental right to effective post-conviction review, including the right to challenge procedural bars and receive effective assistance of counsel. The court denied relief on both claims. *Id.* at 413. These holdings limit *Jackson's* language to requiring the appointment of competent counsel to represent litigants in post-conviction proceedings, as a matter of state law. Mississippi does not extend that language it to requiring effective counsel at that stage, nor does *Jackson* confer a constitutional right to post-conviction counsel.

More importantly, for this Court's purposes, the Fifth Circuit has recently rejected this argument in a case from Mississippi. *Bishop v. Epps*, 265 F. App'x 285 (5th Cir.2008). Bishop's case had been assigned to the Post-Conviction Office in March, 2002, and his post-conviction petition was filed in April, 2003. At the time that his petition was filed, Bishop asked for an extension of time to supplement the pleading, which was denied. These facts were argued to the District Court for the Northern District of Mississippi as supporting Bishop's claim that there was an absence of available state corrective process to protect his rights, thereby excusing his failure to exhaust certain issues. The district court summarized Bishop's claims as follows:

> Petitioner's argument is that, due to the actions of the [state supreme] court in denying him additional time, any potential procedural defaults that might here be imposed against his claims should be excused due to his inability to raise such claims at the State court level. Petitioner asserts the heavy workload of the Office [of Post-Conviction Counsel], combined with the lack of qualifications of post-conviction counsel, denied him any possible redress to his constitutional violations.

Bishop v. Epps, No. 1:04CV319MPM, 2007 WL 2363465 at *6 (N.D.Miss. Aug.16, 2007). Additionally, Bishop argued that his post-conviction counsel was ineffective. *Id.* at *20. The district court denied habeas relief on both grounds. On appeal, the claim was characterized as an ineffectiveness claim, and the Fifth Circuit also refused to acknowledge it. *Bishop*, 265 F. App'x at 289-90, citing *Finley*, 481 U.S. at 555.

The case came before the Fifth Circuit again a few months later, in the form of a motion for relief under Fed.R.Civ.P. 60 and a request for an emergency stay of execution. *Bishop v. Epps*, No. 08-70029, 2008 WL 2831273 (5th Cir. July 22, 2008). Bishop claimed that, rather than having an attorney representing him in his post-conviction proceedings, he "had an attorney actively working to subvert his case and ensure that he had no chance of success."

The Fifth Circuit did not stay Bishop's execution, characterizing his pleading as a successive habeas petition rather than a Rule 60 motion. Moreover, despite his allegations against Ryan, the Fifth Circuit adhered to its original ruling that ineffectiveness of post-conviction counsel cannot be grounds for habeas relief, citing both 28 U.S.C. § 2254(I) and *Matchett*. The court ended its opinion by stating, "Our decision is final and resolves the issue entirely." 2008 WL 2831273 at *4. That opinion, while unpublished and not binding,[2] provides persuasive authority to guide this Court's decision on virtually the same argument.

Although the history of the Office of Post-Conviction Counsel presents troubling questions, Stevens's argument suffers from two significant weaknesses. First, the Mississippi Supreme Court has expressly disclaimed that its prior opinion in *Jackson* intended to establish a right to anything but a competent attorney for that process. Second, it fails to recognize that the State of Mississippi was not constitutionally obligated even to provide post-conviction review, as the Fifth Circuit has unequivocally declared. Additionally, it is not clear that Stevens suffered any individual prejudice from the problems in that Office, since both a petition, and a supplemental petition were filed on his behalf. Stevens is not entitled to relief on this issue.

2008 WL 4283528, at 45-47. [Emphasis added.]

See also Bell v. Epps, 2008 WL 2690311, 15 (N.D. Miss. 2008); *Bishop v. Epps*, 2007 WL

2727228, 2 (N.D. Miss. Sept. 17, 2007)(denial of COA on question); *Bishop v. Epps*, 2007 WL 2353465, 6-7 (N.D. Miss. Aug. 16, 2007)(denial of relief on the merits).

Looking to the opinion of the Fifth Circuit in *Bishop v. Epps*, 265 Fed.Appx. 285, 289-90 (5th Cir.), *cert. denied*, ___ U.S. ___, 128 S.Ct. 2975, 171 L.Ed.2d 899 (2008), on this question we find:

> **A. Ineffective Assistance of Post-Conviction Counsel** [4]
>
> Section 2254 of Title 28 of the United States Code guarantees post-conviction habeas relief only on the basis that a petitioner's conviction or sentence violates the Constitution or laws of the United States. Although individual states, for independent reasons, may decide to create a right to counsel for post-conviction review, the decision has no basis in the Constitution. *See, e.g., Jackson v. State*, 732 So.2d 187, 190-91 (Miss.1999) (categorizing post-conviction efforts as "an appendage, or part, of the death penalty appeal process at the state level" and granting attorney compensation and litigation expenses to petitioner, even though the grant is not required by the Constitution or by Mississippi's Uniform Post-Conviction Collateral Relief Act). But the Supreme Court has "never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions." *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987) (citing *Johnson v. Avery*, 393 U.S. 483, 488, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969)). The *Finley* Court wrote: "We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process." *Id.* Because Bishop has no right to counsel in post-conviction proceedings, he can allege no unconstitutional denial of the effective assistance of post-conviction counsel. *See Wainwright v. Torna*, 455 U.S. 586, 587-88, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982); see also 28 U.S.C. § 2254(I) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.").

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4. Bishop's claim relating to the qualifications and ineffectiveness of post-conviction counsel can be found in Subpart G of "Claim IV Ineffective

> Assistance of Counsel," in "Claim V Ineffective Assistance of Post-Conviction Counsel," and in an unnumbered section entitled "Procedural Defaults."
>
> 265 Fed.Appx. at 289-90 .

Unsatisfied with the original answer to this question Bishop again presented the question in a successive habeas petition to the Fifth Circuit.[6] The Fifth Circuit in *Bishop v. Epps*, 288 Fed.Appx. 146 (5th Cir. 2009)[7] held:

> Bishop does not rely on a new rule of constitutional law to justify an order allowing his successive petition. Rather, he argues that, until recently, he had no opportunity to discover Ryan's incompetence during state post-conviction proceedings. But, as we observed when we denied Bishop's request for a COA to appeal the denial of his first federal habeas petition, federal law prohibits his claim: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. 2254(i); *see also Matchett v. Dretke*, 380 F.3d 844, 849 (5th Cir.2004) (per curiam) ("[A] state prisoner may not cite the ineffective assistance of state habeas counsel as cause for a procedural default even for cases involving constitutional claims that can only be raised for the first time in state post-conviction proceedings." (internal quotations omitted)). Therefore, allowing the district court to consider a successive habeas petition which states a claim that is not cognizable would be futile.
>
> Our decision is final and resolves the issue entirely. "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

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[6]This claim was presented in a successive petition for post-conviction relief to this Court, however the Court denied the application in an unpublished order properly holding that the petition was both a successive petition and time barred without addressing the merits of any claim. *See Bishop v. State*, 2008-DR-01122-SCT, denied July 9, 2008.

[7]There was no petition for writ of certiorari filed as the federal habeas statute does not allow one from the denial of leave to file a successive habeas petition.

288 Fed.Appx. at 149-50.

See Bell v. Mississippi Department of Corrections, 290 Fed.Appx. 649, 656 (5th Cir. 2008)(no constitutional right to counsel in pursuing post-conviction relief). Petitioner has no right to the effective assistance of counsel on post-conviction review.

Respondents would again assert that the claims of ineffective assistance of post-conviction counsel raised in the direct appeal are not properly before this Court. Further even if they were they would be without merit as there is no right to the effective assistance of counsel on post-conviction review. Petitioner is barred from presenting these claim for the first time on direct appeal and further do not state a claim on which relief can be granted.

B. Petitioner was evaluated by a licensed psychologist who specialized in the field on mental retardation as mandated by *Chase v. State*.

Petitioner next contends that petitioner was never examined by a licensed psychologist who specializes in the filed of mental retardation as mandated by *Chase v. State*, 873 So.2d 1013 (Miss. 2004). Petitioner attempts a bit of slight of hand in arguing this point by contending that none of the people who actually signed the State Hospital Report were licensed psychologist who specialized in the field of psychology and draws the incorrect conclusion that he was not examined by a licensed psychologist.

As we pointed out in our original brief, Dr. Paul Deal is a psychologist specializing in mental retardation and was associated by the forensic staff State Hospital to assist in their evaluation of Goodin. In his original brief petitioner's argument was since the State Hospital obtained the services of an "outside" expert in mental retardation in the person Dr. Deal to

assist in this evaluation he was also entitled to an expert of his own choosing. As pointed out there Dr. Deal 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. While Dr. Deal did not sign the report he fully participated in the evaluation of petitioner. Further, Dr. Charles Harris, a licensed psychologist and employee of the Department of Mental Health also participated in the evaluation. Further, all of these mental health professionals were employees of the State Hospital are employees of the Mississippi Department of Mental Health[8] and were properly credentialed to work at Whitfield. The fact that the report was signed by the director of the forensic unit does not mean that petitioner was not evaluated by a licensed psychologist who specialized in mental retardation. Dr. McMichael was simply signing off on the report arrived at by the whole panel of doctors who evaluated petitioner. This claim is without merit.

The state would also point out that petitioner makes several references to an Exhibit 26 – a motion to reconsider. However, the State has searched the Court Papers in this case and do not find this exhibit. Further, it is not contained in petitioner's record excerpts. No motion to reconsider with such an exhibit was filed with the circuit court in this case. Therefore, this appears to be something outside the record that petitioner is relying on. The State would assert that this exhibit cannot be considered as it is not a part of the record in this case. Further, petitioner refers to the affidavit of Dr. Criss Lott which was obtained in 2008

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[8]Therefore, they were not "outside" experts.

and mentioned above by the State. The State asserts that Dr. Lott's affidavit was never filed in the circuit court and is not a part of the record on appeal in this case. Therefore, the State has filed a separate motion to strike this and another latter day affidavit of Dr. O'Brien.

Petitioner is entitled to no relief on this claim.

C. Petitioner was not entitled to an independent mental health expert to review the report of the State Hospital and assist in preparing for the evidentiary hearing.

Petitioner's next claim in this supplemental brief is one that was presented and addressed in the original briefing. The State responded to this claim in its original brief under Proposition II, at 8-13. As pointed out there, this Court has already been presented with this claim in the form of an interlocutory appeal. The State pointed out in its original brief:

> 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 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.

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.

Petitioner again asserts that under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), however, *Ake* does not apply to post-conviction proceedings. *Ake* holds that if the State is going to introduce psychological evidence against a petitioner at the sentence phase of his capital murder trial then the state must furnish him with assistance. This is not the sentence phase of the trial, but a hearing on a post-conviction petition.

The State would assert that the trial court had already appointed experts to examine petitioner. On October 1, 2003, the trial court entered an order sending Goodin to the Forensic Unit of the Mississippi State Hospital at Whitfield, Mississippi to be evaluated under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In a report dated March 22, 2004, the staff at the State Hospital concluded that Goodin was not mentally retarded and competent. Petitioner being dissatisfied with those conclusions requested additional examination by mental health experts of his own choice.

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. 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). This Court has held that examination at the 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). Respondent would assert that this is just what petitioner was attempting to do, get additional experts appointed in an attempt to find one who would testify as he wanted.

Further, petitioner continues to argue that the forensic staff at the State Hospital are the State's experts, they were not. The trial court appointed the forensic staff as the court's experts. The fact that the court's experts did not find petitioner to suffer from mental retardation or to be incompetent does not make those experts the State's experts. Albeit, the State would certainly have called those experts to testify at the evidentiary hearing in this

case had petitioner presented evidence that sufficed to put the question in issue. Further, petitioner was provided with an independent expert, Dr. C. Gerald O'Brien, prior to the trial of this case. Dr. O'Brien evaluated petitioner twice, on January 7, 1999 and February 19, 1999, and furnished a report regarding his findings prior to trial. *See* P.R.Exc. at 93-96. Petitioner again obtained the assistance of Dr. O'Brien in the form of an affidavit in the preparation of the post-conviction application in this case. *See* P.R.Exc. at 97-98. In fact, this affidavit was one of the moving factors which resulted in the remand of this case for a hearing on his *Atkins* claim. Thus, petitioner has not been deprived of the assistance of mental health experts at any time during the litigation of this case. The trial court was not required to appoint any independent experts to examine petitioner or prepare for the hearing in this case.

Petitioner now relies on *Panetti v. Quarterman*, 551 U.S. 930, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007), as authority for his assertion of the right to an independent mental health expert. However, the case at bar is not akin to that found in *Panetti*. There the trial court appointed experts and then refused to hold a hearing on the motion to determine whether Panetti was competent to be executed under *Ford v. Wainwright*, 477 U.S. 399, 106 S.C.t 2595, 91 L.Ed.2d 335 (1986). The Court pointed out that in *Ford* the controlling opinion was that of Justice Powell as his concurrence was on a narrower ground than that of the plurality. The Court then stated:

> Justice Powell's opinion states the relevant standard as follows. Once a prisoner seeking a stay of execution has made "a substantial threshold

showing of insanity," the protection afforded by procedural due process includes a "fair hearing" in accord with fundamental fairness. *Ford*, 477 U.S., at 426, 424, 106 S.Ct. 2595 (opinion concurring in part and concurring in judgment) (internal quotation marks omitted). This protection means a prisoner must be accorded an "opportunity to be heard," *id.*, at 424, 106 S.Ct. 2595 (internal quotation marks omitted), *though "a constitutionally acceptable procedure may be far less formal than a trial,"* *id.*, at 427, 106 S.Ct. 2595. As an example of why the state procedures on review in *Ford* were deficient, Justice Powell explained, the determination of sanity "appear[ed] to have been made solely on the basis of the examinations performed by state-appointed psychiatrists." *Id.*, at 424, 106 S.Ct. 2595. "Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations." *Ibid.*

Justice Powell did not set forth "the precise limits that due process imposes in this area." *Id.*, at 427, 106 S.Ct. 2595. He observed that a State "should have substantial leeway to determine what process best balances the various interests at stake" once it has met the "basic requirements" required by due process. *Ibid.* These basic requirements include an opportunity to submit "evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination." *Ibid.*

127 S.Ct. at 2856. [Emphasis added.]

In *Ford*, the only experts to examine the petitioner were experts hired by the State. Here the experts who examined Goodin were not hired by the State, nor were they appointed on any motion filed by the State. The experts were appointed by the Court's as its experts, not the State's. In fact, the State had little if any input into the evidence and materials that were presented to the forensic staff at the State Hospital. Almost all, if not all, of the information used by the forensic staff came from the petitioner. This fact as has been pointed out repeatedly and petitioner continues to ignore that fact.

Petitioner also relies on *Rivera v. Quarterman* 505 F.3d 349 (5th Cir. 2007), it is true that the Fifth Circuit applied *Panetti* to a claim under *Atkins*. However, like the factual scenario found in *Panetti* the facts in *Rivera* are not like those found in the case at bar. In *Rivera* the Texas court's denied petitioner any hearing at all on his *Atkins* claim. That is not what happened here. The trial court appointed experts to examine petitioner, they found him not to suffer from mental retardation, and an evidentiary hearing was held at which petitioner could put on any other evidence that he had, he could have called Dr. Deal, Dr. Harris, Dr. McMichael, Dr. Montgomery, and Dr. Beall to the stand and questioned them, but he chose not to do so, relying solely on the testimony of his sister.

Petitioner has failed to demonstrate that there has been any constitutional violation in the denial of an independent mental health expert in this case. Therefore, the trial court decision and this Court's earlier decision on this issue should be affirmed.

D. Petitioner was not entitled to have his counsel present during the evaluation conducted at the Mississippi State Hospital.

Petitioner next reargues that he was entitled to have his counsel present during the evaluation at the Mississippi State Hospital. The State fully addressed this claim in its original brief filed in this direct appeal. From what the State can ascertain the only thing new that petitioner claims is that he was not given his Miranda warnings prior to the examination. It must be remembered that this was not the type mental evaluation found in *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). This mental evaluation was given with the full knowledge of his attorneys and he was informed prior to the interview that

anything that he said could be used against him. C.P. at 166 (Notification). One only has to read this section of the report from the State Hospital to see that this claim is specious.

The State fully addressed this claim under the under Proposition III, at 13-19. The State would adopt that argument as a further argument under this claim. The trial court did not err in denying the motion for counsel to be present during the evaluation at the State Hospital. This claim is without merit.

E. The trial court did not rely on an unpublished rule to deny a *Daubert* hearing in this case.

Petitioner now contends that the trial court denied him a *Daubert* hearing based on an unpublished rule that has not been approved by this Court. The State addressed the claim regarding the denial of a *Daubert* hearing in the original brief in this direct appeal under Proposition IV, at 19-20. As the State pointed out at that time, petitioner was not denied a *Daubert* hearing. The trial court merely stated that he would take that issue up after he had heard from the experts. The experts were never called to testify therefore no *Daubert* hearing was conducted.

Petitioner cites the Court to page 23 of the transcript for support of his claim, however, if one reads, this portion of the record, petitioner was attempting to call up his *Daubert* motion, but had instructed the experts not to come to court on that day. How can you have a hearing regarding the experts that are going to testify if they are not there. Petitioner's counsel expressed surprise that one of the witnesses was present when the

hearing began – Dr. Harris. Tr. 23-25.[9] Petitioner only filed his motion for a *Daubert* hearing on October 8, 2004, the Friday prior to the scheduled evidentiary hearing set for October 12, 2004. However, when we read further in the record we find that the trial court revisited this question and stated that he would conduct any *Daubert* hearing after hearing from the expert witnesses. Tr. 36-37.

The State would further assert that petitioner was not entitled to a *Daubert* hearing on the question of the testimony of these experts as they were not testifying to any novel psychological theory or fact. Mental retardation is not a topic that is deserving of a *Daubert* hearing.

The trial court committed no error in its dealings with the motion for a *Daubert* hearing. This claim is without merit and the circuit court's decision should be affirmed.

III. THE CIRCUIT COURT DID NOT DISREGARD THIS COURT'S ORDER TO DETERMINE COMPETENCY AT THE TIME OF TRIAL.

Petitioner contends that the trial court did not follow the mandate of this Court and make a determination of petitioner's competency at the time of trial. This Court's opinion held:

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[9]The State did not issue subpoenas for these experts because petitioner had done so. While somewhat outside the record, Dr. McMichael had called counsel for the State to ask if the evidentiary hearing had been called off as they had been told not come to court, but to be on standby by petitioner's counsel. Counsel for the State informed Dr. McMichael that the hearing was still scheduled for 9:00 a.m. October 12, 2004, as far as he knew and that they should be ready to testify. While this is not totally in the record it does give context to the record. This is done knowing that the record alone can be considered in this appeal.

> ¶ 57. We deny the State's Motion to Strike Petitioner's Rebuttal Brief. We grant Howard Goodin's Application for Leave to File Petition for Post-Conviction Relief limited to the following issues: (1) mental retardation; (2) ineffective assistance of counsel on the issue of mental illness and (3) ineffective assistance of counsel on the issue of competency.
>
> 856 So.2d at 284-85.

Petitioner reads this mandate as one to make a determination of petitioner's competency at the time of trial, thus challenging the finding of the trial court that petitioner was competent to stand trial. However, this Court held:

> ¶ 45. What is known is that defense counsel did not object to Dr. O'Brien's conclusions as incorrect and did not object to the circuit court's finding of Goodin as competent. *Any attempt to raise the circuit court's finding of competency as erroneous, as Goodin does, is procedurally barred at this point.* Only because this issue is so closely related to the issue of Goodin's mental illness, this Court finds that Goodin be granted leave to proceed in the trial court on this particular issue.
>
> 856 So.2d at 283. [Emphasis added.]

The challenge to petitioner's competency at the time of trial was held to be barred. The particular issue the Court granted a hearing on was the claim of ineffective assistance of counsel for not investigating further the issue of competency issue. The State addressed the claim of ineffective assistance of counsel in the original brief filed in this direct appeal. *See* Proposition VI, at 24-36. Petitioner put on no evidence regarding trial counsel's failure to investigate the competency issue at the evidentiary hearing, nor did he ever request the appointment of experts for that purpose. His request for expert assistance focused on the mental retardation claim.

In its report the forensic staff from the State Hospital found that:

> 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-conviction relief, and that he has a rational, as well as a factual understanding of the nature and object of these legal proceedings.
>
> It also is the unanimous opinion that Mr. Goodin has the present capacity to understand and knowingly, intelligently, and voluntarily to waive or assert his constitutional rights.
>
> C.P. at 169-70.

Thus the staff found him presently competent to stand trial just as Dr. O'Brien had prior to trial.

Petitioner called no witness in support of his claim of ineffective assistance of counsel. Without putting on proof he failed to meet his burden, as the burden of proof is on the petitioner in a post-conviction setting.

The trial court did not err in not making a determination of petitioner's competency at the time of trial, and petitioner never challenged the failure to do so at trial. This claim is barred by this Court's post-conviction decision. The trial court did not err in denying the claim of ineffective assistance of counsel as more fully set forth in the original direct appeal brief of the State. The decision of the circuit 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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STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
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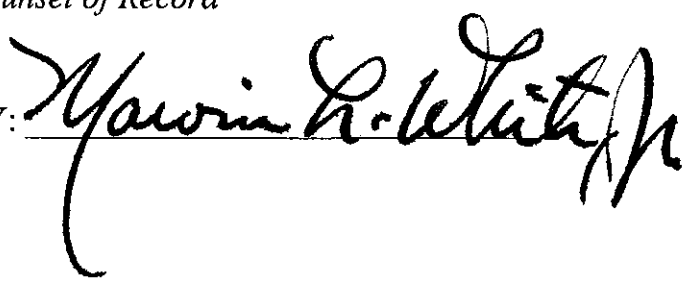
Counsel of Record

BY: 

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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 **SUPPLEMENTAL BRIEF FOR APPELLEE** to the following:

Glenn Swartzfager, Esquire
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Honorable Marcus D. Gordon
Circuit Court Judge
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Honorable Mark Duncan
District Attorney
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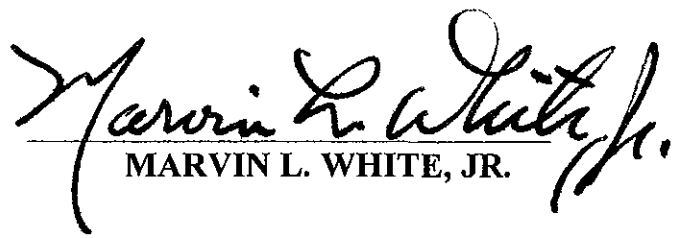
Philadelphia, Mississippi 39350

This the 13th day of April, 2008.



MARVIN L. WHITE, JR.