IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2007-CA-00972-SCT

HOWARD DEAN GOODIN ***Appellant***

Versus

STATE OF MISSISSIPPI ***Appellee***

APPELLANT'S CORRECTED REPLY BRIEF

ORAL ARGUMENT REQUESTED

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APPELLANT'S REPLY BRIEF

Introduction

In remanding this case to the trial court on three issues, this Court was convinced that the following evidence presented in the post-conviction petition should be evaluated by the Circuit Court to determine whether Howard Goodin is mentally retarded under *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Chase v. State*, 873 So. 2d 1013 (Miss. 2004):

- The pretrial evaluation of Gerald O'Brien, dated February 24, 1999
- A social security disability report dated April 23, 1998
- An unsigned psychological evaluation from Dr. Michael Whelan dated May 1998
- A mental health evaluation from Dr. David Powers, dated May 25, 1998
- A disability determination and transmittal form dated May 25, 1998
- Progress notes from Dr. Thomas Welsh in Laird Hospital dated August 10, 1998
- An intake evaluation interview dated July 13, 1998
- A Weems Mental Health Discharge/Termination Summary dated February 25, 1999
- An unsworn undated statement of from Dr. Whelan
- Judge Gordon's Report of the trial, where he marked Goodin's intelligence level as being "Low (IQ below 70)";
- Goodin's school records for grades 1-4 (it appears Goodin spent three years in the third grade);
- Affidavits from relatives stating that Goodin acted strangely at times;
- Several affidavits from MOCPCC personnel stating what other people had told them about Goodin's behavior; and
- An affidavit from Dr. O'Brien. dated November 15, 2002

Goodin v. State, 856 So. 2d 267, 273- 277 (Miss. 2003).

This Court also found that an evidentiary hearing was necessary on Goodin's ineffective assistance claim based on a detailed affidavit from trial counsel and documentation that Goodin suffers from schizophrenia. *Goodin,* 856 So. 2d at 282. Similarly, based on this additional evidence of schizophrenia, the Court also ordered a hearing on the question of Goodin's competency to stand trial and his attorney's handling of that issue. *Goodin*, 856 So. 2d at 283.

Unfortunately, none of this evidence was considered by the Circuit Court on remand. The non-performance of Goodin's assigned counsel, who called only one live witness and who failed to seek appropriate mental health evaluations, was compounded by the inexplicable actions of the Circuit Court, which made an IQ determination based on facts not in the record, cherry-picked one document (the most recent Whitfield evaluation) from the Court file on which to base its-written opinion, and considered that document after announcing at the hearing that a *Daubert* hearing on the Whitfield evaluators' qualifications would not be allowed, because the Court was not going to consider the Whitfield report at all. When all was said and done, the Circuit Court ruled that Howard Goodin was not mentally retarded and thus not entitled to relief on any of the three issues for which the case was remanded, based on an IQ determination not in the record and the unqualified expert opinions expressed in the Report for the Mississippi State Hospital at Whitfield, which was not presented as evidence at the Evidentiary Hearing and which Howard Goodin was not allowed to challenge or rebut.

I. The facts in the court file, fairly considered, prove that Howard Goodin is mentally retarded; the Circuit Court erred by making an IQ assessment not based on any fact in the record.

A. The Circuit Court's findings are not supported, but rather disproved, by the Whitfield Report

In his Supplemental Brief, Goodin argued that sufficient evidence existed in the Court file for a finding that he is mentally retarded and therefore exempt from execution under *Atkins*. Goodin Supp. Brief at 16-20. The State, in response, relies on the written opinion issued by Circuit Judge Gordon after the hearing to contend that the court below made a specific finding that Goodin is not retarded. State's Supp. Br. at 4.

But the Circuit Court's Order raises far more questions than it answers. The Circuit Court's Order reads that "the forensic opinion establishes the Petitioner's intelligence (IQ) as 70 to 75, and diagnosed the petitioner as malingering." C.P. 699. However, no where in the forensic report from Whitfield is Goodin's IQ listed as 70-75. The State cites to C.P. 169-170 (State' Supp. Br. at 5), but an IQ of 70-75 does **not** appear on this page.

It is difficult to discern what the Circuit Court relied upon in making its ruling, because the Court's bench ruling and its written opinion contradict each other on this point. From the bench, the Circuit Court granted a "directed verdict" to the State at the close of Goodin's case:

> Now, the issue in this case is the mental retardation of Howard Goodin. Counsel did not request funds for expert to determine the mental retardation of Howard Goodin. The only request in this motion for Expert Funds was to have experts to assist them in the examination of the experts at Whitfield, Mississippi. In other words to cross examine those experts.
>
> Therefore, this court is the opinion that the Motion for directed Verdict should be sustained and it's dismissed.
>
> That's the ruling of the Court. Court's adjourned. R. 103.

Thus, the Circuit Court based its bench ruling on the utter incompetence of Goodin's lawyer, who even failed to request an expert to evaluate Howard Goodin even though the controlling case clearly states that an expert opinion is required to prove mental retardation. *Chase v. State*, 873 So. 2d 1013, 1029 (Miss. 2004).

In particular, the Circuit Court refused to allow the State to introduce the Whitfield report into evidence at the Evidentiary Hearing:

BY MR. WHITE: Just one thing briefly, he -- he -- um -- Mr. Ryan has referred to all these prior evaluations and everything, I haven't seen any -- he has offered no exhibits to his case. He has offered to evidence. Uh -- these things that I've seen he's raised up like this where there's been no introduction of those. The only thing that I know of that is before the Court would probably be the report from Whitfield – the lengthy report from Whitfield and the State would move its introduction right now as the State's exhibit Number One as to its grounds for -- uh -- as the basis of its --

BY THE COURT: No, I'll not -- I'll not accept that motion at this juncture of this case --

BY MR. WHITE: Okay.

BY THE COURT: -- because -- uh -- what's before me at this time is -- uh -- the defendant has rested and you've made a motion for directed verdict.

BY MR. RYAN: Right. Okay.

BY THE COURT: So -- uh -- that might be appropriate only if I overrule the motion for a directed verdict which I know you don't want me to do.

R. 99-100 (emphasis added).

In the written opinion, however, the Circuit Court without explanation or without notice to Goodin made all motions, pleadings, reports, including the reports of the Mississippi State Hospital, part of the record in its Order Granting the Directed Verdict. C.P. 670. And rather than relying on a "directed verdict" theory, the Circuit Court made an affirmative finding that "the forensic opinion establishes the Petitioner's intelligence (IQ) as 70 to 75, and diagnosed the petitioner as malingering." This finding of fact is not based on, or supported by, any of the evidence in this case, and is therefore clearly erroneous.

This alone is grounds for reversal. On appeal, the factual findings of a circuit judge sitting without a jury are treated like a chancellor's findings and are given deferential review. *Liberty Mut. Ins. Co. v. McKneely*, 862 So. 2d 530, 533 ¶8 (Miss. 2004). *W.H. Properties, Inc. v. Estate of Johnson,* 759 So. 2d 394, 395 ¶9 (Miss. 2000).

Under that standard, this Court has said that "we will not disturb a trial judge's findings of fact where there is in the record substantial evidence supporting the same, and that the findings of fact of a trial court should and must be accepted unless they are manifestly wrong." *DeSoto Times Today v. Memphis Publishing Co.*, 991 So. 2d 609, 613, ¶15 (Miss. 2008).

But a finding of fact is "clearly erroneous" when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *U.S. Fidelity & Guar. Co. v. Estate of Francis ex rel. Francis,* 825 So.2d 38, 44 (Miss. 2002); *Matter of Estate of Taylor,* 609 So.2d 390,393 (Miss. 1992). Where this standard is met, this Court does not hesitate to reverse. *See, e.g., Liberty Mut. Ins. Co., supra; Miss. Dep't of Transp. v. Johnson,* 873 So. 2d 108 (Miss. 2004).

Importantly, in applying the manifest error standard, this Court is "endowed with "the right to make its own construction of authenticated written documents." *Boyd v. Tishomingo County Democratic Executive Committee, 912 So.2d 124, 128-29 (Miss. 2005); see also Pegram v. Bailey*, 708 So.2d 1307, 1313 (Miss. 1997). Under this rule, when this Court has a different interpretation of a document considered by the trial court, it owes no deference, and can reverse the trial court's judgment. See *W.H. Properties, Inc. v. Estate of Johnson,* 759 So. 2d 394, 396-97 ¶¶12-13 (Miss. 2000) (reversal where Supreme Court, on reading of transcript of telephone conversation, disagreed with trial court's interpretation of that document).

In this case:

1. The Whitfield report does not contain any statement or finding that Goodin's IQ was 70-75[1];

[1] Goodin's intellectual functioning would fall in the mentally retarded range even if this inflated and unsubstantiated score was accurate.

2. The prior evaluations reported in the Whitfield report consistently found low level intellectual functioning and significant deficits in adaptive functioning; and

3. The live testimony of Ada Reece which was not impeached, also supported a finding of adaptive functioning deficits. *See* the Supplemental Brief of the Appellant pp. 3-14.

On this appeal, the State bases its entire argument for affirmance on the written order, supported by the Whitfield evaluators' conclusions that Goodin was malingering during his evaluation. Supplemental Brief of the Respondent/Appellee pp. 7-9. But the Whitfield evaluators had no basis to conclude that Goodin malingered on the prior IQ tests.[2] For example, Goodin had no incentive to malinger during the 1973 test administered at Parchman. Moreover, the Whitfield evaluators could not explain why Goodin's IQ scores remained fairly consistent over time.

The State also relies on the 1999 (pre-trial) conclusions of Dr. Gerald O'Brien to support the Whitfield evaluators' conclusion. But as this Court noted in remanding this case for hearing, Dr. O'Brien himself disavowed these conclusions in his 2002 affidavit. Supplemental Brief of the Respondent/Appellee pp.10-12. In this connection, the State misstates O'Brien's 2002 affidavit. After being presented with additional social history documents and records provided by original post-conviction counsel, Dr. O'Brien changed his earlier assessment. The 2002 affidavit of Dr. O'Brien clearly states:

> 10. It is often difficult to evaluate whether someone is mentally retarded when that person suffers from a mental illness, such as schizophrenia. It is quite possible that what I may have perceived as lack of effort on the part of Gooden was in fact a manifestation of his schizophrenia and that he was not really malingering. In light of the additional evidence of deficits in adaptive functioning, which I was not provided at the time, Mr. Gooden may very well be mentally retarded and the IQ scores that I obtained may very well reflect his intellectual functioning. CP. 140 R.E. 54; C.P. 352 R.E. 98 (emphasis added).

[2] As discussed later in this brief and in the Supplemental Brief of the Appellant pp. 39-45, the ultimate conclusions of Whitfield regarding its diagnoses are subject to question because the evaluators lacked the necessary qualifications required by *Chase*.

To buttress its attempt to support the Circuit Court's opinion, the State cherry-picks through the myriad of records documenting Mr. Goodin's mental retardation and mental illness summarized in the Whitfield report. Whitfield found that Goodin had adaptive deficits but failed to explain why those deficits are not attributable to Goodin's intellectual functioning. C.P. 170; R.E. 84. Attempting to support this, the State argues that the results of the Vineland Adaptive Behavior Scale show strengths in adaptive functioning. But Goodin scored a 65 on that scale, which equates to severe adaptive deficits. Supplemental Brief of Respondent/Appellee p. 7; Vineland results, R.E. 84.

The State also relies on the hearsay testimony of Deputy Warden Harris, who claims that Goodin reads his own trial transcript and attorney letters R.E. 88-89. This ignores Mr. Goodin's statement that "the inmate next door, Curtis Jackson read me my cases from my appeal." C.P. 169. Similarly, the State ignores the testimony of Warden Streeter, who has known Goodin for 15 years and describes Goodin as "definitely slow." C.P. 150. The State argues this point to say that Goodin is not retarded. Supplemental Brief of respondent/Appellee at 6.

The State's argument on adaptive functioning echoes the position taken by Texas in *Rivera* that Rivera's adaptive deficits may or may not have been caused by Rivera's diminished intellectual capacity; these deficits may have been caused by Rivera's long-term drug abuse. *Rivera v. Quarterman*, 505 F.3d 349, 363 (5th Cir. 2007). The Fifth Circuit rejected this argument, pointing out that the "Supreme Court noted in *Atkins* that mental retardation 'has many different etiologies and may be seen as a final common pathway of various pathological processes that effect the functioning of the central nervous system.'" *Id.*

Moreover, the State refuses to acknowledge the overwhelming evidence of Howard Goodin's mental retardation that is contained in the Whitfield report and

contradicts the findings of the evaluators. Because this evidence is found in a written document that was considered by the Circuit Court, this Court can evaluate it without deference to the trier of fact. *W.H. Properties, supra,* 759 So. 2d at 396-97 ¶¶12-13 (Miss. 2000).

The Whitfield Report contains three sets of IQ test scores, one test by Parchman, one by Dr. O'Brien, and one by the Mississippi State Hospital. All three test scores were in the mentally retarded range. The State concedes that the test results obtained by the State Hospital "were much the same as those obtained during the first evaluation by Dr, O'Brien." Supplemental Brief of the Respondent/Appellee, p. 12.

The consistency of the test scores is only one piece of evidence relied on Dr. W. Criss Lott in an opinion contrary to Whitfield's. Indeed, based on the overwhelming evidence cited in the Whitfield report, Dr. Lott determined that there is no basis for Whitfield to conclude that Goodin is not mentally retarded:

> 4. Because of the great number of records provided, I have had time to conduct only a preliminary review. Based on my review of the records, there is data that supports the criteria for mental retardation, that is, he evidences subaverage intellectual functioning, manifested before age 18, and he appears to have deficits in adaptive functioning. This opinion is based on the following:
>
> > A. All the psychological test results -- including the testing at Parchman in 1973 when Gooden [sic] obtained a Full Scale IQ of 63, the tests done by Dr. O'Brien in 1999 when Gooden obtained a Full Scale IQ of 60, and the testing performed at Mississippi State Hospital in 2004 when Gooden obtained at Full Scale IQ of 52 -- place Howard Gooden's IQ in the mentally retarded range. Even accounting for malingering, Mississippi State Hospital estimated Mr. Gooden's IQ to be 70-75 which still falls within the mentally retarded range.
> >
> > B Although Mr. Gooden was described as malingering, the consistency of the IQ scores over time suggests that his intellectual functioning probably falls in the subaverage range.

C. Gooden's school records show poor school performance. He failed the third grade twice and the fourth grade, which reflect a history of functional academics deficits before age 18.

E. The Social Security Determination Records indicate that Mr. Gooden is disabled and unable to work, which reflects an adaptive deficit in the area of work.

F. The affidavits of family members indicate adaptive deficits, in that the family members report that Mr. Gooden has never been able to live independently.

G. Mr. Gooden scored a 65 (severe deficits) in the socialization domain of the Vineland administered by Whitfield.

5. Mr. Gooden also has a history of treatment for mental illness. Mr. Gooden has been diagnosed with schizophrenia by Weems Community Mental Health Center, Laird Hospital, and the Social Security Disability Determination Records.

6. It is important to note that genuinely mentally ill individuals may also malinger, some as a cry for help, others for secondary gain. In either case, malingering, per se, does not negate the fact that Mr. Gooden suffers from a mental illness. It also does not negate the fact that he has significant subaverage intellectual deficits and marked deficits in adaptive functioning, both factors associated with the diagnosis of mental retardation.

(Exhibit 11, Motion to Reconsider, affidavit of W. Criss Lott; R.E. 143-145).[3] This affidavit clearly shows how flawed Whitfield's reasoning and conclusions were.

Thus, although the Circuit Court announced at the hearing that the *Atkins* claim was being denied on "directed verdict," when the written opinion was issued, the Court made affirmative findings about Goodin's *Atkins* claim that were specifically based on

[3] The State has moved to strike the affidavit of Dr. Lott. As explained more fully in Petitioner's response to that motion, Petitioner uses Dr. Lott's affidavit to demonstrate the prejudice from the lower court's denial of expert assistance to counter Whitfield's flawed evaluation. *See Harrison v. State*, 653 So.2d 894, 902 fn. 2. (Miss. 1994) Moreover, it enables Petitioner to demonstrate prejudice from the denial of minimally competent counsel at the evidentiary hearing. *See Strickland v. Washington*, 466 U.S. 668 (1984); *cf. Jackson v. State*, 732 So. 2d 187 (Miss. 1999). If nothing else, Dr. Lott's review of the Whitfield report summarizes the glaring deficiencies of that evaluation and can serve as a basis for this Court to reject the findings of the lower court.

the Whitfield report. As discussed above, the Whitfield report itself contains significant evidence that Howard Goodin is mentally retarded. When combined with the testimony of Ada Reece, the evidence in that report is itself grounds for reversing the Circuit Court on the *Atkins* claim.

B. By considering the Whitfield report without allowing Goodin to challenge or rebut the report, the Circuit Court violated Goodin's due process rights.

The Circuit Court's consideration of the report after the hearing was recessed presents another ground for reversal. Goodin suffered a clear violation of the right to rebut or explain the State's case. *Panetti v. Quarterman*, 127 S.Ct. 2842, 2858 (2007); *Rivera v. Quarterman*, 505 F.3d 349,358 (5th Cir. 2007); *Gardner v. Florida*, 430 U.S. 349, 362 (1977), *Simmons v. South Carolina*, 512 U.S. 154, 161 (1994). *Jenkins v. McKeithen,* 395 U.S. 411, 428 (1969) ("We have frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process"); *Greene v. McElroy,* 360 U.S. 474, 497 (1959).

Goodin was clearly prejudiced by the Court's post-hearing consideration of the Whitfield report. Prior attorney Robert Ryan's motion for an expert to assist in the challenge of Whitfield's conclusions was denied. R.8; R.E. 27; C.P. 544-545; R.E. 25-26; C.P. 529-534; R.E. 10-14. The Lott affidavit clearly shows the value of an expert to rebut the State's case. (Exhibit 11, Motion to Reconsider, affidavit of W. Criss Lott; R.E. 143-145). Also, Mr. Ryan's motion to challenge the Whitfield evaluators' qualifications under *Daubert* and Miss.R.Evid. 702 was denied.

The Circuit Court also ruled that because Howard Goodin was not retarded, the issue of his trial counsel ineffectiveness was irrelevant. CP. 669. As this Court made clear, however, those were distinct issue. Moreover, the other records submitted with the

pleadings contain a wealth of documentation from mental health professionals and family members confirming Goodin's mental illness. Records from the Social Security Adminstration, his incarceration (even before the crime for which he was sentenced to death), Weems Community Mental Health Center, and Laird Hospital contain diagnoses of Schizophrenia. CP. 475; 477-478; 480; R.E. 101-123;124-127; 128. Family members also recall Goodin complaining of auditory hallucinations. C.P. 342; 344;347; 349.Clearly this well documented history of mental illness is mitigating and failure to present readily available mitigation is ineffective counsel. *Wiggins v. Smith,* 539 U.S. 510 (2003); *Rompilla v. Beard,* 545 U.S. 374, 391-393 (2005) (finding trial counsel ineffective for failing to examine file of defendant's prior conviction when the contents of which would have pointed to defendant's mental illness including schizophrenia.)

C. Conclusion

Thus, the fact that the written order incorporates the Whitfield report and other documents does not, as the State asserts, provide a reason to affirm the judgment below. Instead, the Circuit Judge's post-hearing consideration of those documents presents three different reasons for reversal. First, that the Whitfield report and other documents proves that Howard Goodin is mentally retarded, and thus dismissal of post-conviction relief was error. Second, that by considering the Whitfield report without allowing Goodin to challenge or rebut that report, the Circuit Court violated Goodin's due process rights. Finally, if the lower court based its decision on materials in the record even though they were not formally introduced at the evidentiary hearing, then the unrebutted evidence is that Goodin's trial counsel were constitutionally ineffective. For these reasons, the Circuit Court should be reversed.

II. The Circuit Court, the Mississippi State Hospital at Whitfield, and the Mississippi Office of Post-Conviction Counsel, independently and together, denied Howard Goodin due process by preventing him from receiving a full and fair hearing on the evidence of his mental retardation.

A. Howard Goodin was denied his right to counsel and his due process right to present a meaningful defense as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 3, Sections 14, 26 and 28 of the Mississippi Constitution, Jackson v. State, 732 So. 2d 187 (Miss. 1999), and Miss. Code Ann. 99-39-1, et seq. when he was saddled with a completely incompetent lawyer.

a. Ryan took no steps to give his client any chance to prevail and in fact suppressed overwhelming evidence of Goodin's mental retardation and mental illness and thus caused grave prejudice to Goodin

The State wastes no energy trying to defend Robert M. Ryan's horrific representation of Howard Goodin at the post-conviction Evidentiary Hearing. Indeed, the State essentially agrees that Ryan had no inkling as to how to provide even minimally competent representation. The State highlights many of the same glaring and inexcusable deficiencies of Ryan that Petitioner discussed in his Supplemental Brief:

1. "petitioner did not produce an expert who expressed an opinion to a reasonable degree of medical certainty that Goodin is mentally retarded." Supplemental Brief of the Respondent/Appellee, p. 15;

2. "petitioner put on no evidence that comports with Chase." Supplemental Brief of the Respondent/Appellee, p. 16;

3". . .an evidentiary hearing was held at which petitioner could have put any other evidence that he had, he could have called Dr. Deal, Dr. Harris, Dr. McMichael, and Dr. Beal to the stand and questioned them, but he chose not to do so, relying solely on the testimony of his sister." Supplemental Brief of the Respondent/Appellee p.36;

4. "petitioner was attempting to call up his *Daubert* motion, but had instructed the experts not to come that day. How can you have a hearing regarding the experts that are going to testify if they are not there." Supplemental Brief of the Respondent/Appellee, p. 37;

5. "Petitioner put on no evidence regarding trial counsel's failure to investigate the competency issue at the evidentiary hearing, nor did he

request experts for that purpose." Supplemental Brief of the Respondent/Appellee, p. 39;

6. "Petitioner put on no proof of his claim of ineffective assistance of counsel." Supplemental Brief of the Respondent/Appellee p. 40.

On pages 33-39 of his Supplemental Brief, Goodin outlined the myriad ways in which Robert Ryan failed him Clearly, the State embraces Petitioner's assessment of Ryan.

b. Goodin is entitled to effective assistance of counsel in his post-conviction proceedings

Undersigned counsel did not represent Goodin at the Evidentiary Hearing. As new counsel on direct appeal, undersigned counsel raises prior counsel's ineffectiveness. This is the first opportunity for Goodin to raise prior counsel's ineffectiveness. *See Archer v. State,* 986 So. 2d 951, 956 (Miss. 2008) ("it is absurd to fantasize that [a] lawyer might effectively litigate the issue of his own ineffectiveness") (quoting *Read v. State*, 430 So. 2d 832, 838 (Miss. 1983)).

The State, predictably, argues that Goodin has no "right to the effective assistance of counsel on post-conviction review." State's Supp. Br. At 29. However, this Court has recognized that egregious incompetence of counsel may warrant reversal even in a civil case. *McCollum v. Franklin*, 608 So. 2d 692 (Miss. 1992). There, this Court reversed a tort case, noting that "the trial court, even where as here, . . . was bereft of the assistance of effective counsel for the plaintiff, [and] should have recognized unfairness"). *Id.* at 692. This Court also found that "[p]laintiff's attorney is to be faulted for ineptitude and defendant's for taking unfair advantage." *Id.*

The State ignores the recent rulings of the Fifth Circuit that due process requires that counsel and expert assistance be given – **even in post-conviction proceedings** – to a

prisoner with a colorable claim of mental retardation or mental illness. *In re Hearn*, 376 F.3d 447, 458 (5th Cir. 2004). This only makes sense. If the Eighth Amendment forbids the execution of a mentally retarded prisoner, *Atkins*, then the Fourteenth Amendment must require that the State give minimally competent counsel to a prisoner with a colorable claim of retardation. What is the alternative – to require the prisoner to present his own evidence of retardation pro se? That is the exact rationale of *Hearn* and (with respect to expert assistance) *Rivera v. Quarterman,* 505 F.3d 349, 358 (5th Cir. 2007). And if due process requires appointment of counsel, then that counsel must give effective assistance. For this reason – standing alone – the State's assertion of "no constitutional right to counsel" must fail.

But even outside the narrow context of mental retardation and mental illness claims, a prisoner such as Howard Goodin is entitled to effective post-conviction counsel. The first source of this right is the prior rulings of this Court. In *Jackson v. State,* 732 So. 2d 187 (Miss. 1999), this Court found that (1) post-conviction proceedings were part of the appellate process in capital cases; (2) those proceedings were critical to fulfilling the exhaustion requirement in subsequent federal habeas proceedings; (3) post-conviction proceedings required investigation into facts outside the record; (4) death row inmates were incapable of self-representation due to the complexity of the proceedings, the need for investigation, and other difficulties faced by the inmates; and (5) the provision of counsel was necessary to guarantee a right of access to courts.

The State responds to this Court's opinions by citing the rulings in federal habeas corpus cases which are distinguishable. See State's Supp. Brief at 22-26, relying on *Stevens v. Epps,* 2008 WL 4283528 (S.D. Miss 2008) and *Gray v. Epps*, 2008 WL 4793796 (S.D. Miss. Oct. 27, 2008). Importantly, the Court in *Stevens* found that the State had interfered with the provision of post-conviction counsel. 2008 WL 4283528 at

44. Moreover, this Court has expressly held that death-sentenced inmates have the right to counsel. *See Jackson,* 732 So. 2d at 191 ("finding that death row inmate was "entitled to appointed and compensated counsel") (emphasis added); *Puckett* 834 So. 2d 676, 677 (Miss. 2003) (noting that under the post-conviction statute and *Jackson v. State* death-sentenced inmates were "assured competent counsel"); *see also id.* at 680 (pursuant to *Jackson,* "Puckett was clearly entitled to appointed competent and conscientious counsel to assist him with his pursuit of post-conviction relief").

In *Stevens* the District Court believed that this Court "has expressly disclaimed that its prior opinion in *Jackson* intended to establish a right to anything but a competent attorney for that process." 2008 WL 4283528 at 47. But Howard Goodin did not receive anything that came close to resembling a "competent" attorney, and this point is **not contested**. Furthermore, in *Puckett*, the state court reaffirmed *Jackson*, finding that it had "assured competent counsel" and held that inmates were "entitled to appointed competent and conscientious counsel").

In *Stevens,* the District Court believed that this Court, in cases decided subsequent to *Puckett,* backed away from its position regarding the right to counsel. 2008 WL 4283528 at 46 (citing *Wiley v. State,* 842 So. 2d 1280 (Miss. 2003) and *Brown v. State,* 948 So. 2d 405 (Miss. 2006)). There are several obvious problems with relying on these opinions. First, and foremost, constitutional rights are not like spigots that can be turned on or off on a whim. If the preconditions giving rise to the *Jackson* opinion remain the same, then this Court cannot arbitrarily deprive the rights granted in that decision. This would give rise to a Fourteenth Amendment claim of the arbitrary deprivation of a state law right. That is to say, even if states are not required to grant the right to post conviction counsel in the first place, once they do the state-created entitlement may not be arbitrarily denied. *See, e.g., Hicks v. Oklahoma,* 447 U.S. 343, 346 (1980) (*citing*

Vitek v. Jones, 445 U.S. 480, 488-489 (1980)); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Morrissey v. Brewer*, 408 U.S. 471 (1972). *See also NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 457-58 (1958).

Second, neither *Wiley* nor *Brown* address the type of circumstances presented here. In *Wiley,* the petitioner, who was represented by Robert B. McDuff, an experienced capital attorney, along with members of a prestigious law firm from Washington, D.C., sought retroactive application of the portion of the *Jackson* holding allowing for funding for reasonable litigation expenses. This Court first found this successive petition procedurally barred. *Id.* at 1283. This Court also found that Wiley had experienced counsel who had represented him in a prior round of post-conviction litigation and who were also representing him in federal court. In fact, McDuff, Wiley's lead counsel, had agreed to represent him "without payment" when he first became involved in the case. *Wiley*, 842 So. 2d at 1284. This Court also found that *Jackson* did not give an unqualified right to funding for experts; instead, inmates still had to seek authorization, and the court found that Wiley had not made a sufficient showing to justify the expenditure of funds. *Id.* This Court did not overrule *Jackson* in any sense; in fact, it quoted language from that opinion describing the need for counsel. *Id.* at 1285. However, this Court was quick to point out that Wiley already had the benefit of experienced counsel for a first round of post-conviction proceedings.

In one sentence, this Court remarked that *Jackson* did not "specifically establish a constitutional right to compensated counsel." *Id.* at 1285. This Court also noted that in *Murray* [*v. Giarratano*], the Supreme Court did not find that there was a right to post-conviction counsel. However, nowhere in *Wiley* did this Court backtrack from its finding that in Mississippi "death row inmates have been unable to obtain counsel or requisite

help from institutional lawyers," a finding which distinguished the situation in Mississippi from that in *Giarratano*. *Jackson,* 732 So. 2d at 191. As noted in *Murray v. Giarratano,* Virginia inmates had always been able to locate legal assistance; the enormous difference between those facts in the Virginia case and the circumstances in Mississippi led this Court to issue its holding in *Jackson.*

Also, the *Jackson* Court explicitly held that there was a right to post-conviction counsel: "In summary, we find that Henry Curtis Jackson, Jr., as an indigent, is deprived of assistance of counsel and access to the court system in his attempt to obtain post-conviction relief from his conviction and sentence." *Id.* The *Jackson* Court also expressly held "that in capital cases, state post-conviction efforts, though collateral, have become part of the death penalty appeal process at the state level." *Id.* The court then cleared up any remaining doubt with the next sentence: "We therefore find that Jackson, as a death row inmate, is entitled to appointed and compensated counsel." *Id.* (emphasis added)

This Court's opinion in *Brown* does not retract its position in *Jackson.* In *Brown,* lawyers from the Office asked this Court not to apply various procedural rules, including rules of default and res judicata. *Brown,* 948 So. 2d at 413. The Office argued that it could not provide effective post-conviction representation if such stringent procedural rules applied. *Id.* This Court denied Brown's request but not because it reconsidered the scope of *Jackson.* Rather, this Court simply found that Brown did not present any new evidence in support of this argument or pointed to any case law allowing it to disregard procedural bars or pertaining to effective post-conviction representation. *Id.* Simply put, this Court did not revisit *Jackson*; it simply did not find any basis for reading *Jackson's* guarantee of counsel to vitiate long-standing procedural rules.

Thus, in neither *Wiley* nor *Brown* did this Court back away from its holding regarding the right to competent post-conviction counsel or its holding that post-conviction is part of the appellate process in capital cases.

In *Stevens*, the District Court found that despite the "troubling questions" presented by the history of the Office, two significant weaknesses worked against the prisoner in that case. First, the District Court found that this Court "expressly disclaimed that its prior opinion in *Jackson* intended to establish a right to anything but a competent attorney for that process." *Id.* As discussed in the preceding paragraphs, Appellant disagrees with that reading of Mississippi cases. More significantly, however, Howard Goodin did not even receive "a competent attorney." For all practical purposes, he had no attorney at all.

The second point raised in *Stevens* is that "the State of Mississippi was not constitutionally obligated even to provide post-conviction review." 2008 WL 4283528 at 47. Regardless of the merit of that argument with respect to *Stevens,* it certainly cannot apply in a situation in which a mentally retarded inmate seeks relief pursuant to *Atkins.* Moreover, this point, however, is hardly a weakness. The federal constitution does not recognize a right to a direct appeal, but the Supreme Court has held that when a state recognizes a right to a direct appeal and counsel to pursue the appeal, then to comport with due process, it must provide effective assistance of appellate counsel. *Evitts v. Lucey,* 469 U.S. 387 (1985). Thus, by committing to provide counsel to death-sentenced prisoners via Rule 22 and the Act creating the Office, the State of Mississippi created an interest which it cannot arbitrarily deny. The State cannot, consistent with the Fourteenth Amendment, saddle Howard Goodin with unqualified counsel. Furthermore, the Eighth Amendment requires the effective assistance of post-conviction counsel, and competent counsel is essential to provide the guarantee of access to the courts. As one

commentator has amply demonstrated, the Constitution compels states that have created a state statutory right to capital postconviction counsel to provide effective counsel. *See* Celestine Richards McConville, The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel, 2003 Wis. L. Rev. 31, 67-68.[4]

The course of Howard Goodin's legal proceedings has been unconscionable for any fair system of justice. Although Goodin's life was on the line, his trial attorneys failed to prepare for the most important part of the trial. Even though he was on notice that Howard Goodin suffered mental impairments, the trial lawyer did not gather records or hire an expert. When the case was remanded for a full and fair hearing on the issues of Howard Goodin's mental retardation and his trial lawyers to failure to present evidence of Goodin's mental retardation, mental illness and competency, post-conviction counsel failed to call any expert witnesses and in fact only presented one lay witness even though many others were willing and available to testify.

B. Petitioner was never evaluated for Mental Retardation by a licensed psychologist who specializes in the field of Mental Retardation as mandated by *Chase v. State*.

None of the individuals who signed off on the forensic report furnished to the Circuit Court of Newton County met the qualifications under *Chase* to give an expert opinion whether Goodin is mentally retarded. Dr. Reb McMichael, Shirley M. Beall and Beth Kilary all testified that they were not experts in field of mental retardation the *State of Mississippi v. Devail Hudson*, Oktibbeha County, Mississippi Circuit Court Case

[4] Letty S. Di Giulio, Note, Dying for the Right to Effective Assistance of Counsel in State Post-Conviction Proceedings: State Statutes & Due Process in Capital Cases, 9 B.U. Pub. Int. L.J. 109, 129-31 (1999) (presenting an initial version of the theory); *see also* Megan K. Rosichan, Comment, A Meaningless Ritual? The Due Process Mandate for the Provision of Competent Counsel in Arkansas Capital Post-Conviction Proceedings, 38 U.S.F. L. Rev. 749, 751-52 (2004) (arguing that Arkansas' failure to provide effective assistance of postconviction counsel appointed pursuant to a state statute may create federal and state claims for "deprivation of due process of law in violation of the Fourteenth Amendment").

No.2002-0058-CR which was attached as Exhibit 26 to the unopposed Motion to Reconsider the Motion to Allow the Filing of a Supplemental Brief Or Motion for Compliance with Remand filed with this Court on August 11, 2008. The State makes no argument in support of the qualifications under *Chase* of McMichael, Beall and Kilary. The State makes unsupported allegations of counsel that Dr. Paul Deal and Dr. Paul Harris are qualified under *Chase*. However, there is nothing in the record to support that Dr. Deal and Dr. Harris are in fact qualified under Chase or that they participated in the evaluation of Howard Goodin. The Whitfield Report merely states that: "Doctoral staff present at that interview included Dr. McMichael, Dr. Paul Deal, Dr. John Montgomery, and Dr. Charles Harris." CP 169. There is no discussion of the role of Harris and Deal.

More importantly, Kilary and Beall, two of the admittedly unqualified individuals, actually administered the psychological testing. R.E. 85-92. Experts qualified in the field of mental retardation would not have made the glaring mistakes and oversights that spoiled the Whitfield evaluation. Because Howard Goodin has not been evaluated by an expert who is qualified under *Chase*, he is entitled to a new evidentiary hearing.

C. Howard Goodin was denied the appointment of an independent neutral expert to review the report of the State Hospital and assist in the preparation of his case at the evidentiary hearing.

The Circuit Court made in court rulings and issued orders denying Howard Goodin his own independent expert. R.8; R.E. 27; C.P. 544-545; R.E. 25-26; C.P. 529-534; R.E. 10-14. On July 12, 2004, defense counsel filed a Petition for Review of Lower Court's Order Denying Petitioner's Motions for Expert Assistance; Motion for Stay. C.P. 546-601. The Mississippi Supreme Court denied the interlocutory appeal on August 11, 2004. The State argues that this issue is res judicata because this Court did not grant Goodin's petition for review. Supplemental Brief of the Respomdent/Appellee p. 31-32.

However, the doctrine of res judicata applies only in final judgments; a judgment which is merely interlocutory does not operate as res judicata. A denial of a petition for review under Rule 5 M.-R.A.P does not prevent raising the same request for relief upon the appeal of final judgment. *In re Knapp*, 536 So. 2d 1330, 1333. (Miss. 1988); *Holland v. People's Bank & Trust Co.*, 3 So. 3d 94, 104 ¶(Miss. 2008)("this Court's denial of an **interlocutory appeal** is not a **final judgment** on the merits"), citing *Mauck v. Columbus Hotel Co.*, 741 259, 268 (Miss. 1999). *Accord*, L. MUNFORD, MISSISSIPPI APPELLATE PRACTICE §4.5 at 4-20 & n. 74 (MLI 2006).

The denial of counsel's repeated requests for an expert to assist with cross-examination of the state's witnesses and interpretation of raw data violated due process. Recent decisions of the United States Supreme Court and the Fifth Circuit Court of Appeals make it clear due process requires that a court allow Goodin to make an adequate response to the State's evidence with respect to a claim of mental retardation or mental illness. *Panetti v. Quarterman*, 127 S.Ct. 2842, 2858 (2007); *Rivera v. Quarterman,* 505 F.3d 349, 358 (5th Cir. 2007).

In *Ake v. Oklahoma*, 470 U.S. 68, 71 (1985), the Supreme Court recognized that indigent defendants are entitled to independent mental health experts when their assistance "may well be crucial to the defendant's ability to marshal a defense." *Ake*, supra, 470 U.S. at 80. The Court conducted a Fourteenth Amendment due process analysis, *Id.* at 87, and held that without independent experts defendants could be denied "meaningful access to justice." *Id.* at 76-77. *Ake* specifically held that a defendant is entitled to assistance of a mental health expert "to assist in preparing the cross-examination of the State's psychiatric witnesses." *Ake,* 470 U.S. at 82. Although *Ake* was decided in the context of insanity rather than mental retardation, the Court extensively

discussed the importance of psychiatric testimony to a defendant whose mental condition is crucial to his defense. *Ake,* 470 U.S. at 79-81.

The Federal Circuit Courts have long recognized a defendant's right to an expert to help prepare a defense or cross-examination of state's witnesses. *See, e.g., Starr v. Lockhart*, 23 F. 3d 1280, 1287-1288 (8th Cir. 1994); *Cowley v. Stricklin,* 929 F.2d 640 (11th Cir. 1991) (holding that neither the psychiatrist appointed by the court for both the state and the defense nor, the pro bono expert called by the defense, satisfied *Ake* because court-appointed expert did not help prepare defense or cross-examination of the state's witnesses; state could not preempt defendant's right to a defense psychiatrist by appointing its own expert);*Smith v. McCormick*, 914 F.2d 1153, 1157 (9th cir. 1990); *see also* ABA Guidelines in Death Penalty Cases, Guideline 4.1, commentary ("quality representation cannot be rendered unless assigned counsel have access to adequate supporting services," and that this "need is particularly acute in death penalty cases").

The denial of an expert to assist in developing a challenge to the flawed Whitfield evaluation was particularly prejudicial in this case since the Court relied on the Whitfield report in denying relief. Had the Circuit Court provided Goodin an expert to assist in developing a challenge to the report, Goodin would have the benefit of the type assistance provided by Dr. Lott in his affidavit. See. *Panetti v. Quarterman*, 127 S.Ct. 2842, 2858 (2007); *Rivera v. Quarterman*, 505 F.3d 349,358 (5th Cir. 2007); *Gardner v. Florida*, 430 U.S. 349, 362 (1977), *Simmons v. South Carolina*, 512 U.S. 154, 161 (1994).

Due process and fundamental fairness demand that Howard Goodin have an independent mental health expert to assist his defense team in whatever capacity the defense deemed appropriate. The staff of the Mississippi State Hospital at Whitfield was not an adequate substitute, especially since the personnel who actually administered the

testing lacked the necessary qualifications. Because the Circuit Court denied defense counsel's many requests for an independent expert, Howard Goodin is entitled to a new evidentiary hearing.

D. Howard Goodin was denied his Fifth and Sixth Amendment right to have his counsel present while he was examined at the Mississippi State Hospital at Whitfield.

The State argues that Goodin had no right to counsel's presence at the Whitfield evaluation conducted by the unqualified Whitfield staff. However, the protections afforded by the right to counsel are to assure that a defendant "need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *United States v. Wade*, 388 U.S. 218, 226, (1967). Clearly, the evaluation of Howard Goodin at the Mississippi State Hospital by the unqualified examiners was a confrontation at which counsel's presence was needed to preserve Goodin's right to a fair trial as affected by his right to cross examine the witnesses against him. Neither Beth Kilary or Shirley Beall is a licensed psychologist; Kilary does not even have a doctoral degree. Clearly, the Circuit Court relied on Whitfield's determination that Goodin was malingering. C.P. 699; R.E. 35. Clearly, the testing of Goodin Whitfield was a critical stage. The Whitfield examiner's based their opinions not only on test results but on Goodin's expressions and demeanor. In support of her diagnosis of malingering, Kilary states that "Mr. Goodin frequently closed his eyes during the sections of the test when he was supposed to be looking at items that he was going to be asked to remember later." R.E. 86 Kilary also stated that Goodin, "smirked and stared." R.E. 88 Without being present for the interview, Goodin's counsel was in no position to challenge the highly prejudicial descriptions of Goodin's behavior by the unqualified Whitfield staff.

E. The Circuit Court erred in relying on the Mississippi State Hospital report after refusing to allow Howard Goodin's lawyer to bring a *Daubert* challenge to the qualifications of the State Hospital personnel who conducted a court-ordered evaluation.

Mr. Goodin's post-conviction lawyers filed a Motion challenging the qualifications of the staff of the Mississippi State Hospital at Whitfield under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 589 (1993). On October 4, 2004, Robert M. Ryan wrote a letter to Judge Gordon which was filed with the Newton County Circuit Clerk on October 5, 2009, asking to have the *Daubert* hearing on the same day as the Evidentiary Hearing. C.P.651. Then, Ryan tried to call up the motion on the morning of the twelfth day of October before the Evidentiary Hearing was held. R. 23. Judge Gordon refused to allow Ryan to proceed on the *Daubert* Motion because Ryan had not contacted the Judge or his Court Administrator in accordance with the practice dictated by an unpublished local rule. R. 24.

In its original brief, the State argued that the staff at Whitfield did not testify at the Evidentiary Hearing so the *Daubert* hearing was unnecessary. Brief of Respondent/Appellee, p. 20. However, like the Circuit Court, the State relies heavily on the opinions expressed by the Whitfield staff in its Supplemental brief of the Respondent/Appellee pp.4-13. Thus, the lower court made factual findings reached by unqualified people based on evidence that Goodin had no opportunity to rebut or explain The State also complains that it would have been impossible for the *Daubert* hearing to be held because the experts in question were not available to give testimony. The state clearly misstates the record. In fact, Doctor Harris was present in the court room. R.22. Mr. White himself informed the Judge of the staff at Whitfield's availability:

BY MR. WHITE: Uh --- he's not really our witness. He is here for the *Daubert* hearing if the Court elects to proceed on that hearing. Then we would have the rest of the Whitfield people come in, but he's not going to be our witness in the case in chief.

BY THE COURT: So -- uh - that might be appropriate only if I overrule the motion for a directed verdict which I know you don't want me to do. R. 99-100.

The Circuit Court without explanation makes the Whitfield Report part of the record in its Order Granting the Directed Verdict. C.P 667-670. The opinions of the staff at Whitfield become the basis for the Court's ruling.

The State also argues that "Mental retardation is not a topic that is deserving of a *Daubert* hearing." Supplemental Brief of Respondent/Appellee p. 38. However all expert testimony is governed by Mississippi Rule of Evidence 702 and must be relevant and reliable. This Court acknowledged the *Daubert* standard of admissibility of expert testimony under Mississippi Rule of Evidence 702 in *Mississippi Transp. Comm'n v. McLemore*, 863 So. 2d 31, 39 (Miss. 2003). Expert testimony about a plaintiff's psychological condition has been excluded on the grounds it failed to meet the *Daubert* standard. *Gilbert v. Ireland*, 949 So. 2d 784, 792 (Miss. App. 2006). In *Gilbert v. Ireland*, the psychological testimony of the expert is excluded because the plaintiff misstated her symptoms to the doctor and thus, "the opinion was not 'based upon sufficient facts or data.' M.R.E 702." *Gilbert v. Ireland,* 949 So. 2d at 791. Moreover, *Chase* requires that experts giving an opinion on mental retardation have expertise in that area. Finally, fundamental principles of due process require that Goodin have had an opportunity to challenge the training, background, qualifications, and conclusions reached by the evaluators. Thus, the State's suggestion that experts in mental retardation cases are immune from challenges to their qualifications and methods has no support whatsoever. By including the Whitfield report in the record after the hearing had concluded, the Circuit Court foreclosed Howard Goodin a full and fair opportunity to challenge the qualifications of the staff at Whitfield who did not in fact testify at his Evidentiary Hearing. For this reason Howard Goodin is entitled to a new evidentiary hearing.

III. The Circuit Court Flagrantly Disregarded This Court's Order to Determine Whether Goodin's Trial Counsel Was Ineffective In Failing to Present Mitigation Evidence.

The Circuit Court held that its denial of Goodin's *Atkins* claim foreclosed the separate claim of ineffective assistance of counsel for failing to present mitigation evidence. C.P. 670 Goodin's original Brief argued that this ruling was error. Goodin's Br. at 18-22. In response, the State asserted that the Circuit Court's holding against Goodin on his *Atkins* claim mooted his separate claim of ineffective assistance. State's Brief at 24.

But this simply makes no sense. Whether or not Goodin is mentally retarded, his below normal intellectual functioning was evidence in mitigation that should have been presented by his lawyer. The United States Supreme Court has held defense counsel ineffective where they failed to present evidence, *inter alia*, of a defendant's low IQ (specifically, 79) in mitigation of a capital charge. *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 2536 (2003). Wiggins' "diminished mental capacities" were one aspect of mitigating evidence that counsel was ineffective for failing to present. Id. at 535, 123 S. Ct. at 2342.

The lower federal courts have, likewise, held that failure to present evidence of low intellectual functioning at the sentencing phase of a capital trial is deficient performance under *Strickland*. Thus, in *Jackson v. Herring*, 42 F.3d 1350, 1365 (11th Cir. 1995), the defendant showed in post-conviction proceedings that her intelligence was borderline – below normal but not so low as to be mentally retarded. On federal habeas review, the Eleventh Circuit held that counsel was ineffective in not presenting this evidence. *Id.* at 1367. At that time, there was no bar to executing the mentally retarded, but the court nevertheless held that low intellectual functioning was highly relevant mitigating evidence.

The Eleventh Circuit reached the same result in a post-*Atkins* case where the defendant had borderline intelligence, but was not mentally retarded. *Brownlee v. Haley*, 306 F.3d 1043 (11th Cir. 2002). The expert who examined defendant for trial reported:

> Brownlee had an IQ of 70, which is classified as "in the mild mental retardation range," but that his adaptive intelligence indicated that "his skills were somewhat higher." Therefore, he classified Brownlee as having borderline intellectual functioning, "which is out of the retarded range, but still impaired."

Id. at 1051.

Despite the trial expert's finding that Brownlee was not mentally retarded, the Eleventh Circuit held that counsel was ineffective for failing to present the defendant's low intellectual functioning as mitigation evidence. The court began by noting that "the broad inclusion of mitigating evidence is mandated not only by the Alabama statute, but also by the Supreme Court and this Court, which have repeatedly emphasized the constitutional right of a defendant facing the death penalty to present any relevant evidence of mitigating circumstances." *Id.* at 1070, *citing Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978).

The Eleventh Circuit then found that "there is a reasonable probability that, but for counsel's unprofessional errors, the jury would have found that '[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.'" *Id.* at 1072, citing Ala. Code §13A-5-51(2) (identical to Miss. Code Ann. §99-19-101(6)(f)). The Court concluded:

> [I]t is abundantly clear that an individual "right on the edge" of mental retardation some of the same limitations of reasoning, understanding, and impulse control as those described by the Supreme Court in *Atkins*. Counsel's failure to investigate this issue at all or to present any of this evidence seriously undermines our confidence in the application of the death sentence.

during pre-trial evaluations. Citing the defendant's long history of suffering from schizophrenia, this Court reversed the death sentence of Hezikiah Edwards and remanded the case to resentence to life in prison. *Edwards v State*, 441 so. 2d 84, 93 (1983). This Court specifically noted:

> Equally clear is the inescapable fact that Edwards is a seriously and dangerously mentally ill person, an illness for which, insofar as medical science can determine, Edwards himself is blameless. *Edwards*, So.2d at 93

Recently the Fourth Circuit found trial counsel ineffective in capital sentencing for failing to adequately prepare and present mental health evidence. *Gray v. Branker*, 529 F.3d 220 (4th Cir 2008). *See also Summerlin v. Schiro,* 427 F.3d 623 (9th Cir 2005) (Counsel ineffective for failing to investigate defendant's family and social history or to develop a mental health defense).

IV. The Circuit Court Flagrantly Disregarded This Court's Order to Determine Goodin's Competency at the Time of Trial.

This Court also remanded for a determination as to whether trial counsel was ineffective in addressing the issue of Goodin's competence to stand trial. This Court lists the unexamined issues regarding the trial lawyer's handling of competency:

> First, the defense counsel did not have Goodin examined; the circuit court did. Defense counsel did not, as far as this Court can tell, select Dr. O'Brien. It is unknown whether defense counsel did have or could have had any input into Dr. O'Brien's decision on competency. It also is unknown whether O'Brien would have considered any findings by any other doctors in making his decision. He says now he would have. If defense counsel had evidence contrary to Dr. O'Brien's conclusions, it would have been advisable to present those to the circuit court so they could have been considered. Defense counsel now states in an affidavit that he would have done this but did not have the time of resources. *Goodin v. State*, 856 So.2d at 282-283.

This Court relied on the affidavit of trial counsel which stated: "Given the time and resources I had to prepare for this capital murder trial, there was simply no way I could have known to look for Mr. Gooden's records because the times I spoke with the

CERTIFICATE OF SERVICE

I, Stacy Ferraro hereby certify that I have caused a true and correct copy of the foregoing Supplemental Rebuttal Brief of the Appellant to be placed in the United States mail, first-class postage prepaid, to:

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This 28th day of July, 2009.

Stacy Ferraro