IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Newton County Cause No. 99-CR-0002-NW-G
Mississippi Supreme Court No. 2007-CA-00972-SCT

HOWARD DEAN GOODIN (GOODEN), *Petitioner/Appellant*

vs.

STATE OF MISSISSIPPI, *Respondent/Appellee*

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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STATEMENT WITH RESPECT TO ORAL ARGUMENT

Counsel for Goodin, the Mississippi Office of Capital Post-Conviction Counsel would respectfully state its belief that the issues are adequately briefed such that oral argument would not be helpful to the reviewing court. Therefore, oral argument is not requested.

If, however, counsel for Appellee, or this Honorable Court feels that oral argument would aid in the prosecution of this appeal the undersigned stands ready to assist the Court in whatever way is thought appropriate, including oral argument.

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BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF ISSUES

Following remand and evidentiary hearing on the issues of (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, Goodin raises the following issues in his appeal:

ISSUE I

TRIAL COURT ERRED IN DENYING PETITIONER AN EX PARTE HEARING ON HIS MOTIONS FOR FUNDING AND FOR EXPERT ASSITANCE

ISSUE II

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTIONS FOR THE ASSISTANCE OF MENTAL HEALTH EXPERTS FOR EVALUATING, TESTING, AND REVIEWING RAW DATA OF THE MISSISSIPPI STATE HOSPITAL RECORDS AS CONCERN THE PETITIONER'S CLAIMS OF MENTAL RETARDATION, MENTAL ILLNESS AND COMPETENCY

ISSUE III

THE TRIAL COURT ERRED IN DENYING PEITIONER'S COUNSEL THE RIGHT TO BE PRESENT DURING THE MENTAL EVALUATION OF THE PETITIONER BY THE MENTAL HEALTH STAFF OF THE MISSISSIPPI STATE HOSPITAL

ISSUE IV

THE TRIAL COURT ERRED IN DENYING PEITITONER'S MOTION TO CONDUCT A *DAUBERT* HEARING CONCERNING THE RESPONDENT'S PROPOSED MENTAL HEALTH EXPERT WITNESSES

ISSUE V

THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION FOR SUMMARY JUDGMENT/DIRECTED VERDICT

ISSUE VI

THE TRIAL COURT ERRED IN HOLDING THAT THE ISSUE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WAS IRRELEVANT UPON A FINDING OF NO MENTAL RETARDATION

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STATEMENT OF THE CASE

Howard Dean Goodin (Gooden) was convicted and sentenced to death in 1999 for the murder of Willis Rigdon. Goodin appealed his conviction to the Mississippi Supreme Court which affirmed his conviction May 17, 2001. *Goodin v. State*, 787 So.2d 639 (Miss. 2001); *Goodin v. Mississippi*, 535 U.S. 996 (2002) (certiorari denied).

Goodin filed a petition for post-conviction relief on April 30, 2002. On August 7, 2003, the Mississippi Supreme Court granted, in part, post-conviction relief and granted leave to proceed in the trial court on the issues of mental retardation, ineffective assistance of counsel on the issue of mental illness and ineffective assistance of counsel on the issue of competency. *See Goodin v. State*, 856 So.2d 267 (Miss. 2003). *RE -1.*

Pursuant to the Court's decision, the Circuit Court of Newton County entered an order on October 1, 2003, directing a mental examination at the Mississippi State Hospital at Whitfield, Mississippi, upon the issues designated by the Mississippi Supreme Court. *RE-2. Newton County Circuit Court Order.*

The evaluation made by the staff of the Mississippi State Hospital was completed and the results of the evaluation disseminated to all interested parties on March 22, 2004. *R. 128.* The

evidentiary hearing was conducted on October 12, 2004, at 9:00 a.m., at the Circuit Court of Newton County in Decatur, Mississippi. After hearing the evidence presented by the Petitioner on the issue of mental retardation, the court granted the State of Mississippi's *ore tenus* Motion for Summary Judgment/Directed Verdict. Additionally, the court held that since the mental retardation claimed failed, the issue of ineffective assistance of counsel had therefore become irrelevant. *R.-667. RE-3.*

Goodin, timely filed his Motion for New Evidentiary Hearing. Same was denied by the trial court. Goodin now files this his appeal.

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must go "to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings v. Oklahoma,* 45 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

The Mississippi Supreme Court addressed, in *Russell v. State*, 819 So.2d 1177(2001), that it "recognizes the burden placed on the inmate to file fully developed post-conviction pleadings." The Court further held that "*Ex parte* presentation should be available in proceedings for expenses and discovery."

The denial of Goodin's request to proceed *ex parte* placed him on unequal footing with those defendants who can afford to hire experts without having to ask the court for assistance. By denying Goodin's request, the trial court effectively infringed upon his right to a fair proceeding. See also *Griffin v. Illinois*, 351 U.S. 12 (1956).

ISSUE II

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTIONS FOR THE ASSISTANCE OF MENTAL HEALTH EXPERTS FOR EVALUATING, TESTING, AND REVIEWING RAW DATA OF THE MISSISSIPPI STATE HOSPITAL RECORDS AS CONCERN THE PETITIONER'S CLAIMS OF MENTAL RETARDATION, MENTAL ILLNESS AND COMPETENCY

The United States Supreme Court has held that the execution of individuals with mental retardation is cruel and unusual punishment. *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002). The United States Supreme Court also left it up to the individual states to determine standards and procedures to use to make this determination. It has long been recognized that when a State brings forth its judicial power against an indigent defendant it must insure that the defendant has a fair opportunity to present his case. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct.

1087 (1985). A criminal proceeding is fundamentally unfair if the "State proceeds against an indigent defendant without making certain that he has access to the raw materials integral" to presenting his case. *Id.* The Due Process Clause of the Constitution requires authorization for appointment of a particular expert. *Johnson v. State*, 476 So.2d 1195.

Under *Ake*, an indigent defendant is entitled to a state funded expert to "build . . . an effective defense." 470 U.S. at 77. Mississippi law requires that the defendant meet a threshold showing of specific and substantial need. *Holland v. State*, 705 So. 2d 307, 329 (Miss. 1997). A defendant must "demonstrate a substantial need in order to justify the trial court expending public funds for an expert to assist the defense." *Id.* At 334. The defendant "must offer concrete reasons, not just undeveloped assertions, that assistance of the expert would be beneficial' to his defense. *Id.*; *Hansen v. State*, 592 So.2d 114, 125 (Miss. 1991); *see also Ex Parte Moody*, 684 So. 2d 114, 119-20 (Ala. 1996) (if indigent shows an expert is needed either to answer a question raised by the State or to support a critical element of the defense, then the trial court may authorize State funding). There is, however, no single test for determining whether an expert is necessary, and the necessity of an expert will depend on the facts and circumstances of the particular case. *Griffin v. State*, 557 So.2d 542, 551 (Miss. 1990) (citing *Oregon v. Acosta*, 597 P.2d 1282, 1284 (Ore. 1979).

When need is shown, it is inappropriate to deny expert funding. "It is error of constitutional magnitude to refuse such funds when the defendant has made a threshold showing of specific need and when expert assistance is of material importance to his defense or its absence would deprive him of a fair trial." *State v. Bridges*, 385 S.E. 2d 337, 339 (M.C. 1989)[1].

[1] In *Bridges*, the North Carolina Supreme Court ordered a new trial where the trial court denied the indigent state funds for a fingerprint expert to confront fingerprint evidence offered by the state.

Three factors must be considered when determining whether an indigent defendant must be provided competent mental health assistance: (1) the private interest that will be affected by the action of the State; (2) the governmental interest that will be affected if the expert were provided; (3) and the probable value of the assistance versus the risk of an error if the assistance is denied. *Morris v. Alabama*, 956 So.2d 431(Ala. Crim. App. 2005). The private risk is simply a matter of life or death for the inmate. The governmental interest as stated by the trial court in the case *sub judice* was "that if an expert is to be appointed to assist counsel for the petitioner, the State would be entitled to an expert as is the attorney for the Defendant and also for the further reason that the Court required the Defendant to be examined by personnel at the Mississippi State Hospital at Whitefield." *R.-545.* Under *Ake*, the State can "not legitimately assert an interest in the maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." *470 U.S. at 79.* The value of the assistance by an expert schooled in mental retardation is immeasurable. The elementary school ideation of that if you-have-one-then-I-must-have-one-too has no place in a court of law especially when a life is at stake. Without question, the risk of error without mental health assistance is great. Given that Goodin's mental status is relevant to his punishment, the assistance of a mental health expert was crucial. *See Solesbee v. Balkcom*, 339 U.S. 9 (1950).

Similarly, this Court has established factors to be considered when a defendant was denied a requested expert. *Fisher v. City of Eupora*, 587 So.2d 878 (Miss. 1991). To be considered is: (1) The degree of access the defendant has to the state's experts; (2) whether those experts were available for rigorous cross-examination; and (3) the lack of prejudice or incompetence by the state's expert. *Id.*

Counsel for Goodin did not have an opportunity to cross-examine the State experts. No

method was available to determine level of competence. Goodin's motion for a *Daubert* hearing was denied by the trial court and the very nature of their employment, labeled the evaluators as state actors. Additionally, counsel for Goodin was denied access during testing.

The opinion of the staff of the Mississippi State Hospital, as expressed in the evaluation, reflected a substantial difference from previous opinions made by behavioral and mental health experts. Though appropriately educated and experienced in the law, Counsel for Petitioner, the staff of the Mississippi Office of Capital Post-Conviction Counsel are not behavioral scientist nor are they medically trained in the field of psychiatry and psychology. In order to properly represent Petitioner, the report of the Mississippi State Hospital, as well as all other data available, and to understand the disparity of the various assessments of Petitioner's psychological and psychiatric circumstance, post-conviction counsel should have been allowed funding for an expert to assist thereby providing a comprehensive and reliable interpretation of Petitioner's mental status and other disorders and impairments.

The disparity of the various assessments concerning the psychological and psychiatric circumstance required at a minimum, a review of all previous data. The ABA Standards, as to mental and psychological impairments state that "counsel should have the right to have such services provided by persons independent of government." *Guideline 4.1B (1) & (2). ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003).*

The United States Supreme Court has stressed the "need for reliability in the determination that death is the appropriate punishment in a specific case. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). The United States Supreme Court has also held that indigent defendants are entitled to expert assistance, especially if their mental state is at issue.

See Ake v. Oklahoma, 470 U.S. 68 (1985).

ISSUE III

THE TRIAL COURT ERRED IN DENYING PETITIONER'S COUNSEL THE RIGHT TO BE PRESENT DURING THE MENTAL EVALUATION OF THE PETITIONER BY THE MENTAL HEALTH STAFF OF THE MISSISSIPPI STATE HOSPITAL

The mental evaluation, conducted by the State was a critical stage of the proceeding under the Sixth Amendment and, as well, implicates the defendant's Fifth Amendment rights. *Estelle v. Smith*, 451 U.S. 454, 467, 470 (1981). Goodin's mental evaluation was conducted well after appointment of counsel and, therefore, required the presence of counsel unless that presence was properly waived. *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1989). Goodin meet with Dr. Reb McMichael, Dr. Shirley Mullins Beal, Dr. William Paul Deal, Dr. Charles Eugene Harris, Dr. John Montgomery, Ms. Jean Hoover, Ms. Beth Ann Killary, M.A. and Rebecca Rowzee, R.N.

To be adequately assisted by counsel, there is a necessity that counsel be able to competently evaluate the test and testing procedures used in the evaluation of Goodin's mental retardation status. Also of primary importance was counsel's observation of any personal mannerism or trait which might have affected the outcome of the testing procedure.

Counsel for Goodin even offered an alternative to counsel's physical presence, the option of having the proceeding video taped and/or audio taped for later review. *R.-124.*

Goodin was entitled to have counsel present at any such proceedings. *Diaz v. United States*, 223 U.S. 442 (1912). Goodin was entitled to have notice and representation of counsel with regard to any mental evaluation. *Estelle v. Smith*, 451 U.S. 454 (1981). The trial court's

denial of counsel's presence resulted in a violation of Goodin's clearly established fundamental rights.

Based on the above, the trial court's mandate which forbade defense counsel from attending Mr. Goodin's evaluation by the Mississippi State Hospital violated Mr. Goodin's constitutional rights. Therefore, Mr. Goodin is entitled to a new evidentiary hearing.

ISSUE IV

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO CONDUCT A *DAUBERT* HEARING CONCERNING THE RESPONDENT'S PROPOSED MENTAL HEALTH EXPERT WITNESSES

The trial court opined that "a *Daubert* hearing is to attack the witnesses that this Court has appointed, attacking the credibility." *T.-24.* Pursuant to Rule 702, 703 and *Daubert*, it is the trial court's duty as "gatekeeper" to hold a hearing. Goodin sought to determine: (1) whether the experts were properly qualified; (2) whether the experts were proposing to testify to scientific knowledge based on sound methodology; (3) whether the methodology and its derived knowledge "fit" the facts and issues of the case; and (4) whether the proposed experts and/or proposed expert testimony would assist the trier of fact to understand or determine a fact in issue. R.-653. *See also American Bar Association Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised Edition, February 2003).

Daubert applies to all expert testimony. "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2686, 2796 (1993). *See also* M.R.E. 104 (a), 702 and 703. The analytical criteria for the admissibility of expert testimony

was announced in the two United States Supreme court cases of *Daubert* and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999).

Concerned with junk science testimony, the United States Supreme Court provided clear guidelines to be followed:

> (a) *Daubert* applies to all expert testimony. *Kumho Tire Co.*, 119 S.Ct. at 1174.
>
> (b) The trial judge must insure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. *Daubert*, 113 S.Ct. at 2795.
>
> (c) In order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation – *i.e.*, 'good grounds,' based on what is known. *Id.*
>
> (d) The trial judge must determine at the outset, pursuant to Rule 104 (a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. *Daubert*, 113 S.Ct. at 2796.
>
> (e) ". . . that scientists typically distinguish between 'validity' (does the principle support what it purports to show?) and 'reliability' (does application of the principle produce consistent results?) . . . our reference here is to *evidentiary* reliability—that is, trustworthiness . . . In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*. *Daubert*, 113 S.Ct. at 2795 n. 9 [emphasis original].
>
> (f) In this way, this Court is the *gatekeeper* and must make a preliminary assessment as to whether the reasoning and methodology proffered are scientifically valid. *Daubert*, 113 S.Ct. at 2796.
>
> (g) As the gatekeeper, this Court must ensure that proffered testimony is relevant and reliable with a focus solely on principles and methodology. *Daubert*, 113 S.Ct. at 2797. Evidentiary admissibility may only be based upon reliability determined by the degree of scientific validity. *Id.* at 2795.
>
> (h) In its analysis, the gatekeeper must be mindful that scientific methodology means generating hypotheses and testing them to see if they can be falsified. Asking the key question: has the technique been "tested?" Further, the

produce an expert that states an opinion to a reasonable degree of certainty that the defendant is mentally retarded. It was and is Goodin's position that none of the individuals employed by the Mississippi State Hospital were qualified under *Chase* to evaluate and/or offer an opinion as to whether Goodin is mentally retarded.

In response to Goodin's request for discovery, it was revealed that Dr. Reb McMichael, Dr. Shirley Mullins Beal, Dr. William Paul Deal, Dr. Charles Eugene Harris, Dr. John Montgomery, Ms. Jean Hoover, Ms. Beth Ann Killary, M.A. and Rebecca Rowzee, R.N. were involved with Goodin's evaluation. A review of the vitas supplied showed a glaring absence of experience with regard to the area of mental retardation. Clinical experience is necessary to make a deferential diagnosis of mental retardation. "Clinical judgment is rooted in a high level of clinical expertise and experience; . . . It is based on the clinician's explicit training, direct experience with people who have mental retardation, and familiarity with the person and the person's environments." *Mental Retardation, Definition, Classification, and Systems of* Supports, 10th Edition, AAMR. (2002). Both Dr. McMichael and Dr. Montgomery have testified that they were not qualified in the area of mental retardation.[2] Dr. Deal, who was not an employee of Mississippi State Hospital, had limited experience listed in the area of mental retardation. None of the above listed individuals were qualified as an expert in the area of assessment, administration, and interpretation of test or in the evaluation of persons with mental retardation. Because trial counsel was prohibited from performing a *Daubert* review of these individuals, Goodin was denied his Sixth Amendment right to effective counsel in addition to being subjected to a decision that was not based on sound doctrine.

In its ruling, the trial court refused to hold a *Daubert* hearing because it concluded that

[2] *Hudson v. State*, Oktibbeha Conty Cause No. 2002-58-CR1; Mental Retardation hearing September 8, 2004 and *Snow v. State*, 2002-DR-0097-SCT; Simpson County Cause No. 9488; *Daubert* hearing February 18, 2005.

"[it] would require considerable delay - - considerable testimony." *T.-24.* The trial court further stated that counsel for Goodin "did not contact me. You did not contact my office." *Id.*

The record however indicates otherwise. On October 4, 2004, counsel for Goodin faxed and mailed notice to the trial judge and his request for a *Daubert* hearing. Counsel informed the court of the following:

> Having now received and reviewed the Curriculum Vitas of the numerous Mississippi State Hospital Mental Health personnel that will be called upon to offer expert testimony in the above styled case, it has become clear to petitioner's counsel that the qualifications, education and experience of such personnel is questionable. The petitioner has caused to be filed with the Court his motion to conduct a *Daubert* Hearing for purposes of aiding the court in its gatekeeping responsibilities...
>
> In the interest of judicial economy, the convenience of the proposed expert witnesses, the Court, the parties, and the prevention of unnecessary delay, the petitioner would be agreeable to having the motion heard and considered on the date and time heretofore set for the commencement of evidentiary hearing in this cause.

R.-651. *See also Fax confirmation sheet RE-4.* The court received notice at least six business days before the scheduled evidentiary hearing. *Id.* Additionally, the State was prepared to go forward with a *Daubert* hearing on October 12, 2004. T.-23. No prejudice to the State would have resulted. It was an abuse of discretion by the trial court to base his ruling not on law but on personal belief.

ISSUE V

THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION FOR SUMMARY JUDGMENT/DIRECTED VERDICT

Petitioner respectfully submits the assertion that the trial court was in error in granting the motion for summary judgment/directed verdict. It is expected that a motion for summary judgment/directed verdict will be made when the movant rests. In the instant case, counsel placed the sister of the defendant on the stand. She testified to facts that would need to be established to satisfy a finding of mental retardation–Mr. Goodin's life before the age of eighteen. A competent mental health expert would have to investigate to determine not only that Mr. Goodin fell within a certain IQ level, but also that he had the necessary related limitations in his adaptive skills, and that both were present before the age of eighteen. While a certified mental health expert would be the best available avenue to judge IQ levels, Petitioner asserts that someone who knew him during his childhood would be the best person to offer testimony relating to adaptive skills.

Per *Gregg v. Georgia*, 428 U.S. at 153 (1976), when a defendant's life is at stake, a court must be "particularly sensitive to insure that every safeguard is observed." *Eddings v. Oklahoma*, 45 U.S. at 110 (1982) expounds upon that and requires our justice system to do everything possible to ensure a "sentence was not imposed out of whim, passion, prejudice, or mistake." The trial court found, when granting the State's motion for summary judgment/directed verdict that *Wiley,* quoting *Chase,,* required that a defendant may not be adjudged as mentally retarded unless an expert opinion was produced that the defendant is retarded. This same court, the trial court, denied the defendant the very mechanism he needed to produce the expert opinion that they stated was needed. By denying funds for an expert, the

defendant effectively blocked the defendant from proceeding further, and from being able to protect his constitutional rights not to be executed under *Atkins*.

The fact that evidence was presented during the hearing that established two of the needed criteria to determine mental retardation, adaptive skills and age of onset, gave the trial court sound reasoning to continue forward and not grant summary judgment/directed verdict. The third requirement, the IQ level, for a finding of mental retardation was met by counsel making available records and previous testing done on Mr. Goodin that did show his low IQ. Defense was denied the right to have those tests reviewed by the Court's denying funding for an expert to assist and by the refusal of the Court to conduct a *Daubert* hearing. The State would not have been harmed by the continuation of the hearing. On the reverse side, the defendant lost his chance to pursue a valid and viable constitutional claim.

ISSUE VI

THE TRIAL COURT ERRED IN HOLDING THAT THE ISSUE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WAS IRRELEVANT UPON A FINDING OF NO MENTAL RETARDATION

The Sixth Amendment of the United States Constitution and Article 3, Section 26 of the Mississippi Constitution guarantee the right to the effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-686 (1984). The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." *Mempa v. Rhay*, 389 U.S. 18 (1967). Thus, a defendant is guaranteed the right to have effective assistance of counsel at the guilt and at the sentencing phases of trial. A reviewing court must consider the seriousness of the penalty when reviewing a

claim of ineffective assistance of counsel. *Tokman v. State*, 564 So.2d 1339, 1343 (Miss. 1990); *Washington v. Watkins*, 655 F.2d 1346, 1356-57 (5th Cir. 1981).

The test for ineffective assistance of counsel is well-established. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In *Wiggins v. Smith*, 539 U.S. 510 (2003), the petitioner claimed to have received ineffective assistance of counsel because his attorneys failed to investigate and present mitigating evidence at his sentencing. The Mississippi Supreme Court relied on *Wiggins* and held that "a court is to determine whether counsel exercised reasonable professional judgment in conducting its investigation based on an assessment of the prevailing professional norms. . .." *Crawford v. State*, 867 So.2d 196 (Miss. 2003). Surely professional norms would call for an attorney to zealously represent his client with every available tool, even if that same argument had failed in a prior case. Trial counsel, Robert Brooks, simply failed to put forth evidence of mental retardation or mental illness. Until trial, he did not even realize that his client had been diagnosed with a mental illness. The law is now well established that the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character, record, or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *West v. State*, 519 So.2d 418, 426 (Miss. 1988). *Leatherwood v. State*, 473 So.2d 964, 969 (Miss. 1985) further states "in view of the importance of mitigating evidence in the sentencing phase it is difficult to understand why favorable, willing witnesses who could be discovered by questioning the defendant would not be called." Investigation into the life of

Goodin, would have opened up numerous avenues of mitigation in the relation to mental illness, mental retardation and even competency to be on trial in the first place.

Petitioner's post-conviction remanded claims regarding trial counsel's ineffectiveness addressed not one, but three, separate and distinct areas of ineffectiveness: (1) failure to investigate mental retardation, (2) failure to investigate mental illness, and (3) failure to investigate the question of competency. These three are different in content and in character. The Mississippi Supreme Court found that Goodin had produced enough evidence to be granted leave to proceed in the trial court on the issue of mental retardation as well as the two additiional issues. *See Wiggins v. Smith*, 539 U.S. 510 (2003). Each aspect of ineffective assistance of counsel relating to these three areas were addressed in different portions of the court's opinion remanding back to the trial court. The Mississippi Supreme Court further found Goodin's argument that trial counsel failed to investigate Goodin's competency to be similar to the argument as to whether trial counsel failed to investigate mental illness but acknowledged that the argument called into question the nature of the process of determining a defendant's competency to stand trial and the defense counsel's role in that process. The court declared the issue of revisiting competency procedurally barred but because it was so closely related to the issue of Goodin's mental illness, the court waived the bar and granted leave to proceed in the trial court on that particular issue. The very expert that tested Goodin for competency for trial, the expert chosen by the court, has come to question the validity of his earlier report. Dr. O'Brien, by his own admission may have reached an erroneous conclusion about mental retardation. If defense counsel had provided Dr. O'Brien with proper records, it is likely that Goodin would have been found mentally retarded and mentally ill, not that he was malingering. If he had received the vital information regarding Goodin's mental health issues, he would have been

better equipped to make a concrete finding to the court. Instead, due to the ineffectiveness of trial counsel, he now doubts his own finding. In fact Dr. O'Brien wrote "in light of the additional evidence of deficits in adaptive functioning, which I was not provided at the time, Mr. Goodin may very well be mentally retarded." *See RE-5. Affidavit of C. Gerald O'Brien, Ph.D. at # 10.* Even if counsel found to be effective in one area, or if the matter was determined to be irrelevant in one area, the other two areas were still to be determined.

Trial counsel represented another capital case defendant just prior to the case at hand. Because the evidence of mental retardation in the previous case did not prevent a death sentence, Mr. Brooks felt that it would be futile to pursue such an argument in Goodin's trial. The failure of counsel to conduct an adequate and sufficient investigation for purposes of mitigation and failure to present mitigation evidence at trial and sentencing resulted in Goodin suffering from the ineffective assistance of counsel to such a degree that the same more than satisfies the two-pronged test as set forth in *Strickland v. Washington*, 466 U.S. 688 (1984).

An attorney has a duty to investigate all possible mitigating factors. Trial counsel, by his own admission, did not investigate the areas that, if placed before a jury, could have made Petitioner exempt from execution. Trial counsel had a duty to make a reasonable investigation or to make a reasonable decision that a particular investigation is unnecessary. When dealing with a capital case, it could hardly be considered reasonable to decide not to investigate simply because the issue failed to prevail in another case. This is especially true in the case at hand because Mr. Brooks admits that he knew something was wrong with Goodin. The simple task of questioning family could have easily uncovered the fact that Goodin had not only been diagnosed with a mental illness, schizophrenia, but that he was actually receiving disability because of it. "[W]hen a client faces the prospect of being put to death unless counsel obtains

and presents something in mitigation, minimal standards require some investigation." *Mapes v. Coyle*, 171 F.3d 408, 426 (6th Cir. 1999); *see Baster v. Thomas*, 45 F.3d 1501, 1512 (11th Cir. 1995) (stating that counsel was obligated to investigate mitigating mental health evidence for sentencing). By neglecting to investigate Goodin's mental health and possible mental retardation, Brooks' performance can be viewed as nothing less than ineffective. Where counsel has notice of potential mitigating evidence, but fails to investigate, counsel has inadequately prepared for sentencing. *Moore v. Johnson*, 194 F.3d 586, 615 (5th Cir. 1999). Mitigating evidence is crucially important to humanize the defendant and ensure that he receives a proportionate sentence. *Bracy v. Schomig*, 286 F.3d 406, 417 (7th Cir. 2002). Justice Sutherland wrote "the giving of effective aid in the preparation and trial . . . requires the guiding hand of counsel at every step in the proceeding against him." *Powell v. Alabama*, 287 U.S. 45, 69-71 (1932). Counsel must, in order to be effective, at a minimum perform a full and complete investigation of mitigating evidence including investigating the defendant's "history, background and organic brain damage." *Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1995). Mr. Brooks admits that he was aware that Goodin had a low IQ level and that there was something "wrong" and "odd" about Goodin. *See RE-6. Affidavit of Robert N. Brooks.* Because of the finding of no mental retardation, these facts were not put before the trial court upon remand.

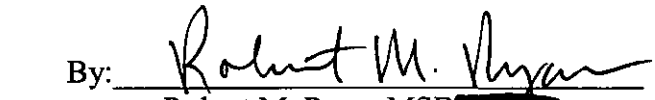
Petitioner would respectfully submit that the Court erred in ruling that the issue of ineffective assistance of counsel was irrelevant once a directed verdict on mental retardation was handed down. Furthermore, the issues of mental illness and competency were not addressed. The court was mistaken in the belief that a directed verdict, based on the fact that Petitioner failed to put an expert on the stand to testify to mental retardation, made the issues of ineffectiveness of counsel irrelevant. When declaring that the court was following the directions of the Mississippi Supreme Court, the trial court overlooked the fact that the remand opinion addressed three separate issues of ineffectiveness on the part of trial counsel.

The Mississippi Supreme Court remanded on three separate and distinct issues relating to ineffective assistance of counsel. If Petitioner prevailed on any of the three issues, the verdict at the end of the day might very well have held a different ending for Petitioner. Therefore, Petitioner has a constitutional right to have the issue of ineffective assistance of counsel heard before the trial court as ordered in the opinion issued by the Mississippi Supreme Court.

In conclusion, Petitioner disputes the finding that mental retardation was not found. Further, Petitioner asserts that if it had been indisputably established, which it was not, the fact that trial counsel was ineffective was still an issue to be determined by further hearings. The court erred in determining that the issue of ineffective assistance of trial counsel was irrelevant upon a finding of no mental retardation. As stated above, effective assistance of counsel is a constitutional right and guarantee. As such, it can never be irrelevant.

WHEREFORE, the petitioner moves the Court, pursuant to the authorities cited herein, to vacate the order of the Circuit Court of Newton County granting the State's Motion for Directed Verdict and Dismissing the Petition for Post-Conviction Relief and remanding this case further hearing on post-conviction. The petitioner prays for such other and further relief as he may be entitled to receive in the premises.

Respectfully submitted
HOWARD DEAN GOODIN (GOODEN),
Petitioner/Appellant

By: 

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CERTIFICATE OF SERVICE

I, Robert Ryan, attorney of record for the appellant HOWARD DEAN GOODIN (GOODEN), certify that I have on this day filed this

BREIF OF APPELLANT

with the clerk of this Court and have served a copy via mail with postage prepaid on the following persons at these addresses:

Honorable Jim Hood,
Attorney General
P.O. Box 220
Jackson, Mississippi 39205

This the 3rd day of December, 2007.

Robert M. Ryan, MSB [redacted]
Certifying Attorney

CERTIFICATE OF SERVICE

I, Robert Ryan, attorney of record for the appellant HOWARD DEAN GOODIN (GOODEN), certify that I have on this day filed this

BREIF OF APPELLANT

with the clerk of this Court and have served a copy via mail with postage prepaid on the following persons at these addresses:

Honorable Marcus D. Gordon
Newton County Circuit Court Judge
P.O. Box 220
Decatur, Mississippi 39327

Honorable Jim Hood,
Attorney General
P.O. Box 220
Jackson, Mississippi 39205

This the 3rd day of December, 2007.

Robert M Ryan by DG.

Robert M. Ryan, MSB [redacted]
Certifying Attorney