IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-CA-00972-SCT

HOWARD DEAN GOODIN ***Appellant***

versus

STATE OF MISSISSIPPI ***Appellee***

SUPPLEMENTAL BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies pursuant to Mississippi Rules of Appellate Procedure 28(a)(1) that the following persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Howard Dean Goodin
Defendant/Appellant
Death Row, Parchman, MS 38738

Honorable Marcus D. Gordon
Trial Court Judge
P.O. Box 220
Decatur, MS 39327

Honorable Robert N. Brooks
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Goodin's Trial Counsel
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Honorable Mark Duncan
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Newton, MS 39345

Honorable Robert M. Ryan
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So CERTIFIED, this the eighteenth day of November, 2008.

Stacy Ferraro
Attorney for Howard Goodin

STATEMENT OF THE RECORD

The trial court record from State of Mississippi v. Howard D. Gooden, Newton County No. 99-CR-0002-NW, Lamar County No. 99/k/405G, Mississippi Supreme Court Case #1999-DP-00975-SCT will be cited to as T. The Court's Papers from the trial court record will be cited to as T.C.P. Citations to the Post-Conviction Evidentiary Hearing Record with be labeled R. The Court's Papers from the Post-Conviction Evidentiary Hearing will be labeled C.P. Citations to the Record Excerpts will be labeled R.E.

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STATEMENT OF THE ISSUES

I. All Prior Evaluations, Including the Evaluation of the Mississippi State Hospital, Conclusively Demonstrate that Goodin is Mentally Retarded; Did the Circuit Court Commit Legal Error by Disregarding this Evidence?

II. Was Howard Goodin denied his rights to due process, counsel, meaningful access to the courts, and to present a meaningful defense where:

A. Howard Goodin was denied his right to counsel and his due process right to present a meaningful defense when he was appointed a completely incompetent lawyer;

B. Prior to the evidentiary hearing, Howard Goodin was never examined by an expert qualified under the requirements of Chase v. State;

C. Howard Goodin was denied the appointment of an independent expert to review the report of the State Hospital and assist in the preparation of his case at the 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 Whtifield, Mississippi; and

E. The Circuit Court erred in relying on local rules that have not been approved by this Court to refuse 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.

III. Must this Case be Remanded for Full Compliance with the Court's Prior Mandate Given that the Circuit Court Flagrantly Disregarded this Court's Order to determine Mr. Goodin's Competency at the Time of Trial?

STATEMENT OF THE CASE

Petitioner was indicted for the capital murder of Willis Rigdon. In December 1998, Petitioner's trial counsel filed a Motion for Psychiatric Examination stating that trial counsel believed that "the Defendant is at this time of insufficient soundness of mind and because thereof not capable of making a rational defense." T.C.P. 14-16. On December 10 1999, the Circuit Court ordered a psychiatric examination by Dr. Donald C. Guild and a psychological examination by Dr. Gerald O'Brien. T.C.P.18-19. In May 1999, Petitioner was tried and convicted of the capital murder. On May 19, 1999, Petitioner was sentenced to death for the capital murder of Willis Rigdon. This Court affirmed Goodin's conviction and sentence. *Goodin v. State,* 787 So.2d. 639 (Miss. 2001).

Goodin filed a Petition for Post-Conviction Relief on April 30, 2002. The Mississippi Supreme Court granted his Application for Leave to File Petition for Post-Conviction relief on the following issues: 1) mental retardation; 2) ineffective assistance of counsel on the issue of mental illness; 3) ineffective assistance of counsel on the issue of competency. *Goodin v. State*, 856 So.2d 267, 284-85 (Miss. 2003). In October 2004, the Circuit Court of Newton County purported to hold an evidentiary hearing on these issues. Goodin's appointed post-conviction counsel, Robert Ryan, the former Director of the Mississippi Office of Capital Post-Conviction Counsel, put on one lay witness and then rested. The state moved for a directed verdict. The Circuit Court issued a directed verdict in favor of the state. C.P. 667-670; R.E. 33-39.

Ryan filed a notice of appeal on November 1, 2004, but the record was not completed until July 30, 2007. Goodin's brief was due October 15, 2007. However, Ryan asked for more time. Appellant's brief was filed on December 3, 2007. Ryan delegated the actual drafting of the brief to an unqualified lawyer with whom Ryan had contracted to perform legal work on a part-

time basis. Effective December 31, 2007, Robert Ryan resigned as Director of the Office of Post-Conviction Counsel.

Effective January 1, 2008, Glenn S. Swartzfager became the Director of the Mississippi Office of Capital Post-Conviction Counsel. On April 17, 2008, Swartzfager filed a Motion to Stay Briefing and for Supplemental Briefing Schedule. On July 29, 2008, the Court denied this Motion. On August 11, 2008, Goodin filed a Motion to Reconsider the Motion to Allow Supplemental Brief or Motion for Compliance with Order of Remand (hereinafter referred to as "Motion to Reconsider"). On October 2, 2008, this Court granted in part that Motion and allowed the filing of a supplemental brief.

STATEMENT OF FACTS

A. Howard Goodin Has Long Been Diagnosed as Mentally Retarded and Schizophrenic.

Howard Goodin has struggled all of his life with mental retardation. He also suffers from schizophrenia. His severe problems have been well-documented by numerous mental health professions and schools even prior to his capital murder trial, and these evaluations corroborate the recollections of his family. His severe intellectual deficits were all too clear even at an early age. His first grade teacher observed that he was "a slow student." C.P. 240; R.E. 132. He failed third grade two times, and eventually gave up on school when he was sixteen years old but only in sixth grade. C.P. 237-241; 331-334; R.E. 129-137.

His family observed that Goodin was never able to live independently and had difficulty learning relatively simple tasks. C.P. 338, 340, 342, 344, 347, 349. For example, Goodin offered to mow lawns but never learned to clear away debris before mowing. C.P. 336; 338.

Not surprisingly, Goodin has been considered mentally retarded. When he was incarcerated for a prior offense in 1973, he was administered psychological tests and scored in the mentally retarded range. The test results are as follows:

> CONCLUSIONS: Mr. Howard Gooden is a 19 year old Negro male functioning intellectually in the mild range of mental retardation. He obtained a Verbal IQ score of 67, a Performance IQ of 62, and a Full Scale IQ of 63. These were parallel Verbal and Performance abilities. On the WRAT, Howard obtained a reading level of 3.2, a spelling grade of 3.7, and an arithmetic grade of 2.3. He is over-achieving by 1 grade level in reading and spelling and achieving normally in arithmetic. Patterning such as this is indicative of language retardation. The Bender-Gestalt reproductions were indicative of a person with low intelligence and negativistic attitudes. He utilizes fantasy and escapism from reality as a defense mechanism. (C.P. 152); R.E. 66.

Besides being mentally retarded, Goodin suffers from schizophrenia. Again, there is a wealth of documentation from mental health professionals and family members confirming his mental illness. Records from the Social Security Administration, 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. C.P. 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. Howard told his family members he heard voices telling him to do bad things. C.P. 342, 349. Howard sometimes saw children crawling on the floor or running through the house, but Howard never had any children. C.P. 344, 349.

Due to his many chronic illnesses and deficits, Social Security deemed him disabled and unable to work. C.P. 458-473; R.E. 101-123. Dr. Whelan, who conducted the evaluation in the proceedings to determine whether he was disabled, noted that the Department of Corrections had found Goodin to suffer from auditory hallucinations and prescribed him medication three years prior to the social security evaluation. C.P. 459; R.E. 109. At the time Dr. Whelan evaluated Goodin, Goodin was having auditory hallucinations which Goodin described as "thoughts from Satan and his demons" and "Satan telling him about the bleeding Jesus." C.P. 459; R.E. 109. Dr. Whelan specifically found "I don't think claimant would be competent to manage money should

benefits be awarded." C.P. 460; R.E. 110. A social worker at Weems noted that Goodin has "very limited leisure and recreational activities." C.P. 478; R.E. 125.

B. Pre-trial Evaluations Did Not Have the Benefit of the Rich Documentation of Goodin's Mental Illness and Disability.

Robert Brooks was appointed to represent Goodin following his indictment for the capital murder of Willis Rigdon. Brooks had difficulty communicating with his client and even asked the court to appoint someone to conduct a competency evaluation. The trial court appointed Dr. Gerald O'Brien and Dr. Donald Guild. T.C.P. 18-19. Dr. O'Brien evaluated Mr. Goodin and gave him psychological tests including two IQ tests, the Wechsler Adult Intelligence Scale Revised (WAIS-R) and the Shipley. The Results were as follows:

> On the Wecshler Adult Intelligence Scale-Revised, he achieved a Verbal IQ of 65, a Performance IQ of 60, for a Full Scale IQ of 60, placing him intellectually in the mildly retarded range, if taken at face value. C.P. 447; R.E. 94.
>
> On the Shipley, he obtained a (WAIS-R) IQ of 50, which also falls in the mildly mentally retarded range. C.P. 447; R.E. 94.

At this time, Dr. O'Brien expressed concerns that Goodin was malingering. However, Goodin's scores on the WAIS-R were virtually identical to the scores he received in 1973.

Inexplicably, trial counsel called no expert on behalf of Goodin. Trial counsel called only three witnesses, Mr. Goodin's sister Tommie Peden Dennis, Mr. Goodin's roommate Sheila Nash and Mr. Goodin himself. T. 465-495. Ms. Dennis testified that Howard received a "mental check" and that in 1998 the social security office called her to the office because they were looking for a guardian over Howard's check. T. 484-485. Ms. Nash testified that Howard was "nervous." T. 492. Howard tried to explain his mental illness by saying, "I be encountering voices in my mind." T. 467. The Prosecutor cross-examined Howard Goodin about his mental illness:

Q: You talked about your mental disability and all this treatment and everything you had. Could we expect any of those doctors to testify about that today, or are we pretty much going to have to take your word for it?

A: The doctor testified to the effect that I am a mental patient.

Q: Okay.

A: Matter of fact, I've been approved as a mental patient by the State of Mississippi. I'm a certified mental patient. T. 478.

As indicated previously, trial counsel called no expert who had previously diagnosed or treated Goodin for schizophrenia to corroborate his testimony.

Although the jury did not hear of the prior diagnoses and testing, the Circuit Court was able to observe Goodin and review reports submitted by court-appointed experts. Based on those materials, the Circuit Court expressly found that Goodin had an IQ below 70, which placed him squarely in the mentally retarded range. Because Goodin was tried before *Atkins v. Virginia,* 536 U.S. 304 (2002), he could not seek relief on this basis until post-conviction proceedings. *See Chase v. State*, 873 So.2d 1013 (Miss. 2004).

C. Post-Conviction Investigation.

When Goodin first entered post-conviction proceedings, he was represented by Terri Marroquin. She conducted an investigation into his background and uncovered a wealth of information about Goodin's mental illness and intellectual limitations. For instance, post-conviction counsel obtained records from the Social Security Administration, Laird Hospital, Weems Community Mental Health Center, the Department of Corrections, and Neshoba County school records. These records provided overwhelming evidence that Goodin is mentally retarded

and has schizophrenia. Trial counsel was provided an opportunity to review the records, and he admitted that he had not obtained them.

3. When I represented Mr. Gooden, I had just litigated the capital murder trial of Mack Wells. In Mr. Wells' case I presented evidence of mental retardation. Because Mr, Wells was still sentenced to death, I felt presenting such evidence was futile. Even though I was aware of the fact that Mr. Gooden's IQ was low and that I had great difficulty communicating with him, I did not raise his retardation or investigate it further for mitigation purposes.

4. I knew something was wrong with Mr. Gooden, besides the retardation, But I really couldn't put my finger on why he was so odd. I never knew Mr. Goodin was a diagnosed paranoid schizophrenic or that he was receiving Social Security Disability for his condition. He mentioned it for the first time in passing on the stand at trial, at which point it was too late to follow up with investigation.

5. I have never seen the Laird Hospital or Weems Records concerning Mr. Gooden's schizophrenia.

6. I have never seen the Social Security Records concerning Mr. Gooden's schizophrenia.

7. Had I known Mr. Gooden was certifiably schizophrenic, I would have put doctors on the stand from Laird, Weems, etc. to assist in his mitigation.

8. I definitely would have put Dr. Whelan on the stand had I seen his 1998 report before trial.

9. I would have given any reports concerning prior diagnoses of Mr. Gooden to Dr. O'Brien to consider in his evaluation had I known of any of these.

10. Given the time and the 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 client he was very crazy and not helpful in preparing his defense at all. I had to get his sister to talk to him on occasion for me in order to explain things to him.

11. I begged Mr. Gooden not to take the stand, but he was completely irrational and would not listen to the advice of counsel in that regard.

12. I have never seen Mr. Gooden's school records.

C.P. 354.

Dr. O'Brien was also shown the records obtained by initial post-conviction counsel, and he, too, acknowledged that he had not seen them. Dr. O'Brien provided an affidavit to post-

conviction counsel stating that if he had known that Goodin was schizophrenic, he would not have concluded that Goodin was malingering on an IQ test.

6. In the pre-trial evaluation, Mr. Gooden had a full scale IQ score of 60, which placed him in the mild mentally retarded range. At the time, however, I suspected that he may have been malingering. However, if I had been aware of the additional records, I may easily have reached a contrary conclusion.

7. There are essentially three criteria for mental retardation: subaverage intellectual functioning, significant deficits in adaptive behavior, and indications of onset prior to age 18. School records would have been important for all criteria. The school records show that Mr. Gooden had to repeat third grade three times. Mr. Gooden's first grade teachers observed that he was "a slow student." Furthermore, Mr. Gooden dropped out of school when he was 16 years old, but he was only in 6th grade at the time.

8. The Social Security records and information contained in Dr. Whelan's report likewise indicate significant deficits in adaptive functioning. Mr. Gooden was unable to hold a job, and the few jobs he held were typically unskilled, menial jobs. Dr. Whelan also noted that Mr. Gooden was not competent to manage money should social security benefits be awarded.

9. Donald Guild, M.D., was also appointed to evaluate Mr. Gooden. In his report, which I do not recall seeing at the time of the evaluation, Dr. Guild recommended that Mr. Gooden resume taking anti-psychotic medication and that I retest Mr. Gooden after he began taking the medication again. No one asked me to retest Mr. Gooden in light of Dr. Guild's recommendation. I certainly agree with Dr. Guild that Mr. Gooden should have been retested after he had been treated for his schizophrenia.

10. It is often difficult to evaluate whether someone is mentally retarded when that person also suffers from a mental illness, such as schizophrenia. It is quite possible that what I may have perceived to have been a lack of effort on the part of Mr. 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.

11. At this point, I strongly recommend that Mr. Gooden receive a thorough evaluation both to thoroughly assess his mental illness and to determine whether he is mentally retarded. Based on the records and my prior testing, I believe that there is a significant likelihood that Mr. Gooden is in fact mentally retarded. Additional testing, however, must be undertaken when Mr. Gooden is receiving

treatment for his schizophrenia, and only if the evaluators have access to all relevant records.

C.P. 351-352; R.E. 97-98.

Post-conviction counsel also obtained affidavits from family members that provided additional details about Goodin's deficits in adaptive functioning and the symptoms of his chronic mental illness. C.P. 336, 338, 340, 342, 344, 345B, 347, 349.

Based on this wealth of evidence, this Court granted post-conviction relief and remanded for an evidentiary hearing on three issues: 1) whether Petitioner is mentally retarded; 2) whether trial counsel were ineffective in handling evidence of mental illness; and 3) whether trial counsel were ineffective in litigating Petitioner's incompetency to stand trial.

D. The Post-Conviction State Hospital Evaluation.

After this Court remanded this matter for an evidentiary hearing, the Circuit Court ordered the Mississippi State Hospital ("Whitfield") to conduct an evaluation to determine:

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

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

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

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

C.P. 36-37; R.E. 5-6.

Even though this Court remanded for a determination as to whether Petitioner may have been competent at the time of trial, the Circuit Court did not ask Whitfield to address this issue.

The report issued by the Whitfield evaluators provided more confirmation of Goodin's retardation. Goodin again scored poorly on an IQ test. Moreover, Whitfield determined that he was not malingering on the tests.[1] On the WAIS-III, Goodin obtained a Verbal IQ of 56, Performance IQ of 56, and a Full Scale IQ of 52. On the Vineland Adaptive Behavior Scales which was completed by Mr. Goodin's sister Tommie Peden Dennis, Mr. Goodin scored a 65 in the socialization domain which indicates severe adaptive deficits. (Exhibit 8, Motion to Reconsider, Whitfield Results of Psychological testing; R.E. 85-92). Significantly, even though Whitfield was concerned about malingering, Goodin scored well on the Test of Memory Malingering, "TOMM," a test that distinguishes between malingered and true memory impairments.[2]

The Whitfield evaluators also reviewed the extensive documentation of Goodin's substantial deficits in adaptive functioning. Thus, they were aware of Goodin's poor academic performance and his inability to work. The Whitfield evaluators had the Social Security records which documented Goodin's inability to work and inability to manage money. C.P. 451-473; R.E. 101-123. Substantial deficits in these two areas of adaptive functioning – functional academics and work – satisfies that portion of the criteria for determining if someone is mentally retarded.

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[1] As discussed below, the ultimate conclusions of Whitfield regarding its diagnoses are subject to question because the evaluators lacked the necessary qualifications required by *Chase*.

[2] In *Lynch v. State*, 951 So.2d 549 (Miss. 2007), this Court found it was acceptable to use the MMPI-II or other similar tests to detect malingering. The TOMM was specifically mentioned as a test suggested by mental health experts.

Indeed, based on the overwhelming evidence cited in the Whitfield report, W. Criss Lott, Ph.D., determines 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).

Notwithstanding the test results and compelling evidence to support a finding of retardation, the Whitfield evaluators concluded, against all evidence, that Goodin was not retarded. Without explanation and without any evidence, the evaluators simply assumed that Goodin had not put forth sufficient effort on prior tests. However, no prior evaluator ever felt that Goodin was malingering. Likewise, Goodin fared well on Whitfield's specific malingering tests.

Significantly, none of the evaluators who administered the testing to Goodin were qualified in the area of mental retardation. Thus, the testing did not comply with the mandate of *Chase v. State*, 873 So.2d 1013 (Miss. 2004), that an inmate alleging mental retardation must present evidence from an expert qualified in the field of mental retardation.

E. The Evidentiary Hearing Fiasco.

This should have been a simple case. Armed with sworn statements from defense counsel, affidavits from family members, records from mental health institutions and state agencies, and a favorable affidavit from the court-appointed psychologist, post-conviction counsel could have easily made a strong case that trial counsel were ineffective. Moreover, post-conviction counsel could have introduced records and arranged for an independent evaluation to confirm Goodin's retardation and comply with this Court's clear direction in *Chase*.

By this time, however, Goodin was represented by Robert M. Ryan, who either had no inkling of what his responsibilities or duties were or who threw the case in favor of the State. Despite the wealth of available records and witnesses, Ryan called just one ill-prepared lay witness and brought no records to the attention of the Circuit Court. Despite the requirement of *Chase* that a petitioner present testimony from a qualified expert, Ryan called no expert; he did not even arrange for Goodin to be evaluated. Moreover, he expressly informed Dr. O'Brien that his presence was *not* required at the evidentiary hearing. (Exhibit 22, Motion to Reconsider; R.E. 99-100).

He did not call trial counsel, even though trial counsel had given a favorable affidavit and was prepared to acknowledge substantial shortcomings in his own performance. Ryan did not bother to introduce records regarding Goodin's mental illness or retardation, and made no effort whatsoever to investigate Goodin's competency at the time of trial. In short, Ryan could not even manage to present to the Circuit Court the materials on which this Court relied to grant the evidentiary hearing.

After the State cross-examined the one witness whom Ryan called, Ryan rested. R. 91. The State then moved for a directed verdict R. 91, which was granted. R. 103; R.E. 39.

Although Ryan's performance fell far short of being even minimally competent, actions on the part of the Circuit Court also rendered the hearing fundamentally unfair. The Circuit Court denied a request to retain an expert to review the results of the Whitfield evaluation. R. 8; R.E. 27. The Circuit Court also refused to allow a hearing to challenge the qualifications of the Whitfield evaluators on the grounds that Ryan did not call up to schedule such a motion for a hearing. R. 24. However, there is no rule that would have prohibited the Circuit Court from entertaining that motion at the outset of the evidentiary hearing. The Circuit Court also

misapprehended the nature of the proceeding. Although this Court clearly remanded for a consideration of trial counsel's performance regarding mitigating circumstances, the lower court found that any remaining grounds for relief were moot after it determined that Goodin was not mentally retarded. R. 97-98.

SUMMARY OF THE ARGUMENT

Howard Goodin is mentally retarded. The only mental health professionals who reached a contrary conclusion were not qualified in the field of retardation, and their testing and data pointed to only one conclusion: Goodin is mentally retarded. He has consistently scored low on IQ tests – usually in the low- to mid-60s. His academic records, disability records, and evidence from other witnesses establish beyond any doubt that Goodin has significant deficits in adaptive functioning, and his records also demonstrate that his retardation was manifest prior to age 18.

Howard Goodin suffers from Schizophrenia. Howard Goodin's family members confirm that Howard suffers from hallucinations. Howard Goodin has been diagnosed and treated for Schizophrenia by the Weems Community Mental Health Center and Laird Hospital. Howard Goodin was diagnosed with schizophrenia and awarded benefits by the Social Security Administration.

After careful consideration of the evidence presented by original post-conviction counsel which included an affidavit from the trial lawyer, this Court remanded for an evidentiary hearing to determine whether Goodin was mentally retarded and whether Goodin's trial counsel was ineffective for failing to investigate and present the evidence of his mental retardation, mental illness, and competency. *Goodin v. State*, 856 So. 2d 267, 284-285 (Miss. 2003). The Circuit Court's hearing failed to meet the mandate of the court. On the issue of retardation, this Court specifically mentioned Goodin's school records and the affidavit of Dr. O'Brien as evidence supporting a remand for a hearing. *Id.* at 277-278. On the issue of whether trial counsel was

ineffective for failing to present evidence of mental illness, this Court relied on the affidavit of trial counsel when granting the remand to Circuit Court. *Id.* at 282.

Howard Goodin was never given a full and fair hearing. Goodin was never examined by any expert qualified under *Chase v. State*. However, Goodin had no ability to challenge or rebut the state's case because Goodin was denied an expert to assist in his defense. In addition, Goodin's lawyers were not allowed to be present when Goodin was evaluated by the unqualified State experts. The Circuit Court, citing local rules that have not been approved by this Court, refused to allow Goodin's lawyers to challenge the lack of qualifications of the State's experts.

To make matters even worse, Goodin was saddled with a completely incompetent lawyer who failed to present the readily available and willing witnesses who could have described his mental condition and limited abilities. Goodin's post-conviction lawyer failed to call the trial lawyer who had previously given an affidavit in which he admitted that although he was aware that Mr. Goodin had mental limitations and problems, he had not gathered any records documenting Howard Goodin's mental limitations or mental illness. Goodin's post-conviction lawyer did not call any mental health expert who had previously diagnosed Goodin as Schizophrenic. Goodin's lawyer did not call Dr. O'Brien, who had tested Goodin pre-trial and changed his assessment of Goodin's effort after he saw Goodin's school and medical records. Goodin's lawyer only called one family member even though there were several other family members available and willing to discuss Howard Goodin's mental limitations and hallucinations. Goodin's lawyer utterly failed to present the abundant evidence of Howard Goodin's mental retardation and mental illness.

In ruling on the issues presented, the Circuit Court failed to consider fairly the evidence in the record. The Circuit Court ignored the numerous records in the Whitfield report which

contradicted Whitfield's conclusion that Goodin was not retarded. However, the Court made a finding of fact that Howard Goodin's IQ was between 70-75 -- a determination which places Howard Goodin in the mentally retarded range.

The Court also flagrantly disregarded the mandate of this Court to determine Goodin's competency at the time of trial. In the Order for Mental Evaluation, the Court did not ask the State Hospital to consider competency at the time of trial. As Goodin did not have his own expert, Goodin's competency at the time of trial was never evaluated.

ARGUMENT

I. The Consistent Findings of Multiple Tests Both before and after the Homicide in the Case, Establish Beyond any Serious Dispute that Howard Goodin is Mentally Retarded.

Despite the abundant evidence of Goodin's mental retardation that was already in the record of this case and despite Judge Gordon's previous finding that Goodin's IQ was under 70 (Motion to Reconsider, Exhibit 7; R.E.138-142), the Circuit Court directed a verdict against Goodin at the evidentiary hearing. In the Judgment Granting Motion for Directed Verdict and Dismissing Petition for Post-Conviction Relief, the Circuit Court made a finding of fact that "the forensics opinion established the Petitioner's intelligence quotient (IQ) as 70-75 and diagnosed the Petitioner as malingering." CP 669; R.E. 35. The Circuit Court did not explain how it arrived at that conclusion because Goodin scored much lower on the Whitfield IQ tests.

Likewise, the Circuit Court did not explain its basis for concluding that Goodin was malingering in light of Goodin's favorable scores on tests to detect malingering. In addition, the Circuit Court did not explain why it changed its post-conviction assessment of Goodin's IQ when it found Goodin to have an IQ of less than 70 prior to trial.

Finally, the Circuit Court did not explain any possible basis for concluding that Goodin was not mentally retarded given the vast evidence of substantial deficits in adaptive functioning

and the fact that the most recent Whitfield IQ score placed Goodin in the mentally retarded range. Goodin's school records clearly show that his intellectual deficits manifested before he was 18. C.P. 237-241; R.E. 129-137. His first grade teacher labeled him "slow." C.P. 240; R.E. 132. When an IQ score between 70-75 and the manifestation of intellectual deficits before age 18 is considered in conjunction with the documented deficits in adaptive functioning, there is no question that Goodin is mentally retarded.

In *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), the Supreme Court held that the execution of mentally retarded individuals violates the Eighth Amendment. The Court acknowledged disagreement will arise "in determining which offenders are in fact retarded" and, therefore, left to the states the task of defining mental retardation and "developing appropriate ways to enforce thi[s] constitutional restriction." *Id.* at 317. Following *Atkins*, this Court adopted a definition of mental retardation to be used in Mississippi Courts:

> The Atkins majority cited, with approval, two specific, almost identical, definitions of "mental retardation." The first was provided by the American Association on Mental Retardation (AAMR):
>
> > Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.
>
> *Atkins*, 536 U.S. at 308 n. 3, 122 S.Ct. 2242, *citing* Mental Retardation: Definition, Classification, and Systems of Support 5 (9th ed.1992). The second was provided by The American Psychiatric Association:
>
> > "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure,

> health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." Diagnostic and Statistical Manual of Mental Disorders 39 (4th ed.2000).

Chase v. State, 873 So.2d 1013, 1027-28 (Miss. 2004).

> The Diagnostic and Statistical Manual of Mental Disorders, from which the American Psychiatric Association definition is quoted, further states that "mild" mental retardation is typically used to describe persons with an IQ level of 50-55 to approximately 70. *Id.* at 42-43. The Manual further provides, however, that mental retardation may, under certain conditions, be present in an individual with an IQ of up to 75.[18] *Id.* at 40. Additionally, according to the *Atkins* majority, " [i]t is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Id.* citing 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 2952 (B. Sadock & V. Sadock eds 7th ed.2000) (emphasis added).
>
> FN18. This point is conceded by the State. However, IQ, alone, does not determine mental retardation. According to the DSM-IV, "it is possible to diagnose Mental Retardation in individuals with IQ's between 70 and 75 who exhibit significant deficits in adaptive behavior." Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning.

Chase v. State, 873 So.2d 1013, 1027-28 (Miss. 2004).

This definition was previously adopted in *Foster v. State*, 848 So.2d 172, 174 (2003). In *Foster*, this Court made clear that a diagnosis of mental retardation includes intellectual functioning and numerous other factors. *Id.* at 175. As Psychologist W. Criss Lott points out, the Whitfield records contain overwhelming evidence that Mr. Goodin clearly meets all three criteria for a diagnosis of Mental Retardation:

> 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.

(Exhibit 11, Motion to Reconsider, Affidavit of Criss Lott; R.E. 143-145).

The Fifth Circuit Court of Appeals recently vacated and remanded a case to consider evidence that the results of a prior IQ were inaccurate because the evaluator did not follow certain testing protocols. *Lewis v. Quarterman,* 541 F.3d 280 (5th Cir. 2008). In this case, the Mississippi State Hospital did not consider the history of low IQ scores, ignored its own test findings of no malingering, assumed malingering based on no evidence, failed to consider deficits in adaptive functioning and substituted its own protocol — did the petitioner know a few big words — for the actual criteria for mental retardation.

In a non-jury trial, the Court can grant the defendant's motion for involuntary dismissal only on a finding that there is no arguable evidence to support the plaintiff's claim. *Aronson v. University of Mississippi*, 828 So.2d. 752 (Miss 2002). Such a motion should not be granted "when the facts and the law presented require judicial resolution." *Cheatham v. Stokes*, 760 So. 2d 795 (Miss. App. 2000). The trial court must "consider the evidence fairly." *Stewart v. Merchant's National Bank*, 700 So. 2d 255 (Miss.1997). The Court's review on appeal is to determine if the dismissal is supported by substantial evidence or is manifestly erroneous. *Singing River Electric Power Association v. MDEQ*, 693 So. 2d. 368 (Miss 1997).

Here, the Court did not "consider the evidence fairly," because it did not consider, at all, the evidence that was already in the Record of the case. This Court has often noted that on post-conviction review, the evidence of the prior record could be considered by the Circuit Court. *Boddie v. State,* 875 So.2d 180, 183 (Miss. 2004) (as to Boddie's argument that there was no factual basis for his guilty plea, this Court is not limited to the transcript of Boddie's guilty plea hearing, but was allowed to review the record as a whole). *See Corley v. State*, 585 So.2d 765, 767-68 (Miss.1991).

This is in keeping with MRCP 43(e), the only relevant authority that would forbid the trial court from considering matters not actually introduced during the evidentiary hearing. That rule provides that '[w]hen a motion is based on facts not appearing of record the court may hear the matter on affidavits . . . but the court may direct that the matter be heard wholly or partly on oral testimony or depositions. (emphasis added).

Because the O'Brien affidavit and the Whitfield report were already facts "appearing of record," nothing prevented the Circuit Court from considering them in connection with the State's motion. Even if Rule 43(e) did apply, Judge Gordon never directed, prior to the hearing, that the issue of mental retardation must be heard wholly on oral testimony. It was error for the Court to disregard the prior Record both of the trial and in the post-conviction petition when granting the State's Rule 41(b) motion.

Moreover, even if the court was limited to the evidence it discussed in its ruling, the IQ of 70-75 plus the testimony presented demonstrated that Goodin is mentally retarded. Thus, even then, the Circuit Court's ruling was not based on substantial evidence and was manifestly erroneous.

Howard Goodin tested in the mentally retarded range at Parchman in 1973. Howard Goodin tested in the mentally retarded range with Dr. O'Brien in 1999. Also, in 1999, Judge Gordon marked that Howard Goodn's IQ was below 70 in his trial judge report. Howard Goodin received scores in the mentally retarded range at the Mississippi State Hospital at Whitfield in 2004. In 1998, the Social Security Administration found him unable to work and unable to handle money. Howard Goodin's school records show poor school performance beginning in first grade and deficits in functional academics. Given this overwhelming evidence, how can the Court find Goodin not mentally retarded on a directed verdict/involuntary dismissal motion?

II. Petitioner's Rights to Due Process, Access to the Courts, and Effective Assistance of Counsel Requires, At a Minimum, that the Case be Remanded.

In *Rivera v. Quarterman*, 505 F.3d 349, 357 (5th Cir. 2007), the United States Court of Appeals for the Fifth Circuit held that the deprivation of a defendant's right to fully develop the substance of a claim of mental retardation under *Atkins v. Virginia* violates the federal constitution's guarantee of due process. In that case, the Fifth Circuit held, "[T]he finding that Rivera had not made a prima facie showing deprived Rivera of the opportunity to develop fully the substance of his [mental retardation] claim before the state courts."

The Court in *Rivera* went on:

> *Atkins,* like *Ford v. Wainwright*, "[left] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Ford* is instructive because of the similarity of the competency and mental retardation issues: both decisions affirmatively limit the class of persons who are death penalty eligible. While *Atkins* itself did not specifically impose the sort of procedural requirements that *Ford* mandates, neither did *Atkins* purport to sweep away the protections of due process.
>
> Under *Ford,* "[o]nce a prisoner seeking a stay of execution has made a 'substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." As Justice Powell explained, due process does not require a full trial on the merits, but a process that affords the prisoner an "opportunity to be heard.

> For our purposes, we are concerned with the Supreme Court's application of *Ford* in *Panetti v. Quarterman.* In *Panetti,* the prisoner had made a "substantial showing of incompetency," but according to the prisoner, the state failed to provide him with procedures in conformity with *Ford* to develop his claim. This failure, the prisoner argued, rendered the state's decision denying his incompetency claim an unreasonable application of clearly established federal law. The Supreme Court agreed:
>
> The state court's failure to provide the procedures mandated by *Ford* constituted an unreasonable application of clearly established law as determined by this Court. It is uncontested that petitioner made a substantial showing of incompetency. This showing entitled him to, among other things, an adequate means by which to submit expert psychiatric evidence in response to the evidence that had been solicited by the state court. And it is clear from the record that the state court reached its competency determination after failing to provide petitioner with this process .... As a result of this error, our review of petitioner's underlying incompetency claim is unencumbered by the deference AEDPA normally requires.
>
> Even though *Atkins* did not specifically mandate any set of procedures, it was decided against the backdrop of the Supreme Court's and lower court's due process jurisprudence. The lesson we draw from *Panetti* is that, where a petitioner has made a prima facie showing of retardation as Rivera did, the state court's failure to provide him with the opportunity to develop his claim deprives the state court's decision of the deference normally due.

Rivera v. Quarterman, 505 F.3d at 357-60 (5th Cir. 2007)(internal citations omitted)(footnotes omitted).

Panetti, which was relied on by the Court in *Rivera*, makes clear that due process demands more than merely providing a prisoner the right to file a successive petition that asserts his ineligibility to be executed. Due process in the *Atkins* context requires a meaningful opportunity to develop evidence of mental retardation, which includes the appointment and compensation of qualified counsel and access to funds for obtaining appropriate investigative and expert assistance.

In this case, it is clear that Howard Goodin was not provided a fair hearing in accord with fundamental fairness. This Court's procedural guidelines set out in *Chase* were honored only in the breach. The evaluators lacked the necessary qualifications, failed to account for Goodin's lengthy history of poor performance on IQ scores, minimized his favourable scores on a malingering scale, and all but ignored evidence of adaptive functioning. Moreover, the Circuit Court denied Goodin the right to have an expert to review the gross deficiencies of the Whitfield evaluation and denied him the right to challenge the State's experts.

Compounding this problem, Goodin for all practical purposes had no lawyer. As the Fifth Circuit has recognized, the right of a mentally retarded inmate to seek relief is meaningless without the assistance of counsel. *In re Hearn,* 376 F.3d 447 (5th Cir. 2004). Appointed counsel ignored this Court's requirements set out in *Chase* and did not even bother to seek an independent expert evaluation to assess mental retardation, review evidence of psychotic mental illness, or address competency. Goodin's lawyer even failed to make use of the report from the Mississippi State Hospital at Whitfield which documented prior and recent tests results that indicated that Mr. Goodin was retarded. Goodin's lawyer also failed to make use of the readily available records showing prior testing in the mentally retarded range, school records showing a manifestation of intellectual deficits before age 18 and an adaptive deficit in the area of functional academics, and medical records showing Goodin was a schizophrenic who was unable to work and incompetent to manage money. Goodin's lawyer failed to call a number of readily available witnesses that would have testified to Goodin's adaptive functioning deficits and mental illness.

There is no way that Goodin -- who is mentally retarded and mentally ill -- could have presented his own case. Mr. Goodin is clearly entitled to appointed competent and conscientious

counsel to assist him with his pursuit of post-conviction relief. *See Puckett v. State*, 834 So. 2d 676, 680 (Miss. 2002).

By any reckoning, this was not a difficult case. Goodin had a lengthy history of low IQ scores and records from before the crime documenting deficits in adaptive functioning. Goodin also had a lengthy history of diagnoses for schizophrenia. Trial counsel cooperated with Terri Marroquin, Goodin's first post-conviction lawyer, and Dr. O'Brien provided a supportive affidavit. Numerous family members were available to testify, and this Court's decision in *Chase* provided the basis for counsel to seek expert assistance to evaluate Goodin. Inexplicably, then Director Ryan did not seek a new evaluation, whether to assess mental retardation, mental illness, or competency. He subpoenaed trial counsel and Dr. O'Brien but inexplicably told them not to bother to show up. (Exhibit 22, Motion to Reconsider; R.E. 99-100). Finally, his staff found family members ready and willing to testify, but Ryan sat down after calling but one witness who he had not bothered to prepare.

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

This Court has held that death-sentenced inmates are entitled to the assistance of counsel and reasonable expenses for litigation. *Jackson v. State*, 732 So. 2d 187, 188 (Miss. 1999). As this Court observed, "[t]he reality is that post-conviction efforts, though collateral, have become an appendage, or part, of the death penalty appeal process at the state level." *Id.* at 190; *see also id.* at 191. In other words, this Court recognized that capital post-conviction proceedings are part

of the direct appeal process, and thus the right to qualified counsel attaches, as it does on direct appeal. *See Evitts v. Lucey,* 469 U.S. 387 (1985).

The Court also elaborated on the need for the assistance of counsel:

> Applications for post-conviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of the [state post-conviction statute]. The inmate is in effect denied meaningful access to the courts by lack of funds for this state-provided remedy.

Jackson, 732 So. 2d at 190.

Several years later, this Court elaborated on this right to capital post-conviction counsel. In *Puckett v. State*, 834 So. 2d 676, 677 (Miss. 2003)[3], the Court affirmed that death-sentenced inmates are 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).

Although *Puckett* addressed circumstances in which equitable tolling is permissible, its rationale is on point for this case. For Puckett, his initial attorney was charged with withholding files necessary to preparing a petition for post-conviction relief and ignored requests to return the files. *Id.* at 679-80. As this Court pointed out, Puckett did not complain about "mere excusable neglect" on the part of counsel. *Id.* at 680. Instead, the Court found that Puckett had been unable to file a timely petition **"[d]ue to circumstances completely beyond his control."** *Id.* (Emphasis added).

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[3] This Court requires that trials and hearings be conducted by counsel who perform their professional obligations in a minimally competent manner. Thus, even in civil cases, where there is no Sixth or Fourteenth right to counsel, this Court has reversed judgments where counsel was "not performing in a professionally competent manner . . . . [by coming] to trial so unprepared and unskilled as to permit continued transgressions of our evidentiary rules." *McCollum v. Franklin*, 608 So. 2d 692, 695 (Miss. 1992).

Noting that Puckett was "clearly entitled to appointed competent and conscientious counsel to assist him with his pursuit of post-conviction relief," the Court found that prior counsel's refusal to return files "fell below professional standards and frustrated Puckett's efforts to seek relief." *Id.* The Court repeated that this was not a case of mere "inexcusable neglect;" rather, it deemed the actions of prior counsel "to rise to the deprivation of fundamental due process." *Id.* at 681.

Given the importance of qualified counsel to the post-conviction process, it should hardly require stating that "the guarantee of counsel 'cannot be satisfied by mere formal appointment.'" *Id.* at 395 (quoting *Avery v. Alabama*, 308 U.S. 444, 446 (1940)). Instead, counsel must actively prepare a case on behalf of his or her client and also assist the petitioner in navigating the "intricate rules that to a layperson would be hopelessly forbidding." *Id.* at 396.

In *In re Hearn*, 376 F.3d 447, 458 (5th Cir. 2004), the Fifth Circuit stayed an execution and found that Hearn was entitled to counsel to pursue a successive habeas petition on *Atkins* grounds. Relying on *McFarland v. Scott*, 512 U.S. 849 (1994), the Fifth Circuit recognized that indigent defendants had a right to quality legal counsel in habeas corpus proceedings. *In re Hearn*, 376 at 451-452. The Fifth Circuit found the evidence that Hearn presented including school records which showed that he failed first grade and performed poorly in school despite regular attendance, a score of 82 on a Weschler Adult Intelligence Scale Revised (WAIS-R) short form, trial testimony from a family member as to Hearn's compromised social skills and a note from his lawyer that he was "not very intelligent—maybe below normal," sufficient to justify the appointment of counsel to investigate and prepare a successive petition. *Id.* at 455.

Howard Goodin had every right to expect that his appointed counsel would act in accordance with elemental rules of professional conduct. *See Evitts v. Lucey*, 469 U.S. 387, 394

(1985) (appointed counsel "must play the role of an active advocate"). He also had the right to expect that the State Office would perform its duties as mandated by the MOCPCC Act. Instead, his lawyer for all practical purposes "threw" the case. *Myers v. Mississippi State Bar,* 480 So. 2d 1080 (Miss. 1985) ("the gravity of the misconduct, deliberate abandonment of a criminal defendant at a crucial stage in the trial, warrants serious concern").

Thus, as a practical matter, Goodin suffered a constructive denial of the counsel assured him under the MOCPCC Act and Rule 22 because the Office did nothing to safeguard his rights. *See United States v. Cronic*, 466 U.S. 648 (1984); *Entsminger v. Iowa,* 386 U.S. 748, 752 (1967) ("By such action all hope of any adequate and effective appeal at all, *Lane v. Brown*, 372 U.S. 477, 485 (1963), was taken from the petitioner."); *Lucey,* 469 U.S. at 394 n.6 ("it is difficult to distinguish respondent's situation from that of someone who had no counsel at all").

"When an attorney is grossly negligent, . . . the judicial system loses credibility as well as the appearance of fairness, if the result is that an innocent party is forced to suffer drastic consequences." *Community Dental Services v. Tani*, 282 F.3d 1164, 1170 (9th Cir. 2002).

As in *Puckett,* Ryan's misconduct fell well below mere excusable neglect. In fact, it was worse than having no counsel at all. Ryan abandoned his client and worked directly against his client's interests to ensure that he had no hope of prevailing at the remand hearing.

In short, this Court has recognized that where post-conviction counsel is required to be appointed, the utter failure of that counsel to serve his client's interests "going beyond excusable neglect" can "rise to the deprivation of fundamental due process" and thereby be "circumstances beyond [the prisoner's] control."

However, there are, in addition to *Jackson* and *Puckett*, several separate constitutional reasons to recognize that Goodin had a right to effective (or at least, loyal and competent)

counsel in the filing of his first post-conviction petition. The first of these is based on the 6th and 14th Amendments. In this context, the statement made by this Court in *Jackson* is significant. Because this Court has recognized that the post-conviction process is " 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' the procedures used in deciding [those proceedings] must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (quoting *Griffin v. Illinois,* 351 U.S. 12, 18 (1956)).

Simply put, if post-conviction proceedings are part of the appellate process in capital cases, then the *Evitts* right of effective appellate counsel applies to this case.

Also, 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).

Thus, as one commentator has amply demonstrated, the Constitution compels states that have created a state statutory right to capital post-conviction 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; 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 post-conviction 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").

Indeed, this was precisely the reasoning of the Alaska Supreme Court in *Grinols v. State*, 74 P.3d 889, 894-95 (Alaska 2003). Although the Alaska Supreme Court is not one that has interpreted its state's statutory entitlement to counsel to include an entitlement to effective counsel, it read the due process clause of its constitution, which it gave the same meaning as the Fourteenth Amendment, to require that result. *See Grinols*, 74 P.3d at 894-95.

Thus, by committing to provide counsel to death-sentenced prisoners via Rule 22 and the MOCPCC Act, the State of Mississippi created an interest which it cannot arbitrarily deny. The State cannot, consistent with the Fourteenth Amendment, tell Howard Goodin, "you will be given counsel" and then give him a lawyer in name only who discards material evidence and makes no effort to satisfy the burden of establishing an entitlement to post-conviction relief notwithstanding the abundance of evidence available to him.

Furthermore, the Eighth and Fourteenth Amendments require that mentally retarded inmates have competent counsel to assist them. In *Atkins,* the Court charged the states with devising means to implement methods of determining whether an inmate is mentally retarded. As a matter of fundamental fairness, such an inmate must have the assistance of competent counsel; otherwise the right guaranteed in *Atkins* becomes meaningless. *In re Hearn*, 376 F.3d 447 (5th Cir. 2004).

Separately, there is a line of cases decided under both the Due Process Clause and the Equal Protection Clause that establish that the State may not fail to provide meaningful access to

the courts in civil cases where an indigent party stands in jeopardy of forfeiting fundamental rights. *M.L.B. v. S.L.J.*, 519 U.S. 102, 110-13, 120-21 (1996) (holding that the state of Mississippi had to provide a free trial transcript to an indigent mother to enable her to appeal the loss of her parental rights). *See also Bounds v. Smith*, 430 U.S. 817, 823 (1977) (even for discretionary appeals, "States must 'assure the indigent defendant an adequate opportunity to present his claims fairly.'") (quoting *Ross v. Moffitt*, 417 U.S. 600, 616 (1974)).

Similarly, the United States Supreme Court recently reiterated the test for analyzing a Due Process Clause claim that a prisoner is entitled to particular procedural rights (including the provision of counsel) in a context presenting "weighty and sensitive governmental interests" that militated against the procedural safeguards sought by the prisoner. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516, 531 (2004) (plurality opinion) (deciding what process is due in making the determination that an individual may be detained as an "enemy combatant").[4]

The *Hamdi* Court stated:

> [T]he process due in any given instance is determined by weighing the private interest that will be affected by the official action against the Government's asserted interest, including the function involved and the burdens the Government would face in providing greater process. The *Mathews [v. Eldridge]* calculus then contemplates a judicious balancing of these concerns, through an analysis of the risk of an erroneous deprivation of the private interest if the process were reduced and the Aprobable value, if any, of additional or substitute procedural safeguards.

Hamdi, 542 U.S. at 529 (internal quotes and citations omitted).

In *Jackson v. State,* this Court performed the type of balancing later required in *Hamdi*, and concluded that the right to counsel as the only means to guarantee that death-sentenced inmates had meaningful access to the courts. This Court found that death-sentenced inmates

[4] The main opinion was written by Justice O'Connor for a four-member plurality. In a concurring opinion joined by three other Justices, Justice Souter stated that he would have decided the case in favor of the petitioner on other grounds, and, had he reached the due process issue, would have provided more robust procedural rights than the plurality did. See *Id.* at 553-54 (Souter, J., concurring).

were incapable of handling their own cases. "The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of the UPCCRA." *Jackson*, 732 So. 2d at 190.

This Court's *Jackson* decision, the promulgation of Rule 22, and the passage of the MOCPCC Act put Mississippi in line with the near-unanimous consensus of the death penalty states. At the time of the United States Supreme Court decision in *Murray v. Giarratano*, 492 U.S. 1 (1989), only eighteen of the thirty-seven states with the death penalty automatically appointed defense counsel in capital post-conviction proceedings. *Giarratano*, 492 U.S. at 10 n.5 (plurality opinion). Today, thirty-three of the thirty-seven death penalty states do so.[5] The courts of many of these states have emphasized the importance of the right to counsel on post-conviction review of death sentences.[6]

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[5] See Ariz. R. Crim. P. 32.4(c); Ark. Code Ann. § 16-91-202(a)(1)(A)(i) (2006); Cal. Gov't Code § 27706 (West 1988); Colo. Rev. Stat. § 16-12-205(1) (2004); Conn. Gen. Stat. Ann. § 51-296 (West 2005); Fla. Stat. Ann. § 27.702 (West Supp. 2006); Idaho Crim. R. 44.2; 725 Ill. Comp. Stat. Ann. 5/122-2.1 (LexisNexis 2006); Ind. Code Ann. § 33-40-1-2(a) (LexisNexis 2004); Kan. Stat. Ann. § 22-4506(d)(1)(C)(2) (Supp. 2004); Ky. Rev. Stat. Ann. § 31.110(2)(c) (West 1999); La. Rev. Stat. Ann. 15:149.1 (2005); Md. Code Ann. Crim. Proc. § 7-108(a) (LexisNexis 2001); Mo. R. Crim. P. 24.036(a); Mont. Code Ann. § 46-21-201(3)(b)(i) (2005); Neb. Rev. Stat. Ann. § 23-3402(1) (LexisNexis 2005); Nev. Rev. Stat. Ann. § 3-34.820 (LexisNexis 2005); N.J. Stat. Ann. § 2A:158A-5 (West Supp. 2005); N.M. Stat. Ann. § 31-16-3 (LexisNexis 2004); N.C. Gen. Stat. Ann. 7A-451(c) (LexisNexis 2005); Ohio Rev. Code Ann. § 2953.21(I)(1) (LexisNexis 2003); Okla. Stat. Ann. tit. 22, § 1355.6 (West 2003); Or. Rev. Stat. § 138.590 (2003); Pa. R. Crim. P. 904(G)(1); S.C. Code Ann. § 17-27-160(B) (West 2003); S.D. Codified Laws § 21-27-4 (1987); Tenn. Sup. Ct. R. 13(d)(1)(D); Tex. Code Crim. Proc. Code Ann. art. 11.071(2) (West Supp. 2005); Utah Code Ann. § 78-35a-202(2)(a) (LexisNexis 2002); Va. Code Ann. § 19.2-163.7 (LexisNexis 2004); Wash. R. App. P. 16.25; Wyo. Stat. Ann. § 7-6-104(c)(ii) (LexisNexis 2005).

[6] *See, e.g., Grinols v. State*, 74 P.3d 889, 894-95 (Alaska 2003) (holding that the due process clause of Alaska's constitution requires effective post-conviction counsel); *Lozada v. Warden*, 613 A.2d 818, 821-22 (Conn. 1992) (holding that the statutory right to counsel in post-conviction proceedings includes the right to effective assistance of counsel); *Hernandez v. State*, 992 P.2d 789, 793 (Idaho Ct. App. 1999) (holding the ineffectiveness of a lawyer representing the defendant in a prior action for post-conviction relief to be a sufficient reason to permit the defendant to pursue a second petition for relief); *In re Carmody*, 653 N.E.2d 977, 983 (Ill. App. Ct. 1995) (holding that the statutory right to counsel in post-conviction proceedings includes the right to effective assistance of counsel); *Daniels v. State*, 741 N.E.2d 1177, 1189-91 (Ind. 2001) (recognizing a limited right to effective assistance of post-conviction counsel);

Congress similarly provides for appointed, compensated counsel in death penalty habeas corpus proceedings. See 21 U.S.C. § 848(q)(4)(B) (2000); *McFarland v. Scott*, 512 U.S. 849, 859 (1994) (noting the importance of this entitlement "in promoting fundamental fairness in the imposition of the death penalty").

These developments carry forward, in our more modern procedural context, the Eighth and Fourteenth Amendment principle established in the infamous case of the "Scottsboro Boys":

> All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.

Powell v. Alabama, 287 US 45, 53 S.Ct. 55, 71 (1932).

This significant change in State rules and legislation is evidence of the emerging consensus that, in the absence of counsel for State post-conviction proceedings, the selection of capital murder defendants for the death penalty will be arbitrary. That is sufficient to recognize as Eighth Amendment right to counsel in State capital post-conviction proceedings. Finally, the

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Dunbar v. State, 515 N.W.2d 12, 14-15 (Iowa 1994) (reconsidering the right to effective assistance of counsel after the U.S. Supreme Court held that no such federal constitutional right exists, and holding that the statutory right to effective assistance of counsel remains good law because it is not grounded in the Federal Constitution); *Brown v. State*, 101 P.3d 1201, 1203-04 (Kan. 2004) (holding that the statutory right to counsel in post-conviction proceedings includes the right to effective assistance of counsel); *Stovall v. State*, 800 A.2d 31, 37 (Md. Ct. Spec. App. 2002) (same); *Crump v. Warden*, 934 P.2d 247, 252-53 (Nev. 1997) (holding that a petitioner who had post-conviction counsel appointed by statutory mandate was entitled to effective assistance by such counsel); *State v. Velez*, 746 A.2d 1073, 1076-77 (N.J. Super. Ct. App. Div. 2000) (holding that the state's rule mandating the assignment of counsel for post-conviction proceedings creates an entitlement to effective assistance of counsel); *Hale v. State*, 934 P.2d 1100, 1102-03 (Okla. Crim. App. 1997) (inferring a requirement of effectiveness from statutory mandate for appointment); *Commonwealth v. Pursell*, 724 A.2d 293, 303 (Pa. 1999) (holding that the ineffectiveness of post-conviction counsel provides a basis for relief because effectiveness is implicit in the enforceable right to post-conviction relief); *Jackson v. Weber*, 2001 SD 136 ¶ 12-19, 637 N.W.2d 19, 22-24 (holding that the statutory right to counsel in post-conviction proceedings includes the right to effective assistance of such counsel).

"evolving standards of decency" that control the application of the Eighth Amendment to Mississippi (by means of the Fourteenth Amendment) requires recognition of a right to counsel in post-conviction proceedings to prevent the arbitrary imposition of capital punishment in this State.

b. Ryan took no steps to give his client any chance to prevail.

Ryan's wholesale failure to attempt to present available evidence made the hearing a sham. Whether this Court evaluates Ryan's ineptitude under the *Strickland* standard, under the *Puckett* ruling, or some other standard, it should be clear that Goodin never had a chance, despite substantial and readily available evidence in his favor. Petitioner herein reviews Ryan's failure under the familiar *Strickland* standard. Under *Strickland's* first prong, Goodin must show that counsel's performance was deficient, which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052 (1984).

In this case, Ryan's did not come close to performing with any degree of competence. In *Chase*, this court held that no defendant may be adjudged mentally retarded:

> unless such defendant produces, *at a minimum*, **an expert** who expresses an opinion, to a reasonable degree of certainty, that:
>
> 1. The defendant is mentally retarded, as the term is defined by the American Association on Mental Retardation and/or The American Psychiatric Association;
>
> 2. The defendant has completed the Minnesota Multiphasic Personality Inventory-II (MMPI-II) and/or other similar tests, and the defendant is not malingering.

Chase v. State, 873 So.2d 1013, 1029 (Miss. 2004). (emphasis added).

The *Chase* Court then stated that at the conclusion of the defendant's evidentiary hearing regarding mental retardation, "the trial court must determine whether the defendant has established, by a preponderance of the evidence, that the defendant is mentally retarded." *Id.*

Robert Ryan did not even meet the *minimum* requirement, as described in *Chase,* necessary for a defendant making a mental retardation claim. Simply put, he never sought to have an independent expert evaluate Goodin, and he even told Dr. O'Brien, who had provided a favorable affidavit regarding earlier testing, that his presence at the evidentiary hearing was unnecessary. He did not even make an argument based on prior testing. The Circuit Court zeroed in on this gross deficiency:

> Now, the issue in this case is the mental retardation of Howard Goodin. Counsel did not request funds for expert assistance to determine 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.

R. 103; R.E. 39. The Circuit Court is accurate in its description of the motion filed by defense counsel. Robert Ryan's Motion for Expert Assistance specifically asks to retain an expert:

> for the purposes of aiding counsel in the preparation of cross examination of the state mental health experts, additionally, assisting counsel in the interpretation of raw data as a consequence of the petitioner's mental health evaluation performed by the personnel at the Mississippi State Hospital at Whitfield, Mississippi.

C.P. 529-43; R.E. 10-24.

Moreover, this Court remanded for a determination whether trial counsel ineffectively handled questions concerning Goodin's mental illness and competency at the time of trial. Ryan did not attempt to find experts to assist with this determination, though it would have been impossible to prevail without expert assistance. By not seeking any expert assistance to assist in developing evidence, Ryan surrendered any possibility of Goodin prevailing, and he cannot rationalize his gross incompetence as "strategy." *See Jacobs v. Horn,* 395 F.3d 92 (3rd Cir. 2005) (failure to secure obviously necessary expert assistance for mental health defense amounts to deficient performance); *Van Hook v. Anderson,* _____ F.3d _____, 2008 WL 2952109, (6th

Cir. 2008) (counsel found ineffective for failing to secure an independent mental health expert to testify the defendant's crime was a product of a mental disease where defendant pleaded not guilty by

reason of insanity.)

Numerous courts have found counsel ineffective for failing to retain an expert or to present available evidence necessary for their defense theories. Ryan's inexplicable failure to do take the basic steps to represent Goodin was prejudicial. *See Strickland*, 466 U.S. at 694.

In sustaining the State's Motion for Directed Verdict, the circuit court found that Goodin's counsel failed to demonstrate by a preponderance of evidence that Goodin is mentally retarded because "[t]he Petitioner did not request funds for expert assistance to determine whether the Petitioner is mentally retarded, nor did the Petitioner retain and produce a licensed psychologist or psychiatrist qualified as an expert in the field of assessing mental retardation as required in *Chase*." C.P. 667-670; R.E. 33-36.

Had counsel sought out an independent psychological or psychiatric expert, as he was required to do, the Circuit Court would have been presented with overwhelming evidence that Goodin is indeed mentally retarded, making a directed verdict impossible. As Dr. Lott points out, even the Whitfield evaluation that the Circuit Court ordered contained overwhelming evidence of mental retardation. Considering the fact that Goodin's counsel's complete failure to meet the minimum requirements of *Chase* despite the ready availability of a qualified expert and evidence demonstrating Goodin's mental retardation, there is more than a reasonable probability that the result of Goodin's evidentiary hearing would have been different. For these reasons, this Court should find that Robert Ryan rendered ineffective assistance in violation of Goodin's federal and state constitutional rights.

c. Robert Ryan suppressed overwhelming evidence of Goodin's mental retardation and mental illness.

At the Evidentiary Hearing in Newton County Circuit Court, Robert Ryan only put on one witness, Mr. Goodin's sister, Ada T. Reece, and then rested. R . 37, 91. Ryan did not call any of the other witnesses he subpoenaed. Nor, did he enter any of the many records that were available to show Goodin's intellectual deficits, adaptive deficits and mental illness. Ryan did not enter Goodin's school records that showed he spent three years in third grade into evidence. C.P. 237-241; 331-334; R.E. 129-137.

Nor did Ryan did not call Goodin's niece Teresa Clemons who was subpoenaed to court, and who was present. (Exhibit 13, Motion to Reconsider, Subpoena for Teresa Clemons; Exhibit 20 Motion to Reconsider, Affidavit of Van Williams). Teresa had provided an affidavit stating that her Uncle would tear up her lawn mower when he tried to mow the lawn because he would not move rocks and trash. C.P. 336. Ryan did not call Tommie Peden Dennis who was subpoenaed to court (Exhibit 15 Motion to Reconsider, Subpoena for Tommie Peden Dennis) and would have testified that her brother Howard was never able to live independently. Tommie agreed that Howard did not have enough sense to move rocks when mowing the lawn. C.P. 338. Indeed, no lawyer from Ryan's office ever interviewed her or discussed her testimony with her. Dennis came to court and waited outside the courtroom, but she was never called to testify. (Exhibit 17 Motion to Reconsider, Affidavit of Tommie Dennis).

Ryan failed to call Sheila Nash, who had lived with Mr. Goodin in 1998. Nash was subpoenaed. (Exhibit 18 Motion to Reconsider, subpoena for Sheila Nash). Nash would have testified that Goodin was slow, easily persuaded and did not have a checking account or know how to drive a vehicle. (Exhibit 19 Motion to Reconsider, Affidavit of Sheila Nash). Ryan did

not call any of the family members who responded to their subpoenas. (Exhibit 20 Motion to Reconsider, Affidavit of Van Williams).

Ryan did not even call Dr. Gerald O'Brien, the psychologist who had tested Goodin in 1999 and provided an affidavit in 2002 saying if he had been provided Goodin's school records and mental health records he would have had a different opinion about Mr. Goodin's alleged malingering. C.P. 351-352; R.E. 97-98. Dr. O'Brien was subpoenaed. (Exhibit 21 Motion to Reconsider, Subpoena for Gerald O'Brien) However, Dr. O'Brien says, "During the summer of 2004, no lawyer from the Mississippi Office of Capital Post-Conviction ever interviewed me or discussed my possible testimony. I was willing to testify consistent with my opinion in my 2002 Affidavit." (Exhibit 22, Motion to Reconsider; R.E. 99-100.) Ryan never discussed possible testimony with Dr. O'Brien. In fact, someone from the Mississippi Office of Capital Post-Conviction Counsel called Dr. O'Brien and told him he was not needed at the hearing. (Exhibit 22 to Motion to Reconsider, 2008 Affidavit of Dr. Gerald O'Brien; R.E. 99-100).

Ryan also failed to call Goodin's trial counsel, Robert N. Brooks, who had provided an affidavit candidly admitting his deficient performance. Brooks conceded that he had not obtained Goodin's school records or records from Weems, Laird Hospital or Social Security. Indeed, Mr. Brooks admitted in his affidavit that he had failed to investigate Mr. Goodin's mental retardation or mental illness even though he knew Mr. Goodin's IQ was low and Brooks had great difficulty communicating with Goodin. C.P. 354-355. Brooks was also under subpoena. (Exhibit 24 Motion to Reconsider, subpoena for Robert Brooks). Mississippi Office of Capital Post-Conviction Counsel staff attorney Van Williams had interviewed Brooks, and he was willing to testify consistent with his 2002 affidavit. (Exhibit 20 Motion to Reconsider, Affidavit of Van Williams).

In addition to failing to call these witnesses, Ryan failed to put the Whitfield report, which summarized many of Mr. Goodin's records, into the record at the hearing. C.P. 131-170; R.E.42-84. Ryan also failed to put the numerous records which documented Goodin's Schizophrenia into the record. C.P. 450-473; R.E. 101-123; C.P. 477-480; R.E. 124-125.

Clearly the failure to call willing and available witnesses is deficient performance that prejudiced Mr. Goodin. In *Woodward v. State,* 635 So. 2d 805, 810 (Miss. 1993) this Court found counsel ineffective in their presentation of a mitigation case. The defense called a psychiatrist to testify about Woodward's mental illness. Out of fear they would open the door to damaging character evidence, the defense limited the psychiatrist's testimony to the results of the psychological testing. The psychiatrist was not allowed to provide critical information about Woodward's mental health history. This Court found counsel had improperly limited the testimony and Woodward had been prejudiced as a result. Stating, "Having made a tactical decision to rely solely on mental illness as a mitigating factor, counsel's failure to offer all of the evidence they had was inexcusable;" this Court reversed Woodward's death sentence *Id.*

Similarly, in Michael Leatherwood's case, this Court found:

> [T]he failure to call available witnesses on critical issues is a factor to be considered under the totality of the circumstances.... 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. If it were within the financial ability of the defendant to arrange for the appearance of a representative group of them, this would have a strong bearing on whether trial counsel provided effective assistance. Of course, counsel's overall performance must be considered.

Leatherwood v. State, 473 So. 2d 964, 970 (Miss. 1985).

Like Woodward and Leatherwood, Howard Goodin's case was doomed by the lack of any competent counsel at his side.

d. Ryan took no steps to insure that the Whitfield evaluators complied with *Chase.*

As discussed in the next section, the Whitfield evaluators in 2004 lacked the qualifications that this Court required in *Chase*. Ryan filed a *Daubert* motion and subpoenaed the Whitfield staff involved in the evaluation. However, the Circuit Court found that Ryan failed to call his motion for a hearing and then found it unnecessary to have a hearing after Ryan failed to offer any probative evidence to support his client's grounds for relief. Even though there were a number of grounds for challenging the Whitfield evaluation, Ryan made no attempt to articulate any of them. After calling his one, ill-prepared witness, Ryan meekly surrendered, completing the abandonment of Howard Goodin.

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.*

In *Atkins v. Virginia*, the United States Supreme Court specifically left it up to the states to develop "appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins v. Virginia*, 536 U.S. 304, 317 (2002). This Court acknowledged the holding

in *Atkins*, and set for the procedure for determining mental retardation for the purposes of *Atkins*. This Court specifically held that an expert appointed to determine whether an inmate is mentally retarded must be a licensed psychologist or psychiatrist, qualified as an expert in the field of assessing mental retardation, and further qualified as an expert in the administration and interpretation of tests, and in the evaluation of persons, for purposes of determining mental retardation. *Id.*

In an order entered on October 1, 2003, the Newton County Circuit Court ordered the Mississippi State Hospital to evaluate Mr. Goodin for, *inter alia*, mental retardation. C.P. 36-40; R.E. 5-9. Mr. Goodin was seen by the Mississippi State Hospital on March 22, 2004, and the evaluators issued a report dated March 22, 2004 C.P. 128-170; R.E. 42-84 and an addendum to the report dated March 26, 2004 (Exhibit 8 Motion to Reconsider; R.E. 85-92). The March 22 report was signed by Dr. Reb. McMichael, Service Chief of Forensic Services, and the March 26 report was signed by Beth Killary, Psychologist I, and Shirley M. Beall, Forensic Psychologist.[7] C.P. 128-170;R.E. 42-84.

Incredibly, none of the three individuals who signed off on the forensic report furnished to the Newton County Circuit Court met the qualifications under *Chase* to give an expert opinion as to whether, *vel non*, Goodin is retarded. In spite of that, however, the reports find that Goodin was malingering and is not mentally retarded. The Circuit Court adopted, *in toto*, the findings of the Mississippi State Hospital regarding Goodin's lack of mental retardation. C.P. 667-670; R.E. 5-9. On September 8, 2004, all three of the aforementioned individuals gave sworn testimony

[7]In response to a request from the Mississippi State Hospital for the Curricula Vitae of the aforementioned individuals, a note was received from the State Hospital which stated, "Dr. Beall was not directly involved in the evaluation of Mr. Gooden and was not present when he was evaluated. Beth Killary administered and interpreted the psychological tests given Mr. Gooden [sic] at the time of his evaluation at Mississippi State Hospital and Dr. Beall merely supervised the assessment report." Motion to Reconsider Exhibit 27. However, Dr. Beall has also signed off on the report opining that Mr. Goodin was malingering and not retarded.

admitting their lack of relevant qualifications in *State of Mississippi v. Devail Hudson*, Oktibbeha County, Mississippi Circuit Court Case No. 2002-0058-CR. In that case, on direct examination, Beth Killary testified as follows:

A. For the record, I'm not a psychometrist. But a psychometrist gives tests. And if it was a psychometrist, they give them and score them, and they hand them to someone to interpret.

Q. That's what you do at the State Hospital; is that correct?

A. I actually give them, score them, interpret them, write the report, and give it to the Ph.D. to ensure that my interpretation is accurate and my scoring is accurate.

(See Exhibit 26 Motion to Reconsider, p. 73).

On cross-examination, Killary admitted that she is not qualified to give an opinion regarding mental retardation.

Q. Now, are you an expert in determining mental retardation?

A. No, sir, I am not.

. . . . . .

Q. Have you ever been tendered as an expert in mental retardation?

A. No, sir.

(Exhibit 26 Motion to Reconsider, p. 85).

On cross-examination Shirley Beall testified at the time of the hearing she was the only Ph.D. in the building. (Exhibit 26 Motion to Reconsider, p.119). She further testified that she was not a licensed psychologist.

Q. Dr. Beall, are you familiar with the case called Ricky Chase versus State of Mississippi?

A. Yes, sir.

Q. And isn't it a fact that that case said that a person making mental retardation determinations should be a licensed psychologist by the State of Mississippi?

A. It does.

Q. And you are not licensed; is that correct?

A. That's correct.

(Exhibit 26 Motion to Reconsider, p. 116). She also testified that she had failed the licensing test twice.

A. Have you taken the test at any point?

A. Yes, I did. When I first came to the state hospital, I tried to study for two weeks and take it. Because we're so busy there with all these cases, I didn't have the time to take off for an extended period, which is recommended, like six months. And I barely failed it.

Q. Okay. That's the only time you took it?

A. No. I took it two times in a row with a two-week study, that's it.

(Exhibit 26 Motion to Reconsider, p. 117).

Reb McMichael testified on cross-examination that he has no formal training in and is not an expert in accessing mental retardation.

Q. Dr. McMichael, have you had any training that qualifies you as an expert in the field of assessing mental retardation?

A. I'm trained as a psychiatrist and have a great deal of experience in assessing issues of mental illness and mental retardation for the Courts and have assessed a number of people who are mentally retarded. I have attended different courses and things in terms of continuing medical education that involve assessments of people with mental retardation, but in terms of any degrees or anything like that in assessing mental retardation, no, sir.

Q. Since Atkins versus Virginia, how many workshops have you attended in assessing mental retardation?

A. I attended the American College of Forensic Psychiatry this year where Atkins was a topic and doing these assessments was a topic of some discussion.

Q. Is that the only time?

A. Yes, sir.

Q. What percentage of that course involves Atkins and mental retardation?

A. The minority, ten percent maybe, 15.

Q. And it's your position that qualifies you as an expert?

A. No, sir. I didn't say I was an expert in mental retardation.

Q. Okay. Have you had any training that qualifies you as an expert in administration and interpretation of tests and any evaluation of person for purposes of determining mental retardation?

A. No, sir

.

(Exhibit 26 Motion to Reconsider, 141-42).

The foregoing sworn testimony of each of the individuals who signed off on the report or the addendum from the Mississippi State Hospital clearly demonstrates that they did not meet the standards required by the Court in *Chase*. Indeed, Beth Killary admitted that she is not an expert in mental retardation. (Exhibit 26 Motion to Reconsider, p. 73). Reb McMichael also testified that he is not an expert in mental retardation. (Exhibit 26 Motion to Reconsider, pp. 141-42). *Chase* requires an expert. *Chase*, 873 So.2d at 1029. Shirley Beall testified that she is not licensed and failed the licensing test twice. (Exhibit 26 Motion to Reconsider, pp. 116-19). *Chase* requires the expert to be licensed. *Id.* Because none of the individuals who signed off on the report and/or addendum were qualified under *Chase*, their opinions finding that Goodin was malingering and not retarded are completely invalid. Moreover, their lack of competence resulted in a number of oversights. As Dr. Lott points out, the records reviewed by Whitfield contain evidence of consistently low IQ scores over a long period of time and document deficits in adaptive functioning.

Dr. Lott lists the evidence supporting a diagnosis of Mental Retardation in his affidavit:

A. All the psychological test results -- including the testing at Parchman in 1973 when Gooden 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.

(Exhibit 11 Motion to Reconsider, Affidavit of W. Criss Lott; R.E. 143-145).

Dr. Lott also refuted the notion that Mr. Goodin was malingering on the Whitfield tests.

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; R.E. 143-145).

Experts qualified in the field of mental retardation would not have made the glaring mistakes and oversights that spoiled the Whitfield evaluation.

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.

On October 17, 2003, Circuit Judge Marcus D. Gordon signed an Order directing a mental evaluation of Howard Dean Goodin at the Forensics Services unit of the Mississippi State Hospital at Whitfield, Mississippi at the earliest date. C.P. 36-40; R.E 5-9. At a hearing on Wednesday, June 23, 2004, in the Scott County Courthouse, defense counsel asked for an ex parte hearing regarding the expenditure of funds for a mental health expert. The Court overruled the motion citing that the "Defendant has been thoroughly examined by several experts, who I expect will give testimony in this case." R.8; R.E. 27.

A week later, a telephone conference was conducted on June 29, 2004. CP 544. During this conference, defense counsel again asked for the services of a non-testimonial mental health expert to assist counsel in the preparation of cross-examination of state mental health experts and to aid counsel in the interpretation of the testing data resulting from the mental health evaluation of Goodin by the staff at the Mississippi State Hospital. The Circuit Judge denied the Motion. C.P. 544-545; R.E. 25-26.

Subsequent to the telephone conference, defense counsel filed a written Motion for Expert Assistance again asking for an "independent mental health expert of petitioner's choosing to aid counsel in the preparation of cross-examination of state mental health experts and for the interpretation of raw data." C.P. 529-534; R.E. 10-14. The Court issued an Order denying the both the verbal and the written motions stating, "the Court is of the opinion 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 Whitfield, Mississippi, to conduct an independent examination of the Defendant for the Court." C.P. 544-545; 25-26.

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 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. Indeed, the law is clear that the defense has a right to an independent expert based on the due process requirement of presenting a meaningful defense. Goodin clearly was entitled to his own expert to assist in whatever capacity his defense team deemed appropriate. The State doctors at the Mississippi State Hospital in Whitfield, Mississippi were not defense witnesses and thus not an adequate substitute for a defense expert.

Under *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), when an indigent defendant places his mental state at issue due process requires that the state provide a competent expert who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense. In short, the defendant is entitled to a defense expert. "The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution." *United States v. Sloan,* 776 F.2d 926,929 (10th Cir. 1985). *See Smith v. McCormick,* 914 F.2d 1153, 1157 (9th Cir. 1989) (holding the right to psychiatric assistance is not satisfied by appointing a "neutral" psychiatrist, but requires "the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate--including to decide, with the psychiatrist's assistance, not to present to the court particular claims of mental impairment.")

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.

Indeed, Goodin has a right to rebut or explain the evidence gathered by the state against him. *Gardner v. Florida*, 430 U.S. 349, 362 (1977), *Simmons v. South Carolina*, 512 U.S. 154, 161 (1994). In denying Goodin a defense expert, the Court denied Goodin the right to rebut the State's case. Without his own expert, Goodin was in no position to challenge the State's case or make objections. Due process requires that a court allow Goodin to make an adequate response to the State's evidence. *Panetti v. Quarterman*, 127 S.Ct. 2842, 2858 (2007); *Rivera v. Quarterman*, 505 F.3d 349,358 (5th Cir. 2007). In this case, that would mean the opportunity to present expert evidence explaining the flaws and oversights in the Whitfield report.

Recognizing the due process requirements, the Mississippi Legislature has provided that indigents seeking post-conviction relief are entitled to expert and investigative assistance if "reasonably necessary to adequately litigate the post-conviction claims." Miss. Code § 99-15-18(3); see also M.R.A.P. 22(c)(3) ("petitioner shall make a preliminary showing that such expenses are necessary to the presentation of his case and that they relate to positions which may reasonably be expected to be beneficial"). 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. 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 Whtifield, Mississippi.

On March 22, 2004, pursuant to an Order signed by Circuit Judge Marcus D. Gordon, Howard Goodin was evaluated by the staff at the Mississippi State Hospital in Whitfield, Mississippi. CP 36-40; R.E. 5-9 128-170; R.E. 42-84. Mr. Goodin was alone. Mr. Goodin's appointed counsel was not present for the evaluation. Mr. Goodin's lawyers were not allowed to be present. Mr. Goodin was denied his Sixth Amendment right to counsel during this evaluation. On January 23, 2003, Howard Goodin filed an Assertion of Right to Be Present and to Have Counsel Present. C.P. 63-67; R.E. 28-32.

In *Estelle v. Smith*, 451 U.S. 454 (1981), the United States Supreme Court held that both the Fifth and Sixth Amendments were violated when a mental health expert testified for the State on the basis of a psychiatric interview he conducted with the defendant without Miranda warnings to the defendant and without notice to defense counsel. The Court held that the defendant, in custody and being interviewed by a State actor, was entitled to Miranda warnings prior to the interview taking place. *Estelle*, 451 U.S. at 461-468. The Court also held that the psychiatric interview was a critical stage of the proceedings as to which Sixth amendment protections attached. *Id.* at 468-74.

In *Satterwhite v. Texas*, 486 U.S. 249, 254 (1988), the United States Supreme Court reaffirmed this sixth amendment protection, emphasizing that "for a defendant charged with a capital crime, the decision whether to submit to a psychiatric examination designed to determine his future dangerousness is literally 'a life or death matter' which the defendant should not be required to face without the 'guiding hand of counsel.' Like the determination of future dangerousness, the determination of mental retardation is a "life or death matter" which the defendant should not be required to face without the "guiding hand of counsel." Howard Goodin was denied his sixth amendment right when he was examined by the staff at the Mississippi State

Hospital without the presence of his attorney. Therefore, Mr. Goodin is entitled to a new evidentiary hearing.

E. The Circuit Court erred in relying on local rules that have not been approved by this Court to refuse 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 *Daubert* Motion challenging the qualifications of the staff of the Mississippi State Hospital at Whitfield. Robert 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 did not allow Robert Ryan to proceed on the *Daubert* Motion because, Ryan had not conducted the Judge or his office to schedule the hearing. R. 24.

Judge Gordon refused to let Goodin's lawyers proceed on their *Daubert* motion because they had not contacted his Court Administrator to put the motion on the hearing calendar. However, there is nothing in the Local Rules of the Eighth Circuit Court District requiring that action as a prerequisite to having a motion heard. Rule 83(b) of the Mississippi Rules of Civil Procedure requires that all local rules must be submitted to the Mississippi Supreme Court for approval before becoming effective. The Comment to MRCP 78 says that rules establishing procedure for motion hearings must be promulgated according to Rule 83. Rule 1.14 of the Uniform Rules of Circuit and County Court Practice uses even stronger language: "There shall be no local rules of court unless such rules are approved by the Supreme Court of Mississippi."

These rules were enacted because due process requires advance notice of the rules governing court procedure. The law is clear that a sudden change in procedure may constitute a denial of due process. *See National Ass'n for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958). Thus, it was improper for Judge Gordon to have blocked Robert Ryan from bringing his *Daubert* motion on for hearing.

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

The trial court failed to fully carry out the mandate of this Court. In it's decision regarding Mr. Goodin's post-conviction claim, this Court concluded, "We grant Howard Goodin's Application for Leave to File Petition for Post-Conviction Relief limited to the following issues: (1) mental retardation; (2) ineffective assistance of counsel on the issue of mental illness and (3) ineffective assistance of counsel on the issue of competency." *Goodin v. State*, 856 So.2d 267, 284 -85 (Miss. 2003).

On the issue of competency, the Court noted, "Goodin argues that 'when counsel had Mr. Goodin examined for competency to stand trial, the evaluator failed to take into account Mr. Goodin' s long-standing history of mental illness and dismissed his claims about hallucinations, finding him competent.'" *Goodin v. State*, 856 So.2d 267, 282 (Miss. 2003). This Court specifically held, "because this issue is so closely related to the issue of Goodin's mental illness, this Court finds that Goodin be granted leave to proceed in the trial court on this particular issue." *Goodin v. State*, 856 So.2d 267, 283 (Miss. 2003).

On remand, the trial court ordered the Mississippi State Hospital to conduct an evaluation of Mr. Goodin. C.P. 36-40; R.E. 5-9. However, the order did not require the Mississippi State Hospital to evaluate Mr. Goodin for his competency at the time of trial, rather it only directed it to evaluate competency at the present time. C.P. 36-40; R.E. 5-9. Thus, the trial court failed to fully carry out the mandate of this Court.

This Court has held, "The execution of orders issued by this Court is a purely ministerial act, and lower courts have no authority to alter or amend them." *Foster v. State*, 961 So.2d 670, 671-72 (Miss. 2007)(citing *Miss. Comm'n on Judicial Performance v. Sanders,* 708 So.2d 866, 874 (Miss.1998)). The principle stated in *Foster* is not new law.

> The decree was sent down to the Chancery Court *solely for execution;* and that court had no power to inquire whether that decree was erroneous for matter of fact existing at the time of its rendition, any more than it had power to pronounce it erroneous for matter of law. As to the enforcement of the decree as rendered, in obedience to the mandate of this court, the power of the chancellor was ministerial rather than judicial.

Henderson v. Winchester, 1856 WL 2600, 3 (Miss. Err. & App. 1856)(emphasis in original).

In 1932, the Court reaffirmed this principle in *Eastman-Gardiner Naval Store Co. v. Gregory*. There the Court held, "These statutes, and their predecessors, have been uniformly interpreted by this court to require a judgment rendered by it in dismissing an appeal, affirming a judgment of the court below, or reversing it and rendering such judgment as the court below should have rendered, to be enforced by the court from which the appeal came, after its certification thereto by the clerk of this court." *Eastman-Gardiner Naval Store Co. v. Gregory*, 139 So. 626, 626 (Miss. 1932)(citing *Morton v. Simmons*, 2 Smedes & M. 601; *Montgomery v. McGimpsey*, 7 Smedes & M. 557; *Mobile & O. R. Co. v. Watly*, 69 Miss. 475, 12 So. 558; *Ganong v. Jonestown*, 98 Miss. 265, 53 So. 594)).

Finally, in *Collins v. Acree*, 614 So.2d 391(Miss. 1993), the Court reiterated:

> From time immemorial, we have adhered to the basic and elementary rule that our appellate affirmance ratifies, confirms, and declares that the trial court judgment was correct as if there had been no appeal. Upon issuance of our mandate, the trial court simply proceeds to enforce the final judgment. **The execution of the mandate of this Court is purely ministerial.**

Collins v. Acree, 614 So.2d at 392 (citing *Denton v. Maples,* 394 So.2d 895, 897 (Miss.1981); Miss.Code Ann. § 11-3-41 (Supp.1991)(emphasis added)).

The trial court denied Goodin the right to a mental health expert C.P. 544, Thus, the only possible way to comply with the mandate, since Goodin's hands were tied, was for the trial court to order an evaluation. However, the trial court's order did not direct the Mississippi State Hospital to evaluate Mr. Goodin's competency at the time of trial, nor did the trial court make

any findings or issue any ruling regarding the same. Accordingly, the trial court did not fully comply with the mandate of this Court on remand, and the Court should reverse and remand with specific directions for the trial court to determine Mr. Goodin's competency at the time of trial.

CONCLUSION

Due to circumstances completely beyond his control, Mr. Goodin was denied a full and fair hearing. For this reason, Court should reverse and remand with specific directions for the trial court to determine 1) mental retardation; 2) ineffective assistance of counsel on the issue of mental illness 3) ineffective assistance of counsel on the issue of competency.

WHEREFORE PREMISES CONSIDERED, Howard Dean Goodin prays that the Court will grant Post-Conviction Relief and vacate his death sentence. In the alternative, he asks the Court to remand this matter to the Circuit Court for a new evidentiary hearing. If Howard Dean Goodin has prayed for improper or insufficient relief, then he prays for such to which he is entitled in the premises.

RESPECTFULLY SUBMITTED this the 18th day of November, 2008.

HOWARD DEAN GOODIN

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CERTIFICATE OF SERVICE

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

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This 18th day of November, 2008.

Stacy Ferraro