

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2009-CP-00064-COA

BILLY L. WARDLEY, JR.

APPELLANT

V.

STATE OF MISSISSIPPI, ET AL.

APPELLEES

BRIEF OF APPELLEES STATE OF MISSISSIPPI, ET AL.

**On Appeal from the Circuit Court of the First Judicial
District of Hinds County, the Honorable W. Swan Yerger**

Oral Argument Not Requested

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ORAL ARGUMENT IS NOT REQUESTED

STATEMENT OF ISSUES

1. Whether inmate Billy Wardley's civil action in which he seeks a declaration that he received ineffective assistance of counsel during his criminal trial, an order vacating his conviction, and a new criminal trial was properly recognized as a collateral attack on the constitutionality of his conviction governed by the exclusive and uniform procedures of the Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-1 *et seq.*

2. Whether Wardley's 2008 civil action alleging that he received ineffective assistance of counsel in 1995 is barred by all applicable statutes of limitations regardless of whether the claim is governed by the Uniform Post-Conviction Collateral Relief Act.

COMBINED STATEMENT OF THE CASE AND FACTS

Plaintiff Billy L. Wardley Jr. is an inmate in the Wilkinson County Correctional Facility. Wardley was tried and convicted in the Circuit Court of Franklin County for the sale of a controlled substance. *See Wardley v. State*, 760 So. 2d 774, 776 (Miss. App. 2000). He was sentenced as a habitual offender to a term of thirty years. *Id.* On appeal, Wardley's new attorney argued, *inter alia*, that he received ineffective assistance of counsel from his public defender. *Id.* at 777-780. The Mississippi Court of Appeals rejected that contention and affirmed his conviction. *Id.* In May 2008, some thirteen years after his original conviction, Wardley filed this "petition to show cause" in the Circuit Court of Hinds County naming as defendants the State of Mississippi, Governor Haley Barbour, and Attorney General Jim Hood (collectively, "the State"). Wardley's "petition" reargues the same ineffective assistance argument rejected by the Court of Appeals and seeks in relief a declaratory judgment that he was denied effective assistance of counsel, an order vacating his conviction, a declaratory judgment that the current public defender

statutes result in ineffective assistance, and an order requiring that he be retried “under a new legislative [sic] established statewide, state funded system of indigent criminal defense.” *See* Petition at ¶ 8, R. 13; ¶ 15, R. 14.; ¶ 17, R. 15; ¶18, R. 15.

A. Wardley’s Criminal Conviction in Franklin County and Direct Appeal Regarding Ineffective Assistance of Counsel.

As set forth in *Wardley v. State*, Wardley was indicted in April 1995 for the sale of a controlled substance after he sold crack cocaine to an undercover agent working with the Mississippi Bureau of Narcotics. 760 So.2d at 776. Wardley was found guilty by a jury in Franklin County Circuit Court. *Id.* Wardley was represented at trial by public defender Leonard H. Rosenthal. *See* Petition at p. 12, R.11.¹ On appeal, Wardley was represented by Pamela A. Ferrington. *See* 760 So.2d at 775. Wardley’s appellate attorney asserted that the trial and conviction violated Wardley’s constitutional rights because, among other alleged deficiencies, (1) he was denied effective assistance of counsel when his trial attorney failed to object to the State’s juror challenges, and (2) he was denied effective assistance of counsel when his trial attorney failed to submit a proposed jury instruction regarding eyewitness identification. *Id.* at 775. The Mississippi Court of Appeals reviewed each of these allegations and affirmed Wardley’s conviction. *Id.* at 780.

As a result of his conviction, Wardley was sentenced to thirty years without early release and remains an inmate in the Wilkinson County Correctional Facility. *See* Petition at “Statement of Facts” at p.10, R.9; Appellant’s Br. at 6.

B. Wardley’s “Petition” in Hinds County Circuit Court Collaterally Attacking the Constitutionality of His Criminal Conviction and Sentence.

¹ Citations to the petition include a reference to either the page or paragraph number included on the petition by Wardley (p. or ¶) and the page in the appellate record (R.).

On June 2, 2008, Wardley filed a “Petition for Order to Show Cause” in the Hinds County Circuit Court naming as defendants the State of Mississippi, Governor Haley Barbour, and Attorney General Jim Hood. *See* Complaint, R. 9. Wardley’s civil action directly challenges the constitutionality of his conviction and sentencing in Franklin County Circuit Court. Wardley’s petition alleges (or re-alleges, in light of his criminal appeal) that he was denied effective assistance of counsel at trial by his public defender. In relief, Wardley seeks a declaratory judgment that he was denied effective assistance of counsel, an order vacating his conviction, a declaratory judgment finding that the current county-based system causes ineffective assistance of counsel, and an order requiring that he be retried “under a new legislative [sic] established statewide, state funded system of indigent criminal defense.” *See* Petition at ¶ 8, R. 13; ¶ 15, R. 14.; ¶ 17, R. 15; ¶18, R. 15.

Specifically, the petition recites that United States and Mississippi Constitutions require the State to provide effective assistance of counsel to indigent criminal defendants and “that in 1995 [Wardley] was in danger and sustained real and immediate injury to his right to counsel and other rights resulting from” his conviction. *See* Petition “Statement of Claims” at ¶ B, R. 9. Wardley resurrects his previously unsuccessful allegation that his public defender provided ineffective assistance of counsel because the public defender failed to raise a *Batson* challenge during jury selection. *See id.* at R. 10. Wardley also contends that his public defender was “unprepared and overworked” and without adequate resources during his trial. *See id.* at ¶ 3, R. 11. Wardley also asserts that the amount of compensation paid to his public defender resulted in effective assistance of counsel. *See id.* at ¶ 11, R.14.

Based on these allegations, Wardley’s “petition” before the Hinds County Circuit Court asserts that “this Court must conclude, here, that petitioner was being unconstitutionally deprived

of his right to effective assist[ance] of counsel.” ¶ 18, R. 15. The petition further alleges that “[t]his court should also conclude that had petitioner been afforded well compensated representation at all phases of this case, it is clear within the realm of possibility that he would have been found not guilty or it is almost undeniable, that he would not have been sentenced so severely.” ¶ 18, R. 15. The petition further contends that the fact alleged “requires reversal of [his] conviction unless the defendants/Respondents demonstrate that the error was harmless.” ¶ 15, R. 14.

In relief, Wardley requests, among other items, that the Hinds County Circuit Court determine that the State “failed in its duty to provide effective indigent defense to Petitioner in 1995.” Petition at ¶ 8, R. 13. Wardley requests that the Hinds County Circuit Court (rather than the Franklin County Circuit Court) “retain jurisdiction over Mr. Wardley and retry him under a new legislative [sic] established statewide, state funded system of indigent criminal defense.” *Id.* at ¶ 8, R. 13; ¶ 17, R. 15.

C. Disposition of the Petition by the Hinds County Circuit Court.

The State Defendants’ motion to dismiss Wardley’s petition was granted by the Hinds County Circuit Court. The lower court’s order listed five reasons why Wardley’s complaint should be dismissed: (1) Wardley’s claims are a collateral attack on his conviction and he failed to follow the exclusive requirements of the Uniform Post-Conviction Collateral Relief Act (“UPCCRA”), Miss. Code Ann. § 99-39-7; (2) Wardley’s claims are barred by the statute of limitations; (3) the Mississippi Supreme Court has already reviewed the constitutionality of the public defender “system”; (4) Wardley’s claims under 42 U.S.C. § 1983 are not actionable under *Heck v. Humphrey*, 512 U.S. 477 (1994); and, finally, (5) the defendants are immune from any monetary claims. *See* Order, R. 58-60. Wardley filed a timely notice of appeal and this

proceeding ensued.

SUMMARY OF THE ARGUMENT

Inmate Billy Wardley's "petition to show cause" seeks a declaration that he received ineffective assistance of counsel during his criminal trial, an order vacating his conviction, an order declaring the public defender statutes to be unconstitutional, and an order providing him a new criminal trial. Wardley's petition is clearly a collateral attack on the constitutionality of his criminal conviction. The plain language of the Mississippi Uniform Post-Conviction Collateral Relief Act declares that the UPCCRA shall be the "exclusive and uniform procedure for the collateral review of convictions and sentences." Miss. Code Ann. § 99-39-3(1). This Court has previously recognized the broad scope of the UPCCRA in directing that "[r]egardless of label, matters cognizable under the post-conviction relief statutes should be decided under those rules and limitations." *See Edmond v. State*, 845 So.2d 701, 702 (Miss.App. 2003). The Hinds County Circuit Court correctly determined that Wardley's petition was governed by, and properly dismissed pursuant to, the exclusive and uniform procedures of the UPCCRA. Specifically, Wardley failed to secure leave from the Supreme Court to initiate this collateral challenge to his conviction as required by Section 99-39-7.

Further, regardless of whether this petition is governed by the UPCCRA, Wardley's civil action is barred by all applicable statutes of limitations. Wardley contends that he was denied effective assistance of counsel during his 1995 criminal trial. Having filed this petition in 2008, some thirteen years have passed since his alleged injury. The Hinds County Circuit Court correctly determined that his claim would be barred by any applicable statute of limitations.

ARGUMENT

I. The Appellate Standard of Review.

The legal conclusions in the circuit court's order of dismissal are reviewed *de novo* by this Court. *See Willis v. State*, 950 So.2d 200, 201 (Miss.App. 2006) (*de novo* review of legal conclusions when reviewing claims subject to UPCCRA); *Chitty v. Terracina*, 16 So.3d 774, 777 (Miss.App. 2009) (legal conclusions in Rule 12(b) dismissals are reviewed *de novo*).

II. Wardley's Petition Was Properly Dismissed Pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA).

Wardley's self-styled "petition to show cause" seeking a determination that he received ineffective assistance of counsel and seeking in relief of an order vacating his criminal conviction and providing a new criminal trial is clearly a collateral attack on the constitutionality of his criminal conviction and, as a collateral attack, it is governed by the Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA), Miss. Code Ann. § 99-39-1 *et seq.* The UPCCRA's purpose is to "revise, streamline and clarify the rules and statutes pertaining to post-conviction collateral relief law and procedures . . . and to provide the courts of this state with an **exclusive and uniform procedure for the collateral review of convictions and sentences.**" Miss. Code Ann. § 99-39-3(1) (emphasis supplied). A prisoner asserting in state court that his conviction was obtained in a manner that violated the state or federal constitutions **must** assert those claims through two procedures: the direct appeal of his conviction or a collateral action pursuant to the UPCCRA. *See* Miss. Code Ann. § 99-39-5(1)(a) (addressing UPCCRA) & 99-39-5(3) (addressing direct appeal). Wardley's direct appeal having been decided, *see Wardley v. State*, 760 So. 2d 774 (Miss.App. 2000), his petition in the Circuit Court of Hinds County must be governed by procedures and limitations of the UPCCRA. Because Wardley did not follow the

jurisdictional requirements of the UPCCRA, the Hinds County Circuit Court correctly dismissed this matter for a lack of jurisdiction.

A. Wardley's Allegation of Ineffective Assistance of Counsel is a Collateral Attack on the Constitutionality of his Conviction and is Governed by the UPCCRA.

There are two issues for resolution by this Court: First, is Wardley's contention that he received ineffective assistance of counsel during his criminal trial and his request to vacate his conviction cognizable under the UPCCRA. If so, may Wardley circumvent and nullify the exclusivity and uniformity provisions of the UPCCRA by styling his "petition" as a request for a declaratory judgment or by attaching other extraneous and meritless requests for relief.

1. Wardley's Contentions and Requested Relief are Cognizable Under the UPCCRA.

First, it is absolutely clear that the UPCCRA applies to Wardley's contention that his criminal conviction is unconstitutional because he received ineffective assistance of counsel. Further, it is equally clear that the UPCCRA applies to Wardley's requested relief of an order vacating his conviction and a new trial. By its terms, the UPCCRA governs any collateral attack on a criminal conviction by an current inmate. The act states in relevant part:

(1) Any prisoner in custody of a court of record of the State of Mississippi who claims:

(a) That the conviction or the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of Mississippi;

* * *

(c) That the statute under which the conviction and/or sentence was obtained is unconstitutional;

* * *

(I) That the conviction or sentence is otherwise subject to collateral attack upon any grounds of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy;

may file a motion to vacate, set aside or correct the judgment or sentence, or for an out-of-time appeal.

Miss. Code Ann. § 99-39-5. Wardley is a prisoner in the custody of a court of record of the State of Mississippi, thereby satisfying Section 99-39-5(1). *See* Petition at p. 10, R. 9. Wardley's petition asserts that his conviction was in violation of the federal and state Constitutions because he was provided constitutionally ineffective assistance of counsel, thereby satisfying Section 99-39-5(1)(a). *See* Petition at ¶18, R. 15; ¶ 8, R. 13. Wardley further asserts that the statutes through which he was provided a public defender are unconstitutional, which itself is a claim that would be governed by Section 99-36-5(1)(c) or (I). Finally, the petition's request that the circuit court vacate his conviction and "retry him" are clearly the types of relief cognizable under Section 99-39-5(1)'s "motion to vacate, set aside or correct judgment or sentence, or for an out-of-time appeal." *See* Petition ¶ 15, R. 14; ¶ 8, R. 13; ¶ 17, R. 15. Indeed, it is hardly disputable that UPCCRA governs the ineffective assistance of counsel claims and relief sought by Wardley. *See e.g., Belk v. State*, 8 So.3d 272, 275 (Miss.App. 2009) (addressing ineffective assistance claim under UPCCRA); *Bliss v. State*, 2 So.3d 777, 780 (Miss.App. 2009) (same).

In fact, Wardley's petition is a classic "collateral attack" on the validity of his conviction that is governed by the UPCCRA. *See* Miss. Code Ann. § 99-39-3(1) (UPCCRA governs "the collateral review of convictions"). The direct review of Wardley's conviction occurred during his direct appeal. *See Wardley*, 760 So. 2d 774. Now, Wardley has filed a subsequent civil action in which he asks the Hinds County Circuit Court to declare that Wardley received ineffective assistance of during his criminal trial in the Franklin County Circuit Court. By

definition, a “collateral attack” on a conviction occurs when a prisoner seeks “to impeach the validity or binding force of the judgment or decree as a side issue or in a proceeding instituted for some other purpose.” *See* Black’s Law Dictionary, definition of “direct attack” (6th ed. 1991). Wardley’s petition clearly seeks to undermine his criminal conviction by alleging that the system and statutes under which he was provided a public defender resulted in him receiving ineffective assistance of counsel during his criminal trial. In other words, for Wardley to prevail in this petition, the trial court would have to determine that Wardley’s constitutional right to effective assistance of counsel was violated in his 1995 criminal trial. Indeed, Wardley’s petition acknowledges that this proceeding is a collateral attack – if not a direct attack – on the constitutionality of his conviction when it states that the facts alleged “**requires** reversal of [his] conviction unless the defendants/Respondents demonstrate that the error was harmless.” *See* Petition at ¶ 15, R. 14 (emphasis supplied). The petition’s request that the circuit court “retain jurisdiction over Mr. Wardley and **retry him** under a new legislative [sic] established statewide, state funded system of indigent criminal defense” leaves no doubt that this action is an attack on his current conviction. *Id.* at ¶ 8, R. 13; ¶ 17, R. 15. In sum, Wardley’s claims and the relief sought are clearly the types of claims and relief traditionally and properly brought by prisoners under the UPCCRA.

2. A Prisoner’s Claims That are Cognizable Under the UPCCRA Must be Brought Pursuant to the UPCCRA.

Given that Wardley’s claims and requested relief are clearly cognizable under the UPCCRA, Wardley may not circumvent the exclusive procedures, requirements, and limitations of the UPCCRA by arguing that his “petition” merely seeks a declaratory judgment or by arguing that he is also seeking other extraneous and meritless relief, such as a declaration regarding the

constitutionality of statutes. By its plain terms, the UPCCRA is the **“exclusive and uniform procedure** for the collateral review of convictions.” Miss. Code Ann. § 99-39-3(1) (emphasis supplied). Wardley is not the first prisoner to attempt to evade the limitations of the UPCCRA through creative pleading, nor will he be the last. This Court has recognized that when a prisoner files a civil action alleging that his criminal conviction was constitutionally flawed, that action is governed by the UPCCRA regardless of how the prisoner characterizes the matter. *See Fielder v. State*, 3 So.3d 175, 176 (Miss.App. 2009) (finding that “Motion for Immediate Release from the Department of Corrections” was a collateral challenge governed by UPCCRA). To avoid the very procedural arguments raised by Wardley in this matter, this Court has expressed in no uncertain terms that **“[r]egardless of label, matters cognizable under the post-conviction relief statutes should be decided under those rules and limitations.”** *Edmond v. State*, 845 So.2d 701, 702 (Miss.App. 2003) (emphasis supplied) (“Edmond's substantive claim attacking the underlying indictment was properly construed by the trial court as a ‘purely collateral post-conviction remedy’ and is therefore governed by the [UPCCRA]”).

When a prisoner asserts a constitutional defect in his conviction and seeks a new trial, the UPCCRA governs and the “character of the proceeding cannot be unilaterally changed by [the prisoner] simply by the name he chooses to attach to his pleading.” *Maston v. State*, 768 So.2d 354, 355 (Miss.App. 2000). It is the nature of the claims that determine the applicability of the UPCCRA. As this Court has noted in a similar context, “Trotter's request for relief, in essence, is simply a challenge to the validity of his life sentence. Therefore, Trotter's request for relief is a motion for post-conviction relief.” *Trotter v. State*, 907 So.2d 397, 400 (Miss.App. 2005). Regardless of whether the relief is phrased as one of a “declaratory judgment” or “motion for immediate release,” attacks on the constitutionality of ones conviction are governed by, and

subject to the limitations of, the UPCCRA. *See Milam v. State*, 578 So.2d 272, 273 (Miss. 1991) (“He presents a claim cognizable under our post-conviction relief act. Miss.Code Ann. § 99-39-5(1)(d) and (g) (Supp.1990). His suit asks for a declaratory judgment. Rule 57, Miss.R.Civ.P.”); *Fielder*, 3 So.3d at 176 (finding “motion for immediate release” to be governed by UPCCRA).

In light of the foregoing well established law, Wardley seeks to avoid the “exclusive and uniform” procedures of the UPCCRA through a series of factually or legally incorrect contentions. First, Wardley states: “Appellant did not challenge his convictions no where [sic] in his filing(s).” Appellant Br. at 15. In fact, Wardley’s petition and his brief to this Court directly challenge the constitutionality of his conviction. Wardley’s petition alleges that his public defender provided ineffective assistance of counsel during his 1995 criminal trial. *See* Petition at p. 11-12; R.10-11. The petition alleges that the State “failed in its duty to provide effective indigent defense to Petitioner in 1995.” *Id.* at ¶ 8, R. 13. The petition contends that “if this Court finds that he has demonstrated error due to funding and resource deficiencies, this requires reversal of the conviction unless the defendants/Respondents demonstrate that the error was harmless.” *Id.* at ¶ 15, R. 14. Wardley requested that the Hinds County Circuit Court “retain jurisdiction over Mr. Wardley and retry him under a new legislative [sic] established statewide, state funded system of indigent criminal defense.” *Id.* at ¶ 8, R. 13; *see also id.* at ¶ 17, R. 15. Further, Wardley’s appellate brief is rife with allegations (and requests for this Court to so hold) that he received ineffective assistance of counsel in 1995. *See e.g.*, Appellant’s Br. at 21-22 (“Appellant contends that trial counsel was not able to provide him with reasonable effective assistance of counsel”); *see also* Appellant Br. at 5-7, 11, 17, 20. It is simply undeniable that Wardley’s petition challenges the constitutionality of his criminal conviction.

Next, Wardley contends that the UPCCRA does not apply because – in addition to seeking an order vacating his conviction and a new trial – Wardley says he is also challenging the constitutionality of the statutes governing the public defender system. *See* Appellant Br. at 11. First, the UPCCRA explicitly permits prisoners to contend that “the statute under which the conviction and/or sentence was obtained is unconstitutional.” Miss. Code Ann. § 99-39-5(1)(c). Further, if Wardley is correct that the operation of the statutes deprived him of a constitutional right and therefore invalidates his conviction, that contention is also cognizable under the UPCCRA’s catch-all provision permitting challenges to a conviction “upon any grounds of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy”. Miss. Code Ann. § 99-39-5(1)(I). Second, Wardley misconstrues the issue and confuses the cause with the effect. For the purposes of the UPCCRA, it does not matter that Wardley has alleged that the public defender statutes “caused” him to receive ineffective assistance of counsel or whether the alleged ineffectiveness resulted from simple public defender incompetence, what matters is that Wardley has alleged that his conviction was obtained as a result of ineffective assistance of counsel “in violation of the Constitution of the United States or the Constitution or law of Mississippi” and that claim must be brought pursuant to UPCCRA. *See* Miss. Code Ann. § 99-39-5(1)(a).² In sum, Wardley cannot circumvent the UPCCRA when his petition seeks a determination that his constitutional

² For example, for the purposes of the UPCCRA, it would not matter if Wardley alleged that the statutes governing the jury pool or the rules governing jury selection resulted in a violation of his constitutional rights. The UPCCRA governs **any** claim by a prisoner that his conviction was in violation of the constitution, regardless of whether the constitutional deficiency was caused by a statute, a rule, or the actions of the judge, jury, prosecutor, or defense counsel. The UPCCRA governs any claim regarding the constitutional infirmity of a prisoner’s conviction and such is especially so when the prisoner seeks an order vacating his conviction and a setting a new trial.

right to effective assistance of counsel was violated and further seeks an order vacating his conviction and a new trial.

B. Wardley's Attempt to Recast His Petition as Merely a Generalized, Prospective Challenge to the Public Defender System is Irrelevant and Meritless.

Wardley now argues to this Court that the UPCCRA does not apply because his petition is only a "prospective challenge" to the "indigent defense system." Appellant Br. at 18. This contention is both contradicted by the petition itself and, even if true, would not save his petition from dismissal. As an initial matter, the petition is clearly not a prospective challenge when it seeks the retrospective relief of a declaratory judgment that Wardley received ineffective assistance of counsel in 1995 and further seeks an order vacating his conviction and granting him a new criminal trial.

Further, even if the petition did seek solely prospective relief, Wardley's alleged generalized and prospective challenge to the current public defender statutes would be subject to dismissal. First, Wardley's alleged prospective challenge does not meet the most basic requirements for a proper declaratory judgment under Rule 57. A declaratory judgment is appropriate only when there exists an "actual controversy" between the parties that has not reached the stage where either party could seek a coercive remedy. *See* Miss. R. Civ. P. 57, cmt. There is no "actual controversy" between Wardley and the State regarding the future (or "prospective") application of the public defender statutes to Wardley. Wardley does not allege that the public defender statutes will be applied to him in the future; Wardley does not allege that he is under indictment for a crime or that he is likely to be subject to a criminal trial in the near future in which he will need a public defender. As our courts have recognized regarding declaratory judgment under Rule 57,

Distinct from the typical thresholds of personal and subject matter jurisdiction, claims must present “controversies that are definite and concrete, that touch the relations of real parties having antagonistic interests.” 1 Jeffrey Jackson, Mississippi Civil Procedure § 1:21 (1999). As stated by our supreme court, “[i]t is one of the fundamentals of judicial procedure that courts will not undertake to decide abstract questions when there is no actual justiciable issue between the purported litigants.” *Ladner v. Fisher*, 269 So.2d 633, 634 (Miss.1972). One component of a justiciable claim is ripeness.

Swaney v. Swaney, 962 So.2d 105, 107 -108 (Miss.App. 2007). In this matter, there is no “actual controversy” regarding any **prospective** application of the public defender statutes to Wardley **and** any controversy that does exist regarding whether Wardley received ineffective assistance of counsel in 1995 is a claim that is exclusively governed by the UPCCRA. Thus, Wardley’s claim to “prospective” relief, even if true, does nothing to save this petition from dismissal.

Further, even if there was an “actual controversy” between Wardley and State regarding the public defender statutes, whether to grant declaratory relief under Rule 57 is a matter left to the discretion of the trial court. *See* Miss. R. Civ. P. 57(a) (“Courts . . . may declare rights, status, and other legal relations . . .”). A prospective challenge of the nature now argued to this Court (but not pled in the petition) is inappropriate for two reasons. First, the constitutional effectiveness of counsel is a factually dependent determination that requires the examination of particular acts of a public defender. *See e.g., Bowling v. State*, 12 So.3d 607, 609 (Miss.App. 2009) (applying the *Strickland v. Washington* standard). Wardley’s generalized challenge to the application of the public defender statutes in the future lacks the requisite factual specificity to be justiciable. Second, the effectiveness of counsel is routinely challenged by criminal defendants in their individual cases, either on direct appeal or through the UPCCRA. Wardley’s alleged prospective challenge to statutes that may never be applied to him in the future is rightfully denied when the effectiveness of criminal defense counsel is going to be properly scrutinized in

numerous future cases by indigent criminal defendants. *Cf. Board of Trustees of State Institutions of Higher Learning v. Ray*, 809 So.2d 627, 632 (Miss. 2002) (“Constitutional litigation by private citizens may be maintained in cases where there is no probability of the statute being challenged by one of the class discriminated against. . .”). In other words, whether the public defender statutes result in ineffective assistance of counsel for future criminal defendants is best litigated by those actual future criminal defendants and not by Mr. Wardley.

C. Wardley’s Collateral Attack on the Constitutionality of his Conviction was Properly Dismissed Pursuant to the UPCCRA.

The UPCCRA contains important jurisdictional requirements on where and when an inmate may seek to collaterally attack the constitutionality of his conviction. Section 99-39-7 provides that the collateral attack is to be filed as an “original civil action in the trial court” in which the prisoner was convicted. *See* Miss. Code Ann. § 99-39-7; *see Stanley v. Turner*, 846 So.2d 279 (Miss.App. 2003) (affirming dismissal of inmate suit brought in trial court other than the trial court of conviction). However, more relevant to this petition, Section 99-39-7 further provides that if the prisoner’s conviction has been affirmed on appeal, he must seek leave from the Supreme Court before initiating his UPCCRA action. As this Court has recognized, obtaining leave is a jurisdictional prerequisite. “A prisoner whose conviction and sentence have been affirmed on appeal must therefore seek leave of the supreme court to proceed on post-conviction relief in the trial court. Absent such permission, the trial court is without jurisdiction to hear a motion for post-conviction relief.” *Peterson v. State*, – So.2d –, 2009 WL 3086450, 1 (Miss.App. 2009). It is undisputed that Wardley neither obtained permission from the Supreme Court to file a UPCCRA action nor did Wardley file this action in the trial court of his conviction. Accordingly, the Hinds County Circuit Court properly dismissed this collateral

attack on the constitutionality of Wardley's criminal conviction for a lack of jurisdiction.

III. Wardley's Claims are Barred by All Applicable Statutes of Limitations.

Regardless of whether his claim is governed by the UPCCRA, Wardley's petition is barred by all applicable statutes of limitations. Wardley's purported injury – the deprivation of his constitutional right to effective counsel – is alleged to have occurred during his 1995 criminal trial. *See* Appellant Br. at 6. Wardley's "petition to show cause" was filed in 2008, some thirteen years later. Wardley can identify no applicable statute of limitations that would permit him to litigate an alleged injury that occurred thirteen years ago. *See* Miss. Code Ann. § 15-1-49 (Mississippi's three year general statute of limitations); Miss. Code Ann. § 11-46-11 (Mississippi's one year tort claims act statute of limitations); *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (three year statute of limitations in Section 1983 claims).

IV. Wardley's Statement That He is Not Asserting a Claim Under 42 U.S.C. § 1983 or Seeking Monetary Damages Simplifies this Appeal.

Wardley's statement to this Court that he is not asserting a claim under 42 U.S.C. § 1983 nor is he seeking monetary damages eliminates several issues from this appeal. First, Wardley's statement that he is not seeking monetary relief avoids the necessity of considering the immunity claims of the State defendants.

Second, Wardley informs this Court that he "did not file a 42 U.S.C. § 1983" claim. *See* Appellant's Br. at 11 (emphasis in original). Having disavowed a Section 1983 claim, Wardley's allegations regarding violations of the federal Constitution's guarantee of effective counsel are properly dismissed.³ Under established federal law, there are no direct causes of action under the

³ Under a properly initiated UPCCRA action, Wardley can assert that his conviction violated the federal Constitution. *See* Miss. Code Ann. 99-39-5(1)(a). If the UPCCRA does not apply, Wardley's failure to assert his federal constitutional claims through Section 1983 would

federal Constitution against state officials; claims that a state actor violated the federal Constitution **must** be brought pursuant to 42 U.S.C. § 1983. The “means of seeking relief against state officials who violate the [federal] Constitution” is through a Section 1983 action. *Dean v. Gladney*, 621 F.2d 1331, 1337 n.14 (5th Cir. 1980). There are no causes of action directly under the federal Constitution against state officials. See *Shelby v. McAdory*, 781 F.2d 1053, 1054 n. 1 (5th Cir.1986), *overruled on other grounds by St. Francis College v. Al-Khazraji*, 481 U.S. 604, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987) (“[C]auses of action asserted directly under the constitution are appropriate only against federal agents.”); *Personal Care Products, Inc. v. Hawkins*, 2009 WL 2406253, 5 (W.D.Tex.,2009) (“The law is clear that a suit alleging federal constitutional claims against state actors may only be brought pursuant to the provisions of 42 U.S.C. § 1983. . . .”); *Bates v. University of Tex. Medical Branch*, 425 F.Supp.2d 826, 840 (S.D.Tex. 2003). Simply stated,

“42 U.S.C. § 1983 is the necessary vehicle through which a plaintiff must assert a Constitutional claim. If the plaintiff does not assert 42 U.S.C. § 1983, the plaintiff’s federal Constitutional claims should be dismissed.” *Hunt v. Smith*, 67 F.Supp.2d 675, 681 (E.D.Tex.1999); *also Hearth, Inc. v. Department of Public Welfare*, 617 F.2d 381, 382 (5th Cir.1980) (“[T]he federal courts, and this Circuit in particular, have been hesitant to find causes of action arising directly from the Constitution.”).

Garrett v. Dallas Public Schools, 1999 WL 1212859, 2 (N.D.Tex.,1999). Thus, when Wardley informed this Court that he is foregoing a claim under Section 1983, his federal constitutional arguments necessarily fail.

In the alternative, as found by the lower court, if Wardley was to assert a federal constitutional claim under Section 1983, that claim would be barred by *Heck v. Humphrey*, 512

result in dismissal of his federal claims.

U.S. 477 (1994). *Heck* provides that before a plaintiff may assert a tort claim based on an allegedly unconstitutional conviction or imprisonment, “the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.” *Id.* at 486-487 (footnote omitted). *Heck* “avoids parallel litigation over the issues of probable cause and guilt...and it precludes the possibility of the claimant...succeeding in the tort action after having been convicted in the underlying criminal prosecution.” 512 U.S. at 484. *Heck* applies to constitutional claims brought under Section 1983. *See McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1097 n.4 (9th Cir. 2004); *see also Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000) (holding that when state-law claims are based on the same premise as constitutional claims under 42 U.S.C. § 1983, *Heck* will also bar relief). *Heck* also applies to claims of declaratory relief. *See Edwards v. Balisok*, 520 U.S. 641, 648 (1997).

V. Affirming the Continued Application of the UPCCRA to Claims Like Those Presented by Wardley is Required by the Plain Language and Policy of the UPCCRA.

The outcome of this matter is clearly dictated by the plain language of Section 99-39-3(1) declaring that the UPCCRA shall be the “exclusive and uniform procedure for the collateral review of convictions and sentences,” and by the previous decisions of this Court holding that “[r]egardless of label, matters cognizable under the post-conviction relief statutes should be decided under those rules and limitations.” *See Edmond v. State*, 845 So.2d 701, 702 (Miss.App. 2003). Nonetheless, it is worth mentioning that the continued application of the UPCCRA to creatively styled civil petitions filed by inmates vindicates an important public policy implemented by the legislature, a public policy also recognized by the United States Supreme

Court in *Heck v. Humphrey*, 512 U.S. 477 (1994). As set forth above, the federal courts have long recognized that inmates, once their traditional avenues of review have been exhausted, have been known to initiate civil lawsuits seeking declaratory or other relief premised on the argument that they were denied a constitutional right during their criminal proceeding. Recognizing the nature and goal of such civil suits, *Heck* instructed federal courts (and state courts reviewing Section 1983 claims) to “consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.” *Id.* at 486-487 (footnote omitted). Both the UPCCRA and *Heck* declare that traditional civil lawsuits are not vehicles to directly or collaterally review the constitutionality of criminal convictions.

CONCLUSION

For the foregoing reasons, the Defendants-Appellees pray that this Court will affirm the order of the Circuit Court dismissing the Plaintiff-Appellant's claims in this matter.


Submitted, this the 16th day of October, 2009 .

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

STATE OF MISSISSIPPI

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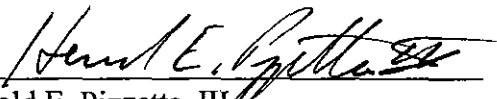
CERTIFICATE OF SERVICE

This is to certify that I, Harold E. Pizzetta, III, Special Assistant Attorney General for the State of Mississippi, have this date mailed via United States mail, postage fully prepaid, a true and correct copy of the foregoing *Brief of Appellees* to the following:

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Honorable W. Swan Yerger
Circuit Court Judge
Post Office Box 327
Jackson, Mississippi 39205

This the 16th day of October, 2009.



Harold E. Pizzetta, III