

IN THE SUPREME COURT OF MISSISSIPPI

No. 2010-CA-00814

STEVE KNOX, et al.

APPELLANTS

versus

THE STATE OF MISSISSIPPI,

APPELLEE

**APPEAL FROM THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY,
MISSISSIPPI**

REPLY BRIEF OF APPELLANTS

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ARGUMENT IN REBUTTAL

I. INTRODUCTION

Appellants properly brought a claim for relief in Chancery Court based on the State's deliberate interference with their rights to competent and conscientious counsel in post-conviction proceedings. In response, the State clumsily attempts to mischaracterize Appellants' claims. Only by doing so can it make the otherwise inapposite argument that the Chancery Court does not have subject matter jurisdiction. The State asserts that Appellants have no remedy in *any* court even if the State deliberately and systemically undermined their post-conviction representation in case after case. By now arguing that the Chancery Court lacks jurisdiction, the State aims to avoid once again any judicial accountability for its actions denying Appellants' fundamental rights under Mississippi law.

The State's position is not and cannot be the law in Mississippi. First and foremost, after the passage of the Mississippi Capital Post-Conviction Counsel Act, Miss. Code Ann. § 99-39-101 et seq. ("the MCPCCA" or "the Act"), it is no longer debatable whether there is a right to post-conviction counsel in death penalty cases. Moreover, this Court has held and recently reaffirmed that the appellate process includes post-conviction proceedings in capital cases. *Jackson v. State*, 732 So.2d 187, 189 (¶ 5) (Miss. 1999); *accord Chamberlin v. State*, No. 2008-DR-01690-SCT, 2010 WL 4484614, at *1 (¶ 3) (Miss. Nov. 10, 2010). To ensure Appellants' right to meaningful access to a fair judicial process, this Court and the Mississippi legislature guaranteed that Appellants would receive competent and conscientious post-conviction counsel. *State v. Puckett*, 834 So.2d 676, 680 (¶ 16) (Miss. 2002).

The State, however, broke this promise and undertook to cripple the MOCPC. As a direct result of the State's interference, the state-provided attorneys from the Mississippi Office of Capital Post-Conviction Counsel ("MOCPC"):

- (1) failed to develop and present credible evidence of innocence or whether the petitioner was the actual killer;
- (2) failed to develop and present potentially exculpatory DNA evidence;
- (3) failed to conduct any meaningful investigation into the guilt or mitigation phases of the trial;
- (4) failed to develop and present expert evidence of mental retardation or mental illness;
- (5) provided no affidavits or admissible evidence to support its claims of ineffective assistance of counsel;
- (6) failed to obtain the assistance of appropriate expert witnesses to support critical issues; and
- (7) submitted improper hearsay affidavits from its own staff that were inadmissible and not considered by the Court.¹

The State cannot contend legitimately that it is just coincidence that all of MOCPC's pleadings in these cases suffer from the same deficiencies. Rather, these opinions prove that a system-wide violation of the State Constitution and the MCPCCA occurred because the State failed to meet its obligation to provide "competent and conscientious" counsel to Appellants. The Court's opinions also prove that the State's interference with MOCPC caused these systemic Constitutional and statutory violations by restricting the hiring of private counsel, disciplining Directors for filing motions for extensions, and hiring unqualified lawyers.

To prevent the State from benefitting from its own misconduct, Appellants filed this lawsuit in Chancery Court seeking declaratory and injunctive relief to obtain what state law promises them: a meaningful opportunity to *seek* post-conviction relief. This lawsuit does not

¹ Details about the cases of each of the Appellants are summarized in the Appendix to their initial brief to this Court.

request that Appellants' convictions or sentences be vacated; nor does it seek the adjudication of any substantive ground for relief in their individual cases. In response, the State falsely accuses Appellants of seeking to have a Chancery Court interfere with ongoing criminal proceedings and misconstrues Appellants' argument as an effort to have the Chancery Court review this Court's prior decisions. The State suggests that Appellants could seek relief with individual successive post-conviction petitions, but that approach precludes Appellants from addressing the systemic violation present here.

The State claims that the separation of powers claim is moot, a patently fallacious argument made in an attempt to evade judicial scrutiny. Such an argument simply conveniently ignores the constitutional error that occurred when the Judicial Department had authority over MOCPCC, a wrong not only uncontroverted and ignored by the State but also one for which the State believes no remedy should ever exist.

The State further contends incorrectly that this suit is barred by a statute of limitations. No Mississippi authority exists to support the State's contention that a statute of limitations should apply in a case for injunctive relief based on State constitutional violations. Assuming that a three-year statute of limitations should apply as the State suggests, that statute did not begin to run until 2008 at the earliest when the Fifth Circuit rejected a challenge to the effectiveness of post-conviction counsel in *Bishop v. Epps*, 265 F. App'x 285, 290 (5th Cir. 2008). This suit would not be time-barred based on that decision.

Finally, if the State's ultimate intention to deny Appellants their fundamental rights to competent and conscientious post-conviction counsel was not clear enough, it makes the bald assertion that Appellants' complaint amounts to much ado about nothing because Appellants do not even have a right to competent post-conviction counsel. This position has no basis in the laws of Mississippi or the opinions of this Court.

Appellants first address the State's denial that the Chancery Court has jurisdiction to entertain this suit. Appellants then place the State's arguments in the broader context of the State's ongoing, and thus far successful, efforts to avoid accountability for its actions.

II. THE STATE OVERLOOKS THE CONSTITUTIONAL BASIS FOR THE CHANCERY COURT'S JURISDICTION TO HEAR THE SEPARATION OF POWERS CLAIM AND INSTEAD MISCONSTRUES IT AS AN ARGUMENT FOR CHANCERY COURT REVIEW OF THIS COURT'S ORDERS.

The Chancery Court has jurisdiction to entertain Appellants' argument that a violation of the separation of powers provision in the Mississippi Constitution occurred as a result of the appointment of the MOCPPC Director by the Chief Justice of the Mississippi Supreme Court. *See, e.g., Sec'y of State v. Weisenberg*, 633 So.2d 983 (Miss. 1994) (chancery court); *Ball v. Fitzpatrick*, 602 So.2d 873 (Miss. 1992) (chancery court). Appellants do not advance this argument "[i]n the alternative," as contended by the State. (State's Br. 35). This is, rather, an independent legal basis for this Court to reverse the Chancery Court's decision.

The State made no challenge below to the Chancery Court's jurisdiction to address Appellants' claim arising under the separation of powers provisions of the Mississippi Constitution. Nor does the State suggest that Appellants had an opportunity to raise this claim during state post-conviction or federal habeas corpus proceedings. This Court should reverse the Chancery Court's order and remand for further proceedings.

The State advances no legal argument to refute the Chancery Court's jurisdiction. The State instead urges mootness as a defense to Appellants' separation of powers claim because the Mississippi Legislature amended the Act in 2009 to provide for appointment of the Director of the MOCPPC by the Governor as opposed to the Chief Justice. (State's Br. 35-36.) This contention misses the crucial point that all of Appellants filed their post-conviction petitions and this Court ruled on them *before* the Legislature corrected this constitutional deficiency and

during the period that the Chief Justice had authority to remove the MOCPC director, with no right of appeal. The harm from this deficiency continues in each of Appellants' cases. The uncontested proof is that the real or perceived threat of removal by the Chief Justice prevented the MOCPC from competently and conscientiously representing the Appellants.

The State likewise argues that the Chancery Court lacks authority to review or reverse a decision of the Mississippi Supreme Court. Contrary to the State's assertion, this lawsuit does not challenge the adjudications of Appellants' post-conviction petitions by this Court. Appellants do not ask the Chancery Court to "reverse" the orders of the Mississippi Supreme Court. But the structure of the Mississippi court system forbids an initial challenge to a violation of the separation of powers provisions of the Mississippi Constitution to be brought originally in the Supreme Court. *See, e.g.,* Miss. Const. art. IV, § 146 ("The Supreme Court shall have such jurisdiction as properly belongs to the court of appeals and shall exercise no jurisdiction on matters other than those specifically provided by this Constitution or by general law."); *In re Fordice*, 691 So.2d 429, 434 (Miss. 1997) (citing cases for the well-established principle that controversies concerning the power of state bodies and officials are adjudicated at the trial court before being reviewed on appeal by the Mississippi Supreme Court). Jurisdiction in the Chancery Court is proper.

III. THE CHANCERY COURT HAS JURISDICTION TO PROVIDE AN EQUITABLE REMEDY FOR THE STATE'S PERSISTENT AND SYSTEMIC FAILURE TO GUARANTEE AN ADEQUATE POST-CONVICTION PROCESS.

As this Court has recognized, a party may seek declaratory and injunctive relief for "systemic ineffective assistance of counsel that has gone unchecked and unremedied by the State." *State v. Quitman County*, 807 So. 2d 401, 408 (¶ 23) (Miss. 2001). To avoid judicial review of its conduct, the State argues that the Chancery Court lacks jurisdiction. According to the State, this lawsuit is actually a "criminal" proceeding, and the Chancery Court has no

authority to issue orders in criminal cases or to act as an appellate court to review this Court's final orders. (*See, e.g., State's Br. 14, 18.*) The State's position, however, rests on a mischaracterization of this suit. Courts at equity have long had jurisdiction to fashion *in personam* remedies to redress inequitable conduct, including injunctive relief against litigants in a separate case at law, enjoining the inequitable litigant from taking certain positions or actions in the case at law.

A. The State Mischaracterizes This Action as a Criminal Proceeding.

The State characterizes this systemic challenge to its misconduct as a "criminal" matter and thus beyond the purview of the Chancery Court. Simply referring to this lawsuit as a criminal matter or rebranding Appellants as "criminal defendants," however, does not change the essential civil characteristics of this suit.

This case has none of the hallmarks of a criminal proceeding. In a criminal case, the State files a complaint and has the burden of proving all elements of the charged offense beyond a reasonable doubt while the defendant retains the rights prescribed by the United States and Mississippi Constitutions to challenge the State's contentions. Moreover, a criminal case becomes final when a petition for a writ of certiorari is denied following the direct appeal of the conviction and sentence. *See Manning v. State*, 929 So. 2d 885, 896-98 (Miss. 2006). Finally, a criminal proceeding seeks punishment in the form of imprisonment or execution, whereas this case seeks civil injunctive relief. This case arose due to State action during post-conviction proceedings that occurred *after* Appellants' criminal cases concluded. Appellants seek an equitable remedy for the State's actions that resulted in a denial of their guaranteed right to competent post-conviction counsel and access to the courts.

The State attempts to confuse the issue further by conflating this action to remedy a systemic violation of Appellants' rights with Appellants' individual post-conviction cases. The

State refers to post-conviction proceedings as “quasi-criminal,” presumably thereby suggesting that this action is quasi-criminal as well. (State’s Br. 14 (citing *Milam v. State*, 578 So.2d 272, 273 n.1 (Miss. 1991)).) Even momentarily setting aside the important distinction between this suit and the individual appellants’ post-conviction proceedings, the State mistakenly relies on *Milam*. In *Milam*, this Court noted only that post-conviction is “quasi-criminal” to the extent that it shares one attribute of a criminal proceeding: the possibility of the appointment of counsel pursuant to Section 99-39-(23)(1) of the Mississippi Code. Otherwise, as *Milam* recognized, a post-conviction applicant may obtain discovery pursuant to the Rules of Civil Procedure and seek summary judgment. *Milam*, 578 So.2d at 273 n.1. The State also ignores the Uniform Post-Conviction Procedure Relief Act (“UPCCRA”), which declares that post-conviction is “an original civil action.” Miss. Code Ann. § 99-39-7; *see also Jackson v. State*, 732 So.2d 187, 190 (¶ 8) (Miss. 1999) (describing post-conviction proceedings as “unique kind of civil action”).

More importantly, however, the State’s position that post-conviction proceedings are “quasi-criminal” is a red herring because Appellants’ lawsuit is not a post-conviction petition, nor is it brought pursuant to the UPCCRA. For an action to be cognizable under the UPCCRA, the applicant must challenge the legality of his conviction or sentence. Miss. Code Ann. § 99-39-5(1). Appellants have not sought that relief but rather have brought a civil lawsuit seeking declaratory and injunctive relief for the State’s failure to provide competent and conscientious counsel during post-conviction proceedings. Appellants do not contest here the legality of their convictions and sentences.

B. A Suit for Equitable Relief Is Proper Under These Circumstances.

The State asserts that even the inquiry into whether it met its obligations under the Mississippi Constitution and MCPCCA “unquestionably” amounts to asking the Chancery Court to “interfere in an inherently criminal matter.” (State’s Br. 15.) That is not the case. Chancery

courts in Mississippi have, since before the 1890 Constitution, had jurisdiction to enjoin civil actions at law where, as Justice Griffith taught, there are

definite equitable circumstances . . . upon which the court at law cannot adequately act, but of which the court of equity can take cognizance, and that without the inclusion of competent and adequate action upon those features of the case, it would be against equity and good conscience that it should proceed.

B. Bridges & J. Shelson, Griffith's MISSISSIPPI CHANCERY PRACTICE, §438, page 243 (2000) (citing *Ex parte Wimberly*, 57 Miss. 437, 1879 WL 4075 (1879)). As this Court said in *Wimberly*, "[t]he power of the Chancery Court to enjoin actions at law is ancient and indisputable." 1879 WL 4075, at *7.

The *Wimberly* template fits this case exactly. Here, the State restricted, hampered, and interfered with the MOCPCC in state post-conviction proceedings, thereby assuring that Appellants did not have the opportunity to develop meritorious claims. After securing rulings in this Court based on the inadequate pleadings filed by the MOCPCC, the State successfully argued in federal habeas corpus that Appellants cannot add facts or legal theories beyond those raised by the MOCPCC. Moreover, after the federal courts denied relief, the State then successfully argued that this Court should not entertain successive petitions for post-conviction relief. *Holland v. State*, No. 2010-DR-00764-SCT (Miss. May 17, 2010) (order denying successive petition); *Bishop v. State*, No. 2008-DR-01122-SCT (Miss. July 9, 2008) (same); *Berry v. State*, No. 2008-DR-00717-SCT (Miss. May 5, 2008) (same). Thus, Appellants have no adequate remedy at law. To prevent the State from securing the benefit of its actions to frustrate the intent of the legislature, Appellants have no option but to seek equitable relief.

The State cites *Wimberly* and other cases for the proposition that a Chancery Court may not interfere with a criminal prosecution and spends significant time arguing that equity has no place in criminal law. This argument is both incorrect and irrelevant as applied to this action.

As discussed above, Appellants' suit is not a criminal action. Even to the extent that the civil suit here might have an effect on post-conviction proceedings, which could be characterized as "quasi-criminal," the State has still failed to cite to any case law that would prevent the Chancery Court from hearing this action.

The State makes vastly overbroad and misleading characterizations of the law concerning the role of equity in criminal law. While the State claims that the cases it cites hold that equity has no place in criminal law, they actually stand for the much narrower proposition that a court of equity cannot *prevent another court from hearing a claim or trying a case*.² The distinction between the State's "interpretation" and the actual holdings of these cases highlights the crux of its misrepresentation about the effect of Appellants' requested relief: Appellants do not ask the Chancery Court to enjoin another other court from hearing any claims related to their cases; rather Appellants ask that any proceedings in their cases be conducted equitably and in accordance with the Mississippi Constitution and the Act.³ The State's only correct contention is that the Chancery Court may not prevent the Mississippi Supreme Court or any other court from continuing to proceed in Appellants' individual cases. Appellants make no such request of the Chancery Court in this action.

² *E.g. Phillips v. Mayor of Stone Mountain*, 61 Ga. 386, 1878 WL 2892, at *1 (1878) ("Philips [and others] filed their bill against municipal authorities *praying that they be restrained from trying convicting and fining them* for a violation of the provisions of an ordinance which the complainants alleged to be void."); *In re Sawyer*, 124 U.S. 200 (1888) (holding that a court of equity did not have jurisdiction to try the matter itself or restrain the tribunals of the state from determining it); *Crighton v. Dahmer*, 13 So. 237, 238 (Miss. 1893) (finding that courts of equity cannot "restrain[] one of the parties from at the same time prosecuting a criminal proceeding.").

³ Not surprisingly, the cases that the State cites in support of this point are all clearly criminal prosecutions. For example, *Eastus v. Bradshaw*, 94 F.3d 788 (5th Cir. 1938), is a case about tax collection; *Phillips v. Mayor of Stone Mountain*, 61 Ga. 386, 1878 WL 2892 (1878), is about violation of a liquor ordinance; and *Crighton v. Dahmer*, 13 So. 237 (Miss. 1893), is a case about trespass by a landlord. None of these cases is remotely similar to Appellants' efforts to seek equitable relief from the State's subversion of the legislative intent and state constitutional guarantees.

Whatever name or label the State wishes to give to Appellants or their cause of action, Appellants' suit filed in the Chancery Court is not a criminal prosecution and does not ask the Chancery Court to enjoin the action of any other court. When a litigant in the law courts has taken unjust advantage of his opponent, equity can appropriately order the litigant (not the court) to refrain from taking that advantage. Thus, Appellants seek to bar the State from asserting procedural defenses, in federal court or in successive state post-conviction petitions, related to MOCPPC's failures. Granting such relief falls squarely within the jurisdiction of the Chancery Court.

C. Quitman County Confirms That Appellants May Seek Equitable Relief for a Systemic Denial of Their Rights.

Appellants pointed out in their opening brief that this Court found in *State v. Quitman County*, 807 So.2d 401 (Miss. 2001), that a complaint seeking structural relief for systemic violations of the rights of the accused in criminal cases stated a claim under Rule 12(b)(6) of the Mississippi Rules of Civil Procedure. The State attempts to distinguish *Quitman County* for three reasons: 1) that suit was brought by a county rather than "criminal defendants" seeking to nullify this Court's orders; 2) that suit pertained to the county's alleged financial injury, which it was ultimately unable to prove at trial; 3) and that case pertained to the standing of a county to sue, and a county did not have to meet the requirements of the UPCCRA. (State's Br. 32-33.)

That a county brought the suit in *Quitman County* is irrelevant because nothing in *Quitman County* limited its holding to suits brought by counties. The primary issue is not the identity of the plaintiff but the nature of the state action giving rise to the suit. *Quitman County*, like Appellants here, sought relief because the State had breached its constitutional and statutory duties. *Id.* at 403 (¶ 3). As in this case, the State moved to dismiss, claiming that *Quitman County* sought relief for ineffective assistance of counsel, which – according to the State – could

only be addressed *post hoc* in a claim under the Post-Conviction Relief Act. This Court rejected the State's theory, distinguishing an individual prisoner's petition to vacate his or her own conviction or sentence from a lawsuit seeking a structural injunction for systemic violations of the right to counsel:

The case at hand is different in that it involves the issue of the State's compliance with its duty to provide representation for indigent criminal defendants in the context of a system of providing indigent defense.

Id. at 407 (¶ 21).

That the county complained about financial injury is not determinative. Indeed, part of Appellants' complaint here is that the State chronically underfunded the MOCPPC. Because the State also adversely affected the rights of Appellants in other ways does not create a jurisdictional obstacle or distinguish this case from *Quitman County*.

Because Appellants, like Quitman County, sought equitable and injunctive relief due to the State's systemic failure to ensure constitutional and statutory protections, the strictures of the UPCCRA are inapplicable. As Appellants have emphasized, that statute comes into play only for individual challenges to convictions or sentences. In other contexts, prisoners may bring challenges to secure relief from unconstitutional state action without invoking post-conviction or habeas corpus procedure.

For example, in 2003 Mississippi death row prisoners brought a civil lawsuit against officials of the Mississippi Department of Corrections ("MDOC") alleging that the State knowingly and deliberately subjected them to conditions that violated the Eighth Amendment's prohibition against cruel and unusual punishment.⁴ In May 2003, following a hearing that permitted fact finding, a magistrate judge agreed and entered ten injunctions to MDOC to address

⁴ These conditions included unsanitary conditions, insect infestations, high temperatures, insufficient mental health care, and exposure to the noise of psychotic inmates.

the conditions. The Fifth Circuit affirmed seven of the ten injunctions, finding that the conditions on death row violated the Eighth Amendment and demonstrated “deliberate indifference” on the part of MDOC officials. *Gates v. Cook*, 376 F.3d 323, 345 (5th Cir. 2004). Similarly, a civil lawsuit now pending in federal district court against the MDOC and the Mississippi State Penitentiary challenges the constitutionality of Mississippi’s lethal injection protocol. That lawsuit, properly filed as a civil proceeding, clearly relates to the “execution of the criminal sentence itself.” *See Thorson v. Epps*, 4:08-cv-00129-WAP-DAS (N.D. Miss.). Under the State’s theory, however, the court would have had no jurisdiction to hear this complaint or the facts supporting these allegations.

These examples refute the State’s theory that all “matters of criminal convictions and sentences, the methods by which criminal defendants may collaterally attack their criminal convictions and sentences, and the execution of the criminal sentence itself” constitute criminal proceedings that must be brought under the UPCCRA. (App.’s Brief at 14). Likewise here, while arguably involving “matters of criminal convictions and sentences” and the “execution of the criminal sentence itself,” this suit was properly filed as and is a civil proceeding.

D. The Chancery Court Is Not Being Asked To Exercise Appellate Jurisdiction Over This Court or Review This Court’s Final Orders.

Contrary to the State’s misrepresentation, Appellants do not seek to have the Chancery Court review final orders of this Court. (*See* State’s Br. 18 (citing *Hinton v. Shedd*, 76 So. 144 (Miss. 1917)).) Like the contention that this lawsuit is a “criminal” matter, this argument misrepresents Appellants’ position. Appellants did not ask the Chancery Court to determine if this Court erred in any of its prior rulings denying post-conviction relief in any of their cases. Instead, Appellants asked the Chancery Court to enjoin the State and/or its officials from raising procedural defenses to new issues in federal habeas or state post-conviction proceedings that

were not raised in earlier proceedings due to the State's interference with post-conviction representation. The jurisdiction of the Chancery Court is "strictly *in personam*." Griffith, *supra*, § 438. Consistent with that principle, Appellants asked only for the Chancery Court to enjoin specific action on the part of the State and/or its officials to prevent them from reaping the benefit of their prior unconstitutional actions that denied Appellants their fundamental rights. *See Wimberly*. Appellants are asking for nothing more than to have an opportunity to have post-conviction proceedings that are conducted equitably and in accordance with the Mississippi Constitution and the Act.

IV. THE UPCCRA DOES NOT PROVIDE A REMEDY FOR THE STATE'S SYSTEMIC INTERFERENCE WITH THE RIGHT TO POST-CONVICTION COUNSEL AND ACCESS TO THE COURTS AND THIS COURT DOES NOT HAVE ORIGINAL JURISDICTION OVER THIS SUIT.

The State inconsistently and incorrectly argues that the Mississippi Supreme Court has original jurisdiction to hear this type of case. (*See State's Br. 29.*) The State asserts that "the request for relief would have to be filed in the individual and underlying post-conviction proceeding involving each Criminal Defendant, and not in a separate mass-action civil complaint." (*State's Br. 38.*) But the State then rejects its own argument; just a few pages later, it denies that Appellants have any rights to adequate counsel. (*State's Br. 40-41.*) The State has good reason to abandon its own position.

Neither the statutory text nor case law supports the proposition that this Court is the proper forum to bring this action initially. First, the UPCCRA provides "an exclusive and uniform procedure for collateral review of *convictions and sentences*." Miss. Code Ann. § 99-39-3(1) (emphasis added). Appellants do not ask the Chancery Court to vacate their convictions or sentences. Moreover, Section 99-39-5(1) of the Mississippi Code sets out the grounds for relief that may be raised and remedied under the UPCCRA. All pertain to challenges to the

legality of an applicant's conviction or sentence. Nowhere does it provide a remedy for deliberate interference by the State in the post-conviction process itself. Similarly, while Rule 22(c) of the Mississippi Rules of Appellate Procedure provides additional procedural guidelines for capital post-conviction cases, it contains no means for seeking redress of systemic state interference with the process.

The State's reliance on *Bessent v. Clark*, 974 So.2d 928, 933 (Miss. Ct. App. 2007), to support its argument that Appellants are required to bring this challenge in a successive petition for post-conviction relief is misplaced. (See State's Br. 30.) In its lengthy block quote from *Bessent*, the State omits the key fact that distinguishes it from Appellants' case: in his prayer for relief, "*Bessent sought the restoration of his freedom.*" *Bessent*, at 932, 974 (¶ 17) (emphasis added). Because Bessent argued that his conviction or sentence was imposed in violation of the Constitution of the United States or the laws of Mississippi, Miss. Code Ann. § 99-39-5(1), his cause of action fell within the ambit of the UPCCRA, and thus the Chancery Court lacked jurisdiction to hear the case. In contrast, Appellants do not ask the Chancery Court to vacate their convictions or sentences or raise other challenges allowed under that Act. They bring an independent action seeking relief from the State's interference with their rights to counsel and access to the courts in post-conviction proceedings, not at their initial trials.

Moreover, the UPCCRA does not provide an adequate remedy at law for the State's actions. It does not authorize a court to grant an injunction requiring the State to provide competent and conscientious counsel. Only a chancery court hearing a suit in equity can provide such a remedy. Because this is a suit in equity falling outside the ambit of the UPCCRA, the Chancery Court has subject matter jurisdiction, and this Court only has jurisdiction to hear an appeal from the ruling of the Chancery Court.

The State also relies on the principle of priority jurisdiction to support its assertion that original jurisdiction of this matter lies with this Court. (State's Br. 38.) However, priority jurisdiction applies when two courts have concurrent jurisdiction over the same parties in the same controversy. *Crawford v. Morris Transp., Inc.*, 990 So.2d 162, 169 (¶ 25) (Miss. 2008). As Appellants have already explained, the controversy in this case is not the same as any controversy brought in earlier post-conviction proceedings. Here, Appellants challenge the State's deliberate and systemic interference with the post-conviction process, and Appellants could not have brought this type of challenge in their earlier proceedings.

V. THE STATE HAS ENSURED THAT APPELLANTS CANNOT SEEK RELIEF IN FEDERAL HABEAS PROCEEDINGS OR IN SUCCESSIVE POST-CONVICTION PROCEEDINGS.

The State's challenge in this case to the jurisdiction of the Chancery Court is its latest step in its efforts to avoid all accountability for denying the right to competent and conscientious post-conviction counsel and access to the courts. The State has thus far rebuffed all other efforts for Appellants to obtain meaningful post-conviction review. When some of the Appellants complained about the representation failures of post-conviction counsel in their federal habeas corpus proceedings, the State successfully argued that they had no federal right to counsel and therefore no right to relief. The State prevailed in this argument even though the federal court found that the MOCPC was "understaffed, underfunded, and overloaded with cases, and this situation was aggravated by the State's interference in some Appellants' representation." *Stevens v. Epps*, Civil Action No. 2:04CV118KS, 2008 WL 4283528, at *45 (S.D. Miss. Sep. 15, 2008), *aff'd* 618 F.3d 489 (5th Cir. 2010); *see also Bishop v. Epps*, 265 F. App'x 285 (5th Cir. 2008). The State then argued that any new claims that habeas counsel uncovered could not be raised in federal court because those claims had not been exhausted in state court. *See* 28 U.S.C. § 2254(b). To complete the erection of an impenetrable procedural wall against any

consideration of Appellants' meritorious claims, the State also successfully argued that this Court should bar new claims if Appellants with new counsel sought to raise them in a successive petition for post-conviction relief. *See, e.g., Bishop v. State*, No. 2008-DR-01122-SCT (Miss. July 9, 2008) (order denying successive petition).

Appellants could not have raised this matter in their initial post-conviction petitions because their representation was compromised by State action, and MOCPC attorneys could not have raised their own ineffectiveness. *See Archer v. State*, 986 So.2d 951, 956 (¶ 20) (Miss. 2008) (finding it "absolutely inappropriate" for trial counsel to raise his own ineffectiveness on appeal). The State has effectively gutted any meaningful opportunity for Appellants to seek post-conviction relief and then worked to foreclose all other options, including federal habeas corpus and state successive proceedings. For these reasons, Appellants found it necessary to bring this structural challenge to seek equitable relief in Chancery Court.

VI. THE STATE'S CONTENTION THAT THERE IS NO RIGHT TO COUNSEL IGNORES THE STATUTORY MANDATE AND THIS COURT'S CONSTITUTIONAL JURISPRUDENCE.

The Mississippi Legislature, along with this Court, has stated with absolute clarity that a right to competent and conscientious counsel exists in Mississippi state post-conviction proceedings. Despite paying lip service to what it claims is this Court's original jurisdiction in this matter, the State makes it plain that it does not believe that Appellants have any remedy to the structural flaws that the State inflicted on the state post-conviction process. The State's position has no basis in the law as written by the legislature and interpreted by this Court.

This Court recently considered a particularly abysmal example of the MOCPC's performance in *Goodin v. State*, No. 2007-CA-00972-SCT (Miss. Aug. 27, 2009) (en banc), where the MOCPC had called one lay witness at a mental retardation evidentiary hearing and then rested without presenting any expert testimony. The State argued in *Goodin*, as it does here,

that the prisoner had no state constitutional right to competent and conscientious counsel. This Court rejected the State's argument. The State's arguments have no more merit here than they did in *Goodin*.

To sustain its extreme and totally unsupportable position, the State must dismiss the Act, Rule 22(c), and this Court's decisions in *Jackson v. State*, 732 So.2d 187 (Miss. 1999), and *Puckett v. State*, 834 So.2d 676 (Miss. 2002). The State even goes so far as to assert that this Court overruled *Jackson* in *Wiley v. State*, 842 So.2d 1280 (Miss. 2003), and *Brown v. State*, 948 So.2d 405 (Miss. 2006). The State takes those cases out of context, and nothing could be more incorrect; *Jackson* and *Puckett* remain the law of this state.

The facts in *Wiley* are materially different from those in both *Jackson* and Appellants' cases. In *Wiley*, the petitioner was represented by an experienced capital attorney along with a prestigious law firm from Washington, D.C. who requested to be appointed as counsel "without payment." 842 So.2d at 1283 (¶ 4). Wiley was not complaining that he was denied competent and conscientious counsel; rather he claimed that he was entitled to "litigation expenses and compensated counsel" based on the Court's decision in *Jackson* and the Eighth and Fourteenth Amendments to the United States Constitution. The Court distinguished *Jackson* based on the fact that "Wiley was able to obtain arguably very 'qualified substitute counsel willing to proceed pro bono . . .'" and held that *Jackson* did not "specifically establish a constitutional right⁵ to compensated counsel." *Id.* at 1285 (¶ 15) (emphasis added); see also *id.* at 1284 (¶ 13) ("The petitioner in *Jackson* suffered because of his inability to obtain adequate representation, i.e., his attorney's failure to file a motion for rehearing. The record indicates that Wiley has been

⁵ Although the Court does not specifically state if it is referring to the United States or Mississippi Constitution, the context of the language makes it clear that this is a reference to the United States Constitution. First, Wiley brought no claims under the Mississippi Constitution, although he did bring claims under the United States Constitution. Second, this statement is supported exclusively by a reference to the United States Supreme Court's holding in *Murray v. Giarratano*, 492 U.S. 1 (1989), that there is no federal constitutional right to post-conviction counsel.

adequately represented by different lawyers at every stage of the process.”). The holding in *Wiley* is limited to the question of whether there is a federal constitutional right to compensated counsel. Neither the question of a federal constitutional right to post-conviction counsel nor the issue of compensation for pro bono counsel is raised by Appellants here or is relevant to their action. Thus, to the extent that the Court distinguished *Jackson* in *Wiley*, it did so in a way that does not alter *Jackson*’s support of Appellants’ claims.⁶

The State’s citation to *Stevens v. Epps*, 618 F.3d 489, 504 (5th Cir. 2010), for the proposition that federal courts recognize that this Court did not create a right to counsel in *Jackson* is misleading at best. (See State’s Br. 45.) The Fifth Circuit evaluated Petitioner Stevens’ claims for federal habeas relief under the United States Constitution, including a claim for ineffective assistance of post-conviction counsel based on *Jackson*. The court asserted that as a basic matter, “ineffective assistance of post-conviction counsel cannot be the grounds for *federal habeas* relief.” *Stevens*, 618 F.3d at 502 (emphasis added). The court then continued on to say that *Jackson* did not create a right to post-conviction counsel, relying solely on this Court’s opinion in *Wiley*. *Id.* at 504. In doing so, the Fifth Circuit mistakenly wrote that *Wiley* stands for the proposition that *Jackson* “did not establish a right to competent post-conviction counsel.” *Id.* (emphasis added). The language cited by the court from *Wiley*, however, says nothing about competence. See *Wiley*, 842 So.2d at 1285 (¶ 15). In fact, as discussed above, competence of post-conviction counsel was not even raised as an issue in *Wiley*’s case. Rather, this Court said there is no right to compensated post-conviction counsel in a case such as *Wiley*’s. *Id.* The fact remains that *Wiley* did not overrule this Court’s holdings in *Jackson* and

⁶ Even if *Wiley* did distinguish *Jackson*, it was clearly not written with the intent of overruling *Jackson*. In fact, the Court favorably cited to key language from *Jackson* before distinguishing the specific facts of *Wiley*’s case. See 842 So.2d at 1285 (¶ 15).

*Puckett*⁷ that there is a right in the state of Mississippi to the assistance of competent and conscientious counsel in post-conviction proceedings.

This Court's opinion in *Brown* provides even less support for the State's erroneous assertion that this Court overruled *Jackson*. In *Brown*, the MOCPC asked this Court not to apply various procedural rules, including rules of default and res judicata. *Brown*, 948 So.2d at 413 (¶ 31). The MOCPC argued that it could not provide effective post-conviction representation if such stringent procedural rules applied. *Id.* This Court denied Brown's request but not because it reconsidered the scope of *Jackson*. Rather, this Court simply found that Brown did not present any new evidence that would entitle him to post-conviction relief or explain why the Court should disregard procedural bars. *Id.* Simply put, this Court did not revisit *Jackson*; rather it found that Brown had failed to make the required showing in his case.

Thus, *Wiley* and *Brown* are not inconsistent with this Court's holding regarding the right to competent post-conviction counsel or its holding that post-conviction is part of the appellate process in Mississippi capital cases. It is particularly telling that the State failed to dispute meaningfully the clear holding of *Puckett* that there is a right to "appointed competent and conscientious counsel" in post-conviction proceedings. 834 So.2d at 680 (¶ 16). The State's only response to *Puckett* was that this holding is contained in a "single phrase." (State's Br. 41.) The concise language used in *Puckett* cannot be a legitimate reason to disregard this Court's clear statement. To argue such is ridiculous. Despite the State's belated and failed attempt to manufacture a dispute on this point, the words of this Court and the legislature establish that

⁷ Notably, and consistent with Appellants' interpretation that its holding is limited to the right to compensation, the Fifth Circuit did not even mention *Puckett v. State*, which explicitly found that *Jackson* provides a right to "competent and conscientious" counsel in post-conviction proceedings, *Puckett*, 834 So.2d at 680.

Mississippi death row prisoners are entitled to the appointment of competent and conscientious counsel in their post-conviction proceedings.

VII. GRANTING THE REQUESTED RELIEF WILL NOT LEAD TO “ENDLESS” LITIGATION NOR WILL IT PREVENT THE STATE OF MISSISSIPPI FROM CARRYING OUT LAWFUL EXECUTIONS

The relief requested by Appellants will impact a small and well-defined group of cases. It will not, as the State suggests, open the door to unending litigation (State’s Br. 34). If the Chancery Court grants the relief requested, it will impact at the most only those individuals represented by the MOCPPC from the time of its creation in 2002 until the Act was amended to give the Governor the power to appoint and remove the Director of the MOCPPC. Even for those individuals, relief will hardly provide them with endless avenues of appeal; rather they will be provided with a single fair evaluation of their post-conviction claims, just like all other individuals filing post-conviction petitions.

The State’s repeated suggestion that this action is really just an attempt to stay executions in Mississippi (*see* State’s Br. 2) is similarly entirely baseless. Since this litigation was introduced, the State of Mississippi has executed three individuals. A temporary restraining order was sought by Appellants in only one of those cases because only one of those individuals was a Plaintiff whose claims fell within the scope of this litigation. The State’s arguments are a transparent attempt to recast the narrow remedy requested as a comprehensive attack on Mississippi’s capital punishment system. The facts of this litigation simply do not support the State’s argument.

VIII. THIS ACTION IS NOT TIME-BARRED.

As an afterthought, the State asserts that Appellants’ suit is barred by the statute of limitations. The State has not cited, and Appellants have not found, any Mississippi authority for the proposition that an action for prospective declaratory and injunctive relief for State

constitutional violations is barred by the passage of time. The law is otherwise. In *Alexander v. State ex rel Allain*, 441 So.2d 1329, 1338 (Miss. 1983), this Court entertained a separation of powers challenge to a statute that had been enacted approximately *thirty years* earlier in the mid-1950s. See also *In re State Tobacco Litigation*, 958 So.2d 790, 807-08 (¶¶ 59-65) (Miss. 2007) (allowing the governor to challenge a four-year-old judgment where the ruling had encroached on the Legislative prerogative of appropriation).

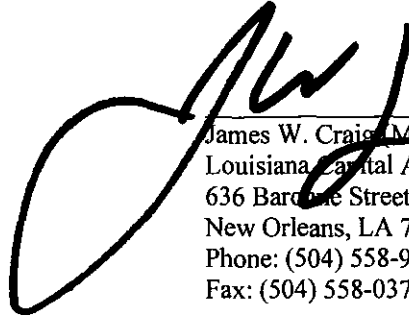
Even were this action to be governed by a three-year statute of limitations as the State asserts (which it is not), the equitable cause of action pled by Appellants would not have occurred or accrued until all elements of the claim had matured; in this case, that includes the requirement that there is no adequate remedy at law. That element did not come into existence until 2008, when this Court and the Fifth Circuit held that the MOCPC's failure to provide competent and conscientious counsel could not be vindicated in state or federal successive post-conviction/habeas proceedings. See *Bishop v. Epps*, 265 F. App'x 285, 290 (5th Cir. 2008); *Bishop v. State*, No. 2008-DR-01122-SCT (Miss. July 9, 2008) (order denying successive petition). Thus, any applicable statute of limitations would not have expired until 2011, and as the Complaint was filed in 2010, it is not time-barred.

IX. CONCLUSION

The State's tactics are transparent: obscure the issue at hand with disingenuous misstatements of law and mischaracterization of Appellants' positions. In this way, the State hopes to continue its successful efforts to avoid judicial scrutiny of its efforts to thwart the intent of the legislature and deny Appellants their constitutional and statutory rights. However, equity courts have long held the power to enjoin an oppressive party from taking unfair and unconscionable advantage of an inequity perpetrated on their opponent. For the reasons set forth herein and in Appellants' initial brief, Appellants ask this Court to hold that the Chancery Court

has jurisdiction and remand this suit for discovery, a hearing on preliminary injunctive relief, and a trial on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, the undersigned counsel of record for Appellants, hereby certify that I have this day caused the above and foregoing Reply Brief to be delivered to Hon. Harold Edward Pizzetta, Chief of Civil Litigation, Office of the Attorney General, by mail to Office of the Attorney General, P.O. Box 220, Jackson MS 39205 and by electronic mail to hpizz@ago.state.ms.us, and to Hon. Marvin L. White, Jr., Chief of Capital Litigation, Office of the Attorney General, by mail to Office of the Attorney General, P.O. Box 220, Jackson MS 39205 and by electronic mail to swhit@ago.state.ms.us, and to the Hon. William Singletary, Chancellor, Hinds County, by U.S. Mail to P.O. Box 686, Jackson, MS 39205.

This the 9th day of March 2011.



JAMES W. CRAIG