IN THE SUPREME COURT OF MISSISSIPPI

JOSEPH PATRICK BROWN, *Appellant*

versus **NO. 2010-CA-01246-SCT**

STATE OF MISSISSIPPI, *Appellee*

BRIEF FOR APPELLEE

Appeal from the Circuit Court of Adams County, Mississippi
No. 04-KV-0020-P

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BRIEF FOR APPELLEE

I. STATEMENT OF THE CASE

The case at bar originated in the Circuit Court of Adams County, Mississippi, wherein Joseph Patrick Brown was convicted of one count of capital murder during the commission of a robbery. Appellant was indicted on June 21, 1993. A jury was empaneled on March 8, 1994 and his trial began on March 9, 1994. Brown was found guilty on March 11, 1994. A sentencing hearing was held on the capital murder conviction where the jury heard evidence in aggravation and mitigation of sentence. The jury retired to consider whether Brown would be sentenced to death or life imprisonment. After due consideration, on March 12, 1994, the jury returned a sentence of death in proper form. The jury verdict on sentence reads as follows:

> We, the jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder:
>
> 1. That the defendant, Joseph Patrick Brown a/k/a Peanut, actually killed Martha Day.

Next, we the jury, unanimously find that the aggravating circumstances of:

1. Joseph Patrick Brown a/k/a Peanut, was previously convicted of a felony involving the use or threat of violence to the person.

2. Joseph Pratrick [sic] Brown a/k/a Peanut, was engaged or was an accomplice, in the commission of, or an attempt to commit or flight after committing or attempting to commit armed robbery.

3. The capital offense was committed for the purpose of avoiding or preventing a lawful arrest.

Are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances and we further find unanimously that the defendant, Joseph Patrick Brown a/k/a Peanut should suffer death.

s/ Charles L. Taylor
Foreman of the Jury

After the sentence of death was imposed, the trial court ordered Brown to suffer death by lethal injection and set an execution date on April 14, 1994. This execution date was stayed pending appeal.

On direct appeal to this Court petitioner presented nine assignment of error. These were:

I. THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT BECAUSE THE TESTIMONY OF AN ACCOMPLICE OR CO-CONSPIRATOR IS INSUFFICIENT TO SUSTAIN A CONVICTION WHEN THAT TESTIMONY IS SUBSTANTIALLY IMPEACHED, UNREASONABLE, OR SELF-CONTRADICTORY,

II. THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY OF A "JAIL HOUSE SNITCH" TO CORROBORATE THE TESTIMONY OF A CO-CONSPIRATOR AND ACCOMPLICE,

III. THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY OF A WITNESS WHO HAD BEEN PRESENT IN THE COURTROOM AFTER THE SEQUESTRATION RULE HAD BEEN INVOKED,

IV. THE TRIAL COURT ERRED IN ADMITTING A .22 HANDGUN AND TESTIMONY RELATIVE TO THE WEAPON INTO EVIDENCE WHEN THE CHAIN OF CUSTODY HAD BEEN BROKEN AND ITS PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY THE POTENTIAL FOR PREJUDICE AND FOR MISLEADING THE JURY,

V. THE TRIAL COURT ERRED IN ADMITTING CERTAIN LETTERS INTO EVIDENCE THAT WERE WRITTEN BY APPELLANT TO RACHEL WALKER AFTER HE HAD ASSERTED HIS CONSTITUTIONAL RIGHTS TO SILENCE AND TO COUNSEL,

VI. THE TRIAL COURT ERRED IN ADMITTING UNNECESSARY AND GRUESOME AUTOPSY PHOTOGRAPHS INTO EVIDENCE,

VII. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY TO CONSIDER THE ROBBERY AS AN AGGRAVATING CIRCUMSTANCE IN VIOLATION OF STATE LAW AND CONTRARY TO CONSTITUTIONAL PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT,

VIII. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THEY COULD CONSIDER AS AN AGGRAVATING FACTOR THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING ARREST, AND

IX. THE AGGREGATE ERROR IN THE COURT BELOW SERVED TO DENY APPELLANT HIS RIGHT TO A FAIR TRIAL AND REQUIRES REVERSAL OF BROWN'S CONVICTION AND SENTENCE.

Brown v. State, 682 So.2d 340, 342 -343 (Miss.,1996).

On August 15, 1996, this Court affirmed Brown's conviction and death sentence in a written opinion. A motion for rehearing was filed and later denied on October 17, 1996. *See Brown*

v. State, 682 So.2d 340 (Miss.,1996). Petitioner then filed a petition for writ of certiorari challenging this Court's decision with the United States Supreme Court presenting one question. On March 17, 1997, the United States Supreme Court denied the petition for writ of certiorari. *See Brown v. Mississippi*, 520 U.S. 1127 (1997).

Petitioner then filed an application for leave to file a petition for post-conviction relief in the trial court with this Court. On November 4, 1999, the Court issued an decision in which it denied relief on all claims except one. The Court granted an evidentiary hearing "limited to the issue of ineffective assistance of counsel for failure to seek an independent mental evaluation." *See Brown v. State*, 749 So.2d 82 (Miss.,1999).

The regular circuit judges serving in Adams County, recused themselves, and this Court appointed Judge Isadore W. Patrick, Jr. to sit by designation. On January 15, 2004, Judge Patrick entered an order setting March 1, 2004, as the date for the evidentiary hearing in this matter. The hearing was held as scheduled on March 1, 2004, and on November 20, 2009, the circuit court issued an opinion denying post-conviction relief.

Petitioner now appeals that decision.

II. STATEMENT OF THE FACTS

The facts as reflected by the record in this case show that during the late evening hours of August 7, 1992 and the early morning hours of August 8, 1992, Joseph Patrick Brown, a/k/a "Peanut", and his then girl-friend, Rachel Walker, were riding around the

Natchez, Mississippi area looking for drugs. T.Tr. at 551-552.[1] Walker and Brown bought and smoked crack cocaine in several locations that night. T.Tr. 553, 748.

At approximately 2:45 a.m., Brown, who was driving, pulled up in front of the Charter Food Store on Highway 61 South in Natchez, Mississippi. T.Tr. 555. Walker observed Brown pump some gas and enter the convenience store. After briefly walking around inside the store, Brown went to the cash register and confronted the clerk, Martha Day. Brown pulled a gun on her stating, "Bitch, give me the money". Day told him all the money was in the safe and she could not open it. T.Tr. 748. Walker observed from outside of the store that while Brown was at the cash register in front of Day, she grabbed her chest and fell to the floor. T.Tr. 556. Brown shot Day four times, once in the head, once in the chest, and twice in the back. T.Tr. 521. Day died as a result of the gunshot wounds. T.Tr. 528.

After shooting Day, the Appellant ripped the cash register from the wall and off the counter and returned to the truck where Walker had remained during the entire robbery. T.Tr. 749. Brown told Walker, "You better not move, and you better not say anything. If you love me, you won't say anything". T.Tr. 556. Brown and Walker then drove to what is know as the "200 Block" of Natchez, Mississippi. This area of town is frequented by drug dealers and users. T.Tr. 551-552. Brown gave Walker some money from the cash register, including a $2.00 bill to buy some crack cocaine. T.Tr. 561. Walker bought some drugs and

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[1]T.Tr. will be used to designate the transcript of the trial in this case. E.Tr. will be used to designate the transcript of the evidentiary hearing in this case.

she and Brown smoked what they had. Wanting more, Brown directed Walker to get some more and he didn't care how. T.Tr. 562. Walker then went to Floyd Newman and pawned the .22 caliber handgun used in the murder for $20.00. T.Tr. 565. Brown and Walker then purchased additional crack cocaine and smoked it. T.Tr. 566.

It was about dawn when they finished the drugs, and Brown and Walker walked to her sister's house. T.Tr. 567. Throughout the morning Walker made several calls to the Natchez Police Department attempting to give them information about the robbery/murder. T.Tr. 568-569, 687-688, 775-778. Police began searching for Brown and Walker after both the gun and the $2.00 bill were traced back to Walker. On August 11, 1992, they were spotted by Police and arrested after Brown tried to run and hide in some tall weeds and Walker attempted to run and hide under a house. T.Tr. 495-496. When confronted by police, Brown blurted out, "You got me for driving the car". T.Tr. 505.

While in jail awaiting trial, Walker began receiving notes and letters from Brown. T.Tr. 575. The notes and letters contain several statements from Brown to Walker requesting her to keep quiet and not to turn State's evidence. Although there are several incriminating statements, some examples are, "But we must be strong if we are going to beat this stuff . . . just tell them that you don't know anything". T.Tr. 585. Ex. 32. ". . . [T]hey don't have anything on me unless you go against me . . . . They don't have anything at all, so they are going to try and scare you. Just stick to what you told them, Baby, that is Dawson and Mitchell lied to you and trick you into saying what you said first and that you don't know

nothing about what they are talking about . . . . And if they ask you to turn State and go against me, you tell them no". T.Tr. 588. Ex. 28. "Rachel, my lawyer told me that you are on tape and paper making a full confession of what happened. He said that the police had sent the pistol to a lab in Jackson to find out if the bullets matched the one that killed the woman. If the bullets don't match, then they have no case. Flush after you read this." T.Tr. 730. Ex. 43.

Approximately one year after Brown was arrested he confided to a fellow inmate by the name of Larry Bernard, that he did, in fact, rob and murder Martha Day. T.Tr. 748-749. Bernard wrote a letter to the Adams County Sheriff's Department detailing what Brown had told him. T.Tr. 750. Bernard received no consideration for his testimony. T.Tr. 752.

III. SUMMARY OF THE ARGUMENT

Petitioner's assertion that he was denied discovery is without merit. Petitioner was not entitled to discovery under Rule 22. Rule 22 discovery is pre-petition discovery. Discovery after this Court has granted an evidentiary hearing is governed by MISS. CODE ANN. § 99-39-15. Even if Rule 22, does apply petitioner failed to avail himself of the provisions of that rule. He is incorrect in his argument that the state and trial counsel must copy and furnish all of their files to post-conviction without so much as a request. Rule 22 only states that prior counsel and the State "shall make available" the files. Brown never made any request of either the State or prior counsel for the records he asserts he was entitled to have in the three and a half years between the promulgation of Rule 22 and five days prior

to the evidentiary hearing in this case when he filed a motion for Rule 22 discovery. This was nothing more that a clear attempt to delay the evidentiary hearing in this case as the neither contents of prior counsel's files nor the law enforcement and prosecution filed had any impact on the question before the trial court. Admitting that if Rule 22 applies in the procedural posture of this case, it requires prior counsel and the State to make the files available Brown on request. However, Brown has made no attempt in the seven (7) years since the evidentiary hearing to obtain these records by simply requesting them. Brown has not demonstrated that he was prejudiced in any manner by the denial of his motion for discovery made five days prior to the evidentiary hearing in this case.

The trial court found from the evidence introduced at the evidentiary hearing that the decision not to have a report of Brown's evaluation at the State Hospital at Whitfield issued was a strategic decision made because of the unfavorable information that would be contained in that report. In addition, the trial court found that the failure to introduce any of the information obtained by the evaluation at the State Hospital was also a strategic decision made after discussing the matter with the doctors who performed the evaluation and being informed that there would be a lot of information that would be harmful to Brown contained in the report and in any testimony that they gave.

Counsel cannot be found to be ineffective when they make a strategic decision not to introduce information that is of a double-edged nature. Brown failed to demonstrate that counsel's performance was deficient and the trial court so held. That holding is not clearly

erroneous nor against the overwhelming weight of the evidence.

IV. ARGUMENT

I. PETITIONER'S BELATED MOTION WAS PROPERLY DENIED.

Petitioner contends that the trial court erred in denying his motion for discovery. Looking to the November 4, 1999, opinion in *Brown v. State*, 749 So.2d 82 (Miss. 1999), we find the holding of this Court on a single issue of the ineffective assistance of counsel being remanded for a hearing. The Court held:

> ¶ 21. The record shows that the trial court granted a defense motion to have Brown evaluated at the Mississippi State Hospital specifically for the purpose of developing mitigating evidence pursuant to MISS. CODE ANN. § 99-19-101(6) (1994). Defense counsel reported, however, "The Defendant was evaluated at Whitfield for the purposes of mitigation defense. On the basis that the staff at Whitfield could not assist in any mitigation defense, no written reports were ever submitted." There is no further elaboration in the record as to whether there was no favorable evidence to be adduced or whether the State Hospital refused to prepare a report. It cannot be said what weight, if any, a juror might have given to such a report had one been prepared and submitted. *Sawyer v. Whitley*, 505 U.S. 333, 348, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). It is entirely possible that favorable mitigating evidence of Brown's mental state might not have outweighed the aggravating circumstances in the jurors' minds, but such an opportunity was never afforded them. The very purpose of mitigation is to reveal evidence that the defendant is not as bad a person as might be believed from the evidence introduced at the guilt phase of the trial. *Eddmonds v. Peters*, 93 F.3d 1307, 1321 (7th Cir.1996). In the present case, the trial court ordered a mental evaluation but no report was ever produced. It has been held that consideration of all relevant mitigating evidence is required at the sentencing phase because the imposition of the death sentence should reflect a reasoned, moral response to the defendant's background and character and the crime. *Russell v. Collins*, 998 F.2d 1287, 1291 (5th Cir.1993). Brown should be allowed to present this issue to the trial court for a determination of whether trial counsel was ineffective in failing to seek other expert assistance when the State Hospital examination

produced no report and whether such inaction resulted in any prejudice to his case at sentencing.

749 So.2d at 90-91.

At the conclusion of the opinion we find the ultimate holding of the Court as it concerns this Court. The Court held:

> ¶ 29. The application for post-conviction relief *is granted in part only as to the issue of ineffective assistance of counsel for failure to seek an independent mental evaluation.* The ancillary requests for investigative funds, discovery and an evidentiary hearing should be filed in the trial court. In all other respects, the application is denied.
>
> 749 So.2d at 93. [Emphasis added.]

Thus, the issue before the trial court was singular, whether trial counsel failed to obtain and use the results of the testing and evaluation conducted by the State Hospital at Whitfield in mitigation during the sentence phase of the trial.

On January 15, 2004, the State received a notice from this Court, dated January 14, 2004, setting March 1, 2004, as the date for the evidentiary hearing in this case. In response to the January 15, 2004, notice of the hearing, the State made contact with the district attorney and the Mississippi State Hospital at Whitfield. The State then requested an order from the trial court for the release of the records of the examination conducted on Brown on February 22, 1994, prior to the original trial of this case. In the proposed order presented to the trial court the State was careful to make sure that Brown's counsel would be furnished copies of the Whitfield material. In preparation for this hearing, the State issued subpoenas for both of Brown's trial counsel, Donald Ogden, Esquire, and Pamela Ferrington, Esquire.

In addition, the State has also issued subpoenas for Dr. Reb McMichael, M.D, a psychiatrist and Director of Forensic Services at the Mississippi State Hospital at Whitfield and Dr. Criss Lott, PhD., former staff psychologist at the Forensic Unit at the State Hospital and now Director of the Counseling Center at St. Dominic's Hospital in Jackson. Both of these doctors had to make alterations in their schedules in order to be present in Natchez, Mississippi, on March 1, 2004.

Further, the State was informed by the Court Administrator, Brenda Williams, that the Court has issued an order to have Brown transported to Natchez for this March 1, 2004, evidentiary hearing.

On Thursday, February 26, 2004, five days before the scheduled evidentiary hearing, the State received the a pleading entitled Motion for Rule 22 Discovery Order. The prayer for relief in this motion by petitioner requested the trial court to enter an order:

> (A) requiring prior defense counsel, Pamela Ferrington and Donald Ogden, to make their complete files regarding Joseph Patrick Brown available to Petitioner's current counsel *within thirty days* from the date of the Court's Order; and
>
> (B) requiring the State to make available to Petitioner's current counsel, *within thirty days* from the date of the Court's Order, the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed and the prosecution of the petitioner.
>
> C.P at 23-25.

However, counsel for Brown, James W. Craig, Esquire, filed no request for a continuance of the evidentiary hearing.

Later on February 26, 2004, the State filed a response to this motion pointing out that Rule 22, was a pre-petition vehicle for discovery and that discovery prior to a granted evidentiary hearing was controlled by the provisions of MISS. CODE ANN. § 99-39-15, and further that the items requested in the discovery motion were not required for the issue before the trial court.

While there is no order in this record before this Court that the trial court denied the motion for discovery, counsel for appellant contends that the at the bottom of page 4 and the top of page 5 of the record is the evidence of the denial of the motion. The record states:

> THE COURT: . . . We have the State represented by Mr. White. The motion is – there was also filed by the State. The Court heard preliminary arguments on the motion. I told both – last Friday – and I told both sides of the Court – made some preliminary rulings, and we would go forward with this hearing today on the issue that this Court was especially appointed to hear.
>
> Tr. 4-5.

Counsel for the State has no independent recollection of any discussions with the Court on the Friday prior to the evidentiary hearing in this case or the subject of any such discussion. However, the record seems to indicate there was some type of preliminary discussion. For the sake of this argument the State will assume that the trial court overruled the motion. However, petitioner had a duty to have the ruling of the trial court memorialized by an order and failed to do so. Therefore, we have no indication of the reasons the trial court gave for denying the motion. Therefore, it appears that appellant has failed to present a record that is sufficient for a ruling to be made on this claim.

Further, the State would assert that Brown's requests discovery under M.R.A.P. 22 was belated. The State would assert that he is not entitled to discovery under Rule 22. Rule 22 is a tool to obtain discovery prior to the filing of an application for post-conviction relief with this Court. This post-conviction case was remanded to the Circuit Court for an evidentiary hearing on a single issue under the authority of MISS. CODE ANN. § 99-39-27 (7), which reads:

> (7) In granting the application the court, in its discretion, may:
>
> (a) Where sufficient facts exist from the face of the application, motion, exhibits, the prior record and the state's response, together with any exhibits submitted therewith, or upon stipulation of the parties, grant or deny any or all relief requested in the attached motion.
>
> (b) *Allow the filing of the motion in the trial court for further proceedings under Sections 99-39-13 through 99-39-23.* [Emphasis added.]

The discovery provisions of the above noted statutes are found in MISS. CODE ANN. § 99-39-15, and apply to discovery after remand for an evidentiary hearing in this Court. Section 99-39-15, reads:

> (1) *A party may invoke the processes of discovery available under the Mississippi Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.*
>
> (2) Requests for discovery shall be accomplished by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced. [Emphasis added.]

The inclusion of the language "but not otherwise" in subsection (1) of § 99-39-15, makes it clear that this statute, not Rule 22, applies to a case in the procedural posture of the one at

bar. Thus, Brown was entitled to discovery under the provisions of § 99-39-15 the trial court may grant or deny such request in the exercise of its discretion, "but not otherwise."

When we look to the purpose of Rule 22, we find that it was created to fill the void left by the discovery provisions found in § 99-39-15. In order to obtain discovery under § 99-39-15, a post-conviction petitioner had no way to invoke discovery prior to the filing of a post-conviction application. The Court, after its decision in *Jackson v. State*, 732 So.2d 187 (Miss.,1999), providing for the appointment of counsel for death sentenced post-conviction petitioners, created this tool in order that discovery could be had prior to the filing of a post-conviction application with this Court. That was the purpose of the limited remand found in Rule 22, to appoint counsel, allow discovery, and provide funds for investigative and expert assistance.

The State's position in this regards is borne out by the decision in *Russell v. State*, 819 So.2d 1177 (Miss. 2001). Looking to *Russell*, we find the Court speaking of Rule 22 in terms of assistance **prior** to the filing of an application for post-conviction relief, **not after**. In fact, Brown appears to have admitted this in his motion filed with the Circuit Court. In his motion he states:

> 5. During the time since the Petitioner originally sought discovery, the Mississippi Supreme Court promulgated Miss. R.C.P. 22(c)(4)(ii). That rule requires, prior to filing Petitioner's original application in the supreme court:
> . . .
>
> C.P. at 24.

He then recites the language from Rule 22 requiring that prior counsel and the state to "make

available" their files.

This Court quoted from Judge Gray Evans' response to the motion for extraordinary relief noting that he set forth the problem faced by the Court in that case. Judge Evans response stated:

> . . . Although the State's Attorney takes great umbrage at this Court granting Petitioner any discovery, *it only stands to reason that a Petitioner would need access to some information and documentation before he is able to properly form his potential legal claims.*
>
> In the case at bar, the Supreme Court ordered this Court to appoint counsel for Petitioner and to grant him investigative assistance. Surely the Court did not go through the trouble of granting Petitioner an attorney and investigative assistance if it intended to foreclose any real *opportunity to produce a meaningful, complete petition.* The Circuit Court in this case must be allowed to grant some initial discovery. *Absent this authority, appointment of counsel and investigative assistance would be meaningless.*
>
> 819 So.2d at 1178-1179, ¶ 5. [Emphasis added.]

Clearly, the Court in quoting from Judge Evans' response was setting forth the parameters of discovery **prior** to the filing of an application for post-conviction relief. The Court concluded that Russell was entitled to discovery in order to prepare his application for post-conviction relief. 891 So.2d at 1180, ¶ 9. The application in this case was filed with this Court by Brown and was acted on by this Court. Therefore, any discovery in the post-remand posture must be accomplished under the statutory provisions found in § 99-39-15.

The State would also assert that the limited question remanded for hearing in this case did not require the production of the "complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed and the prosecution" of

Brown. The question remanded to the trial court was whether Brown received ineffective assistance of counsel during the sentence phase of his trial when defense counsel failed to produce mental health mitigation evidence. This was the only question before the Court and the State would assert that Brown has no need for the complete investigative and prosecutorial files in this case. The State had no role in the decision of whether defense counsel chose not to put on certain evidence during the sentence phase of this case. The State would assert that the complete law enforcement investigative and prosecution files were not pertinent or necessary to the limited inquiry before the trial court.

Assuming only for the sake of this argument that Rule 22 applies in a case in this procedural posture State would assert that Brown's reading of the rule is flawed. Petitioner contends that Rule 22 is "self executing" and that the State and prior defense counsel "should have, on their own initiative, provided Petitioner with their complete files." Brf. at 15. Petitioner relies on the provisions of Rule 22(c)(4)(ii) to make this assertion. Rule 22(c)(4)(ii) reads:

> (ii) Upon appointment of counsel, or the determination that the petitioner is represented by private counsel the petitioner's prior trial and appellate counsel *shall make available* to the petitioner's post-conviction counsel their complete files relating to the conviction and sentence. The State, to the extent allowed by law, *shall make available* to post-conviction counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed and the prosecution of the petitioner. If the State has a reasonable belief that allowing inspection of any portion of the files by post-conviction counsel for the petitioner would not be in the interest of justice, the State may submit for inspection by the convicting court those portions of the files so identified. If upon examination of the files, the court finds that such portions of the files could not assist the capital petitioner in

> investigating, preparing, or presenting a motion for post-conviction relief, the court in its discretion may allow the State to withhold that portion of the files. Discovery and compulsory process may be allowed the petitioner from and after the appointment of post-conviction counsel or the determination that the petitioner is represented by private counselor or is proceeding pro se, *but only upon motion indicating the purpose of such discovery and that such discovery is not frivolous and is likely to be helpful in the investigation, preparation or presentation of specific issues which the petitioner in good faith believes to be in question and proper for post-conviction relief, and order entered in the sound discretion of the court.* Upon determination that the petitioner has elected to proceed pro se, such files and discovery shall be made available as provided in subsection (2)(iii) above.

The State would assert that "make available" has a different meaning than that attributed to it by Brown. In order to make something available there has to be a request therefor. The rule does not state that either the state or prior counsel automatically copy their files and send them to counsel. The claims that petitioner is pursuing may not require this information and therefore may not ever make a request for these filed. However, current counsel for Brown made no request of the state or defense counsel to make their files available to him prior to the filing of the motion.[2] Further, if Rule 22 is a pre-petition discovery rule then neither the State or prior counsel was on notice that they were required to do anything after the case was remanded. Petitioner is attempting to place a burden on the State and prior counsel that in not encompassed in Rule 22.

The State also notes that Brown seems to argue that he was forced to file his motion

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[2]Counsel for the State spoke with both of Brown's trial counsel, they both state that they could not recall whether they had previously furnished their files to Craig during his representation of Brown, but both stated that if he has asked for the files they would have been furnished to him at that time with no hesitation.

to compel the State and prior counsel to abide by Rule 22. While it is true that compulsory process may be used to compel discovery, the rule is very specific regarding how this is to be accomplished. The rule reads, in part:

> Discovery and compulsory process may be allowed the petitioner from and after the appointment of post-conviction counsel or the determination that the petitioner is represented by private counselor or is proceeding pro se, but only upon motion *indicating the purpose of such discovery* and *that such discovery is not frivolous* and is *likely to be helpful in the investigation, preparation or presentation of specific issues which the petitioner in good faith believes to be in question* and proper for post-conviction relief, and order entered in the sound discretion of the court.

Brown's only reason stated in his motion is that "[w]ithout discovery, Petitioner cannot be adequately prepared for the evidentiary hearing required by the Supreme Court." C.P. at 24.

We note that Mr. Craig began representing Brown prior to January 15, 1997, as he filed a petition for writ of certiorari with the United States Supreme Court on behalf of Brown after the affirmance of his conviction and sentence on direct appeal. Mr. Craig filed the post-conviction petition that resulted in the remand for the evidentiary hearing that is the subject of this appeal. This case was remanded to the trial court in 1999. Rule 22 was promulgated in 2000. The evidentiary hearing in the case did not take place until March 1, 2004. Yet, in the three years between the promulgation of Rule 22 and five days prior to the scheduled evidentiary hearing in this matter Brown made no request that trial counsel's files or the prosecution and law enforcement files be made available to him. His only excuse is that no judge was appointed who he could have ruled on the motion for discovery. Which way does he want it? Either Rule 22 is self executing or he has to file a motion for discovery.

The State would submit that Rule 22 is self executing to the extent that the prosecution and prior counsel must "make available" their files without court order when a request is made. Petitioner made no such request prior to filing the motion. He could have made the request at anytime over the three and a half years prior to the evidentiary hearing. Further, nothing prevented Brown from filing a motion for discovery in this case promptly so it would be available as soon as a judge was appointed. Even after the judge was appointed and set the date for the hearing Brown waited forty-two (42) days to file his motion for discovery.

After the hearing Brown made no further attempt to secure the files he now contends are so crucial to his case. If Rule 22 is self executing in the manner the State asserts, Brown only had to request that the files be made available even after the hearing. By failing to do so he has presented no specific claim that anything contained in those records was germane to the issue that was decided by the trial court. What the belated motion for Rule 22 discovery appears to be was an attempt to delay the hearing in this case and conduct a fishing expedition attempting to find additional issues to present in this case. However, the trial court could not have entertained any claim other than that which was specifically remanded to it for consideration. The circuit court's jurisdiction was limited to the issues that were remanded to it by this Court and no other. *See Neal v. State*, 525 So.2d 1279 (Miss. 1987) (Remanded for limited evidentiary hearing to determine whether petitioner had been denied his right to testify in his own behalf, all other grounds denied.); *Billiot v. State*, 515 So.2d 1234 (Miss. 1987) (Remanded for limited evidentiary hearing on present sanity to be

executed, relief denied on all other grounds); *Culberson v. State*, 456 So.2d 697 (Miss. 1984) (Remanded for limited evidentiary hearing to determine whether petitioner had been denied his right to testify in his own behalf, all other grounds denied.).

Brown concludes his argument with a general argument asserting that it is reversible error to dismiss a claim in the absence of an "opportunity for discovery." The State would argue that Brown was not denied reasonable discovery in this case has he had an opportunity for discovery and just did not avail himself

Finally, the State would assert that the limited question remanded for hearing in this case did not require the production of the "complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed and the prosecution" of Brown. The question before the trial court was whether Brown received ineffective assistance of counsel during the sentence phase of his trial when defense counsel failed to produce mental health mitigation evidence. This was the only question before the trial court and the State would assert that Brown had no need for the complete investigative and prosecutorial files in this case. The State had no role in the decision of whether defense counsel chose not to put on certain evidence during the sentence phase of this case. The State would assert that the complete investigative and prosecution files were not pertinent or necessary to the limited inquiry before the trial court.

In conclusion, the State would assert that Brown has failed to present a record sufficient to decided this issue as no order denying discovery appears in the papers before

this Court. Additionally, the State would assert that Rule 22 did not apply to a case in the procedural posture of this case as MISS. CODE ANN. § 99-39-15 adequately provides for discovery prior to an evidentiary hearing. Rule 22 is only self executing insofar as a post-conviction petitioner does not have to obtain a court order to force former defense counsel and the state to "make available" their files. A post-conviction petitioner only has to request such availability, which Brown never did. Even so petitioner has yet to demonstrate he was in any manner prejudiced by the denial of his belated discovery motion.

If Rule 22 applies as Brown asserts, he has failed to make a request to have these files made available under the "self executing" provision of the rule. He has also failed to set forth what "specific issues" Brown "in good faith believes to be in question." *See* Rule 22 (c)(4)(ii). Petitioner has failed to demonstrate any prejudice in the trial court's denial of his motion which was actually an attempt to delay the evidentiary hearing in this matter. The circuit court's decision should be affirmed.

II. BROWN WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Brown also contends that the trial court erred in finding that he was not denied the effective assistance of counsel at the sentence phase of his capital murder trial because counsel did not introduce mental health mitigation evidence.

Looking to this Court's opinion remanding the case for an evidentiary hearing we find the Court holding:

> ¶ 21. The record shows that the trial court granted a defense motion to

have Brown evaluated at the Mississippi State Hospital specifically for the purpose of developing mitigating evidence pursuant to MISS. CODE ANN. § 99-19-101(6) (1994). Defense counsel reported, however, "The Defendant was evaluated at Whitfield for the purposes of mitigation defense. On the basis that the staff at Whitfield could not assist in any mitigation defense, no written reports were ever submitted." *There is no further elaboration in the record as to whether there was no favorable evidence to be adduced or whether the State Hospital refused to prepare a report.* It cannot be said what weight, if any, a juror might have given to such a report had one been prepared and submitted. *Sawyer v. Whitley*, 505 U.S. 333, 348, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). It is entirely possible that favorable mitigating evidence of Brown's mental state might not have outweighed the aggravating circumstances in the jurors' minds, but such an opportunity was never afforded them. The very purpose of mitigation is to reveal evidence that the defendant is not as bad a person as might be believed from the evidence introduced at the guilt phase of the trial. *Eddmonds v. Peters*, 93 F.3d 1307, 1321 (7th Cir.1996). In the present case, the trial court ordered a mental evaluation but no report was ever produced. It has been held that consideration of all relevant mitigating evidence is required at the sentencing phase because the imposition of the death sentence should reflect a reasoned, moral response to the defendant's background and character and the crime. *Russell v. Collins*, 998 F.2d 1287, 1291 (5th Cir.1993). *Brown should be allowed to present this issue to the trial court for a determination of whether trial counsel was ineffective in failing to seek other expert assistance when the State Hospital examination produced no report and whether such inaction resulted in any prejudice to his case at sentencing.*

749 So.2d at 90 -91. [Emphasis added.]

By pointing out that "[t]here is no further elaboration in the record as to whether there was no favorable evidence to be adduced or whether the State Hospital refused to prepare a report" it is clear that the Court wanted to know why Whitfield did not issue a formal report. The reason that no report was issued has now been fully explained by the testimony of both the mental health professionals from Whitfield and trial counsel. The second question is whether counsel was ineffective for failing to seek further expert assistance. That question

is resolved by the answer to the first question. Trial counsel met personally with the examining doctors and received a verbal opinion from these Whitfield doctors that there was little in the way of mitigation that they could find had no duty to seek further expert assistance, assuming that such a request would have been granted. The basis for this assertion will be explained below.

A. Standard to be Applied.

The analysis of all claims of ineffective assistance of counsel are governed by the precedent announced in *Strickland v. Washington*, 466 U.S. 668 (1984), by the United States Supreme Court and first employed by this Court in *Stringer v. State*, 454 So.2d 468, 476 (Miss. 1984). The United States Supreme Court has repeatedly reaffirmed that *Strickland* is the test to be followed in assessing ineffective assistance of counsel claims. *See Wiggins v. Smith*, 539 U.S. 510 (2003); *Bell v. Cone*, 535 U.S. 685 (2002); *Williams v. Taylor*, 529 U.S. 362 (2000). Contrary to arguments asserting that *Williams v. Taylor, supra*, changed the *Strickland* test the Court has held that it did not. *See Wiggins, supra*, at 539 U.S. at 521-22; *Rompilla v. Beard*, 545 U.S. 374, 393-94 (2005)(O'Connor, J., concurring.)

Most recently the United States Supreme Court reiterated and further explained *Strickland* in *Pinholster v. Cullen*, ___ U.S. ___, 131 S.Ct. 1388 (2011). There the high court held:

> There is no dispute that the clearly established federal law here is *Strickland v. Washington*. In *Strickland*, this Court made clear that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . [but] simply to ensure that

criminal defendants receive a fair trial." 466 U.S., at 689, 104 S.Ct. 2052. Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct *so undermined* the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*, at 686, 104 S.Ct. 2052 (emphasis added). The Court acknowledged that "[t]here are countless ways to provide effective assistance in any given case," and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.*, at 689, 104 S.Ct. 2052.

Recognizing the "tempt[ation] for a defendant to second-guess counsel's assistance after conviction or adverse sentence," *ibid.*, the Court established that counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *id.*, at 690, 104 S.Ct. 2052 . To overcome that presumption, a defendant must show that counsel failed to act "reasonabl[y] considering all the circumstances." *Id.*, at 688, 104 S.Ct. 2052. The Court cautioned that "[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges." *Id.*, at 690, 104 S.Ct. 2052.

The Court also required that defendants prove prejudice. *Id.*, at 691–692, 104 S.Ct. 2052. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ibid. That requires a "substantial," not just "conceivable," likelihood of a different result. Richter*, 562 U.S., at ——, 131 S.Ct., at 791.

131 S.Ct. at 1403. [Emphasis the Court's and emphasis added.]

The Court continued its discussion, finding that the court of appeals had misapplied *Strickland's* holding in determining that Pinholster's counsel had rendered deficient performance:

The Court of Appeals misapplied *Strickland* and overlooked "the constitutionally protected independence of counsel and . . . the wide latitude counsel must have in making tactical decisions." 466 U.S., at 689, 104 S.Ct.

2052. Beyond the general requirement of reasonableness, "specific guidelines are not appropriate." *Id.*, at 688, 104 S.Ct. 2052. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions . . . ." *Id.*, at 688–689, 104 S.Ct. 2052. *Strickland* itself rejected the notion that the same investigation will be required in every case. *Id.*, at 691, 104 S.Ct. 2052 ("[C]ounsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary" (emphasis added)). It is "[r]are" that constitutionally competent representation will require "any one technique or approach." *Richter*, 562 U.S., at ——, 131 S.Ct., at 779. The Court of Appeals erred in attributing strict rules to this Court's recent case law.[17]

Nor did the Court of Appeals properly apply the strong presumption of competence that *Strickland* mandates. The court dismissed the dissent's application of the presumption as "fabricat[ing] an excuse that the attorneys themselves could not conjure up." 590 F.3d, at 673. But *Strickland* specifically commands that a court "must indulge [the] strong presumption" that counsel "made all significant decisions in the exercise of reasonable professional judgment." 466 U.S., at 689–690, 104 S.Ct. 2052. *The Court of Appeals was required not simply to "give [the] attorneys the benefit of the doubt," 590 F.3d, at 673, but to affirmatively entertain the range of possible "reasons Pinholster's counsel may have had for proceeding as they did,"* *id.*, at 692 (Kozinski, C.J., dissenting). *See also Richter, supra*, at 1427, 131 S.Ct., at 791 ("*Strickland . . . calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind*").

131 S.Ct. at 1406 -07. [Emphasis the Court's and emphasis added.]

The Court continued:

Justice SOTOMAYOR's approach is flatly inconsistent with *Strickland*'s recognition that "[t]here are countless ways to provide effective assistance in any given case." 466 U.S., at 689, 104 S.Ct. 2052. There comes a point where a defense attorney will reasonably decide that another strategy is in order, thus "mak[ing] particular investigations unnecessary." *Id.*, at 691, 104 S.Ct. 2052; *cf.* 590 F.3d, at 692 (Kozinski, C.J., dissenting) ("*The current infatuation with 'humanizing' the defendant as the be-all and end-all of mitigation disregards the possibility that this may be the wrong tactic in some cases because experienced lawyers conclude that the jury simply won't buy*

it"). Those decisions are due "a heavy measure of deference." *Strickland, supra*, at 691, 104 S.Ct. 2052 The California Supreme Court could have reasonably concluded that Pinholster's counsel made such a reasoned decision in this case.

We have recently reiterated that " '[s]urmounting *Strickland's* high bar is never an easy task.'" *Richter, supra*, at ——, 131 S.Ct., at 788 (quoting *Padilla v. Kentucky*, 559 U.S. ——, ——, 130 S.Ct. 1473, 1484, 176 L.Ed.2d 284, (2010)). The *Strickland* standard must be applied with "scrupulous care." *Richter, supra*, at ——, 131 S.Ct., at 788. The Court of Appeals did not do so here.

131 S.Ct. at 1407-08. [Emphasis added.]

Turning to the question of prejudice the Supreme Court also found that the court of appeals had erred in its application of *Strickland.* The Court held:

Even if his trial counsel had performed deficiently, Pinholster also has failed to show that the California Supreme Court must have unreasonably concluded that Pinholster was not prejudiced. "[T]he question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland, supra*, at 695, 104 S.Ct. 2052 We therefore "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins, supra*, at 534, 123 S.Ct. 2527.

131 S.Ct. at 1408.

The Court pointed out that:

To the extent the state habeas record includes new factual allegations or evidence, much of it is of questionable mitigating value. If Pinholster had called Dr. Woods to testify consistently with his psychiatric report, Pinholster would have opened the door to rebuttal by a state expert. *See, e.g., Wong v. Belmontes*, 558 U.S. ——, ——, 130 S.Ct. 383, 389–90, 175 L.Ed.2d 328 (2009) (per curiam) (taking into account that certain mitigating evidence would have exposed the petitioner to further aggravating evidence). The new evidence relating to Pinholster's family—their more serious substance abuse, mental illness, and criminal problems, *see post*, at 1424—is also by no means

clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation. *Cf. Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (recognizing that mitigating evidence can be a "two-edged sword" that juries might find to show future dangerousness).

131 S.Ct. at 1410.

In *Foster v. State*, 687 So.2d 1124 (Miss. 1996), this Court held:

"The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The test is two pronged: The defendant must demonstrate that his counsel's performance was deficient, and that the deficiency prejudiced the defense of the case. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064; *Washington v. State*, 620 So.2d 966 (Miss.1993). "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Stringer v. State*, 454 So.2d 468, 477 (Miss.1984), *citing Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. at 2064. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Stringer* at 477, *citing Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065; *State v. Tokman*, 564 So.2d 1339, 1343 (Miss.1990).

> Judicial scrutiny of counsel's performance must be highly deferential. (citation omitted) . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

Stringer at 477; *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. In short, defense counsel is presumed competent. *Johnson v. State*, 476 So.2d 1195, 1204 (Miss.1985); *Washington v. State*, 620 So.2d 966 (Miss.1993).

Then, to determine the second prong of prejudice to the defense, the standard is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Mohr v. State*, 584 So.2d 426, 430 (Miss.1991). This means a "probability sufficient to undermine the confidence in the outcome." *Id.* The question here is

> whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death.

Strickland, 466 U.S. at 695, 104 S.Ct. at 2068.

There is no constitutional right then to errorless counsel. *Cabello v. State*, 524 So.2d 313, 315 (Miss.1988); *Mohr v. State*, 584 So.2d 426, 430 (Miss.1991) (right to effective counsel does not entitle defendant to have an attorney who makes no mistakes at trial; defendant just has right to have competent counsel). If the post-conviction application fails on either of the *Strickland* prongs, the proceedings end. *Neal v. State*, 525 So.2d 1279, 1281 (Miss.1987); *Mohr v. State*, 584 So.2d 426 (Miss.1991).

687 So.2d at 1129-30.

More recently in *Walker v. State*, 863 So.2d 1 (Miss. 2003), the Court held:

> ¶ 15. Any and all claims of ineffective assistance of counsel are to be decided under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), adopted by this Court in *Stringer v. State*, 454 So.2d 468 (Miss.1984) and followed in *Foster v. State*, 687 So.2d 1124 (Miss.1996). *See Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471, 484 (2003); *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The *Strickland* standard provides a two-part test that must be met to justify the reversal of a conviction or death sentence: first, the defendant must show that counsel's performance was deficient, and second, the defendant must show

that the deficient performance prejudiced the defense. 466 U.S. at 687, 104 S.Ct. 2052. Explanatory excerpts from *Stringer*, upon which this Court has previously relied, follow:

> This requires showing that counsel's error were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.
>
> . . . .
>
> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all to easy for a court, examining counsel's defense after it had proved unsuccessful, to conclude that a particular act or omission of counsel unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effect of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

454 So.2d at 477. In *Mohr v. State*, 584 So.2d 426, 430 (Miss.1991), this Court required the defendant to show the existence of a reasonable probability that, but for counsel's unprofessional errors, the outcome would have been different, where "a reasonable probability is a probability sufficient to undermine confidence in the outcome."

863 So.2d at 10 -11.

Therefore, in order to prove a claim of ineffective assistance of counsel a petitioner must first show that counsel's performance was deficient and second demonstrate that the deficient

performance prejudiced the defense. Both showings must be made in order to substantiate an ineffectiveness of counsel claim. The State would assert that the circuit court did not err in holding that Brown failed to make that showing and therefore was not provided ineffective assistance of counsel. The State would assert that petitioner did not prove deficient performance. However, the State would further assert that Brown cannot demonstrate that there exists a reasonable probability that, even assuming for this argument, that counsel's performance was deficient, there is a reasonable probability that the result of the sentence proceeding would have been different. The State asserts that Brown cannot show deficient performance and prejudice in trial counsel's actions.

Petitioner appears to argue that the recent opinion of the United States Supreme Court in *Williams v. Taylor, supra*, changed the test set forth in *Strickland.* The high court dispelled this notion in its opinion in *Wiggins v. Smith, supra.* There the Court held:

> Our opinion in *Williams v. Taylor* is illustrative of the proper application of these standards. In finding Williams' ineffectiveness claim meritorious, we applied *Strickland* and concluded that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background." 529 U.S., at 396, 120 S.Ct. 1495 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1980)). While Williams had not yet been decided at the time the Maryland Court of Appeals rendered the decision at issue in this case, *cf. post*, at 2546 (SCALIA, J., dissenting), Williams' case was before us on habeas review. *Contrary to the dissent's contention, ibid., we therefore made no new law in resolving Williams' ineffectiveness claim. See Williams, 529 U.S., at 390, 120 S.Ct. 1495 (noting that the merits of Williams' claim "are squarely governed by our holding in Strickland"); see also id.*, at 395, 120 S.Ct. 1495 (noting that the trial court correctly applied both components of the *Strickland*

standard to petitioner's claim and proceeding to discuss counsel's failure to investigate as a violation of *Strickland's* performance prong).

123 S.Ct. at 2535 -2536. [Emphasis added.]

The standard remains that found in *Strickland.* In the *Wiggins* case, the Court focused on the portion of the *Strickland* precedent holding that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691, 104 S.Ct. 2052. In *Wiggins*, the Court explained that a reviewing court's focus in failure to investigate claims is "whether the investigation supporting counsel's decision . . . was itself reasonable." 123 S.Ct. at 2535. The Mississippi Supreme Court recognized this precedent in *Crawford v. State*, 867 So.2d 196 (Miss. 2003), holding:

> . . . Quoting *Strickland*, the Court reiterated that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 2535. Therefore, since counsel is under a general duty to reasonably investigate, a court should not simply concentrate its analysis on the decision not to present evidence, but instead, should "focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . was itself reasonable." *Id.* at 2536.
>
> ¶ 92. Thus, a court is to determine whether counsel exercised reasonable professional judgment in conducting its investigation based on an assessment of the prevailing professional norms, including a "*context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.*'" *Id.* We accept this instruction and stand ready to analyze this issue under the guidelines announced above.

867 So.2d at 217, ¶¶ 91-92. [Emphasis added.]

The trial court conducted a "context-dependent consideration" of the decision of counsel not

to request that a report be completed as seen "from counsel's perspective at the time", without the distorting effect of hindsight. In other words, was the decision to instruct the mental health professionals at Whitfield not to produce a report after considering their advice that there was little in the way of mitigation evidence they could offer, unreasonable.

The Fifth Circuit has also spoken to the requirements of the decision in *Wiggins* in *Riley v. Cockrell*, 339 F.3d 308 (5th Cir. 2003). The Court held:

> Counsel may be deemed constitutionally ineffective if he fails to exercise reasonable professional judgment in investigating a defendant's personal history if the defendant's background would be relevant in evaluating his moral culpability. *See Wiggins v. Smith*, --- U.S. ----, 123 S.Ct. 2527, --- L.Ed.2d ---- (2003) (holding counsel was ineffective for failing to investigate the "powerful" mitigating evidence relating to defendant's extremely troubled personal history). Even given the important role of mitigating evidence, however, counsel's performance is not per se deficient if he fails to present such evidence. *See id.*; *Moore*, 194 F.3d at 615. In determining whether counsel's treatment of mitigating evidence prejudiced the petitioner's defense, a state court must "evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." *Williams*, 529 U.S. at 397-98, 120 S.Ct. 1495.
>
> 339 F.3d at 316-17.

Looking to *Wiggins* we find the question before the high court was whether the failure of counsel to look beyond a pre-sentence report and some social services records and not investigate Wiggins' entire background was deficient performance by his trial counsel. The Court found that counsel failed to uncover evidence of "privation and abuse," "physical torment, sexual molestation and repeated rape," and that petitioner was homeless. 539 U.S. at 535. The Court stated that Wiggins had "the kind of troubled history we have declared

relevant to assessing a defendant's moral culpability." *Id.* The Court then held:

> Given both the nature and extent of the abuse petitioner suffered, we find there to be a reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing in an admissible form. . . . Moreover, given the strength of the available evidence, a reasonable attorney may well have chosen to prioritize the mitigation case over the direct responsibility challenge, *particularly given that Wiggins' history contained little of the double edge we have found to justify limited investigations in other cases*. Cf. *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987); *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).
>
> 539 U.S. at 535-36. [Emphasis added.]

In the case at bar there is no mitigating evidence of the nature or strength of that found in either *Wiggins* or *Williams v. Taylor*, 529 U.S. 362 (2000). Trial counsel conducted a full investigation of Brown's social history as is evident by the Whitfield records furnished by trial counsel. Further, there is no evidence of the nature and quality of that found in *Wiggins* or *Williams* present in the case at bar.

In making this analysis the State would also point out the recent decision of the United States Court of Appeals for the Ninth Circuit on this specific issue. In *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003), *vacated on other grounds, Schriro v. Summerlin*, 542 U.S. 348 (2004), applied *Wiggins* to a case similar to the one at bar. The court held:

> . . . As the Supreme Court recently reiterated, this evaluation must include "an objective review of [counsel's] performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct." *Wiggins v. Smith*, --- U.S. ----, 123 S.Ct. 2527, 2536, 156 L.Ed.2d 471 (2003) (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052).

> A review of the record indicates that Klink's trial performance did not fall below the objective standard of reasonableness required under *Strickland*. *In deciding whether to pursue evidence of Summerlin's mental state, Klink was entitled to rely on the opinions of the mental health experts who already had examined Summerlin. See Hendricks*, 70 F.3d at 1038. At the time, none of the doctors would opine that Summerlin was suffering from a mental disease or defect that would provide a foundation for an insanity defense. None of the physicians, including Dr. Garcia Bunuel, was able to diagnose Summerlin as clearly suffering from psychomotor epilepsy. It thus was reasonable for Klink not to investigate this possibility further. *Cf. Wiggins*, --- U.S. at ---- - ----, 123 S.Ct. at 2536-38 (upholding an ineffective assistance claim against counsel who curtailed investigation despite promising leads in preliminary discovery).
>
> 341 F.3d at 1094 -95. [Emphasis added.]

Hendricks v. Calderon, 70 F.3d 1032, 1038 (9th Cir. 1995), *cert. denied*, 517 U.S. 1111 (1996)(Reliance on the conclusions of his expert shields counsel from claims of ineffective assistance of counsel). The Fifth Circuit also held in *Smith v. Cockrell*, 311 F.3d 661 (5th Cir. 2002), *cert. granted*, 539 U.S. 986 (2003), *cert. dismissed under 46.1*, 541 U.S. 913 (2004):

> Counsel should be permitted to rely upon the objectively reasonable evaluations and opinions of expert witnesses without worrying that a reviewing court will substitute its own judgment, with the inevitable hindsight that a bad outcome creates, and rule that his performance was substandard for doing so. Mr. Parnham's actions in this case were objectively reasonable. The state habeas court did not unreasonably apply federal law in denying Smith's request for relief on this ground. We reverse the district court's holding to the contrary; there is no *Strickland* violation.[9]
>
> ---
>
> 9. Because we find that counsel's performance was not objectively unreasonable, we do not need to reach the second prong of the *Strickland* analysis.
>
> 311 F.3d at 676-77.

That is just what trial counsel did in this case, relied on the opinions of the mental health

experts who had examined petitioner. The mental health professionals clearly stated that they found very little if anything by way of mitigation in their examination of petitioner. Counsel was entitled to rely on that opinion in making their decision not to pursue the matter of psychological mitigation any further. Brown has failed to show deficient performance and totally failed to demonstrate actual prejudice from the actions of trial counsel. Having failed to show both prongs of the *Strickland* test petitioner has failed to substantiate his claim of ineffective assistance of counsel. Further, counsel's decision declining to have an actual report produced by the mental health professionals at Whitfield was a reasonable strategic decision. If a report and had Brown called either Dr. Lott or Dr. McMichael to testify the State would have been entitled to a copy of the report that they had produced. Therefore, the harmful information would have been in the hands of the State for cross-examination and impeachment.

Brown cites to *Smith v. Texas*, 543 U.S. 37, 48 (2004), for the proposition that "two-edged" or "double-edged" evidence must be introduced and counsel is ineffective for failing to do so. However, when we look to the cited portion of *Smith* we find a discussion of a nullification instruction not being sufficient to give the jury a vehicle to consider Smith's evidence of mental retardation as mitigation evidence. There is no mention of double-edged evidence. However, looking further to *Penry v. Lynaugh,* 492 U.S. 302 (1989)(*Penry I*), we find that case was reversed because the instructions given to the jury did not provide a vehicle which would allow the jury to "consider and give effect to mitigation evidence. The

reference in *Penry* to "two-edged" evidence in that case was as follows:

> Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future. As Judge Reavley wrote for the Court of Appeals below:
>
> > "What was the jury to do if it decided that Penry, because of retardation, arrested emotional development and a troubled youth, should not be executed? If anything, the evidence made it more likely, not less likely, that the jury would answer the second question yes. It did not allow the jury to consider a major thrust of Penry's evidence as mitigating evidence." 832 F.2d, at 925 (footnote omitted) (emphasis in original).
>
> The second special issue, therefore, did not provide a vehicle for the jury to give mitigating effect to Penry's evidence of mental retardation and childhood abuse.
>
> 492 U.S. at 324.

Therefore, the Court was concerned with the fact that the jury could not consider the evidence not that it had to be introduced. The same issue is found in *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 265 (2007), whether the jury could give "meaningful effect" or a "reasoned moral response" to the defendant's mitigating evidence. In fact, every case in which the United States Supreme Court has addressed the "two-edged" nature of mitigating evidence has been in connection with special circumstances in the Texas capital sentencing statute not giving the jury a vehicle to consider the mitigating evidence. *See Abdul-Kabir, supra*; *Brewer v. Quarterman*, 550 U.S. 286 (2007); *Tennard v. Dretke*, 542 U.S. 274 (2004); *Johnson v. Texas*, 509 U.S. 350 (1993); *Graham v. Collins*, 506 U.S. 461 (1993); *Penry I*,

supra.[3]

Petitioner asserts that the evidence in several of the cases he has cited "could similarly be deemed 'double edged,' but this did not prevent the Supreme Court from finding that counsel was deficient for failing to investigate and present this evidence." Brf at 26. This is clearly petitioner's characterization of the evidence in these cases as there is no mention of the two-edged or double-edged nature of the evidence in any of those cases. However, there is clearly United States Supreme Court precedent which holds that counsel was not ineffective for failing to present conflicting or two-edged mitigation evidence. In *Pinholster v. Cullen*, *supra*, the United States Supreme Court held:

> To the extent the state habeas record includes new factual allegations or evidence, much of it is of questionable mitigating value. If Pinholster had called Dr. Woods to testify consistently with his psychiatric report, Pinholster would have opened the door to rebuttal by a state expert. *See, e.g., Wong v. Belmontes*, 558 U.S. ——, ——, 130 S.Ct. 383, 389–90, 175 L.Ed.2d 328 (2009) (per curiam) (taking into account that certain mitigating evidence would have exposed the petitioner to further aggravating evidence). The new evidence relating to Pinholster's family —their more serious substance abuse, mental illness, and criminal problems, *see post*, at 1424—is also by no means

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[3]The Supreme Court did mention the two-edged nature of mental retardation evidence in *Atkins v. Virginia*, 536 U.S. 304 (2002). There the Court stated:

> As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. 492 U.S., at 323–325, 109 S.Ct. 2934. Mentally retarded defendants in the aggregate face a special risk of wrongful execution.

Id. at 321.

Therefore, this mention was again in reference to a single mitigating factor being two-edged.

> clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation. *Cf. Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (recognizing that mitigating evidence can be a "two-edged sword" that juries might find to show future dangerousness).
>
> 131 S.Ct. at 1410.

Likewise, the Fifth Circuit recognizes that counsel cannot be held ineffective for failing to present evidence that is "double-edged". In *Gray v. Epps*, 616 F.3d 436 (5th Cir. 2010), *cert. denied*, ___ U.S. ___, 131 S.Ct. 1785 (2011), a case from Mississippi, the Fifth Circuit held:

> In the instant case, there is no allegation of abuse. Indeed, in the proffered mental health records, Gray's mother describes his childhood as "normal." Moreover, Gray cannot show prejudice because *much of the new evidence is "double edged" in that it could also be interpreted as aggravating. See Dowthitt v. Johnson*, 230 F.3d 733, 745 (5th Cir.2000) (*holding that petitioner could not demonstrate Strickland prejudice because the evidence was "double edged in nature"*). For instance, Dr. Stanley described Gray as "markedly antisocial" and "disturbed." The records list Gray's diagnosis as "Conduct Disorder, Soc. Aggressive" and provide evidence that he hit a girl in the face in the classroom. We are not persuaded that Gray's new evidence has a reasonable probability of influencing the jury's decision regarding his moral culpability
>
> 616 F.3d at 449.

In *Martinez v. Quarterman*, 481 F.3d 249 (5th Cir.,2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 1072 (2008), the Fifth Circuit held:

> Without a doubt, Dr. Pearlman's report brimmed with information which could have been useful to Martinez's mitigation case, but it also teemed with damaging information which convinced counsel not to pursue TLE any further.[2] Pearlman's report contained information which counsel rightly did not want the jury to hear. First and foremost, counsel thought that it would be more harmful than beneficial for the jury to learn that Martinez had a mental disorder which, in Dr. Pearlman's words, caused "savage and uncontrolled" aggressiveness. Yenne Dep. Vol. 8 at 160-61. Counsel believed that this

might cause the jury to believe that Martinez was a "complete danger to society" and that he was "incapable of controlling any of his behavior." *Id.* at 161.[3] Counsel thought that evidence of Martinez's aggressiveness, even if it were caused by a physical condition, would not sit well with a Brazoria County jury. *Id.* at 161-62. *The evidence for Martinez's TLE embodies the type of "double-edged" evidence which this circuit has repeatedly stated that counsel may elect not to present to the jury. Martinez v. Dretke*, 404 F.3d 878, 889 (5th Cir.2005) (*Martinez II*); *Johnson*, 306 F.3d at 253.

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2. In the words of Stan McGee, "my sense of our investigation about mitigation and future dangerousness was everything that we came up with or everything that Ms. Yenne came up with seemed to me to be-it hurt more than it helped." McGee Dep. at 47.

3. Admittedly, Dr. Pearlman's report states that with treatment "there is no likelihood that [Martinez] will commit future acts of dangerousness to society," but *it is counsel's decision to decide whether, on balance, the TLE evidence was more helpful than harmful. See Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir.2002) (*noting decision not to present double-edged testimony even less susceptible to judicial second-guessing*). Furthermore, Dr. Pearlman's opinion as to future dangerousness was based, in part, on his belief that Martinez lacked either a criminal history or a prior history of catastrophic violence. Yenne, however, knew that Dr. Pearlman was unaware of some of Martinez's prior bad acts, such as his history of stalking women, and she wanted to avoid exposing Dr. Pearlman to this potential line of cross-examination. Yenne Dep. Vol. 8. at 162, 142 (mentioning history of stalking women).

481 F.3d at 254-55. [Emphasis added.]

The Fifth Circuit also held in *St. Aubin v. Quarterman*, 470 F.3d 1096 (5th Cir. 2006), *cert. denied*, 550 U.S. 921 (2007):

> Although not all of the additional evidence need be favorable to the petitioner for counsel to have been ineffective for failing to present mitigating evidence, *Williams*, 529 U.S. at 396, 120 S.Ct. 1495, "*Strickland* requires ... [courts to] defer to counsel's decision . . . not to present a certain line of mitigating evidence when that decision is both fully informed and strategic, in the sense that it is expected, on the basis of sound legal reasoning, to yield

> some benefit or avoid some harm to the defense". *Moore v. Johnson*, 194 F.3d 586, 615 (5th Cir.1999). *Furthermore, "a tactical decision not to pursue and present potentially mitigating evidence on the grounds that it is double-edged in nature is objectively reasonable, and therefore does not amount to deficient performance"*. *Rector v. Johnson*, 120 F.3d 551, 564 (5th Cir.1997), *cert. denied*, 522 U.S. 1120, 118 S.Ct. 1061, 140 L.Ed.2d 122 (1998).
>
> 470 F.3d at 1103. [Emphasis added.]

See Woodfox v. Cain, 609 F.3d 774, 811 (5th Cir.,2010) ("'Counsel's decision not to pursue evidence that could be "double-edged in nature [was] objectively reasonable and therefore does not amount to deficient performance.'" *Drones*, 218 F.3d at 501 (quoting *Lamb v. Johnson*, 179 F.3d 352, 358 (5th Cir.1999) (other citations omitted)"; *Skinner v. Quarterman*, 528 F.3d 336, 342 (5th Cir.,2008) (Skinner's counsel made an informed, strategic decision that DNA testing was at least as likely to incriminate Skinner as to exonerate him and that additional testing was a gamble not worth taking. Given the "double-edged" nature of that choice, ineffectiveness cannot be established by second-guessing."); *Kitchens v. Johnson*, 190 F.3d 698, 703 (5th Cir.1999) (deeming failure to present evidence not ineffective because of "double-edged nature of the evidence involved"); *Boyle v. Johnson*, 93 F.3d 180 (5th Cir.1996) (same); *Woods v. Thaler* 399 Fed.Appx. 884, 897 (5th Cir.,2010) ("Given the great amount of aggravating evidence and the double-edged nature of the neuropsychological evidence, we do not find that Woods has demonstrated that there was a reasonable probability that the outcome would have been different had the evidence been investigated and introduced."). Therefore, the State would assert that counsel's decision not to have a report produced and further not to introduce evidence from the Whitfield evaluation does not

demonstrate deficient performance. Relying on this Court's decision in *Spicer v. State*, 973 So.2d 184, 191-92, ¶¶ 19-21 (Miss. 2007), which held that the evidence from the evaluation at the State Hospital could have been damaging to Spicer's case. C.P. at 89. This Court concluded:

> Any decision not to use Spicer's mental evaluation in mitigation can be presumed strategic, and Spicer has failed to overcome that presumption.
>
> 973 So.2d at 192.

There is no necessity for the trial court to rely on a presumption in this case. Both of petitioner's counsel testified at the evidentiary hearing that they made a strategic decision not to introduce the evidence and not to have a report of the evaluation issued because of the recognition that the report would be harmful to Brown. The trial court found:

> As a matter of trial strategy they concluded that since Dr. Lott, who had testified in numerous death penalty cases before, had determined, in his professional opinion, that there was not much in the form of mitigating evidence in the exam, that it wold be better not to direct that a written report be made. They were also aware, according to them, that there were things in the report that may be harmful to the Defendant at trial. As the medical staff at the State Hospital, testified at the hearing.
>
> C.P. at 88.

Trial counsel's main mitigation theory was going to be that Brown was under the substantial domination of his co-defendant, Rachel Walker. However, Dr. McMichael testified that he had concluded that Brown was not being dominated by anyone in his actions during this crime. Therefore, the circuit court did not have to speculate as to the reason for counsel's actions and did not err in holding that counsel's actions were strategic and that Brown had

failed to demonstrate that there was deficient performance. The decision of the trial court finding that trial counsel's actions were strategic is not clear error and therefore the trial court's decision should be affirmed.

B. Mitigation Evidence that was Introduced at Trial.

Petitioner has set out a list of "mitigation that could have been reported" in his brief. Petitioner, relying on the testimony of Dr. McMichael, repeated the list he complied as possible available mitigation evidence from the Whitfield records which were introduced at the evidentiary hearing. Petitioner contends that the jury should have been informed of the following:

1. Mr. Brown's parents were never married.
2. His parents separated when he was seven or eight years old.
3. His mother reportedly shot a half-sibling's father when Mr. Brown was five or six years old.
4. Mr. Brown's stepfather abused alcohol.
5. Mr. Brown's biological father died during Brown's childhood.
6. Mr. Brown was struck by a car at age thirteen.
7. He had a history of conduct disorder problems in adolescence.
8. He had a history of substance abuse including alcohol, marijuana and cocaine.
9. He was probably using cocaine around the time of the alleged offense.

Tr. 70-71; Petitioner's brief at 7-8.

His contention is that this listed evidence could have and should have been produced in

mitigation at the sentence phase of the trial and was not. From that assertion he submits that counsel were deficient in their performance and petitioner was prejudiced thereby because the jury was not allowed to consider this information in mitigation.

What petitioner has fails to recognize is this evidence that was actually introduced in mitigation at trial. A reading of the trial transcript and the exhibits introduced at trial refutes petitioner's claim. During the sentence phase of the trial counsel introduced Defense Exhibit 2 into evidence. Tr. 928. This same document was introduced as Petitioner's Exhibit 1-I, at the evidentiary hearing.[4] That document is the in-take report from the Louisiana Department of Corrections regarding Brown's incarceration in the youth facilities in Louisiana when he was age fifteen (15). Reading the Social History Sheet portion of Exhibit 1-I, under the "Family Background" section, we find the following:

> Joseph Brown is the child of *Edna Turner and Abram Hunt, who lived common law, beginning in 1966. Joseph says that they separated when he was about seven or eight years old. Joseph reports that is father died on December 12, 1981 of sugar diabetes*. He says that he was "kinda close" to his father and he felt badly about his death. He still thinks about his father sometimes and feels sad about his death. *While talking about his father, Joseph sucked his thumb, so much so that it was difficult to understand him and this interviewer sometimes had to ask him to repeat what he was saying.*
>
> Joseph described his mother as a "nice, gentle" woman, with whom he gets along well. She punishes him sometimes by whipping him and sometimes by making him stay in his room. Joseph says that he and his mother sing together. In 1976 Mrs. Turner married Charles Turner. Joseph says that his father punishes him the same as his mother does. He does not have any activities

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[4]Defense Exhibit 2, is included in the complete Whitfield records introduced during the evidentiary hearing as Exhibit 1-I. C.P. at 403-07.

with his father. *Later in the interview Joseph reported that his stepfather sometimes drink [sic] heavily, and that when he does, he comes home and goes right to bed.* Also living in the home of Mr. and Mrs. Turner are Joseph's four siblings. Joseph says that he gets along well with his siblings.

The probation report indicates that in 1974, *Mrs. Turner killed a man in self defense. Joseph says that the man who she killed was the father of Joseph's youngest brother.* He says that his mother was put in jail for a short time and then let out on bail. *Joseph told this interviewer that he didn't have any feelings about this incident, as he was staying at the home of his maternal grandmother's at the time it occurred.*

C.P. at 405. [Emphasis added.]

Clearly, these highlighted portions of Exhibit 1-I (Defense Exhibit 2, at trial), contained the information petitioner asserts was not presented in the first five items of his list. The sentencing jury was presented evidence of items 1-5 in the above list in mitigation at trial, contrary to the assertion of petitioner. Dr. McMichael's testimony presented nothing that the jury was not informed of in these areas.

Further, Dr. McMichael stated, and petitioner lists as number 7 above, that petitioner had conduct disorder problems in adolescence, if we look further in Dr. McMichael's testimony that he based this on the fact that petitioner had he had been "sent to training school in Louisiana." Tr. 71. When we again look to Exhibit 1-I (Defense Exhibit 2, at trial), we find the information relating to that incarceration on the first page of the exhibit. It reads:

Joseph Patrick Brown was found to be a proper person to the Department of Corrections by the Juvenile Court for the Seventh Judicial District on November 4, 1983 for the offense of Simple Burglary. His release date is set for November 18, 1985. This is youth's first commitment to the Department

of Corrections.

> The probation report which is available in youth's record does not include the circumstances of the offense for which you is currently incarcerated. Joseph reported the following details regarding the offense during our interview. He and a friend broke into a Game Room and took money from the game machines. When asked why he did this, he said that he was "just messing around doing something." He says that he is sorry for having committed the offense because of his present incarceration.
>
> C.P. at 404.

Therefore, the jury knew about petitioner's conduct problems by way of Defense Exhibit 2, introduced at trial. Therefore, Dr. McMichael's testimony presented nothing new in this area.

Looking again to Exhibit 1-I (Exhibit D-2 at trial), we also find that the jury was informed that, at age fifteen, Brown admitted that he drank beer "occasionally." C.P. at 406. Thus the jury was informed that he was at least using alcohol at an early age. Thus, a portion of the items listed in paragraph 8 above was presented in Exhibit D-2 at trial.

Looking to the transcript of the trial we find that the jury was also informed at the sentencing trial of petitioner's cocaine use both prior to and at the time of the murder. *See* Tr. 919-21; 936; 938-40 (during sentence phase); Tr. 552-53; 562; 566; 783(during guilt phase). Thus, the jury was informed of the evidence petitioner presented as numbers 8 and 9 in his list above.

In fact, Dr. McMichael testified that the type information petitioner says should have been introduced, and we now know was introduced, would not have to come from a mental

health professional, it could have been introduced by other witnesses or evidence. Tr. 72-73. The information was presented to the jury during the sentencing hearing through Defense Exhibit 2 at trial.

Therefore, it appears that the only thing in petitioner's list of possible mitigation complied by Dr. McMichael of which the jury was not informed, was item number 6, the assertion that petitioner was hit by an automobile at the age of 13.[5]

Petitioner also produced another list of things he asserts were mitigating and that counsel knew. That list reads:

> •That Mr. Brown had a troubled childhood history, including his father died in his youth and that his mother had killed a man;
>
> •That Mr. Brown's capacity to appreciate the criminality of his condict [sic] was impaired by his drug use and dysfunctional childhood;
>
> •That Mr. Brown was under the substantial domination of Rachael Walker, the co-defendant;
>
> •That the evidence against Mr. Brown as the shooter was weak; and
>
> •That Mr. Brown could be sentenced as an habitual offender, thus giving the jury notice that any life sentence wold be served without the possibility of parole.
>
> App. Brief at 5.

Brown attributes this list to Ms. Farrington at Tr. 53 and Mr. Ogden at Tr. 57. However, when we turn to the record these pages are during the testimony of Dr. Lott. Ms.

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[5]This information will be discussed *infra*.

Farrington's testimony appears at Tr. 62-69 and Mr. Ogden's testimony is found at Tr. 69-83. First, the last two items in this list have nothing to do with psychiatric or psychological mitigation evidence. The majority of this list appears to come from the Confidential Memorandum prepared by Mr. Ogden and sent to the State Hospital. C.P. 375-78. There we find the following list:

> MITIGATION:
>
> 1. Weak case of guilt and a weak State's witness
> 2. Defendant is a habitual criminal and if not sentenced to death, he will receive life without parole
> 3. Statutory mitigation - (5)(e) "The Defendant acted under . . . , the substantial domination of another person (Rachel Walker)."
> 4. Statutory mitigation - (5)(f) "The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."
>
> C.P. at 377-78.

Thus trial counsel were requesting that the State Hospital look specifically at these factors. Of course the first two are not within the realm of psychological or psychiatric expertise.

The conclusions drawn from the evaluation at the State Hospital was that Brown was not under the substantial domination of Walker and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not impaired. Brown has produced no additional evidence to refute this evidence. All of the documentation and contact information for the State Hospital investigation was furnished to the State Hospital by trial counsel. *See* C.P. at 374; 375-78. The beginnings of the report by the State Hospital, that was never completed, list the things that were furnished to the State

Hospital to consider in their evaluation. *See* C.P. at 380-81.

Because all evidence petitioner contends should have been introduced before the jury was in fact was introduced during the sentence phase, or was decided to be double-edged, petitioner cannot demonstrate the deficient performance required by the test set forth in *Strickland, supra*. Further, since the jury had this information before it during the sentence phase and still sentenced petitioner to death he cannot demonstrate the second prong of *Strickland*. Once the circuit court found that there was no deficient performance he was not required to go further and access whether Brown was prejudiced since a finding of ineffective assistance requires a finding of both deficient performance and resulting prejudice.

However, the State would assert that Brown did not demonstrate prejudice during the evidentiary hearing and has not done so before this Court. Therefore, Brown is not entitled to post-conviction relief.

C. New Evidence Adduced At Evidentiary Hearing.

Having pointed out what was before the jury during the sentence phase of the trial the circuit court had to consider what new information was adduced at the hearing that was not presented to the sentencing jury.

As we noted above, there was no indication in the testimony or exhibits presented to the jury that Brown had been struck by a car when he was thirteen. In fact the Social and Forensic History taken at Whitfield, Exhibit 1-E, indicates that his mother told the person

taking the medical history, that he had twice been struck by a car while walking. On page 6 of Exhibit 1-E, we find the following under Medical History/Treatment:

> x2MVA's age 9-10 – hit by car walking to store at night in rain, ER check out – No Rx needed/ released home.
> 2nd time – also hit by car before age 13 – ER checkout – No Rx needed – Released Hone X 1 or X 2 yrs later – Def had what MS's called Grand Mal Seizure – taken to ER.
>
> Put on IV. Kept over night. Referred to Regular MD. MD put on meds for (mother remembers) approx 1 month. Dr's thought this seizure could have been caused by being hit by car few yrs earlier. No more "hard" seizures but a few "lesser" seizures followed – no unconsciousness or other seizures sy.
>
> C.P. at 390.

In the margin of this note is a further note which reads: "No unconscious then MVA's." From these records it is clear that petitioner did not have any seizures immediately after the accidents where he was hit by a car. In neither case did he lose consciousness, he was given no medication nor was he hospitalized after either of these incidents. Dr. Lott was questioned regarding the possibility of a seizure disorder both on direct and cross. *See* Tr. 17-18; 20-24. On cross-examination Dr. Lott testified:

> Q. We had some discussion or some questions about seizures and testing procedures and things like that and how that may impact. The last mention of a seizure on the record is a hysterical seizure in 1984, '85 or somewhere in there. The crime was committed in 1994 and there is no history between those two period [sic] of times of any type of seizure behavior. What effect does that have?
>
> A. It doesn't appear looking back to have been an issue there. It doesn't appear to be well documented. It wasn't confirmed initially, in fact is seems to be disconfirmed. There wasn't any ongoing concern with the seizures. The concern was if there were any issues here that involved

neurological or brain function that may have somehow been involved in this case.

Q. From what you reviewed can you find that?

A. I don't see that there was seizure disorder that was recent.

Tr. 42.

Dr. McMichael also was questioned regarding a possible seizure disorder. He stated:

> There is some indication in the records that he may have had a seizure at age fifteen; I think, you have gone over some of that, but the ER sheet actually indicates that was an hysterical seizure and not a seizure; His own physician's follow-up indicated that he took anti-convulsions for a short time after that; stopped taking them and, the best we tell, didn't have any other seizures; There is no evidence that he had seizures at the time he was incarcerated; . . .
>
> Tr. 70-71.

The State would assert that the fact that petitioner was twice struck by a car and *may* have had a seizure as a result of those accidents is not significant mitigating evidence. The fact that there is no evidence of a seizure of any type for a ten year period of time prior to the crime in this case clearly demonstrates that there was no persistent seizure disorder. It cannot be said that had the jury been informed that petitioner had suffered a "hysterical seizure" at the age of 14 or 15 it would have established a reasonable probability that but for the absence of this evidence the result of the sentencing phase of this trial would have been different. Clearly, neither prong of the test set forth in *Strickland, supra* has not been met. Petitioner has failed to demonstrate that counsel was ineffective.

Looking to why defense counsel failed to request a report from Whitfield we find that

the professional staff frankly told them that they did not find much in the way of mitigation that they could offer.

Dr. Lott testified:

> A. Whenever we evaluate someone at this stage of mitigation – I do it in cases or have done it in several capital cases – I always would discuss my results with the counsel. The attorney ten decided whether or not he wants me to do a report, which they would subsequently use at trial. I give them my impression and my understanding of the diagnosis and how I see the facts of the case as it applies to my psychological evaluation. In some cases it's advantageous and some cases it's not. I have probably been asked more times than not to generate a report or if I generated the report more times than not it has not been used at trial because it was not advantageous.
>
> Q. So it's not an unusual thing for an attorney to say I don't want a report because it's not going to be beneficial to my client?
>
> A. No, sir. In essence you're going to hurt me more than your are going to help me.
>
> Q. Do you have any recollection if that was reason the report was not don in this case?
>
> A. No, sir. I don't recall. After having reviewed the records that's my assumption.
>
> Q. Your assumption is that after looking at the records now you would say that there is not much in the way of , if anything, mitigation?
>
> A. No, sir. I'm not say that there is no mitigation. There is, though, a significant amount of information that might be damaging, that might be harmful. I could help you in certain areas and I can also hurt you in other areas. You have to decide looking at these facts whether or not –
>
> Q. In other words your are saying that's a matter for the trial strategy of the attorney and not for you. You are saying this is what I've got; it may be more harmful to you than helpful; this is what we are looking at. Have you ever had one that was beneficial that someone told you not to report?

A. No, sir, I can't think of one.

Q. Okay. It would be a very unusual thing for somebody, if there was beneficial evidence in mitigation, or the attorney to tell you , no don't do a report?

A. Yes, sir. I even had a case recently, it wasn't a Mississippi case, but it was a case that it wasn't adverse, but it wouldn't have been very helpful and they chose not to on the side of caution.

Tr. 36-37.

Dr. Lott's testimony concluded:

Q. It is your testimony that by not having a report prepared in this case that it indicates to you that what you concluded or what the staff concluded was not very favorable to Mr. Brown?

A. Yes, sir. That suggested to me that we would have been more harmful than helpful.

Tr. 44.

Dr. Lott's testimony indicates that the staff at Whitfield informed counsel that there report would be more harmful than helpful if it had been prepared. The decision by counsel to forego the report was a reasonable trial strategy to follow in this case.

Pamela Ferrington personally attended the forensic interview at Whitfield. At the conclusion of the interview and assessment she testified she was told:

A. Basically he told me that any report that would be generated from the interview and the testing that was done would be more harmful than beneficial to our client.

Tr. 53.

On cross-examination by the State, Ms. Ferrington testified that it was a matter of trial

strategy not to have the report generated because it would have been more harmful than beneficial. Tr. 54. Ms. Ferrington again indicated to the Court on questioning that the decision not to have a report prepared was based on conversations with Dr. Lott and Dr. McMichael. Tr. 55. She also testified that the mitigating theory of substantial domination was one they attempted to develop at the time of trial. Tr. 54-55.

Don Odgen, petitioner's other trial attorney, testified that he did not go to the staffing at Whitfield, but that Ms. Farrington reported back to him with the events of the interview and conclusions. He testified:

> A. Pam went to the forensic interview at the end of the stay. She went and my best recollection is she called me on the phone and told me all of that. She may have waited until she got back, but she told me how it went, how helpful everybody was. She said it was not going to be beneficial. Just like she said, we made a determination not to get the report because if we got the report it could conceivably be used against us.
>
> Tr. 59-60.

Mr. Odgen testified on cross as to why no report from Whitfield was generated:

> A. It was exactly like Ms. Ferrington just said. She was there; she listened to all that; she had been talking with the doctors; She heard everything that they had to say and discussed it with them; it was not going to be beneficial for Mr. Brown to have the report put in writing so it could be used; We just didn't want it to be ever put out in writing; It was not going to be in favor of the defendant.
>
> Q. I'm not trying to confuse you or anything, but that was just kind of a specific question that the Mississippi Supreme Court asked. They seemed to be confused why Whitfield would not produce a report once they had been ordered to examine somebody. I just wanted to clear that up. They did not produce a report because you asked them not to, is that correct?

A. They would have submitted a report, but we asked them not to put the report in writing.

Q. And that was based on your trial strategy in this case?

A. Yes, it was.

Tr. 62-63.

The trial strategy chosen by trial counsel was reasonable in light of the information they received from the mental health professionals regarding what they would put in the report. Again, it appears that the decision not to have the report generated was based on the discussion with the professionals at Whitfield. Trial counsel was entitled to rely on the findings of those mental health professionals in deciding not to have the report generated.

Finally, Dr. Reb McMichael was called to testify. On direct examination he testified:

A. Based on my recent review of these records it's my opinion that a report generated based on the information contained in these reports would not be helpful to the defendant.

Tr. 68.

The Court questioned Dr. McMichael and the answer given by Dr. McMichael stated that any report generated would have been more harmful than helpful. Tr. 74. He further testified on questioning by the Court that he did recall coming to a conclusion regarding the substantial domination theory that defense counsel wanted to employ. He testified that he reviewed numerous documents and that it was his opinion that petitioner was not being dominated by Rachel Walker. Tr. 74. Again, it is clear that the reason that trial counsel did not have a report prepared was that any report produced by Whitfield would be more harmful

than helpful.

The Court also was concerned why, if Whitfield would not produce a report, why counsel did not seek additional or independent examination of petitioner. The State would assert that the answer is obvious. The staff at Whitfield told them that their report would be more harmful than helpful. This Court has held that trial court is not required to grant multiple psychiatric and psychological examinations in an effort for the defendant to secure an expert who will testify favorably for him. *Willie v. State*, 585 So.2d 660, 671 (Miss. 1991); *Hill v. State*, 432 So.2d 427, 437-38 (Miss. 1983). In order to obtain another examination, petitioner's counsel would have had to explain to the trial court why they wanted an additional examination. Thus, counsel would have had to inform the trial court that the first examination had been unfavorable. It is highly unlikely that the trial court would have allowed an additional examination based on the fact that the first examination was unfavorable. Such was not required under the law. Further, the fact that the examination was done at Whitfield does not make the examination an independent examination. This Court has held that where a defendant is evaluated by psychiatrist and psychologist from the Mississippi State Hospital at Whitfield, "the examination 'satisfied' the constitutional mandate of [*Ake v. Oklahoma*]." *Woodward v. State*, 726 So.2d 524, 528-29, ¶¶ 14-20 (Miss. 1997); *Butler v. State*, 608 So.2d 314, 321 (Miss. 1992); *Willie v. State*, 585 So.2d 660, 671 (Miss. 1991); *Cole v. State*, 666 So.2d 767, 781 (Miss. 1995); *Lanier v. State*, 533 So.2d 473, 480-81 (Miss. 1988). Since the mandate of *Ake v. Oklahoma* was

satisfied by the examination at Whitfield petitioner was denied no right.

The decision of the trial court is not an incorrect application of *Strickland* and its determination of the facts are not clearly erroneous. Therefore, the decision of the circuit court denying post-conviction relief should be denied.

CONCLUSION

For the above and foregoing reasons the State respectfully submits that the decision of the Circuit Court of Adams County denying post-conviction relief should be affirmed.

Respectfully submitted,

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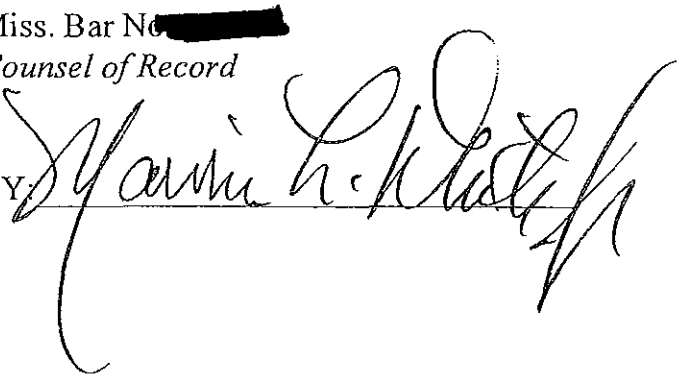
BY: 

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CERTIFICATE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing Brief for Appellee to the following:

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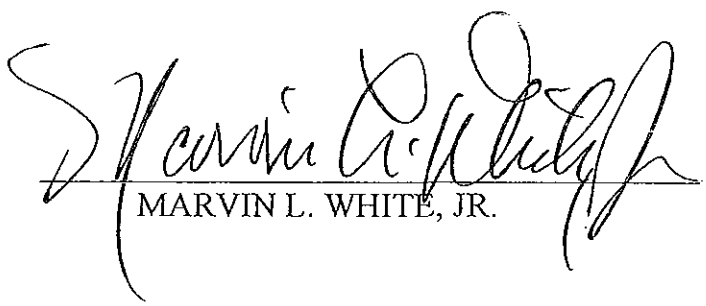
This the 10th day of June, 2011.



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