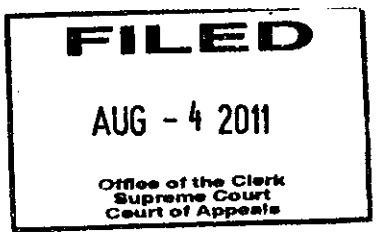
IN THE SUPREME COURT OF MISSISSIPPI

No. 2010-CA-01246-SCT

JOSEPH PATRICK BROWN, APPELLANT

Versus



STATE OF MISSISSIPPI, APPELLEE

Appeal from the Circuit Court of Adams County, Mississippi

APPELLANT'S REPLY BRIEF

Oral Argument Requested

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APPELLANT'S REPLY BRIEF

ISSUE ONE: JOSEPH BROWN, AS A DEATH-SENTENCED PETITIONER, IS ENTITLED TO DISCOVERY UNDER MISS.R.APP.P. 22(C)

This Court promulgated MISS.R.APP.P. 22 on July 22, 2000. The comment to the rule sets forth that the rule was "adopted to govern matters filed on or after January 1, 1995." This Court's jurisprudence calls for newly promulgated rules to be applicable to all pending cases. *Albert v. Allied Glove Corp.*, 944 So. 2d 1, 4 (¶6)(Miss. 2006)("this Court has repeatedly held judicially enunciated rules are to be applied retroactively")(citing cases).

Joseph Brown's original post-conviction petition was filed in this Court on March 17, 1998. The application specifically requested investigative funding, discovery, and an evidentiary hearing. *Brown v. State (Brown II)*, 749 So. 2d 82, 86 (¶4)(Miss. 1999).

Despite this, Joseph Brown has never been given the benefit of Rule 22(c)(4)(ii), which requires trial defense counsel to provide "their complete files relating to the conviction and sentence" to post-conviction counsel, and similarly orders that "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."

The State does not seriously contest this point. Instead, the State argues (a) because Rule 22 applies prior to any petition being filed, it is not applicable on remand for an evidentiary hearing; (b) counsel for Mr. Brown did not request Rule 22 discovery from defense counsel and the State; (c) undersigned counsel for Mr. Brown should have made

his Rule 22 request before February 26, 2004; and (d) Rule 22 discovery had no bearing on the issue remanded for evidentiary hearing.

None of the State's arguments have any merit. It is true enough that Rule 22 applies prior to the filing of an original post-conviction petition. However, the rule was not promulgated until after Mr. Brown's case had already been filed and had been remanded to the Circuit Court for evidentiary hearing. Pursuant to *Albert* and the cases cited therein, Rule 22 was applicable to Mr. Brown's post-conviction case. This plainly requires that the Rule can be invoked in the Circuit Court on remand when, as here, the original petition was filed after the effective date of the rule but before the rule was actually promulgated.

Second, the State's claim that "[i]n order to make something available there has to be a request therefor" is absurd.[1] State's Br. at 17. A formal motion was filed and served. CP 23. Did the State not consider that a request? Similarly, the State's notion that "Brown only had to request that the files be made available even after the hearing" is nonsensical. State's Br. at 19. A motion had been filed and it had been denied. How many "requests" does the State require before it will provide discovery required by the Rule?[2]

Third, the State's claim that the Rule 22 motion was "belatedly filed" is unavailing. In his original petition, filed March 17, 1998, Mr. Brown sought discovery. *Brown II*, 749 So. 2d at 86 ¶4. As discussed in the Brief of Appellant, the two judges in the Circuit District had recused themselves on remand. Brief of Appellant at 15. There was no judge available

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[1] The unsworn hearsay found in the State's Brief at 17, footnote 2 should be struck from the record. A party may not rely on such unsworn statements in post-conviction proceedings. *Smith v. State*, 877 So. 2d 369, 380 (¶21) (Miss. 2004); *Puckett v. State*, 879 So. 2d 920, 954 (¶133) (Miss. 2004).

[2] If a new request is necessary, then Mr. Brown, through this Reply Brief, expressly requests that the State tender to Petitioner's 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" within thirty days of the service of this Reply Brief.

to hear any motions. Within six weeks of Judge Patrick's notice that he had been appointed to hear the case, the undersigned filed the Rule 22 motion.[3]

Finally, the State is wrong in contending that Mr. Brown's Rule 22 motion had to be limited to the issue on which this Court granted an evidentiary hearing. The purpose of the motion was to make a diligent effort to secure for Mr. Brown the discovery that other post-conviction petitioners had been granted through Rule 22. Because no such discovery has been produced, Mr. Brown has been subject to disparate treatment compared to other post-conviction petitioners currently before this Court. He should be allowed what the State calls "pre-petition" discovery on all issues.

But in any event, the discovery requested could certainly have been relevant to the ineffective assistance claim remanded for hearing. Without seeing the defense counsel files and the law enforcement files, neither Mr. Brown nor this Court can possibly know whether relevant information exists in those files. That si exactly why this Court does not require an appellant to prove prejudice from the denial of discovery:

> Erroneous denial of discovery is ordinarily prejudicial in the absence of circumstances showing it is harmless. Here, since we cannot determine from the record whether the requested documents might have changed the result in this trial, we cannot say the error was harmless.

Dawkins v. Redd Pest Control, Inc., 607 So. 2d 1232, 1236 (Miss. 1992).

Because Petitioner Brown was denied Rule 22 discovery, this Court should vacate the Circuit Court's order and remand this case for enforcement of Rule 22 and a new evidentiary hearing.

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[3] As the State notes (State's Br. At 11), the motion did not request a continuance. The Court could have conducted the evidentiary hearing but left the record open for post-discovery supplementation.

ISSUE TWO AND THREE: THE CIRCUIT COURT ERRED IN FINDING THAT TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT

A. Trial Counsel's "Strategy" of Avoiding Detrimental Evidence Was Not Reasonable, Where the "Detrimental Evidence" Was Already Before The Jury.

Strangely, in response to Mr. Brown's claim of ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), the State relies on *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011) as its lead case. But Cullen was a case involving the interpretation of the Antiterrorism and Effective Death Penalty Act (AEDPA) amendments to the Federal habeas corpus statute, 28 U.S.C. §2254. The parameters of the opinion were established by this early statement: "[a]s amended by AEDPA, 28 U.S.C. §2254 sets several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner." *Cullen*, 131 S.Ct. at 1398. *Cullen* does not have the force of *Wiggins v. Smith*, 123 S. Ct. 2527 (2003), *Sears v. Upton*, 130 S. Ct. 3259 (2010), *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Williams v. Taylor*, 529 U.S. 362 (2000) – each of which found that a State court was unreasonable for finding counsel effective, in the face of potential mental health mitigation evidence.

More importantly, however, the State hangs its proverbial hat on this proposition: "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 [had been produced] and had Brown called either Dr. Lott or Dr. McMichael to testify the State would have been entitled to the report that they had produced. Therefore, the harmful

information would have been in the hands of the State for cross-examination and impeachment." State's Br. at 35.

Dr. McMichael testified about the "potential detrimental factors" that, in his view, could have been used by the State against Mr. Brown, had the State Hospital generated a report. Tr. 71-72. These factors Dr. McMichael also testified about the "potential detrimental factors" that, in his view, could have been used by the State against Mr. Brown, had the State Hospital generated a report on the mitigating circumstances set forth above. Tr. 71-72. These factors included:

- prior criminal history;
- an unadjudicated allegation of prior use of a firearm in criminal activity;
- evidence that Brown was a major participant in the pending case;
- that the victim in the pending case had been killed to conceal a crime;
- that the victim in the pending case was shot a number of times;
- that Brown had been using or attempting to use drugs just before the offense in the pending case was committed;
- that some of the money from the offense in the pending case had been used to buy drugs;
- that Brown was "into one thing or another" as a juvenile;
- that Brown escaped subsequent to the offense.

Tr. 72. The State has never had a response to the simple fact that virtually everything that was supposedly "harmful" in Dr. Lott and Dr. McMichael's files was information that would already have been before the jury in the sentencing phase. There could have been no "strategic choice" to keep this information from influencing the jury's decision.

But in any event, the notion that expert mental health testimony should be withheld from the jury because of some negative implications regarding the defendant has been rejected by the Supreme Court as an unreasonable application of Strickland and Wiggins. Thus, in *Sears*, the Supreme Court explained that "adverse" aspects of a defendant's mental health evidence can actually help the jury understand the context of the defendant's actions and thus shape their view of his culpability:

> Finally, the fact that along with this new mitigation evidence there was also some adverse evidence is unsurprising, given that counsel's initial mitigation investigation was constitutionally inadequate. Competent counsel should have been able to turn some of the adverse evidence into a positive .
>
> This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts.

See Sears, 130 S. Ct. at 3264 (internal citations omitted).

B. An Unsponsored Report Does Not Substitute For Expert Testimony.

When this Court granted an evidentiary hearing on Mr. Brown's ineffective assistance of counsel claim, it expressly recognized that "Brown's attorneys did present a case in mitigation by calling four witnesses and submitting a 1984 report from the Louisiana Juvenile Reception and Diagnostic center which characterized Brown as a non-violent individual with emotional problems." *Brown II*, 749 So. 2d at 90 (¶20).

This Court understood that the use of the four lay witnesses and the unsponsored report did not preclude a finding that counsel were ineffective for failing to prepare and present expert mental health testimony at Mr. Brown's sentencing phase:

> 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.

Brown II, 749 So. 2d at 91 (¶21).

The State ignores this history in its current argument, contending that trial counsel for Mr. Brown introduced sufficient evidence in mitigation at the trial. State's Br. at 43-49. A review of the sentencing phase transcript discloses that four lay witnesses were called. Two of these, June Vanderson and Bernice Scott, were nurses who cared for Mr. Brown's step-father. Trial Tr. 908-15 (Ms. Vanderson); Trial Tr. 915-924 (Ms. Scott). The nurses testified that before Mr. Brown met Rachel Walker, he was a responsible person who helped to care for his step-father., but that after he met Ms. Walker, he started using drugs and was a changed person.

The third mitigation witness was Carolyn Franklin (Trial Tr. 924-27), who testified that she was Mr. Brown's girlfriend before he met Rachel Walker, and that Mr. Brown was never violent to her. The last witness was Doretha Brown, Mr. Brown's sister. She gave very abbreviated testimony about the death of her father (Mr. Brown's step-father) and of her other brothers (Trial Tr. 927-29).

At this point trial counsel introduced, without any sponsor, the report referred to in this Court's prior opinion. Trial Tr. 929. The report was not described or explained to the jury by any witness. Trial counsel referred to this report in two paragraphs of her closing

argument – consuming less than a page of transcript. Trial Tr. 960-61. The State felt no need to respond to the report in its rebuttal argument. Trial Tr. 963-67.

The State's argument is that the possible mental health mitigation testified to at the evidentiary hearing by Dr. Lott and Dr. McMichael was merely cumulative to the bare-bones mitigation case presented by trial counsel. In vacating the death sentence and remanding for a new sentencing phase in *Ross v. State*, 954 So. 2d 968 (Miss. 2007), this Court repudiated the exact argument the State advances in Mr. Brown's case:

> While Ross testified to the death of his family, physical abuse as a child, and his drinking problems, and his mother testified to the murder of his sister, **defense counsel provided no expert evidence about how these events had affected Ross psychologically**.

Ross v. State, 954 So.2d 968, 1006 ¶87 (Miss. 2007)(emphasis added).

Ross was cited in the Brief of Appellant at 23-24, but the State makes no reference to this controlling precedent at all in its Brief. *Ross*, which faithfully applied *Wiggins* and its progeny, dictates reversal of the Circuit Court's judgment in this case.

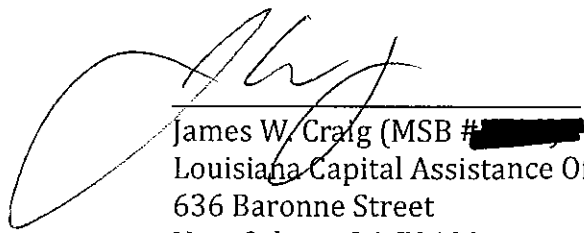
CONCLUSION

Joseph Brown was denied the right to discovery under Rule 22. That is an independent ground for reversal. Despite this handicap, Mr. Brown has established both prongs of the *Strickland* test with respect to Claim F of his Motion to Vacate.

If this Court reverses only on the Rule 22 discovery issue, the Circuit Court's order should be vacated and the case remanded for full discovery and a new post-conviction evidentiary hearing. If, however, this Court reverses on the *Strickland* issue, it can, as it did

in *Doss*, vacate his death sentence and remand this case to the Circuit Court for a resentencing trial.

Respectfully Submitted,



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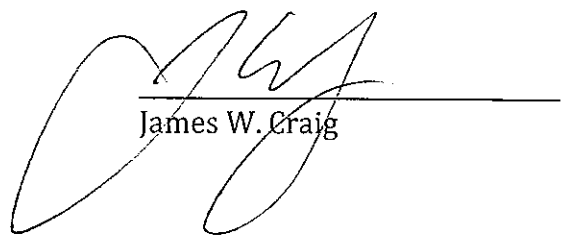
CERTIFICATE OF SERVICE

I hereby certify that I have served the above and foregoing Appellant's Reply Brief on The Honorable Isodore W. Patrick, Jr. Circuit Judge, at his mailing address of P.O. Box 351, Vicksburg, MS 39181, and to Hon. Marvin L. White, Jr., Assistant Attorney General, at his mailing address of P.O. Box 220, Jackson MS 39205.

This the 4th day of August, 2011.



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