IN THE SUPREME COURT OF MISSISSIPPI

KELVIN JORDAN, *Petitioner*

versus **No. 2015-DR-01082-SCT**

STATE OF MISSISSIPPI, *Respondent*

RESPONSE TO MOTION FOR LEAVE TO FILE SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF WITH EXHIBITS AND APPENDIX

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

JASON L. DAVIS
Special Assistant Attorney General
Miss. Bar No. 101207

BRAD A. SMITH
Special Assistant Attorney General
Miss. Bar No. 104321

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205
Phone: (601) 359-3680
Facsimile: (601) 359-3796
Email: bsmit@ago.state.ms.us

TABLE OF CONTENTS

page

TABLE OF AUTHORITIES

Authority *page*

CASES

STATUTES:

RULES:

IN THE SUPREME COURT OF MISSISSIPPI

KELVIN JORDAN, *Petitioner*

versus **No. 2015-DR-01082-SCT**

STATE OF MISSISSIPPI, *Respondent*

RESPONSE TO MOTION FOR LEAVE TO FILE SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF WITH EXHIBITS AND APPENDIX

COMES NOW, the State of Mississippi, Respondent, by and through undersigned, and files this Response to the Motion for Leave to File Successive Petition for Post-Conviction Relief with Exhibits and Appendix filed on behalf of Petitioner, in the above styled and numbered cause.

INTRODUCTION

This matter is before the Court on Petitioner's Motion for Leave to File Successive Petition for Post-Conviction Relief with Exhibits and Appendix, (PCR Motion). His PCR Motion should be dismissed. The claims appearing in his PCR Motion are subject to the procedural bars of Mississippi's Uniform Post-Conviction and Collateral Relief Act, (UPCCRA). Miss. Code Ann. § 99-39-1, *et seq*. Additionally, the claims appearing in Petitioner's PCR Motion are devoid of merit. All of those claims should be denied. The State submits that Petitioner is entitled to no relief. In support, the State would show the following to the Court:

STATEMENT OF THE CASE

This matter arises from the brutal murders of Tony Roberts and his two-year-old son, Codera Bradley, which occurred in Clarke County, Mississippi, on October 5, 1995. This is Petitioner's second attempt to obtain post-conviction relief.

On February 27, 1996, the Grand Jury returned a multi-count indictment that charged Petitioner with: (1) the capital murder of Codera Bradley during the commission of an armed robbery in violation of Miss. Code Ann. § 97-3-19(2)(e); (2) the capital murder of Tony Roberts during the commission of an armed robbery in violation of Miss. Code Ann. § 97-3-19(2)(e); and (3) the armed robbery of Tony Roberts in violation of Miss. Code Ann. § 97-3-79. (R. 6-9.) Petitioner was tried before a jury on October 29, 1996. Petitioner was found guilty on all counts the following day. (R. 212-14.) The sentencing jury returned a verdict, in proper form, recommending the death penalty be imposed for Petitioner's capital murder convictions. (R. 261-62.)

The sentencing verdict that was returned for Count I, appeared in the following form:

> 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 under Count I:
>
> 1. The defendant intended that the killing of Codera Bradley take place, and;
> 2. The defendant contemplated that lethal force would be employed.
>
> Next, we, the jury, unanimously find that the aggravating circumstances of:
>
> 1. The capital offense was committed while the defendant was engaged in the crime of robbery, and;
> 2. The capital offense was committed for the purpose of avoiding arrest, and;
> 3. The capital offense was especially heinous, atrocious, or cruel are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances, and we unanimously find the defendant should suffer death under Count I.
>
> /s/ Kathy Hunter
> Foreman of the Jury

(R. 261.) The sentencing verdict that was returned for Count II, stated:

> 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 under Count II:
>
> 1. That the defendant attempted to kill Tony Roberts;
> 2. That the defendant intended that the killing of Tony Roberts take place, and;
> 3. The defendant contemplated that lethal force would be employed.
>
> Next, we, the jury, unanimously find that the aggravating circumstances of:
>
> 1. The capital offense was committed while the defendant was engaged in the crime of robbery, and;
> 2. The capital offense was committed for the purpose of avoiding arrest, and;
> 3. The capital offense was especially heinous, atrocious, or cruel are sufficient to impose the death penalty and there are insufficient mitigating circumstances to outweigh the aggravating circumstances, and we unanimously find the defendant should suffer death under Count II.
>
> /s/ Kathy Hunter
> Foreman of the Jury

(R. 262.) On November 1, 1996, the Circuit Court of Clarke County entered an order imposing the death penalty for Counts I and II, and setting an execution date of December 17, 1996. (R. 263.) Petitioner's execution was stayed, pending the outcome of his direct appeal to this Court.

On direct appeal, Petitioner raised the following eight issues:

I. Whether the trial court erred in admitting photographs of the victims' bodies at the crime scene and also photographs of the autopsy on both victims.

II. Did the trial court commit error in finding that the defendant had no standing to contest the search of the area surrounding the co-defendant's trailer?

III. Did the trial court err when they allowed Sheriff Cross to testify concerning the confession of Frontrell Edwards (inadmissible hearsay) thereby preventing the defense from cross examining the co-defendant Frontrell Edwards, violating the defendant's constitutional right to confront the witness against him?

IV. Did the trial court err when they allowed evidence of allegations in youth court to be admitted before the jury without showing any adjudication of guilt?

V. Did the trial court err in granting the instruction that says mitigating circumstances must outweigh the aggravating factors thereby shifting the

burden of proof to the defendant?

VI. Did the trial court err in refusing to give instruction D-11 requesting an instruction that mercy could be considered by the jury in determining an appropriate sentence?

VII. Whether the trial court erred in admitting a photograph of the deceased Tony Roberts and son Codera Bradley, taken before their death?

VIII. Is the imposition of the death penalty in this case disproportionate and excessive considering the mitigating evidence concerning the accused?

(Brief of Appellant at 1).[1]

On November 19, 1998, this Court affirmed Petitioner's capital murder convictions and sentences; but reversed his armed robbery conviction and vacated the sentence imposed for that conviction. *Jordan*, 728 So.2d at 1100-1101. Petitioner moved for rehearing on December 4, 1998. Rehearing was denied on January 21, 1999. The Court issued Its Mandate on March 22, 1999.

Petitioner then sought relief by filing a Petition for Writ of Certiorari with the Supreme Court of the United States. Petitioner sought *certiorari* review of the following question:

> Is a defendant in a capital punishment prosecution denied his Sixth Amendment right of confrontation, his Eighth Amendment right to a reliable death penalty determination, and his Fourteenth Amendment right to due process when, at the penalty phase, an accomplice's custodial confession is admitted after the accomplice-declarant refused to testify under the Fifth Amendment, which inculpates the defendant and consistently minimizes the declarant's role?

(Petition for Certiorari at i.) The United States Supreme Court denied his Petition on June 21, 1999. Next, he filed a Petition for Rehearing in the Supreme Court, which was later denied on August 23, 1999. *Jordan v. Mississippi*, 527 U.S. 1026, 119 S.Ct. 2375 (1999), *reh. denied*, 527 U.S. 1059, 120 S.Ct. 26 (1999).

On September 8, 1999, this Court entered an Order, granting Petitioner's Pro Se Motion for

---

[1] *Jordan v. State,* 728 So.2d 1088 (Miss. 1998) (No. 96-DP-01316-SCT).

Appointment of Qualified Counsel and Stay of Execution. (Order, *Jordan v. State*, 728 So.2d 1088 (Miss. 1999) (No. 96-DP-01316-SCT)).

On December 28, 2000, the Court instructed the Office of Capital Post-Conviction Counsel, (OCPCC), to "assume its statutory duties regarding this case, and shall on or before January 15, 2001, assign counsel to represent [Petitioner] in post-conviction proceedings and advise the Circuit Court of Clarke County and this Court of such selection." (Order at 2, *Jordan v. State*, 918 So.2d 636 (Miss. 2005) (No. 1999-DR-01391-SCT)). The OCPCC contracted with Gregory S. Park of Oxford, Mississippi, to represent Petitioner. Mr. Park was unable to do so, and withdrew from the case. The OCPCC secured the services of F. Keith Ball of Louisville as Mr. Park's replacement.

On October 18, 2001, the matter of Mr. Ball's qualifications pursuant to Rule 22 of the Mississippi Supreme Court came to be heard in the Circuit Court of Clarke County. (Order Granting Motion to Determine Compliance of Counsel with Competency Standards Set Forth in M.R.A.P. 22, dated Dec. 5, 2001, *Jordan*, 918 So.2d 636 (No. 1999-DR-01391-SCT)). Then, the circuit court ordered Mr. Ball to file a response concerning his qualifications. Mr. Ball did, and admitted that he was not qualified to represent Petitioner pursuant to Rule 22. (*See id*. at 2). The circuit court of Clarke County disqualified Mr. Ball under Rule 22. Petitioner filed his first Application for Leave to File a Petition for Post-Conviction Relief in this Court on November 19, 2001. He asserted the following sixteen issues:

A. Petitioner was denied his right against self-incrimination, his right to counsel, right to independent expert assistance, to a fair trial, and due process as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments and Mississippi law when a prosecution agent was present at Petitioner's evaluation by a defense mental health expert and presented testimony regarding Petitioner's statements to this expert.

B. Petitioner was denied his rights guaranteed by the Sixth, Eighth, and Fourteenth

Amendments to the Federal Constitution and Mississippi Law by the State's failure to disclose evidence that could have been used to impeach Holloway and Nicholson.

C. In the alternative, Petitioner was denied the effective assistance of counsel due to counsel's failure to adequately investigate and develop evidence to impeach evidence against Holloway and Nicholson.

D. Petitioner was denied his right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Federal Constitution and analogous provisions of the Mississippi Constitution due to trial counsel's failure to request the services of necessary expert witnesses to assist in preparing a defense and to rebut the State's case.

E. Petitioner was denied his right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Federal Constitution and analogous provisions of the Mississippi Constitution due to trial counsel's failure to request specific items in discovery prior to trial.

F. Petitioner was denied his right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Federal Constitution and analogous provisions of the Mississippi Constitution due to trial counsel's failure to adequately voir dire prospective jurors on their ability to consider sentences other than death pursuant to Morgan v. Illinois.

G. Petitioner was denied his right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Federal Constitution and analogous provisions of the Mississippi Constitution due to trial counsel's failure to present evidence of Petitioner's parole ineligibility or to rebut the State's argument that Petitioner should be sentenced to death.

H. Petitioner was denied his rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution and analogous provisions of the Mississippi Constitution due to the cumulative effect of the errors at the culpability phase of his capital trial.

I. Petitioner was denied his rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution and Mississippi law due to defense counsel's failure to develop and present evidence in mitigation of punishment.

J. Petitioner was denied his rights to a fair trial, and due process guaranteed by the Sixth, Eighth, and Fourteenth Amendments and Mississippi law when the court ruled that Petitioner could not introduce at the penalty phase or trial evidence regarding the co-defendant's domination of Petitioner or of Petitioner's childhood illnesses.

K. Petitioner was denied his right to the effective assistance of counsel guaranteed

by the Sixth and Eighth Amendments to the Federal Constitution and analogous provisions of the Mississippi Constitution due to trial counsel's failure to call penalty phase witness Charles McRee at the culpability phase of trial.

L. Petitioner was denied his right to a fair trial, and due process guaranteed by the Sixth, Eighth, and Fourteenth Amendments and Mississippi law because the prosecution was allowed to prosecute conflicting theories of the case in the separate trial of Petitioner and his co-defendant.

M. Petitioner was denied his right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Federal Constitution and analogous provisions of the Mississippi Constitution due to trial counsel's failure to preserve for review issues for direct appeal and for other errors committed during the first phase of his capital trial.

N. Petitioner was denied his rights guaranteed by the Eighth and Fourteenth Amendments to a fair, reliable, and proportionate sentence when trigger-person Frontrell Edwards struck a deal for a life sentence in this case.

O. Petitioner was denied his rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution and Mississippi law due to the cumulative effect of the errors at the penalty phase of his capital trial.

P. Counsel were ineffective in violation of Petitioner's Eighth and Fourteenth Amendment rights for failing to move to strike the death penalty as a punishment because it violates treaties which have been ratified by the United States, and violates established international law.

(Petition for Post-Conviction Relief).[2]

On June 19, 2003, Petitioner filed a Motion for Leave to Proceed in the Trial Court with Amendments to Petition for Post-Conviction Relief. In this Motion, Petitioner raised the following claims:

1. Petitioner's amended petition asks the Court to hold a hearing to determine Petitioner's mental retardation in light of the recent decision of the United States Supreme Court in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002). In *Atkins*, the Court held that the execution of the mentally retarded violates the Eighth and Fourteenth Amendments. Undersigned counsel in good faith believe that Petitioner is mentally retarded.

2. Petitioner's amended petition raises issues based upon the United States

[2] *Jordan v. State*, 918 So.2d 636 (No. 1999-DR-01391-SCT).

Supreme Court's recent decision in *Ring v. Arizona*, 122 S.Ct. 2428 (2002). *Ring* requires a jury determination of any fact that results in the imposition of the death penalty. The Supreme Court's decision in *Ring* impacts upon Petitioner's case in a number of ways, including upon Petitioner's mental retardation claim.

3. Petitioner amends his petition to request that a new sentencing hearing be held to comply with *Atkins*, *supra*, and *Ring*, *supra*, at which an independent judicial – and when necessary – a jury determination, are made as to mental retardation.

4. Petitioner amends his petition to include that the conviction and sentence in his case violate *Ring*, *Atkins*, the 6th , 8th and 14th Amendments, because the indictment in Petitioner's case failed to allege as an element of the offence the absence of mental retardation, and the State did not prove beyond a reasonable doubt the absence of mental retardation in this case.

5. Petitioner's amendments to the petition also include that the statutory aggravating factor heinous, atrocious and cruel, MS ST. 99-19-101(5)(h), and the evade arrest aggravating circumstance, MS ST. 99-19-101(5)(e), cannot stand as aggravating factors to enhance Petitioner's punishment to the death penalty, because they were not alleged as elements of the offense in the indictment.

6. Finally, Petitioner amends his petition at this time to include the claim that the death sentence in this case is unconstitutional, as the jury was not required to reach a unanimous verdict on all factual findings concerning the statutory aggravating circumstances found, and all mitigating circumstances raised by the evidence, in violation of *Ring*, *supra*, *Apprendi*, *supra*, and the 6th and 14th Amendments to the U.S. Constitution.

(Pet'r's Mot. for Leave to Proceed in the Trial Court with Amendments to Pet. for Post-Conviction Relief, filed Jun. 19, 2004).[3]

On March 9, 2004, Petitioner filed a document, entitled: "Amendments to Petition for Post-Conviction Relief." *Jordan*, 918 So.2d 636 (No. 1999-DR-01391-SCT). In this document, he raised the following claims:

1. Petitioner Was Denied His Right to the Effective Assistance of Counsel Guaranteed by the Sixth and Fourteenth Amendments to the Federal

[3] *Jordan*, 918 So.2d 636 (No. 1999-DR-01391-SCT).

Constitution and Analogous Provisions of the Mississippi Constitution Due to Trial Counsel Failure to Preserve for Review Issues for Direct Appeal and for Other Errors Committed During the First Phase of His Capital Trial.

2. Petitioner Was Denied His Rights Guaranteed by the Eighth and Fourteenth Amendment to a Fair, Reliable and Proportionate Sentence When Triggerperson Frontrell Edwards Struck a Deal for a Life Sentence in this Case.

3. Petitioner Was Denied His Rights Guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution and Mississippi Law Due to the Cumulative Effect of the Errors at the Penalty Phase of His Capital Trial.

4. The Mississippi Capital Statute Violates Ring, as the Jury in a Capital Case Is Not Instructed That it must Find Beyond a Reasonable Doubt That Any and All Statutory Aggravating Factors Outweigh Any and All Mitigation Found by the Jury.

5. Petitioner Was Denied His Rights to a Fair Trial, and Due Process Guaranteed by the Sixth, Eighth and Fourteenth Amendments and Mississippi Law When the Court Ruled That Petitioner Could Not Introduce at the Penalty Phase of the Trial Evidence Regarding the Co-defendant's Domination of Petitioner or of Petitioner's Childhood Illness.

6. The Sentence in this Case Is Illegal Because Mississippi's Method of Execution Violates the Eighth Amendment Prohibitions Against Cruel & Unusual Punishment.

7. Mississippi's Felony Murder Aggravating Circumstance Is Unconstitutional.

8. Penalty Phase Jury Instructions Were Erroneous and Prejudiced Petitioner.

9 The Group Voir Dire in this Case Did Not Allow for the Selection of a Fair and Impartial Jury.

10. The Requirement That Jurors Be Age Twenty-one or Older Violated Petitioner's Right to a Jury of His Peers.

(Pet'r's Amendments to Pet. for Post-Conviction Relief, filed Mar. 9, 2004).[4] On May 19, 2005, this Court denied Petitioner post-conviction relief. *Jordan*, 918 So.2d 636. A timely petition for rehearing was filed, and later denied on July 28, 2005.

On May 17, 2006, Petitioner filed a Petition for Habeas Corpus Relief by a Person in State

[4] *Jordan*, 918 So.2d 636 (No. 1999-DR-01391-SCT).

Custody in the United States District Court for the Southern District of Mississippi, Eastern Division. (Doc. #1; Pet. for Writ of Habeas Corpus).[5] Petitioner raised the following claims:

> Claim I. The Trial Court Erred in Finding that the Petitioner Lacked Standing to Contest the Search of the Trailer in Which He Was Residing in Violation of the Fourth Amendment of the United States Constitution and other federal law
>
> ....
>
> Claim II. The Petitioner Was Denied His Constitutional Right to Confront Witness Against Him in Violation of the Confrontation Clause of the Sixth Amendment of the United States Constitution.
>
> ....
>
> Claim III. The Imposition of the Death Penalty in This Case Was Disproportionate and Excessive in Violation of the Fifth and Fourteenth Amendments to the United States Constitution.
>
> ....
>
> Claim IV. Petitioner Was Denied His Right Against Self-Incrimination, His Right to Counsel, Right to Independent Expert Assistance, To A Fair Trial, and Due Process as Guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution When a Prosecution Agent was Present at Petitioner's Evaluation by a Defense Mental Health Expert and Presented Testimony Regarding Petitioner's Statement to This Expert.
>
> ....
>
> Claim V. Petitioner Was Denied His Rights Guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution by the State's Failure to Disclose Evidence Which Could Have Been Used to Impeach State Witnesses, Spencer Tracy Nicholson and Mark Holloway.
>
> ....
>
> Claim VI. Petitioner Was Deprived of His Right to the Effective Assistance of Counsel, in Violation of the Sixth and Fourteenth Amendments to the United States Constitution as follows:
>
> (a) Petitioner's counsel failed to adequately investigate and develop evidence to impeach State witnesses, Spencer Tracy Nicholson and Mark Holloway.
>
> ....

[5] *Jordan v. Epps et al*, No. 4:06-cv-00069-TSL (S.D.Miss. May 17, 2006).

(b) Petitioner's counsel failed to request the services of necessary expert witnesses assist in preparing a defense and to rebut the State's case.

....

(c) Petitioner's counsel failed to request specific exculpatory and/or mitigating evidence in discovery prior to trial.

....

(d) Petitioner's counsel failed to adequately voir dire prospective jurors on their ability to consider sentences other than death.

....

(e) Petitioner's counsel failed to present evidence of Petitioner's ineligibility for parole or to rebut the State's argument that the Petitioner should be sentenced to death.

....

(f) Petitioner's counsel failed to develop and present evidence in mitigation of punishment.

....

(g) Petitioner's counsel failed to call witness Charles McRee at the culpability phase of the trial.

....

(h) Petitioner's counsel failed to preserve for review issues for direct appeal and for other errors committed during the culpability phase of the trial.

....

(i) Petitioner's counsel's cumulative errors at the guilt phase of his trial rendered his counsel ineffective. Exhibit C(1) at 34; Exhibit C(5) at 2; Exhibit C(8) at 8-10.

(j) Petitioner's counsel's cumulative errors at the penalty phase of his trial rendered his counsel ineffective. Exhibit C(1) at 45; Exhibit C(5) at 4-7.

Claim VII. Petitioner Was Deprived of His Right to a Fair Trial, in Violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

(a) Petitioner was deprived of his right to a fair trial when the trial court ruled that Petitioner could not introduce evidence regarding the Co-Defendant's domination of Petitioner or of Petitioner's childhood illnesses at the penalty phase of the trial. Exhibit C(1) at 41-42; Exhibit C(5) at 10-12.

(b) Petitioner was deprived of his right to a fair trial when the trial court allowed the prosecution to present conflicting theories of the case in the separate trial court the Petitioner and his Co-Defendant. Exhibit C91) [sic] at 43-44.

....

Claim VIII. Petitioner Was Deprived of His Sixth, Eight and Fourteenth Amendment Rights to a Full and Fair Hearing and Due Process of Law by the Court's Failure to Require the Jury to Specifically State What Statutory Aggravating and Mitigating Factors Were Found.

....

(a) Petitioner was entitled to a jury finding on the issue of his mental retardation.

....

Claim IX. The Use of Lethal Injection to Procure Death in the Mississippi Capital Punishment Scheme Fails is Violative of the Eighth and Fourteenth Amendment Prohibitions Against Cruel and Unusual Punishment.

....

(Doc. #9; Pet. for Writ of Habeas Corpus).[6] The Petition subsequently stated that: "All of the grounds for habeas corpus relief set forth in paragraph 11 above were previously presented to the state court on direct review or post-conviction review." (Id. at ¶ 12).

On December 1, 2006, Respondents' filed their Answer in *Jordan v. Epps et al*, No. 4:06-cv-00069-TSL (S.D.Miss. 2006). (Doc. #10; Answer to Pet. for Writ of Habeas Corpus). Years later, the district court stayed Petitioner's habeas proceedings in anticipation of *Trevino v. Thaler*, ___ U.S. ___, 131 S.Ct. 1911 (2013). Petitioner sought leave to file a successive post-conviction motion in this Court pursuant to *Trevino*, 131 S.Ct. 1911, *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Grayson v. State*, 118 So.3d 118 (Miss. 2013). The district court granted Petitioner's request, contingent on Petitioner filing a written notice that stipulated his intent to return to State court to exhaust claims of ineffective assistance. (See Doc. #73; Order, dated Jul. 22, 2013) (directing

[6] *Jordan*, No. 4:06-cv-00069-TSL.

Petitioner to File a Stipulation as to His Intent to Seek review of his claims of ineffectiveness).[7]

Petitioner returns to this Court to file a successive PCR Motion. His successive Motion for Leave to File Successive Petition for Post-Conviction Relief is presently before the Court.

STATEMENT OF FACTS

The facts of this case are set out in *Jordan v. State*, 728 So.2d 1088 (Miss. 1998). They appear below for the Court's convenience.

> ¶ 4. On the evening of Thursday, October 5, 1993 Tony Roberts went to visit his two year old son, Codera Bradley, in Pachuta, Mississippi. Codera's mother allowed the child to spend the night with his father. At about 9:15 p.m. Roberts and Codera left the house and drove towards Roberts' home.
>
> ¶ 5. At about 8:00 p.m. on the same evening Kelvin Jordan and his friend Frontrell Edwards walked to a truck stop in Pachuta. Jordan was armed with a .25 caliber pistol; Edwards carried a .22 caliber pistol. During their journey to the truck stop, they discussed the possibility of "jacking" or robbing someone that night to get money to go to a ball game. Jordan was concerned about being identified by the victim, but Edwards responded that he would simply kill the victim following the incident.
>
> ¶ 6. Jordan and Edwards arrived at the truck stop and waited. Shortly thereafter, Tony Roberts pulled into the truck stop. Edwards approached Roberts' car and asked if he and Jordan could have a ride. Roberts agreed and pulled his son into his lap. Jordan sat in the front passenger seat and Edwards climbed into the back seat behind Roberts. They traveled down Highway 11 until they reached Barnett Crossing, at which point Roberts told his passengers he could not take them farther. Roberts pulled the car onto the side of the road to let them out. Edwards then reached from the back seat and shot Roberts in the side of the face with a .22 caliber pistol. Roberts remained conscious, crawled out of the car, and told Jordan and Edwards they could have the car. Roberts was standing on the side of the road clutching his head when Jordan fired additional shots toward Roberts with the .25 caliber pistol. Roberts then fell to the ground. Jordan claims he does not know whether the shots he fired struck Roberts at that time.
>
> ¶ 7. Edwards dragged Roberts across the highway to allow an oncoming car to pass. After searching Roberts' pockets and complaining that Roberts had no money, Edwards dragged Roberts back to the car and placed him in the trunk. Jordan drove

[7] *Jordan*, No. 4:06-cv-00069-TSL.

the car approximately one mile down the highway and exited onto a logging road where they stopped the car and took Roberts from the trunk. When Roberts began to kick and flinch Jordan fired another shot at Roberts with a .380 caliber pistol he had found between the seats in Roberts' car. After removing Roberts' shoes, Edwards dragged the body down a path into the woods. Jordan remained at the vehicle with Codera Bradley.

¶ 8. When Edwards returned from the woods he reached into the back seat of the car, firmly grasped Codera's head, and pulled the child into the front seat of the car. He then asked the child if he wanted to go to where his daddy was, at which time the child began to frantically cry and scream. Covering the child's mouth with his hand, Edwards led Codera into the woods where the body of his father was located, and fired one lethal shot into the back of Codera's head. Edwards then turned and fired one last shot at Roberts before he reemerged from the woods.

¶ 9. Edwards and Jordan drove Roberts' Nissan to a dirt pit away from the road. After removing the car's stereo equipment along with some car care products, they ignited the automobile and left the scene. Jordan tossed Roberts' .380 pistol into a nearby pond, while Edwards threw in the clip. Edwards later gave his mother the .22 pistol. The .25 pistol was left in the bucket of car care products taken out of Roberts' car.

¶ 10. The following day, Tony Roberts and Codera Bradley were reported missing. On Saturday, two days after the murders, two acquaintances of Edwards, Mark Holloway and Tracy Nicholson, went to Edwards' trailer in search of Holloway's pager. In the back bedroom of the trailer they noticed guns and pieces of electronic equipment (a car stereo, speakers, etc.). Holloway later called the wife of a deputy sheriff and told her what they had observed in the trailer.

¶ 11. On Sunday afternoon, the Jasper County Sheriff's Department received a call concerning a burned vehicle in a dirt pit located in the Rose Hill area. The serial number from the car indicated it belonged to Roberts. Upon inspection, the deputy noticed that the radio had been removed from the car. Based upon the phone call to the deputy's wife, a warrant was obtained to search Edwards' trailer.

¶ 12. While searching the trailer, one of the officers noticed an orange object in the woods behind the trailer. He followed a path leading into the woods and discovered that the orange object was a chainsaw. A plastic bucket containing car care products, a .25 caliber pistol, and some loose .380 rounds of ammunition was also discovered. The bucket and accompanying products were later identified as products similar to those which Roberts had kept in his vehicle.

¶ 13. The items found in the woods were seized and Jordan was arrested on October 10, 1995. Jordan subsequently confessed his involvement in the murders to Deputy Sheriff Riley and the investigator for the Highway Patrol, Raymond Delk. Jordan then provided additional statements to Sheriff Cross and Deputy J.G. Kufel.

> ¶ 14. Following his confession, Jordan took Deputy Sheriff Riley and Officer Delk to the site in Clarke County where the bodies of Tony Roberts and Codera Bradley were located. The bodies were found lying next to each other. Tony Roberts suffered two gunshot wounds: one wound entered below the right eye and exited through the left eye; the other entered the left temple above the left ear and exited from the right ear. The latter wound was lethal. The child had been shot once in the back of the head with the bullet exiting above the upper lip. He was still clutching a small package of toys.
>
> ¶ 15. Jordan provided information enabling the officers to recover the .380 pistol from the pond and the .22 pistol from Edwards' mother. A projectile fired from the .380 pistol was found in a pool of blood where Jordan stated Roberts was pulled from the trunk on the logging road. A cartridge casing which was also found at the scene bore class characteristics of the .380. Finally, a cartridge casing found near the foot of Codera Bradley which also bore the characteristics of the .380 pistol found in the pond.

Jordan, 728 So.2d at 1091-93 (¶¶ 4-15).[8]

SCOPE OF REVIEW

Petitioner seeks post-conviction relief based on claims that are admittedly based on evidence and events that occurred prior to and during his trial, direct appeal, and proceedings preliminary to the filing of his initial post-conviction application. He asserts his claims, as he must, under the UPCCRA. The UPCCRA's provisions:

> revise, streamline and clarify the rules and statutes pertaining to post-conviction collateral relief law and procedures, to resolve any conflicts therein and to provide the courts of this state with an exclusive and uniform procedure for the collateral review of convictions and sentences. Specifically, this article repeals the statutory writ of error coram nobis, supersedes Rule 8.07 of the Mississippi Uniform Criminal Rules of Circuit Court Practice and abolishes the common law writs relating to post-conviction collateral relief, including by way of illustration but not limitation, error coram nobis, error coram vobis, and post-conviction habeas corpus, as well as statutory post-conviction habeas corpus. The relief formerly accorded by such writs may be obtained by an appropriate motion under this article. The enactment of this article does not affect any pre-conviction remedies.

---

[8] Additional facts will be provided where necessary.

> Direct appeal shall be the principal means of reviewing all criminal convictions and sentences, and the purpose of this article is to provide prisoners with a procedure, limited in nature, to review those objections, defenses, claims, questions, issues or errors which in practical reality could not be or should not have been raised at trial or on direct appeal.

Miss. Code Ann. § 99-39-3.

Petitioner is totally and completely bound by the definite terms and conditions of the UPCCRA. *See id.* (creating the "exclusive and uniform procedure for the collateral review of convictions and sentences"). "Realistically, the act is a codification of the law existing in Mississippi for many years." *Evans v. State*, 485 So.2d 276, 280 (Miss. 1986); *Dufour v. State*, 483 So.2d 307, 308 (Miss. 1985). *See Cabello v. State*, 524 So.2d 313 (Miss. 1988); *Neal v. State*, 525 So.2d 1279 (Miss. 1987); *Wiley v. State*, 517 So.2d 1373 (Miss. 1987); *Johnson v. State*, 511 So.2d 1333 (Miss. 1987); *Johnson v. State*, 508 So.2d 1126 (Miss. 1987); *Irving v. State*, 498 So.2d 305 (Miss. 1986); *Stringer v. State*, 485 So.2d 274 (Miss. 1986); *Wilcher v. State*, 479 So.2d 710 (Miss. 1985); *Tokman v. State*, 475 So.2d 457 (Miss. 1985); *Leatherwood v. State*, 473 So.2d 964 (Miss. 1985); *Culberson v. State*, 456 So.2d 697 (Miss. 1984); *Johnson v. Thigpen*, 449 so.2d 1207 (Miss. 1984); *Gilliard v. State*, 446 so.2d 590 (Miss. 1984); *Pruett v. Thigpen*, 444 So.2d 819 590 (Miss. 1984); *Callahan v. State*, 426 So.2d 801 (Miss. 1983); *In re Evans*, 441 So.2d 520 (Miss. 1983); *Smith v. State*, 434 So.2d 486 (Miss. 1983); *Edwards v. State*, 433 So.2d 906 (Miss. 1983); *Wheat v. Thigpen*, 431 So.2d 486 (Miss. 1983); *Holloway v. State*, 261 So.2d 799 (Miss. 1979); *Auman v. State*, 285 So.2d 146 (Miss. 1973); *In re Broom's Petition*, 251 Miss. 25, 168 So.2d 44 (1964).

This Court, in *Wiley v. State*, 517 So.2d 1373 (Miss. 1987), made clear that It:

> *does not consider on a petition of this nature, issues raised and decided on the original appeal, even though theories for relief different from those urged at trial and on appeal are now asserted*. Miss. Code Ann. § 99-39-21(2), (3); *Johnson v. State*, *Dufour v. State*, 483 So.2d 307, 311 (Miss. 1985).

....

> Because this Court has considered all these points on their merits on the direct appeals by Wiley, Wiley cannot now be allowed to relitigate the same issues. *Wilcher v. State*, 479 So.2d 710 (Miss. 1985); *Callahan v. State*, 426 So.2d 801 (Miss. 1983). The issues were decided against Wiley's position and he is not entitled to an evidentiary hearing on the same subject matter. On these points, the motion is denied as to Issues E, F, H, I, J, K, L, and M.
>
> Issues C, D, G, N, O, P, Q and R were not raised on direct appeal or at the trial court. Thus, the claims are procedurally barred and not subject to further review by this Court, under Miss. Code Ann. § 99-39-21. *Wilcher v. State*, 479 So.2d 710 (Miss. 1985).
>
> Additionally, claims that were available, but not previously asserted on direct appeal, are waived, and on this additional ground these claims are not subject to federal further review.
>
> [F]or the above reasons, the enumerated claims cannot be litigated; an evidentiary hearing on Issues C, D, G, N, O, P, Q, and R is denied.

Wiley, 517 So.2d at 1377-78 (emphasis added).

In *Cabello v. State*, the Court held:

> In conclusion, the Court wishes to draw counsel's attention to Miss. Code Ann. § 99-39-3(2) (Supp. 1987), which reads:
>
> > direct appeal shall be the principal means of reviewing all criminal convictions and sentences, and the purpose of this chapter is to provide prisoners with a procedure, limited in nature, to review those objections, defenses claims, questions, issues or errors which in practical reality could not be and should not have been raised at trial or on direct appeal.
>
> Although the Court is aware of counsel's responsibilities, especially given the sentence in this case, it is pointless to relitigate issues previously asserted or waived.

555 So.2d 323.

This Court's decisions in *Wiley v. State*, 842 So.2d 1280 (Miss. 2003), *Woodward v. State*, 843 So.2d 1 (Miss. 2003), *McGilberry v. State*, 843 So.2d 21 (Miss. 2003), and *Brown v. State*, 798 So.2d 481 (Miss. 2001), underscore the fact that the provisions of Sections 99-39-1 to 99-39-29 apply with full force and effect to this successive PCR Motion.

ARGUMENT

Petitioner is a convicted murderer, who was sentenced to death by twelve jurors—twice.[9] Even so, he asks this Court to "vacate his death sentence, or in the alternative, remand this case to the trial court for an evidentiary hearing on the claims raised ..." in his successive PCR Motion. (PCR Mot. at 152). In this successive PCR Motion, Petitioner raises three claims for collateral relief. They are:

> GROUND I. [Petitioner] was denied his right to the effective assistance of counsel guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Corresponding Provisions of the Mississippi Constitution Because Counsel Failed to Investigate and Present Substantial and Compelling Mitigation Evidence at the penalty phase of the trial[;]
>
> GROUND II. [Petitioner]'s death sentence is disproportionate and violates his right to be free from cruel and unusual punishment under the eighth and fourteenth amendments to the U.S. Constitution and corresponding provisions of the Mississippi Constitution[; and]
>
> GROUND III. [Petitioner] was denied his rights guaranteed by the eighth and fourteenth amendments to the United States Constitution and corresponding provisions of the Mississippi Constitution for the Sentencer to consider all relevant mitigating evidence, and direct appeal counsel was ineffective for not raising this claim on direct appeal.

(Id. at 9-152). All three are addressed in the following discussion.

A. STANDARD OF REVIEW

This is Petitioner's second attempt to obtain post-conviction relief. The Court should:

> deny relief unless the claims are not procedurally barred and they make a substantial showing of the denial of a state or federal right. Miss. Code Ann. § 99-39-27 (Supp. 2011). Absent an applicable exception, a successive motion for post-conviction relief is procedurally barred. Miss. Code Ann. § 99-39-[27(9)] (Supp. 2011); *Rowland v. State*, 42 So.3d 503, 507 (Miss. 2010).

---

[9] *See* R. 261, 262, 263.

Havard v. State, 86 So.3d 896, 899 (Miss. 2012) (quoting *Knox v. State*, 75 So.3d 1030, 1036 (Miss. 2011)). If the claims are not procedurally barred,

> The standard of review for capital convictions and sentences is "one of 'heightened scrutiny' under which all bona fide doubts are resolved in favor of the accused." *Flowers v. State*, 773 So.2d 309, 317 (Miss. 2000) (citations omitted). "This Court recognizes that 'what may be harmless error in a case with less at stake becomes reversible error when the penalty is death.' " *Id.*...

Grayson v. State, 118 So.3d 118, 125 (Miss. 2013) (citations omitted).

B. The Claims in Petitioner's PCR Motion are Procedurally Barred.

The claims appearing in the present PCR Motion are subject to the UPCCRA's procedural bars.

1. *Time Bar*

The claims appearing in Petitioner's PCR Motion are subject to the one year statute of limitations found at Miss. Code Ann. § 99-39-5(2), and do not fall within the exceptions of that Section. Sub-part (2) of Miss. Code Ann. § 99-39-5 states that:

> (2) A motion for relief under this article shall be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction. Excepted from this three-year statute of limitations are those cases in which the petitioner can demonstrate either:
>
> (a)(i) That there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in caused a different result in the conviction or sentence; or
>
> (a)(ii) That, even if the petitioner pled guilty or nolo contendere, or confessed or admitted to a crime, there exists biological evidence not tested, or, if previously tested, that can be subjected to additional DNA testing that

> would provide a reasonable likelihood of more probative results, and that testing would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution.
>
> (b) Likewise excepted are those cases in which the petitioner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. Likewise excepted are filings for post-conviction relief in capital cases which shall be made within one (1) year after conviction.

Petitioner files this successive PCR Motion more than fifteen years after the one year statute of limitations for filing an application for post-conviction relief lapsed. The one year statute of limitations began to run when this Court issued Its Mandate on March 22, 1999. *See Pucket v. State*, 834 So.2d 676, 677 (Miss. 2002) (holding that "[i]n a death penalty context, a conviction is final only when the mandatory state appellate review is complete, *i.e.*, when this Court's mandate on appeal issues[]"). He offers no evidence that shows any of the claims in his successive PCR Motion are excepted from the time bar found at Miss. Code Ann. § 99-39-5(2)(b). "Our case law has repeatedly held that once a prisoner's claims are time barred, they must fall into one of the enumerated exceptions to remain viable." *Austin v. State*, 863 So.2d 59, 61 (Miss. Ct. App. 2003) (citing *Patterson v. State*, 594 So.2d 606, 608 (Miss. 1992)). Petitioner's PCR Motion and the claims therein are time-barred.

Petitioner, fifteen years after filing his initial application for post-conviction relief files a second application. The State Legislature reduced the statute of limitations for filing post-conviction applications by capital litigants under sentence of death from three years to one for a specific reason. In *Puckett v. State*, 834 So.2d 676, this Court considered the statutory construction of the one year statute of limitations under Miss. Code Ann. § 99-39-5(2)(b). The Court also called attention to the

Legislature's decision to reduce the time that applications filed by capital litigants under sentence of death. The Court found that the creation of the OCPCC was the motivating factor behind that decision. Capital litigants under sentence of death would receive assistance of specialized counsel and support staff necessary to the investigation, preparation, and presentation of claims in an application for post-conviction relief. *Id.* at 677 (citing *Jackson v. State*, 732 So.2d 187 (Miss. 1999)).

Petitioner's post-conviction proceedings in *Jordan*, 918 So.2d 636 ended on August 4, 2005 when the Court issued Its Mandate. A decade passed before Petitioner decided to file the present PCR Motion. His second PCR Motion and the claims contained in it are time-barred. To hold otherwise would be contrary to the Legislature's intent to a reasonable time limitation for seeking post-conviction relief. The State respectfully requests that the Court dismiss his PCR Motion, and deny him the relief he seeks. This PCR Motion is time-barred.

2. *Successive-Writ Bar*

Petitioner's PCR Motion amounts to a successive writ. His PCR Motion is procedurally barred by Miss. Code Ann. § 99-39-27(9). Section 99-39-27(9) states that:

> The dismissal or denial of an application under this section is a final judgment and shall be a bar to a second or successive application under this article. Excepted from this prohibition is an application filed under Section 99-19-57(2), raising the issue of the offender's supervening mental illness before the execution of a sentence of death. A dismissal or denial of an application relating to mental illness under Section 99-19-57(2) shall be res judicata on the issue and shall likewise bar any second or successive applications on the issue. Likewise excepted from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States that would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, that is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction

> or sentence. Likewise exempted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked.

This is Petitioner's second application for post-conviction relief. The Court denied the claims raised in his first post-conviction application. (Mandate, *Jordan v. State*, 918 So.2d 636 (No. 1999-DR-01391-SCT)). His present PCR Motion amounts to a successive writ, and subject to Section 99-39-27(9)'s prohibition against successive writs. None of the exceptions to the successive-writ bar apply to Petitioner's PCR Motion. Petitioner's PCR Motion is procedurally barred as a successive writ, and should be dismissed. Therefore, the State respectfully requests that the Court dismiss Petitioner's PCR Motion under the provisions of Miss. Code Ann. § 99-39-27(9).

3. *Procedural Bars of Waiver and Res Judicata*

Petitioner's PCR Motion should be dismissed, and the claims appearing therein, denied. The claims appearing in Petitioner's PCR Motion are not facially viable claims. His claims are subject to the procedural bars of Section 99-39-21. The Court must deny Petitioner's requests for relief. Miss. Code Ann. § 99-39-27(5). "The procedural bars of waiver, different theories, and res judicata and the exception thereto as defined in Miss. Code Ann. § 99-39-21(1-5) are applicable in death penalty PCR Applications." *Havard*, 988 So.2d 322, 333 (Miss. 2008) (citations omitted). Section 99-39-21 states that:

> (1) Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.
>
> (2) The litigation of a factual issue at trial and on direct appeal of a specific state or federal legal theory or theories shall constitute a waiver of all other state or federal legal theories which could have been raised under said factual issue; and

any relief sought under this article upon said facts but upon different state or federal legal theories shall be procedurally barred absent a showing of cause and actual prejudice.

(3) The doctrine of res judicata shall apply to all issues, both factual and legal, decided at trial and on direct appeal.

(4) The term "cause" as used in this section shall be defined and limited to those cases where the legal foundation upon which the claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal.

(5) The term "actual prejudice" as used in this section shall be defined and limited to those errors which would have actually adversely affected the ultimate outcome of the conviction or sentence.

(6) The burden is upon the prisoner to allege in his motion such facts as are necessary to demonstrate that his claims are not procedurally barred under this section.

Miss. Code Ann. § 99-39-21. Petitioner tells the Court that the claims in his PCR Motion are properly preserved. (PCR Mot. at 7-8). He is mistaken.

4. *The Exceptions to the UPCCRA's Procedurals Bars Do Not Apply*

Petitioner argues three exceptions to the UPCCRA's procedural bars apply to the claims in the present PCR Motion. (PCR Mot. at 7-8). He believes the newly-discovered exception, fundamental rights exception, and the right to effective assistance of post-conviction counsel permit this Court to consider the claims in his PCR Motion. (Id. at 7-8). The State disagrees. All three exceptions are addressed in the discussion below.

The UPCCRA requires Petitioner to show that the claims in his present PCR Motion are not subject to the procedural bars under Miss. Code Ann. § 99-39-21. Miss. Code Ann. § 99-39-27(5). But, Petitioner's PCR Motion and the claims therein are precluded from further review by the at Miss. Code Ann. § 99-39-5(2) and the successive-writ bar under Miss. Code Ann. § 99-39-27(9). These bars, not just those listed under Miss. Code Ann. § 99-39-21, apply with full force and effect

to his PCR Motion and claims. All of these bars serve a function, and were enacted into law with the intent they would be applied in instances like the present one. The purpose of the UPCCRA is, as this Court noted, in *Grayson v. State*, "'to provide prisoners with a procedure, limited in nature, to review those objections, defenses, claims, questions, issues or errors which in practical reality could not be or should not have been raised at trial or on direct appeal.'" *Grayson*, 118 So.3d at 125 (quoting Miss. Code Ann. § 99-39-3(2)).

The UPCCRA makes clear that collateral review does not afford Petitioner a second bite at the apple. "Direct appeal shall be the principal means of reviewing all criminal convictions and sentences...." *Id.* (quoting Miss. Code Ann. § 99-39-3(2)); *see id.* (stating that the petitioner's second PCR motion is time-barred and barred as a successive writ, absent an applicable exception) (citing Miss. Code Ann. §§ 99-39-5(2)(b); 99-39-27(9); *Puckett*\, 834 So.2d at 677-78; *Havard v. State*, 86 So.3d 896, 899 (Miss. 2012)); *Powers v. State*, 945 So.2d 386, 395 (Miss. 2006) ("[T]he procedural bars of waiver, different theories, and res judicata as well as the exceptions thereto contained in Miss. Code Ann. § 99-39-21(1)-(5) are clearly applicable to death penalty post-conviction relief applications."). All of the procedural bars apply to Petitioner's claim, unless he demonstrates otherwise. And as the discussion below shows, all of the procedural bars apply.

a. The Newly-Discovered Evidence Exception

Petitioner believes his claims in his PCR Motion are properly preserved, because they are supported by "evidence not known to trial counsel." (PCR Mot. at 7). Problematic for Petitioner is the fact that there is no exception to any procedural bar listed under the UPCCRA that is based on evidence not known to trial counsel. So, he argues that he "may seek post-conviction relief where material facts, not previously presented, require vacation of conviction or sentence." (PCR Mot. at

7) (citing Miss. Code Ann. §§ 99-39-3(2); 99-39-5(1)(e)). But what he fails to mention and hopes this Court will overlook is that"[p]ost-conviction relief is not granted upon facts which could or should have been litigated at trial and on appeal." *Williams v. State*, 669 So.2d 44, 52 (Miss. 1996). The only exception to the UPCCRA's procedural bars that relates to evidence is the newly-discovered evidence exception.

Newly-discovered evidence is an exception to the time-bar found at Miss. Code Ann. § 99-39-5(2)(b), the bars of waiver under Miss. Code Ann. § 99-39-21(1) & (2), and the successive writ bar listed at Miss. Code Ann. § 99-39-27(9). Newly discovered evidence is "'evidence, not reasonably discoverable at the time of trial, that is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence.'" *Havard v. State*, 86 So.3d 896, 906 (¶ 37) (Miss. 2012) (quoting Miss. Code Ann. § 99-39-27(9)); *see id*. at 904 (¶ 27) (holding a claim of ineffective assistance procedurally barred, in part, by Section 99-39-5(2)(b) where the petitioner failed to offer any newly discovered evidence in support of his claim). A claim is excepted from the procedural bars of waiver if he shows: (1) "the legal foundation upon which the claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal[;]" and (2) "errors which would have actually adversely affected the ultimate outcome of the conviction or sentence." Miss. Code Ann. § 99-39-21(4) & (5). Petitioner has offered absolutely no evidence that constitutes newly-discovered evidence.

And even then, the newly-discovered evidence is an exception that applies to some, but not all of the UPCCRA's procedural bars. Newly-discovered evidence does not except a claim for relief from the procedural bar of *res judicata*. "Unlike the bars of waiver and other theories, the res

judicata bar is not subject to the cause and actual prejudice test." *Walker v. State*, 863 So.2d 1, 27 (Miss. 2003) (citing Miss. Code Ann. § 99-39-21(3); *Foster v. State*, 687 So.2d 1124, 1137 (Miss. 1996); *Gilliard v. State*, 614 So.2d 370, 375 (Miss. 1992)); *see also Wiley*, 517 So.3d at 1377. "The doctrine of res judicata *shall* apply to all issues, both factual and legal, decided at trial and on direct appeal." Miss. Code Ann. § 99-39-21(3) (emphasis added). "An alleged error should be reviewed, in spite of any procedural bar, only where the claim has not previously been litigated or where an appellate court has reversed itself on an issue previously submitted." *Powers*, 945 So.2d at 395 (citing *Foster*, 687 So.2d at 1129); *Gilliard*, 614 So.2d at 376 (quoting *Irving v. State*, 498 So.2d 305, 311 (Miss. 1986)). The claims presented in the present PCR Motion are barred by the doctrine of *res judicata*. And, Petitioner's claims would be subject to the doctrine of *res judicata* even if he had presented newly-discovered evidence. Petitioner realizes the claims in his PCR Motion are procedurally barred without exception. So, he argues the Court may review his claims under the fundamental rights exception.

b. The Fundamental Rights Exception

The fundamental constitutional rights exception does not apply to any of the claims raised in Petitioner's PCR Motion. Petitioner argues this Court may review the claims in his present PCR Motion under the fundamental rights exception. His position is that if his claims "were subject to a procedural bar—which they are not—this Court should ignore such bar where, as here, [Petitioner]'s fundamental constitutional rights are implicated." (PCR Mot. at 8). He is mistaken.

In *Rowland v. State*, 42 So.3d 503 (Miss. 2010), this Court acknowledged that Its precedent was somewhat inconsistent with respect to the application of procedural bars to claims or error affecting constitutional rights. The Court clarified these consistencies by holding, "unequivocally,

that errors affecting fundamental constitutional rights are excepted from the procedural bars of the UPCCRA." *Rowland*, 42 So.3d at 506. Since then, the Court has expressly identified: (1) the right not to be subject to double jeopardy; (2) the right to be legally sentenced; (3) the right against *ex post facto* application of law; and (4) the right to due process at sentencing as fundamental rights.[10]

The claims Petitioner raises in his present PCR Motion do not implicate any of the four fundamental constitutional rights stated above. The State submits that none of Petitioner's fundamental constitutional rights are implicated in the present successive PCR Motion. Therefore, the fundamental rights exception to the UPCCRA's procedural bars does not apply to any of the claims raised in the present PCR Motion. This is evidenced by Petitioner's assertion that none of the procedural bars apply due to the ineffectiveness of Stephanie McArdle, one of his post-conviction attorneys.

c. The Right to Effective Assistance of Post-Conviction Counsel

In addition, Petitioner argues that his present PCR Motion and the claims therein are "not procedurally barred due to the ineffective assistance of post-conviction counsel." (Id. at 8). He cites *Walker v. State*, 131 So.3d 562 (Miss. 2013). (See PCR Motion at 7-8) (citations omitted). To the extent that he cites *Walker* as authority that holds the right to the effective assistance of post-conviction counsel is a fundamental constitutional right, the State disagrees. This is based on its reading of *Rowland v. State*, *supra*, *Grayson v. State*, 118 So.3d 118 (Miss. 2013), and *Walker v. State*, *supra*.

---

[10] *See e.g., Madden v. State*, 165 So.3d 468, 468-69 (Miss. 2015) (recognizing double-jeopardy, illegal sentence, or denial of due process in sentencing are claims that must be considered) (citation omitted); *Bell v. State*, 123 So.3d 924, 924-25 (Miss. 2013) (holding *ex post facto* claims involve fundamental rights).

In *Grayson v. State*, the Court addressed the issue of whether a petitioner under sentence of death had the right to the effective assistance of post-conviction counsel. Grayson filed a successive PCR motion, claiming he was denied his right to the effective assistance of post-conviction counsel. *Grayson*, 118 So.3d at 125-26. He argued that post-conviction counsel's ineffectiveness denied him due process and equal protection—access to the courts. *Id.* at 126. The Court agreed with Grayson, and affirmatively held "PCR petitioners who are under a sentence of death do have a right to the effective assistance of PCR counsel." *Id*. In arriving at that conclusion, the Court relied on precedent and State statutory law. The Court cited prior precedent, which recognized that: (1) PCR cases involving the death penalty were different from all others, and (2) PCR proceedings had evolved to become "a critical stage of the death-penalty appeal process at the state level...."[11] *Id.* at 125 (footnote omitted) (citing *Jackson v. State*, 732 So.2d 187, 191 (Miss. 1999); *Chamberlin v. State*, 55 So.3d 1046, 1049 (Miss. 2010)). Because PCR was a critical stage, the Court explained that State statutory law required counsel be made available to assist petitioners in their efforts to obtain post-conviction relief. *Id.* (quoting Miss. Code Ann. § 99-15-15).[12]

Months later, in *Walker v. State*, this Court granted Alan Dale Walker's motion for leave to file a successive post-conviction motion in light of *Grayson v. State*. *Walker*, 131 So.3d at 563-64 (citing *Grayson*, 118 So.3d at 147). The Court did so, because Walker demonstrated "prior PCR counsel was ineffective for his failure to raise th[e] issue [of trial counsel's deficient performance

---

[11] In *Jackson v. State*, this Court noted that "actions under the UPCCRA ... are a unique kind of civil action ... that ... have become an appendage, or part, of the death penalty appeal process at the state level." 732 So.2d at 190 (citation omitted).

[12] Miss. Code Ann. § 99-15-15 states, in part, that "an accused shall have representation available at every critical stage of the proceeding against him where a substantial right may be affected."

at the penalty stage] in his initial petition for post-conviction relief." *Id.* at 564. That is not the case here.

But more importantly, Petitioner's assertion, that effective post-conviction representation is a fundamental right, does not square with *Rowland*, *Grayson*, or *Walker*. Earlier, it was noted that since *Rowland*, this Court has held claims based on four specific types of errors are excepted from the UPCCRA's procedural bars. *See supra*, at p. 27. The ineffectiveness of post-conviction counsel is not one of the four types of error this Court has identified. The *Grayson* Opinion makes this clear.

Grayson's holding is based on equal protection—access to the courts . Precedent teaches that "[f]undamental rights are guaranteed to *all* persons, without regard of race, color, creed, religion or socio/economic status because of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States." *Terry v. State*, 718 So.2d 1097, 1107 (Miss. 1998) (emphasis added). If a fundamental right is a right guaranteed to all persons, then the right to effective post-conviction counsel cannot be a fundamental right. As it stands, less the fifty individuals enjoy the right to effective post-conviction counsel. *Grayson* specifically states that "this Court has not recognized a general right to the effective assistance of PCR counsel in every criminal case." *Grayson*, 118 So.3d at 126. This Court did not create a fundamental constitutional right in *Grayson*.

Grayson's holding is also based on due process. The *Grayson* Opinion and *Walker* Order make this clear. The denial of the right to effective assistance of post-conviction counsel is tantamount to the denial of a *meaningful opportunity* to fairly present claims for post-conviction relief. *Grayson* creates an equitable rule, not a fundamental constitutional right. That is, a petitioner under sentence of death may overcome the UPCCRA's procedural bars, if he shows post-conviction counsel's ineffectiveness prevented him from raising a meritorious PCR claim that could not have

been raised prior to filing an initial application for post-conviction relief. The *Grayson* Opinion and *Walker* Order bear this out.

Based on the *Grayson* Opinion, Grayson was afforded a meaningful opportunity to present his claims. This Court applied the UPCCRA's procedural bars to all but one (*i.e.*, Cumulative Error) of the claims that Grayson presented in his successive post-conviction motion. The claims that this Court held procedurally barred were:

1. Failure to timely and adequately support the funding motion for an investigator to interview a potentially exculpatory witness in Dade County, Florida, related to the guilt-or-innocence issues, and failure to adequately preserve this issue at trial for presentation on appeal
2. Failure to timely and adequately seek funding, failure to preserve the record with respect to the denial of funding requests, failure to otherwise adequately investigate the issues related to guilt-or-innocence, and failure to seek a continuance
3. Failure to timely and adequately investigate and present evidence and argument in support of Grayson's motion to suppress his statements during both the pretrial hearing and in the presence of the jury during trial
4. Failure to request DNA testing on fingernail scrapings from the victim and blood samples from the crime scene
5. Distancing themselves from Grayson and repeatedly informing the jury that they were appointed counsel present only because they were "ordered to come here to represent him"
6. Failure to adequately review transcriptions of Grayson's audiotaped and videotaped statements admitted into evidence, adequately review the videotape of Grayson's May 24 statement admitted into evidence, and object to inadmissible portions and improper omissions or, alternatively, failure to adequately preserve the record for appeal on these issues
7. Failure to object to the State's closing argument during the trial, which vouched for Jason Kilpatrick and included the prosecutor's personal statements and information not properly admitted into evidence
8. Failure to object to the submission to the jury of an instruction that allowed a verdict of guilty on the capital-murder charge without a finding that Grayson committed every element of that crime

9. Failure to adequately investigate and consult with Grayson prior to trial, which resulted in Grayson informing counsel that he did not desire to oppose a death sentence (if convicted) until the middle of the trial when Grayson's family and independent counsel were brought in to advise Grayson of his options

10. Failure to adequately present mitigation evidence at the sentencing phase in support of additional statutory and nonstatutory mitigating circumstances which prejudiced Grayson

11. Failure to argue mitigation evidence to the jury and making only generic societal and religious arguments against the death penalty in sentencing

12. Failure to object to the trial court's failure to instruct the jury that it should consider all mitigation presented, rather than just the statutory mitigating circumstances

13. Failure to object to the trial court's failure adequately to instruct the jury that a life sentence would be a sentence served without parole eligibility

....

Grayson, 118 So.3d at 133-45.

But, it is evident from the *Walker* Order that Walker was denied a meaningful opportunity to present his claims. In *Walker*, the Court found:

> the mitigation evidence Walker has presented in his petition shows that he potentially was prejudiced by trial counsel's deficient performance at the penalty stage. We further find that Walker's prior PCR counsel was ineffective for his failure to raise that issue in his initial petition for post-conviction relief, and that Walker was prejudiced by that deficient performance if his trial counsel was, in fact, ineffective. Walker has shown (1) deficient conduct and (2) prejudice that resulted from ineffective assistance of PCR counsel sufficient to warrant a hearing on this issue. Walker's claim of ineffective assistance of post-conviction counsel is sufficient to overcome the procedural bars and allow this Court to reach the merits of his claim.

Walker, 131 So.3d at 564.

A couple of points are noteworthy. The first is that *Grayson* and *Walker* establish a cause and actual prejudice test, which is similar to the cause and actual prejudice test found at Miss. Code Ann. § 99-39-21(1) & (2). A reasonable reading of *Grayson* and *Walker* provides review of claims

that would have otherwise been waived. This Court said just that in *Walker*. *See Walker*, 131 So.3d at 563 (noting that, prior to *Grayson*, "Walker would have been barred procedurally from claiming that his PCR counsel was ineffective").

And the second point is that the cause and actual prejudice test *Grayson* and *Walker* create is equitable. *Grayson's* ruling is, in this sense, similar to the Supreme Court of the United States ruling in *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309 (2012). *Martinez* explains that:

> A constitutional ruling would provide defendants a freestanding constitutional claim to raise; it would require the appointment of counsel in initial-review collateral proceedings; it would impose the same system of appointing counsel in every State; and it would require a reversal in all state collateral cases on direct review from state courts if the States' system of appointing counsel did not conform to the constitutional rule. An equitable ruling, by contrast, permits States a variety of systems for appointing counsel in initial-review collateral proceedings. And it permits a State to elect between appointing counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings.

Martinez, 132 S.Ct. at 1319-20.

Grayson did not create a new, fundamental constitutional right. His assertion does not square with *Rowland*, *Grayson*, or *Walker*. Under *Rowland*, claims for relief that are based on "'errors affecting fundamental constitutional rights are excepted from the procedural bars of the UPCCRA....'" *Fluker v. State*, 170 So.3d 471, 475 (Miss. 2015) (quoting *Rowland*, 42 So.3d at 506). Petitioner argues that if his claims "were subject to a procedural bar—which they are not—this Court should ignore such bar where, as here, [Petitioner]'s fundamental constitutional rights are implicated." (PCR Mot. at 8). But if that were true, then why would he need to overcome the UPCCRA's bars under *Walker*? And, how does he explain the fact that this Court barred all but one of the claims raised in *Grayson*?

The State submits that, in order to overcome the UPCCRA's bars under *Grayson*, Petitioner must show that his post-conviction counsels' deficient performance prevented him from raising a meritorious post-conviction claim. And under *Grayson* and *Walker*, Petitioner must show cause and actual prejudice for each, individual claim that he contends is excepted from the UPCCRA's procedural bars under *Grayson*. Petitioner fails to do so. Therefore, the claims raised in his successive PCR Motion are subject to the UPCCRA's procedural bars.

Petitioner argues trial counsel failed to investigate and present mental health matters, which have diminished his mental health and moral culpability. He argues that trial counsel was ineffective for failing to raising the issue, that the trial court erred in excluding the same mitigating evidence at trial, on direct appeal. He does not show the claims set out in his PCR Motion are novel. *Havard*, 988 So.2d at 333. He has not shown a "sudden reversal of law relative to ... [his claims] that would exempt [them] from the procedural bar of res judicata pursuant to Mississippi Code Annotated Section 99-39-21(3) (Rev. 2007)." *Id*. His claims have been waived; and are procedurally barred by the doctrine of *res judicata*. *See e.g., id.* (citing Miss. Code Ann. § 99-39-21(3)). Claims for collateral relief that "were made or should have been made" in a previous matter are precluded from being re-litigated. *Riley v. State*, 150 So.3d 138, 140 (Miss. Ct. App. 2014) (quoting *Hill v. Carroll Cnty.*, 17 So.3d 1081, 1084 (Miss. 2009)).

Petitioner states that he "addresses each ground for relief *and* also *explains* why this petition is not procedurally barred *due to* the ineffective assistance of post-conviction counsel" (PCR Mot. at 8) (emphasis added). Yet, he does not. The State has found no explanation which shows any claim presented in the present PCR Motion should be excepted from any of the UPCCRA's procedural bars, particularly those found at Miss. Code Ann. § 99-39-21.

What is more, Petitioner only asserts claims of ineffective assistance against one of his post-conviction attorneys, Ms. Stephanie McArdle. But Petitioner was represented by two attorneys on post-conviction review, Ms. McArdle *and* Mr. James Craig. Ms. McArdle, who was a foreign attorney, was admitted *pro hac vice*. Mr. Craig served as her local counsel.

Rule 46 of the Mississippi Rules of Appellate Procedure governs the admission of foreign attorneys. It states, in pertinent part, that:

> No foreign attorney may appear pro hac vice before any court or administrative agency of this state unless the foreign attorney has associated in that cause a local attorney. The name of the associated local attorney shall appear on all notices, orders, pleadings, and other papers filed in the cause. The local attorney shall personally appear and participate in all trials, and, unless specifically excused from such appearance by the court or administrative agency, in all pretrial conferences, hearings, other proceedings conducted in open court and all depositions or other proceedings in which testimony is given in this state. *By associating with a foreign attorney in a particular cause, the local counsel accepts joint and several responsibility with such foreign attorney to the client, to opposing parties and counsel, and to the court or administrative agency in all matters arising from that particular case.*

M.R.A.P. 46(b)(4) (emphasis added). The two attorneys responsible for filing the present PCR Motion ask the Court to vacate Petitioner's death sentence. Their request is based solely on assertions that Ms. McArdle's representation amounted to ineffective post-conviction assistance. In fact, the attorneys responsible for filing the present PCR Motion attach an affidavit from Mr. Craig, which, in practical effect, states that he warned Ms. McArdle that he would not be able to give her much assistance in this case.

This Court has addressed a similar situation where a post-conviction petitioner under sentence of death made several assertions of ineffective assistance. When the petitioner in *Spicer v. State*, 973 So.2d 184 (Miss. 2007) asserted that his trial attorneys were ineffective for failing to

conduct an investigation for the guilt phase of his trial, this Court noted that Spicer failed to offer proof that demonstrated of his *both* of his trial attorneys were ineffective. *Spicer*, 973 So.2d at 192-93. At one point in the *Spicer* Opinion, this Court said that:

> ¶ 22. Spicer contends that his attorneys did not consult with him prior to trial. He builds this argument on Hurt's time sheet/billing statement. Spicer asserts that Hurt spent only 63.25 hours on Spicer's case prior to trial and that "not one single hour was devoted to factual investigation or legal research." The State argues that relying on Hurt's billing records alone does not support Spicer's claim. Spicer had two attorneys. Barnett was Spicer's lead counsel during the trial. The State further argues that he was more likely to have been the attorney meeting with Spicer. Barnett was also the Public Defender for George County, and as a salaried public defender, Barnett would have no need to supply a billing statement to the trial court for payment. Spicer makes no assertion as to the number of hours Barnett spent on the case.

Id. at 192-93; *see id.* at 194 (¶¶ 25-27). This Court denied Spicer relief, after reviewing the record and finding Spicer failed to provide his own affidavit that alleged "that his attorneys did not consult with him, formulate a strategy, or investigate the events of the crime." *Id.* at 194.

What makes this case distinguishable from *Spicer* is that Petitioner makes absolutely no assertions of ineffectiveness against Mr. Craig. He offers absolutely no proof that Mr. Craig was ineffective. The State does not suggest that Ms. McArdle was ineffective. In fact, the State submits that Ms. McArdle's performance satisfies *Strickland*. The State would simply draw the Court's attention to the fact that all of Petitioner assertions and evidence are directed towards Ms. McArdle's performance. This Court should find Petitioner's assertions of post-conviction counsels' ineffectiveness are without merit just as It did in *Spicer*. *Id.*

It is also worth noting that the attorneys who filed the present PCR Motion argue that Ms. McArdle was ineffective, because she filed an incomplete post-conviction petition. The two filing attorneys responsible for the present PCR Motion have filed incomplete post-conviction petitions

on behalf of other post-conviction petitioners under sentence of death.[13] The State submits filing of incomplete post-conviction petitions does not make an attorney ineffective. To the contrary, the filing of incomplete post-conviction petitions has proven to be an effective tactic frequently used to force this Court to enlarge the one-year statute of limitations found at Miss. Code Ann. § 99-39-5(2)(b). That is precisely what occurred in this case—twice. Ms. McArdle and Mr. Craig filed two amended post-conviction applications on Petitioner's behalf.

In any event, Petitioner alleges, but absolutely fails to show that his post-conviction counsel were ineffective. Petitioner fails to show that the right to the effective assistance of post-conviction counsel is a fundamental right, because it is not. This case is like Grayson's successive attempt to obtain post-conviction relief. In that case, this Court barred each and evidence single claim due to Grayson's complete failure to show that his post-conviction counsel's ineffectiveness—save one claim (*i.e.*, a cumulative error claim). Consequently, this case is entirely unlike the *Walker* case. Because Petitioner fails to show post-conviction counsel were deficient or that he suffered any prejudice as a result, this Court should apply the UPCCRA's procedural bars to each and every claim in the present PCR Motion.

C. PETITIONER'S FIRST CLAIM, THAT HE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DUE TO TRIAL COUNSELS' FAILURE TO INVESTIGATE AND PRESENT SUBSTANTIAL AND COMPELLING MITIGATION EVIDENCE AT THE PENALTY PHASE OF TRIAL, IS PROCEDURALLY BARRED AND WITHOUT MERIT.

---

[13] *See e.g.,* Petition for Extraordinary Relief: Motion to Require Circuit Court to Entertain Discovery and Motion to Stay Post-Conviction Proceedings at 2, filed Nov. 20, 2014, *Bobby Batiste v. State of Mississippi*, No. 2013-DR-01624-SCT (Miss. 2013) (choosing to file an "incomplete petition...."); Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 5, filed Oct. 3, 2014, *Leslie Galloway, III v. State of Mississippi*, No. 2013-DR-01796-SCT (Miss. 2013) (unequivocally admitting that "Leslie Galloway III's petition is incomplete").

Petitioner's first claim is predicated on assertions that trial counsel were ineffective for failing to investigate and present mitigation evidence during the penalty phase of his trial. This claim, like his others, are procedurally barred and utterly devoid of merit. Petitioner is entitled to no relief. His first claim should be denied for the reasons stated below.

1. Petitioner's First Claim is Time Barred.

Petitioner's first claim is time-barred. He raises his first claim in the present PCR Motion more than fifteen years after this Court issued Its Mandate on direct review in *Jordan v. State*, 728 So.2d 1088 (Miss. 1998) (No. 96-DP-01316-SCT).[14] His first claim is more than fifteen years too late. Miss. Code Ann. § 99-39-5(2)(b); *see Grayson v. State*, 118 So.3d 118, 125 (Miss. 2013) (citing *Puckett v. State*, 834 So.2d 676, 677-78 (Miss. 2002) (holding post-conviction review begins, "[i]n a death penalty context, ... when the mandatory state appellate review is complete, *i.e.*, when this Court's mandate on appeal issues")). The "the adage of 'better late than never' d[oes] not apply ..." to post-conviction motions, including Petitioner's. *Puckett*, 834 So.2d at 677 (quoting *Lockett v. State*, 656 So.2d 68, 71 (Miss. 1995)); *Grayson*, 118 So.3d at 125 (citing *Havard v. State*, 86 So.3d 896, 900 (Miss. 2012)). Petitioner's first claim is time-barred.

2. Petitioner's First Claim is Successive-Writ Barred.

Second, the present PCR Motion amounts to a successive writ. The UPCCRA prohibits review of successive writs. *Grayson*, 118 So.3d at 125 (citing Miss. Code Ann. § 99-39-27(9); *Havard*, 86 So.3d at 899). The present PCR Motion follows the Court's decision to deny relief for the claims that Petitioner raised in his first Motion for Leave to Proceed in the Trial Court with a

[14] The Court issued Its Mandate on March 22, 1998, ending Petitioner's trial and direct review proceedings.

Petition for Post-Conviction Relief and attached Petition for Post-Conviction Relief. (Majority Opinion, entered May 19, 2005, *Jordan*, 918 So.2d 636). That decision became final and post-conviction proceedings ended on August 4, 2005, when the Court issued Its Mandate. (Mandate, *Jordan*, 918 So.2d 636). Petitioner's first claim is subject to the successive writ bar found at Miss. Code Ann. § 99-39-27(9).

No exception to the time and successive-writ bars apply to Petitioner's first claim. Petitioner's first claim is not based on newly discovered evidence. He expressly states that none of the evidence supporting his first claim "was discovered by trial counsel or presented to Kelvin's jury even though the witnesses, records, and other evidence *were readily available to trial counsel*." (PCR Mot. at 73). "Post-conviction relief is not granted upon facts which could or should have been litigated at trial and on appeal." *Williams*, 669 So.2d at 52. Newly discovered evidence is "'evidence, not reasonably discoverable at the time of trial, that is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence.'" *Havard*, 86 So.3d at 906 (¶ 37) (quoting Miss. Code Ann. § 99-39-27(9)); *see id*. at 904 (¶ 27) (holding a claim of ineffective assistance procedurally barred, in part, by Section 99-39-5(2)(b) where the petitioner failed to offer any newly discovered evidence in support of his claim). Petitioner concedes, the evidence supporting his first claim for relief is not newly discovered.

And Petitioner's fundamental constitutional rights are not implicated. Petitioner is asking this Court to reconsider claims of trial counsels' ineffectiveness, because one of his post-conviction counsel was ineffective pursuant to *Grayson*, 118 So.3d at 126. Earlier it was argued that there is no fundamental constitutional right to the effective assistance of post-conviction counsel. *See supra*,

at pp. 27-36. The State would reassert and incorporate its earlier argument as it concerns Petitioner's first claim here. There is no fundamental constitutional right to the effective assistance of post-conviction counsel. Therefore, no exception to the time and successive writ bars apply. Petitioner's first claim for relief should be denied, because it is time and successive writ barred.

3. Petitioner's First Claim is Barred by the Doctrine of *Res Judicata*.

Third, Petitioner's first claim is subject to the procedural bar of *res judicata* found at Miss. Code Ann. § 99-39-21(3). Evidence of Petitioner's mild-manner, behavior, and susceptibility to outside manipulation was presented and rejected at trial. Furthermore, the Court, in *Jordan v. State*, 918 So.2d 636, addressed the issue of trial counsels' performance in presenting mitigating evidence to the sentencing jury. This Court specifically said:

> ***F. Mitigation Evidence***
>
> ¶ 38. Jordan claims that his attorneys failed to investigate the case they presented in mitigation during the sentencing phase and they failed to prepare the witnesses they intended to call, thus presenting inadequate mitigation evidence at the penalty phase. Jordan called nine witnesses in the sentencing phase. Those witnesses included Nannie Craft, Jordan's mother; Dr. Reginald White, the court appointed psychiatrist; Rev. James W. Hare, Jordan's minister; Nobia Hare, the minister's wife and a Jordan family friend; Jethro Trotter, Jordan's neighbor and former school bus driver; Edna Johnson, a family friend who had known Jordan since childhood; Officer John Riley, a jailor; and Charles McCree, a jail trustee. Frontrell Edwards was also called as a witness during the penalty phase; however, he invoked his Fifth Amendment rights and refused to answer any substantive questions. Jordan's petition focuses on his attorneys' allegedly deficient performance in preparing his mother and Dr. White to testify during the penalty phase of the trial.
>
> **1. Nannie Craft**
>
> ¶ 39. Jordan first claims that defense counsel should have prepared his mother, Nannie Craft, to testify about various childhood illnesses and injuries he claims he suffered. Jordan argues that his mother should have testified about his delayed development as a child, that he had attended special education classes, and that he had grown up in poverty. Defense counsel attempted to go into Jordan's early childhood medical and developmental history; however, the trial court ruled that unless these medical problems continued to affect him throughout his adult life, they

were not relevant. Therefore, the record shows that counsel was aware of the early childhood illness, but he was not allowed to address these areas with Craft due to relevance. Further, Jordan submits no school or medical records or any other documentation supporting these claims; therefore, we have no way of ascertaining the relevance of any alleged childhood illnesses or problems.

¶ 40. Jordan also maintains that his attorneys should have clarified questions about Jordan's juvenile records. Jordan's mother was cross-examined about whether Jordan had ever appeared in youth court. Craft testified that Jordan had been involved in youth court proceedings on approximately three occasions, but she claimed that Frontrell Edwards and Jordan's brother, Michael, were the ones responsible for Jordan's delinquent behavior. In a speaking objection, Jordan's attorney attempted to explain that "we don't have anything to show that there was ever any adjudication of delinquency, no order entering anything. All we are talking about are charges against someone." Counsel also explained in his closing argument that Jordan's mother had testified, as to the youth court matters, that "none of that was Kelvin's fault according to her, not one bit of that. All of those things that he had gotten in trouble about through the years, none of it was his fault; it was always someone else's." Any confusion about Craft's youth court testimony was clarified by counsel.

¶ 41. Jordan's petition has not demonstrated deficient performance on the part of counsel, nor has the petition shown any prejudice suffered by Jordan. Because Jordan has failed to meet the requirements of the *Strickland* test, he is entitled to no relief as to this issue, which we find to be without merit.

2. Dr. Reginald White

¶ 42. Jordan claims that neurological testing should have been performed to determine if he suffered from any brain dysfunction or mental retardation. He has not submitted any new testing which would confirm any mental incapacity, and he does not support this argument with any new evidence. We decline to find that the attorneys were deficient where Jordan has still not produced any medical evidence which his prior attorneys should have found.

3. Other Witnesses

¶ 43. Additionally, Jordan has not submitted any substantial affidavits of witnesses who now claim that they had relevant evidence which would have assisted the case in mitigation and that they were willing to testify if they had been contacted or called by the defense attorneys. Attorneys in a death penalty trial have a duty to investigate and present mitigation evidence for the sentencing phase. *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); *Simmons v. State*, 869 So.2d 995, 1000-01 (Miss. 2004); *Grayson v. State*, 879 So.2d 1008, 1016-17 (Miss. 2004). We conclude that Jordan has not submitted sufficient evidence of a breach of the duty of counsel to investigate and present mitigation evidence as required, and we

> determine that counsels' performance was not constitutionally ineffective pursuant to *Strickland*. Taken as a whole, we find that the mitigation case was adequately presented. The defense called nine witnesses. The defense was able to attempt to portray Jordan as a mild-mannered, well-behaved young man who was susceptible to manipulation by Frontrell Edwards. The mere fact that the jury did not accept the defense's argument that Jordan's life should be spared does not mean that the attorneys who made that argument were ineffective. Because Jordan has failed to meet the requirements of the *Strickland* test, he is entitled to no relief as to this issue.

Jordan, 918 So.2d at 651-53.

The fact is evidence of Petitioner's mild-manner, behavior, and susceptibility to outside manipulation was presented and rejected at trial. "The doctrine of res judicata *shall* apply to all issues, both *factual* and legal, decided at trial and on direct appeal." Miss. Code Ann. § 99-39-21(3) (emphasis added). Petitioner simply wants to re-litigate a factual issue that was unanimously decided by twelve individuals at trial—almost two decades ago. The sentencing jury rejected the evidence he hopes to put on again. The doctrine of *res judicata* bars him from doing so. And this Court held that trial counsel were not ineffective for in their efforts to investigate and present those assertions at trial. If this Court found this evidence was presented, how can Petitioner's trial counsel and only one of his post-conviction attorneys be ineffective?

The Court should deny Petitioner's first claim. It is barred by the doctrine of *res judicata*. Petitioner is making the exact arguments that he did more than a decade ago. He is prohibited from doing so.

4. Petitioner's First Claim is also Without Merit.

Alternatively, and without waiving any of the bars above, the State submits that Petitioner's first claim for relief is without merit. Having the benefit of more than a decade to refine and supplement his arguments, Petitioner now asserts that his trial attorneys should have uncovered

substantial and compelling mitigation evidence. He argues that trial counsels' "failure to conduct a reasonable mitigation investigation and present substantial and available mitigating evidence to the jury was not a strategic decision. It was the product of inexcusable indolence and neglect." (PCR Mot. at 73). Petitioner asserts that "because trial counsel failed to conduct a reasonable investigation into [Petitioner]'s social history and background, and failed to have Kelvin properly evaluated by an appropriate expert, the jury never heard *any* evidence to support the existence ..." of the mitigating evidence he now wants to present. (PCR Mot. at 74) (emphasis in the original). His assertions and arguments simply are not true.

When analyzing Petitioner's ineffective assistance of counsel claims in his first post-conviction application, this Court stated that:

> "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). A defendant must demonstrate that his attorney's actions were deficient and that the deficiency prejudiced the defense of the case. *Id*. at 687, 104 S.Ct. at 2064. "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). The focus of the inquiry must be whether counsel's assistance was reasonable considering the totality of the circumstances. *Id*. We have stated:
>
> > 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*, 454 So.2d at 477 (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065). Defense counsel is presumed competent. *Hansen v. State*, 649 So.2d 1256, 1258 (Miss. 1994).
>
> 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).
>
> *Davis v. State*, 743 So.2d 326, 334 (Miss. 1999) (citing *Foster v. State*, 687 So.2d 1124, 1130 (Miss. 1996)).

Jordan, 918 So.2d at 647-48.

The standard above is the standard to be applied in this case. The State would further add that United States Supreme Court precedent holds:

> that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*, 466 U.S., at 689, 104 S.Ct. 2052. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Id.*, at 690-691, 104 S.Ct. 2052. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id*., at 691, 104 S.Ct. 2052.

Wiggins v. Smith, 539 U.S. 510, 533 (2003).

Petitioner is arguing now what he did on ten years ago—that he is a mild-mannered, well-behaved, young man who was susceptible to manipulation by Frontrell Edwards. The difference in the present case, is that Petitioner is now making assertions that are based completely on hindsight. The assertions in his present PCR Motion establish as fact. For example, Petitioner argues: "Had trial counsel performed their duties in accordance with prevailing standards, by contacting witnesses available and willing to testify, obtaining readily available social and medical records, and having [Petitioner] properly evaluated by experts, the jury would have learned that [Petitioner]'s development and journey up to his eighteenth birthday occurred in the context of: 1) severe and pervasive organic bran damage that began during [Petitioner]'s infancy; 2) extremely low intelligence and low intellectual functioning; and 3) severe post-traumatic stress disorder ('PTSD') brought on by the entrenched family dysfunction, poverty, violence, and chronic neglect that infused every aspect of [Petitioner]'s childhood." (PCR Mot. at 17). This Court has held that: "a petition for post-conviction relief is not the forum to advance another theory of mitigation which trial counsel 'should have' offered. Instead, it is the way a defendant calls attention to deficiencies in the way trial counsel actually presented mitigating evidence given the circumstances and information at the time. That [the petitioner] can now concoct a 'better' case for mitigation provides no weight to the analysis of whether his trial counsel provided effective assistance when it was rendered...." *Simon*, 857 So.2d at 686. To reiterate, this Court clearly found:

> that counsels' performance was not constitutionally ineffective pursuant to *Strickland*. Taken as a whole, we find that the mitigation case was adequately presented. The defense called nine witnesses. The defense was able to attempt to portray Jordan as a mild-mannered, well-behaved young man who was susceptible to manipulation by Frontrell Edwards. The mere fact that the jury did not accept the defense's argument that Jordan's life should be spared does not mean that the attorneys who made that argument were ineffective.

Jordan, 918 So.2d. at 653 (emphasis added). Petitioner has not shown that under *Strickland*, trial counsel were ineffective in their efforts to investigate and present mitigating evidence, particularly when the evidence he does offer is cumulative of what this Court considered the first time Petitioner raised this issue. Petitioner is arguing that trial counsel were ineffective based on evidence he believes that they should have found. This Court noted in this very case that hindsight is not part of the standard that is applied when determining whether or not counsels' performance was deficient. *Strickland* is the standard to be applied.

And assuming *arguendo* that trial counsel were deficient because they did not find and present the evidence Petitioner wants to put on now, Petitioner's first claim is still without merit. Again, this Court stated that "[t]aken as a whole, we find that the mitigation case was adequately presented." *Id.*; *see e.g., Simon v. State*, 857 So.2d 668, 688 (Miss. 2003) ("'If the issue was without merit, then the failure to raise an objection cannot be considered ineffective assistance of counsel because no prejudice could result from such an omission.'") (quoting *Williams v. State*, 722 So.2d 447, 449 (Miss. 1998)). The record shows that counsel presented evidence at trial in support of this very argument. This Court found that his trial counsel presented evidence of this very argument. *Jordan*, 918 So.2d at 653. The evidence Petitioner now offers is cumulative of the evidence that was presented at trial. And as such, Petitioner has not, and cannot, show prejudice for trial counsels' failure to find it and present it.

This Court should deny Petitioner's first claim. Petitioner's first claim is procedurally barred. And Petitioner's first claim has no merit. Therefore, the State respectfully requests that the Court deny Petitioner the relief he seeks. He is entitled to no relief for his first claim.

D. PETITIONER'S SECOND CLAIM, THAT THE DEATH PENALTY IS DISPROPORTIONATE AND UNCONSTITUTIONAL IN THIS CASE BECAUSE PETITIONER'S BRAIN DAMAGE, LOW INTELLECTUAL FUNCTIONING, LEARNING DISABILITY, MENTAL ILLNESS, AND YOUNG AGE DIMINISH HIS MORAL CULPABILITY AND PLACE HIM OUTSIDE THE CLASS OF THE MOST CULPABLE DEFENDANTS FOR WHOM THE DEATH PENALTY IS RESERVED, IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Petitioner's second claim concerns the proportionality of his sentence. He claims his sentence is excessive and disproportionate, even though he has been convicted of capital murder—our society's most serious offense. So naturally, he wants the Court to vacate his sentence, or at least grant him an evidentiary hearing. The Court should refuse both requests. Petitioner is entitled to no relief. His second claim should be denied for the reasons stated below.

1. Petitioner's Second Claim is Time Barred.

Petitioner's second claim is time-barred. He raises his second claim in the present PCR Motion, which was filed more than fifteen years after this Court issued Its Mandate in *Jordan*, 728 So.2d 1088.[15] Petitioner's second claim, like his first, is more than fifteen years too late. Miss. Code Ann. § 99-39-5(2)(b); *see Grayson*, 118 So.3d at 125 (citing *Puckett*, 834 So.2d at 677-78 (holding post-conviction review begins, "[i]n a death penalty context, ... when the mandatory state appellate review is complete, *i.e.*, when this Court's mandate on appeal issues")). The "the adage of 'better late than never' d[oes] not apply ..." to post-conviction motions, including Petitioner's. *Id.* at 677 (quoting *Lockett*, 656 So.2d at 71); *Grayson*, 118 So.3d at 125 (citing *Havard*, 86 So.3d at 900). Petitioner's second claim, like his first, is time-barred.

2. Petitioner's Second Claim is Successive-Writ Barred.

[15] The Court issued Its Mandate on March 22, 1998, ending Petitioner's trial and direct review proceedings.

Second, the present PCR Motion amounts to a successive writ. The UPCCRA prohibits review of successive writs. *Grayson*, 118 So.3d at 125 (citing Miss. Code Ann. § 99-39-27(9); *Havard*, 86 So.3d at 899). The present PCR Motion follows the Court's decision to deny relief for the claims that Petitioner raised in his first Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief and attached Petition for Post-Conviction Relief. (Majority Opinion, entered May 19, 2005, *Jordan*, 918 So.2d 636). That decision became final and post-conviction proceedings ended on August 4, 2005 when the Court issued Its Mandate. (Mandate, *Jordan*, 918 So.2d 636). The UPCCRA bars the present PCR Motion, and prohibits collateral review of Petitioner's second claim. Petitioner's second claim, like his first, is subject to the successive writ bar.

The newly discovered evidence exception and the fundamental rights exception do not apply to Petitioner's second claim. Petitioner's second claim is, admittedly, not based on newly discovered evidence. And there is no fundamental constitutional right to proportionality review. Proportionality review is undeniably a legislative enactment. Miss. Code Ann. § 99-19-105. The United States Supreme Court held long ago that the Eighth and Fourteenth Amendments do not require a proportionality review to be made by the state courts in a death penalty case. *See Pulley v. Harris*, 465 U.S. 37, 51 (1984); *Tuilaepa v. California*, 512 U.S. 967 (1994) *Walton v. Arizona*, 497 U.S. 639, 655-56 (1990), *reversed on other grounds by Ring v. Arizona*, 536 584 (2002); *Lewis v. Jeffers*, 497 U.S. 764 (1990); *Murray v. Giarrantano*, 492 U.S. 1, 9 (1989); *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987); *Johnson v. Cockrell*, 306 F.3d 249, 256 (5th Cir. 2002). No exception to the time and successive writ bars apply. Petitioner's second claim for relief should be denied.

3. Petitioner's Second Claim is *Res Judicata*.

Third, Petitioner's second claim is subject to the procedural bar of *res judicata* found at Miss. Code Ann. § 99-39-21(3). This Court, in *Jordan*, 918 So.2d 636, applied the *res judicata* bar when Petitioner raised this issue in his first petition for post-conviction relief. There, the Court held that:

> we find that the proportionality question was decided in Jordan's direct appeal. There, this Court reviewed the proportionality of Jordan's death penalty and found that the sentence was not disproportionate when compared to other death penalty situations. *Jordan*, 728 So.2d at 1099-1100. Therefore, the issue of the proportionality of the sentence of death in this case is *res judicata*. *See* Miss. Code Ann. § 99-39-21(3); *Doss v. State*, 882 So.2d 176 (Miss. 2004); *Bishop v. State*, 882 So.2d 135 (Miss. 2004) (relitigation of disproportionality argument barred by Miss. Code Ann. § 99-39-21(3)).

Jordan, 918 So.2d at 658.

The Court then reviewed this claim, and found it was:

> without merit. Jordan now argues that his sentence is disproportionate to the sentence ultimately imposed upon Frontrell Edwards. On direct appeal, this Court determined that Jordan was a major actor in this double murder. As previously stated, Jordan confessed to his actions in this case. He knew and approved of the plan to rob and kill a convenient gas station customer. He pointed out Roberts as a likely prospect. He had a pistol in his possession when he encountered Roberts and his helpless two-year old child. He fired at least one shot at Roberts, and he helped dispose of the body. There is very little evidence that Jordan was less than a willing accomplice in these crimes.
>
> 34 ¶ 68. In *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), the U.S. Supreme Court stated:
>
> > McCleskey's argument that the Constitution condemns the discretion allowed decision makers in the Georgia capital sentencing system is antithetical to the fundamental role of discretion in our criminal justice system. Discretion in the criminal justice system offers substantial benefits to the criminal defendant. Not only can a jury decline to impose the death sentence, it can decline to convict or choose to convict of a lesser offense. Whereas decisions against a defendant's interest may be reversed by the trial judge or on appeal, these discretionary exercises of leniency are final and unreviewable. Similarly, the capacity of prosecutorial discretion to provide individualized justice is "firmly entrenched in American law." As we have noted, a prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case. Of course, "the power to be lenient

> [also] is the power to discriminate," but a capital punishment system that did not allow for discretionary acts of leniency "would be totally alien to our notions of criminal justice."

Id. at 311-12, 107 S.Ct. at 1777-78, 95 L.Ed.2d at 291 (citations & footnotes omitted). *See also Ladner v. State,* 584 So.2d 743, 750-51 (Miss. 1991). The State is entitled to exercise some discretion in deciding against whom to pursue the death penalty. This Court has held that even though a co-defendant might have received a life sentence, there is no prohibition against another co-defendant being sentenced to death. *Walker v. State*, 671 So.2d 581 (Miss. 1995); *Mack v. State*, 650 So.2d 1289 (Miss. 1994); *Ladner v. State*, 584 So.2d 743 (Miss. 1991); *Culberson v. State*, 379 So.2d 499 (Miss. 1979).

¶ 69. In the federal statutory framework, there is a specific mitigating factor which states that the jury may consider whether "[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death." 18 U.S.C. § 3592(a)(4). Thus, in federal death penalty actions, the jury can consider whether some other defendant has escaped the death penalty and whether that entitles the subject defendant to any leniency. There is, however, no requirement that all equally culpable defendants receive the same punishment.

¶ 70. Jordan relies on *Randall v. State*, 806 So.2d 185 (Miss. 2001), where this Court found that the defendant's death sentence was disproportionate. There, five defendants robbed Eugene Daniels and killed him in the course of the robbery at his apartment. The State was unable to prove definitively which defendant was the actual triggerman. The jury found that Randall had contemplated that lethal force would be employed but the jury did not find that Randall actually killed the victim, attempted to kill him, or intended that a killing take place. *Id*. at 233-34. In contrast, Jordan's jury found that Jordan had attempted to kill Roberts; that Jordan had intended that the killing of Roberts take place; and, that Jordan contemplated that lethal force would be employed. The jury further found that Jordan intended that the killing of Codera Bradley take place and that he had contemplated prior to the killing that lethal force would be employed.

¶ 71. Under the circumstances here, we find that the lone fact that Jordan received the death penalty while Edwards did not is insufficient to establish a disproportionate or constitutionally excessive sentence. After a full review of the record and after considering all of the aggravating and mitigating circumstances presented at trial, and after a comparison with the circumstances of other capital murder cases, we are of the opinion that imposition of the death penalty in Jordan's case is not disproportionate or excessive. Thus, this issue is without merit.

Id. at 657-59.

Before that, in *Jordan v. State*, 728 So.2d 1088 (Miss. 1998), the Court:

> [i]n accordance with the mandate of Miss. Code Ann. § 99-19-105(3)(c)(1994), this Court "shall determine ... [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Where the sentence is found to be disproportionate, this Court may "[s]et the sentence aside and remand the case for modification of the sentence to imprisonment for life." Miss. Code Ann. § 99-19-105(5)(b)(1994).
>
> ¶ 54. The case of *Davis v. State*, 684 So.2d 643 (Miss. 1996) provides sufficiently similar facts upon which a comparison of sentences may be made. Davis confessed to killing Linda Hillman in her trailer after she refused to give him money to buy drugs. He first shot Linda Hillman from behind, but the bullet did not kill her. After fifteen to twenty minutes, Davis then stabbed Linda Hillman to death because she had begun to scream. Linda Hillman was left lying on the bed in the trailer. On the following day, Davis called the police and confessed to the murder.
>
> ¶ 55. This scenario is not unlike that in which Kelvin Jordan was involved. Both cases involve murders committed in the course of robbery. Also, both involved innocent victims, but the present case involves the most innocent and helpless of victims-a two year old child. The child's father, like Linda Hillman, did not die from the first shot. He left the car and told Jordan and Edwards they could have the car. Jordan and Edwards could have taken the car and left the scene at that point. However, Jordan and Edwards again shot Tony Roberts, and later dragged him into the woods and shot him once more. Edwards next led Codera Bradley into the woods and shot him once in the back of the head, instantly killing him. These murders took place simply because Kelvin Jordan and Frontrell Edwards wanted money to go to a ball game. They could have stolen the car while sparing the lives of Tony Roberts and his son, but they declined.
>
> ¶ 56. Doctor Reginald White, M.D. testified at the sentencing phase that it was his opinion that Kelvin Jordan could be easily dominated. However, nothing in the record indicates significant mental problems affecting Jordan. This evidence is not sufficient to indicate a lack of mental capacity or a lack of individual volition sufficient to shift individual responsibility to others.
>
> ¶ 57. After consideration of the accused, his crime, and his sentence in this case as compared to Davis and other death penalty cases, we find the sentence of death proportionate to sentences in like cases. Consequently, we affirm the jury's decision that Jordan should suffer death for the capital murders of Tony Roberts and Codera Bradley.

Jordan, 728 So.2d at 1099-1100. This Court has held the question of proportionality procedurally barred by Miss. Code Ann. § 99-39-21(3). And, this Court has reviewed the proportionality of Petitioner's sentence and upheld it—twice.

Petitioner's second claim is *res judicata*. Petitioner's second claim is procedurally barred. Petitioner's second claim should be denied.

4. Petitioner's Second Claim is Subject to the Procedural Bar of Waiver found at Miss. Code Ann. § 99-39-21(2).

Fourth, Petitioner's second claim is also subject to the procedural bar of waiver found at Miss. Code Ann. § 99-39-21(2). Petitioner's second claim is divided into two parts. The first part of Petitioner's second claim is based on the contention that mental immaturity and impairment diminishes his level of responsibility. Here, he argues that his mental immaturity and impairments qualify him as a member of a class of individuals imposition of the death penalty. (See PCR Mot. at 121-38). In the second part of his second claim, Petitioner argues that his sentence is disproportionate and unconstitutional when compared with Edwards's heightened moral culpability. Here, he argues that his mental immaturity and impairments along with the statements of individuals, who knew Petitioner and Edwards before trial and direct appeal, show that his sentence is disproportionate. (PCR Mot. at 121-38, 138-46).

With respect to the first part of his second claim, the procedural bar of waiver listed at Miss. Code Ann. § 99-39-21 (2) precludes further review. It states that:

> (2) The litigation of a factual issue at trial and on direct appeal of a specific state or federal legal theory or theories shall constitute a waiver of all other state or federal legal theories which could have been raised under said factual issue; and any relief sought under this article upon said facts but upon different state or federal legal theories shall be procedurally barred absent a showing of cause and actual prejudice.

Miss. Code Ann. § 99-39-21(2).

Petitioner's second claim is entirely devoted to supplementing an argument that he raised at trial, on direct appeal, and earlier in his efforts to obtain collateral relief. According to him, this case

is "[i]ndistinguishable from the Petitioners in *Atkins* and *Simmons*[.]" (Id. at 130). But, this Court's Opinion, in *Jordan v. State*, 728 So.2d 1088 (Miss. 1998), states that:

> Doctor Reginald White, M.D. testified at the sentencing phase that it was his opinion that [Petitioner] could be easily dominated. However, nothing in the record indicates significant mental problems affecting [Petitioner]. This evidence is not sufficient to indicate a lack of mental capacity or a lack of individual volition sufficient to shift individual responsibility to others.

Jordan, 728 So.2d at 1100. While Petitioner makes absolutely no mention of the preceding passage, he is clearly aware of it. Petitioner is clearly attempting to re-litigate an issue under a different legal theory—that he is a member of a class of individuals who are exempt from being sentenced to death. (PCR Mot. at 121-38). Miss. Code Ann. § 99-39-21(2) precludes him from doing so.

Furthermore, *Atkins* and *Roper* do not concern the proportionality of a death sentence. Those cases concern individuals who are members of two classes of inmates that may not suffer a sentence of death, because they are exempt from the imposition of the death penalty—juveniles and the intellectually disabled. Petitioner fails to cite relevant authority in support of his second claim. His failure to cite authority serves as yet another bar precluding review of his second claim. "Even when this Court is considering a petition for post-conviction relief, the failure to cite authority means the petitioner's argument lacks persuasion and the issue may be barred from review." *Simon*, 857 So.2d at 681 (citations omitted).

5. Petitioner's Second Claim is Without Merit.

And finally, Petitioner's second claim is entirely devoid of merit. There is absolutely no precedent for the proposition that a person who is not a juvenile, not intellectually disabled, and not mentally insane is exempt from being sentenced to death. That precedent simply does not exist. At

one point in his PCR Motion, Petitioner cites to the dissent in *Dickerson v. State*, 175 So.3d 8 (Miss. 2015), as authority. But in that case, the Majority of this Court said:

> ¶ 28. Dickerson now seeks to have this Court extend *Atkins* and *Roper* to preclude the death penalty for the mentally ill. The Fifth Circuit has rejected this argument repeatedly. *See Ripkowski v. Thaler*, 438 Fed.Appx. 296, 303 (5th Cir. 2011) ("[T]he Fifth Circuit has recognized the distinction between the mentally ill and the mentally retarded and has held that *Atkins* only protects the latter."); *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006) (Defendant claimed that *Atkins* and *Roper* "created a new rule of constitutional law ... making the execution of mentally ill persons unconstitutional." The Fifth Circuit held that "[n]o such rule of constitutional law was created, however, by either *Atkins* or *Roper*."); *In re Woods*, 155 Fed.Appx. 132, 136 (5th Cir. 2005) ("Atkins did not cover mental illness separate and apart from mental retardation[.]").
>
> ¶ 29. *Roper* exempted juvenile offenders from the death penalty, and *Atkins* exempted the mentally retarded. Dickerson is neither under eighteen nor mentally retarded. Therefore, he is not exempt from the death penalty under *Atkins* or *Roper*. We will not extend those cases to apply to the mentally ill when "[t]he Supreme Court has never held that mental illness removes a defendant from the class of persons who are constitutionally eligible for a death sentence." *Ripkowski*, 438 Fed.Appx. at 303. We cannot take the *Atkins* opinion-which was so specific to mental retardation that the Court cited and discussed the clinical definition of mental retardation-and apply it to all other mental disorders. To do so would be no different than taking *Roper* and expanding it to preclude execution of criminals under age twenty-one, rather than age eighteen as the Supreme Court explicitly held. Dickerson's alternative argument that the death penalty cannot be imposed on the mentally ill is without merit.

Dickerson, 175 So.3d at 17-18.

Petitioner blatantly disregards the portion of the *Dickerson* Opinion where the Majority of this Court rejected this very argument. Petitioner is not a juvenile. Petitioner is not intellectually disabled. Petitioner is not mentally insane. Therefore, the State respectfully requests this Court deny his second claim for relief. Not only is it procedurally barred, it is without merit.

Petitioner's second claim is time-barred under Miss. Code Ann. § 99-39-5(2)(b). The present PCR Motion, which contains Petitioner's second claim, is barred as a successive writ pursuant to

Miss. Code Ann. § 99-39-27(9). Petitioner's second claim is, and has been previously held by this Court, barred by the doctrine of *res judicata* listed under Miss. Code Ann. § 99-39-21(3). Further, Petitioner's second claim is precluded from this Court's consideration by the procedural bars of waiver found at Miss. Code Ann. § 99-39-21(2). And Petitioner fails to support his argument with authority. It is clear that Petitioner's second claim is procedurally barred and without merit. Therefore, this Court should deny his second claim.

E. PETITIONER'S THIRD CLAIM, THAT HE WAS DENIED HIS RIGHTS GUARANTEED BY THE EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE MISSISSIPPI CONSTITUTION FOR THE SENTENCER TO CONSIDER ALL RELEVANT MITIGATING EVIDENCE, AND DIRECT APPEAL COUNSEL WAS INEFFECTIVE FOR NOT RAISING THIS CLAIM ON DIRECT APPEAL, IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Petitioner's third claim is a continuation of his first and second claims. Here, however, he claims that he was denied his Eighth and Fourteenth Amendment rights to present "all relevant mitigating evidence that a defendant proffers as counseling less than a sentence of death" (PCR Mot. at 147) (citations omitted). To support his argument, Petitioner once again claims that the trial court erred when it found "evidence regarding [Petitioner]'s childhood illness and [Frontrell] Edwards's violation toward ..." toward him was irrelevant. (Id. at 149). Petitioner further argues that trial counsel was ineffective for failing to raise this issue on direct appeal. (Id. at 150-51). And finally, Petitioner argues that, even though this Court held this very issue procedurally barred *and* without merit, Petitioner contends that his third claim is not subject to the UPCCRA's procedural bars due to the ineffectiveness of one of his post-conviction attorneys. (See id. at 151-52) (noting this Court held the issue of trial counsel's failure to raise the claim that the trial court erred for excluding

mitigating evidence procedurally barred, but failing to even mention that this Court addressed the merits of that claim). The State disagrees.

Petitioner's third claim is subject to the UPCCRA's procedural bars. Alternatively, Petitioner's third claim has no merit. Petitioner is entitled to no relief. His third claim should be denied for the reasons stated below.

1. Petitioner's Third Claim is Time Barred.

First, Petitioner's third claim is time-barred. He raises his third claim in the present PCR Motion, which was filed more than fifteen years after this Court issued Its Mandate in *Jordan*, 728 So.2d 1088.[16] Petitioner's third claim, like his first and second, is more than fifteen years too late. Miss. Code Ann. § 99-39-5(2)(b); *see Grayson*, 118 So.3d at 125 (citing *Puckett*, 834 So.2d at 677-78). Petitioner's third claim, like his first and second claims, is time-barred.

2. Petitioner's Third Claim is Successive-Writ Barred.

Second, the present PCR Motion amounts to a successive writ. The UPCCRA prohibits review of successive writs. *Grayson*, 118 So.3d at 125 (citing Miss. Code Ann. § 99-39-27(9); *Havard*, 86 So.3d at 899). The present PCR Motion follows the Court's decision to deny relief for the claims that Petitioner raised in his first Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief and attached Petition for Post-Conviction Relief. (Maj. Op., *Jordan*, 918 So.2d 636). That decision became final and post-conviction proceedings ended on August 4, 2005 when the Court issued Its Mandate. (Mandate, *Jordan*, 918 So.2d 636). The

[16] The Court issued Its Mandate on March 22, 1998, ending Petitioner's trial and direct review proceedings.

UPCCRA bars the present PCR Motion, and prohibits collateral review of Petitioner's third claim. Petitioner's third claim, like his first and his second, is subject to the successive writ bar.

The newly discovered evidence exception and the fundamental rights exception do not apply to Petitioner's third claim. Petitioner's third claim is, as shown above, not based on newly discovered evidence. And as discussed earlier and incorporated herein, there is no fundamental constitutional right to the effective assistance of post-conviction counsel. *See supra*, at pp. 27-36. Further, Petitioner fails to show that his post-conviction attorneys were ineffective. No exception to the time and successive writ bars apply. Petitioner's third claim for relief should be denied.

3. Petitioner's Third Claim is *Res Judicata*.

Third, Petitioner's third claim is subject to the procedural bar of *res judicata* found at Miss. Code Ann. § 99-39-21(3). This Court, in *Jordan*, 918 So.2d 636, took up the issue during Petitioner's initial post-conviction review proceedings. There, the Court said that:

> ¶ 58. Jordan claims that the trial court should have allowed him to delve into Frontrell Edwards's alleged intimidation or domination of Jordan. The trial court allowed Jordan's mother to testify that Edwards had once shot Jordan. However, the trial court ruled that Jordan's mother, Nannie Craft, could not testify further about the event because she had no firsthand knowledge of the shooting. Jordan also claims that the trial court should have allowed him to put on evidence that he suffered from several illnesses as a child. As this Court has previously stated, the trial court ruled that without some showing that the childhood illnesses had an impact on Jordan as an adult, the proposed testimony was irrelevant.
>
> ¶ 59. These claims are barred for failure to raise the claim on direct appeal of this case. No claim was presented to this Court on the basis of the trial court's sustaining of the objection to this line of questioning. Such a claim can not be raised for the first time on post-conviction review. *See* Miss. Code Ann. § 99-39-21(1); *Bishop v. State*, 882 So.2d 135, 149 (Miss. 2004); *Grayson v. State*, 879 So.2d 1008, 1020 (Miss. 2004). By failing to present proof to support these assertions, Jordan's petition has failed to demonstrate cause and actual prejudice as required by Miss. Code Ann. § 99-39-21; therefore, the procedural bar is not waived.
>
> ¶ 60. Procedural bar aside, Jordan makes no argument under this issue, and he cites no authority. Thus, we decline to address these claims. *Brown v. State*, 798 So.2d

> 481, 497, 506 (Miss. 2001) (citing *Holland v. State*, 705 So.2d 307, 329 (Miss. 1997)). *See also Gary v. State*, 760 So.2d 743, 754 (Miss. 2000) (this Court may, at its discretion, refuse to review an assignment of error not supported by authority yet this is not an absolute bar). We find this issue to be without merit.
>
> ¶ 61. The trial court held a hearing on the issue of childhood illnesses. Finding that these illnesses did not affect Jordan during his adult life, the trial court found them to be irrelevant. We find this ruling to be proper. Also as previously stated, Jordan was able to argue that he was, at times, dominated by other people, especially Frontrell Edwards. Although we hold these claims are procedurally barred, they are likewise without merit.

Jordan, 918 So.2d at 656-67.

Once again, Petitioner argues that the trial erred. This issue has been decided. This issue has been held procedurally barred *and* without merit. And because this Court reached the merits of the same issue, the doctrine of *res judicata* precludes Petitioner from re-litigating it in a successive attempt to obtain post-conviction relief. Petitioner's third claim, like his first two, is subject to the doctrine of *res judicata* found at Miss. Code Ann. § 99-39-21(3).

4. Petitioner's Third Claim is also Without Merit.

Alternatively, and without waiving any of the bars asserted above, Petitioner's third claim is without merit. The first sub-part to Petitioner's third claim is titled, "The Sentencer must not be prevented from considering *any* mitigating evidence." (Id. at 147) (emphasis added). He then proceeds to cite and rely on United States Supreme Court precedent that holds a sentencing jury must not be precluding from hearing *relevant* mitigating evidence. (See id. at 147-49) (citations omitted). And, he argues that "[r]eversal is warranted if mitigating evidence is not considered." (Id. at 148). He also supports his argument by citing to this Court's decision in Frontrell Edwards's case. According to Petitioner, "this Court found reversible error in the case of [Petitioner]'s more culpable

cousin for the identical issue. (Id. at 149) (citing *Edwards v. State*, 737 So.2d 275, 297 (Miss. 1999). This is not accurate.

What the Court said in *Edwards v. State*, was "that the use of mitigating evidence is virtually unlimited *with the only restriction being that it must be relevant*. *Edwards*, 737 So.2d at 297 (emphasis added) (citing *Davis v. State*, 512 So.2d 1291, 1293 (Miss. 1987); *Leatherwood v. State*, 435 So.2d 645, 650 (Miss. 1983). *See also Eddings*, 455 U.S. at 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Washington v. State*, 361 So.2d 61, 68 (Miss. 1978)). In *Edwards*, this Court, like the United States Supreme Court, held that all mitigation evidence must be *relevant* in order to be presented to the sentencing jury. Contrary to Petitioner's assertion, this case is not identical to *Edwards*.

The State would also emphasize a portion of this Court's earlier holding in *Jordan v. State*, 918 So.2d 636. In Petitioner's first attempt to obtain post-conviction relief, this Court held that:

> ¶ 61. The trial court held a hearing on the issue of childhood illnesses. Finding that these illnesses did not affect Jordan during his adult life, the trial court found them to be irrelevant. *We find this ruling to be proper*. Also as previously stated, Jordan was able to argue that he was, at times, dominated by other people, especially Frontrell Edwards. Although we hold these claims are procedurally barred, *they are likewise without merit*.

Jordan, 918 So.2d at 656-67 (emphasis added).

With respect to Petitioner's assertion that trial counsel was ineffective for failing to raise this issue on direct appeal and his assertions directed towards Ms. McArdle's performance, precedent holds that "'If the issue was without merit, then the failure to raise an objection cannot be considered ineffective assistance of counsel because no prejudice could result from such an omission.'" *Simon*, 857 So.2d at 688 (quoting *Williams v. State*, 722 So.2d 447, 449 (Miss. 1998)). Petitioner cannot show prejudice required to overcome the procedural bars pursuant to *Grayson*. *Grayson*, 118 So.3d at 126-27. Furthermore, Petitioner cannot show prejudice necessary to obtain relief for trial

counsel's purported ineffectiveness for failing to raise a claim that had no merit to begin with. Petitioner's third claim is without merit. Petitioner's third claim should be denied. Petitioner is entitled to no relief.

CONCLUSION

For the reasons state above, the State submits that Petitioner's Motion for Leave to File Successive Petition for Post-Conviction Relief with Exhibits and Appendix should be dismissed and all of the claims raised therein, denied. Petitioner is not entitled to any relief.

WHEREFORE, PREMISES CONSIDERED, the State respectfully requests that this Court dismiss Petitioner's Motion for Leave to File Successive Petition for Post-Conviction Relief with Exhibits and Appendix, and deny all of the claims he raises therein.

This, the 4th day of February, 2016.

Respectfully submitted,

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

JASON L. DAVIS
Special Assistant Attorney General
Miss. Bar No. 102157

BRAD A. SMITH
Special Assistant Attorney General
Miss. Bar No. 104321

by: s/ *Brad A. Smith*

CERTIFICATE OF SERVICE

This is to certify that I, Brad A. Smith, Special Assistant Attorney General for the State of Mississippi, have electronically filed the foregoing, Response to Motion for Leave to File Successive Petition for Post-Conviction Relief with Exhibits and Appendix, with the Clerk of the Court using the MECF system, which sent notification of this filing to the following:

Louwlynn Vanzetta Williams, Esq.

Office of Capital Post-Conviction Counsel
239 North Lamar Street, Suite 404
Jackson, MS 39225

This, the 4th day of February, 2016.

By: s/ *Brad A. Smith*

BRAD A. SMITH
Special Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680
Facsimile: (601) 359-3796
Email: bsmit@ago.state.ms.us