IN THE SUPREME COURT OF MISSISSIPPI

TIMOTHY ROBERT RONK *Petitioner*

versus **No. 2015–DR–01373–SCT**

STATE OF MISSISSIPPI *Respondent*

RESPONSE IN OPPOSITION

to

MOTION FOR LEAVE TO PROCEED IN THE TRIAL COURT WITH A PETITION FOR POST-CONVICTION RELIEF

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

JASON L. DAVIS
Special Assistant Attorney General

BRAD A. SMITH
Special Assistant Attorney General

THE OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205

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The State of Mississippi, Respondent, by and through counsel, files this Response in Opposition to Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief and Supplement thereto in the above styled and numbered case. The State opposes the Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief as supplemented, and asks that it be denied for the reasons given below.

INTRODUCTION

Following a five-day jury trial in the Circuit Court of Harrison County, Timothy Robert Ronk[1] was convicted of the capital murder and the armed robbery of Michelle Lynn Craite. He was sentenced to death for his capital murder conviction and thirty years imprisonment for his armed robbery conviction. (C.P 292-93). He directly appealed the judgment of his convictions and

[1] Hereinafter Petitioner. "PCR Application" refers to the Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief. "Supplement" refers the Supplement to Petitioner's PCR Application. The abbreviations, "Tr." and "C.P." refer to the Transcript and the Clerk's Papers of the State Court Record in *Timothy Robert Ronk v. State of Mississippi*, No. 2011-DP-00410-SCT.

sentences. This Court reviewed Petitioner's claims, found no error, and affirmed. Petitioner was appointed post-conviction counsel to assist him in investigating and preparing claims for post-conviction relief. On September 23, 2016, Petitioner filed the PCR Application that is presently before the Court. He presents six claims for post-conviction relief. Three are ineffective assistance claims. The first is an all-out attack on lead counsel's sentencing-phase performance. The second challenges trial counsel's performance during the guilt-phase of trial. The third is a *Batson* claim disguised as an ineffective assistance claim that post-conviction counsel believes should have been raised during jury selection. Petitioner also claims his death sentence is disproportionate; Mississippi's capital sentencing scheme is unconstitutional; and the cumulative effect of errors made before and during trial violated his right to a fair trial.

Petitioner's PCR Application must be denied. The claims in his PCR Application are subject to the provisions of Miss. Code Ann. § 99-39-21, do not show the denial of any right, or both.

STATEMENT OF THE ISSUES

I. Petitioner was not denied his right to the effective assistance of counsel.

II. Petitioner's death sentence is not disproportionate.

III. Mississippi's capital sentencing scheme does not offend the Eighth Amendment?

IV. There are no reversible errors, cumulative or otherwise.

V. Trial counsel did not fail to preserve the record for review.

VI. Post-conviction counsel's supplementation of Petitioner's Motion for Leave.

STATEMENT OF THE FACTS

The facts of this case, as stated in the Majority Opinion and reported at *Ronk v. State*, 172 So.3d 1112 (Miss. 2015), are as follows:

¶ 2. On the morning of August 26, 2008, emergency personnel responded to reports of a house fire on Timber Ridge Lane in Biloxi, Mississippi. In their efforts to extinguish the flames, firefighters discovered the remains of a human body in a bedroom of the house. Dental records would later identify the body as thirty-seven-year-old Michelle Lynn Craite. Craite's autopsy revealed multiple stab wounds to her back in addition to severe burns that destroyed her flesh down to the bone. Craite had suffered blistering and burning to the lining of her mouth, tongue, larynx, and windpipe, and a high level of carbon monoxide was found in Craite's blood. This evidence indicated that Craite was still alive and breathing during the fire. Dr. Paul McGarry, a forensic pathologist, opined that the stab wounds likely were the cause of Craite's death, as she would have died from those wounds within "minutes" or "hours" without medical assistance. However, he noted that the stab wounds also incapacitated Craite so that she could not escape from the fire.

¶ 3. Officer Carl Short and Investigator Mike Shaw with the Biloxi Police Department were called to the scene shortly after the firefighters arrived. While waiting to gain access to the inside of the house, the officers began a perimeter investigation. Officer Short ran the license plate of a red Ford Explorer parked in the house's carport and discovered that the car belonged to Craite. Officer Short also noticed a red plastic gas can sitting in the carport, which appeared to be "out of place." After the fire had been extinguished, Investigator Shaw went to investigate the body, which was laying face down on the floor of the master bedroom. Investigator Michael Manna, who took photographs of the scene, explained that the body had been severely burned, and, "You couldn't even tell it [sic] was a man or a woman until you rolled her over."

¶ 4. Special agents from the Bureau of Alcohol, Tobacco and Firearms investigated the cause of the fire. ATF Special Agent Drew Sheldrick and another agent used a fire dog to walk the perimeter and the inside of Craite's house. In total, the dog "alerted" thirteen times to the presence of ignitable liquid in and around Craite's home, including three alerts in the master bedroom, two alerts in the hallway, two alerts in the carport, and one alert on the porch. The ATF investigation resulted in a determination that the fire in Craite's house had been intentionally set, with gasoline vapors being the ignition source. Agent Sheldrick concluded that the gasoline trail traveled "all the way from [the gas can in the carport] through the kitchen and down the hall and into the master bedroom," where Craite had died.

¶ 5. Sergeant Christopher DeBack, Supervisor for Violent Crimes Against Persons for the Biloxi Police Department, and lead investigator in this case, interviewed Craite's neighbors and family regarding her death. These individuals stated that Craite had moved to Mississippi from Michigan in 2008 and had been in a relationship with Timothy Ronk. They also confirmed that Ronk had been living with Craite at the time of the fire. During his investigation, Sergeant DeBack learned that Ronk drove a dark green 1999 Honda Passport, and he instructed local police to be on the lookout for that vehicle.

¶ 6. Officer Short and Investigators Shaw and Manna conducted a search of Craite's Ford Explorer. Receipts and items from the glove compartment were strewn about the passenger and driver seats of the vehicle. Investigator Manna retrieved a Mississippi tax receipt and a Mississippi application for certificate of title to a 1999 Honda from inside the vehicle. Both of these documents were in Ronk's name. The investigators also found Ronk's birth certificate inside the vehicle.

¶ 7. The police focused on Ronk as their primary suspect and decided to search Craite's bank and phone records for more evidence. After obtaining a subpoena for Craite's bank accounts, the investigators discovered that someone had used Craite's debit card on the morning of her death. The bank records showed a $500 withdrawal from a BancorpSouth ATM located in a Walmart in D'Iberville, Mississippi, a $418.16 purchase at the jewelry department of the same Walmart, and a $116.18 purchase at a Shell gas station in Mobile, Alabama. With a subpoena, police obtained still images from the Walmart ATM's surveillance camera, and Ronk was pictured in the photographs. The police also learned that Ronk had purchased three cartons of cigarettes and an energy drink at the Mobile gas station and had forged Craite's signature on the receipt.

¶ 8. Investigator Shaw interviewed Jennifer Mitchell, the manager of the D'Iberville Walmart. Mitchell confirmed that, on August 26, 2008, she had assisted a man with the purchase of a diamond ring. After being shown the picture from the ATM surveillance camera, Mitchell positively identified Ronk as the man who had purchased the ring. According to Mitchell, Ronk initially had expressed interest in a particular ring, but said that "he didn't have time to wait" when he was told the ring would have to be ordered. Ronk then selected a different ring and purchased it using Craite's debit card, receiving one hundred dollars back in cash.

¶ 9. After obtaining a subpoena for Craite's phone records, Sergeant DeBack learned that Craite kept two cellular phones, and that Ronk had been using one of them. The records revealed that the phone Ronk had been using showed extensive activity to a cell phone number in the (904) area code in northeastern Florida. The phone number belonged to Heather Hindall, a resident of Middlesburg, Florida. Craite's phone records indicated that Ronk and Hindall had communicated regularly, and that their communication had increased in frequency during the two weeks preceding Craite's death. A few days prior to Craite's death, Ronk had sent Hindall a text message asking if she needed a television or an Xbox video game console. Then, on the morning of Craite's death, Ronk had sent Hindall a text message stating that he was loading up and coming to Florida.

¶ 10. On August 27, 2008, two United States Marshals approached Ronk and Hindall as they were leaving a department store in Jacksonville, Florida, and placed Ronk under arrest for the murder of Michelle Lynn Craite. Law enforcement officials also recovered a knife from Ronk's vehicle. That same day, investigators with the Biloxi Police Department traveled to Jacksonville to question Ronk and Hindall. Hindall told the investigators that she had developed an online relationship

with Ronk some time in July of 2008, while he was living with Craite. Hindall was aware that Ronk was living with a "roommate" in Biloxi, but she believed that he planned to move to Florida to marry her. Hindall recalled a phone conversation with Ronk on the night before Craite's death, during which she had heard Craite yelling at Ronk in the background. The next evening, Ronk had arrived in Florida and had proposed to Hindall with the ring he had purchased at the Walmart in D'Iberville.

¶ 11. Hindall visited Ronk after he was arrested. During their meeting, Ronk told Hindall that he and Craite had gotten into an argument when he attempted to leave for Florida, and Craite had tried to attack him with a knife. He told Hindall that he had disarmed Craite and stabbed her when she threatened to get a shotgun and kill him. Then, Ronk "poured gasoline over everything and lit it on fire and jumped in his truck and took off, and he told me that he had threw [sic] the knife over the bay bridge before he got to me."

¶ 12. Ronk later confirmed this story in a letter he wrote to Hindall from prison in October 2008. In the letter, Ronk described Craite as a "rich widow" and an "alcoholic millionaire" who fell for him "at first sight." Ronk admitted to Hindall that he had manipulated Craite "to get the car so I could come see you, used her to buy your ring, used her to have money to make the trip." The letter stated that, on the morning of Craite's death, Ronk told Craite that he was leaving for Florida. She began slapping him and then approached him with a knife. Ronk asserted that he never intended to kill Craite, and he had stabbed her only after she threatened to shoot him. Ronk concluded, "When I realized what I had done, I cleaned the knife off, changed my clothes, doused the house with gasoline, set it on fire and drove off...."

¶ 13. No weapons were found inside Craite's house. However, the police did find two unloaded shotguns stored in their cases in a studio apartment behind Craite's house.

Ronk, 172 So.3d at 1121-23 (¶¶ 2-13).

STATEMENT OF THE CASE

This case arises from the murder of Michelle Lynn Craite. As stated above, Petitioner stabbed Michelle multiple times in the master bedroom of her Biloxi home. And while Michelle was slowly dying from her wounds, Petitioner was packing his SUV (which Michelle bought for him) with items from inside the home that belonged to Michelle. After he had taken what he wanted, Petitioner grabbed a can of gasoline from inside the garage and made his way to the master bedroom.

He doused Michelle and the area immediately around her with gas. Then he retraced his steps through the house, pouring a trail of gasoline as he went. Petitioner ignited the gas on the steps just outside the front door, got into the SUV, and left Michelle to be burned alive.

Trial Proceedings

On June 1, 2009, a grand jury returned a two-count indictment that charged Petitioner with one count of felony capital murder for killing of Michelle Lynn Craite during the commission of an arson and one count of armed robbery. Trial began on October 4, 2010. The guilt phase of trial ended on October 7, 2010, with the jury finding Petitioner guilty on both counts. The following day the jury returned a sentencing verdict, in proper form, that read as follows:

> We, the jury, find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the Capital Murder that the defendant actually killed Michelle Lynn Craite.
>
> Next we the jury, unanimously find that the aggravating circumstances of:
>
> The capital offense was committed when the defendant was engaged in the commission of arson.
>
> The capital offense was committed by a person under sentence of imprisonment.
>
> 3. The capital offense was especially heinous, atrocious, or cruel.
>
> exist beyond a reasonable doubt and are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances and we further find unanimously that the defendant should suffer death.
>
> Foreman of the Jury - /s/Keeah McKlveen[2]

Petitioner moved the trial court for a new trial, or alternatively for judgement notwithstanding the verdict. The trial court denied both motions on February 28, 2011.[3]

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[2] C.P. 278, 279; Tr. 746.

[3] Tr. 766.

Direct Review Proceedings

Petitioner then directly appealed his convictions and sentences to this Court, raising the following twelve claims of error:

I. WHETHER THE TRIAL COURT VIOLATED STATE AND FEDERAL LAW AND COMMITTED REVERSIBLE ERROR BY IMPROPERLY INSTRUCTING THE JURY AT THE CULPABILITY PHASE.

II. WHETHER THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION OF CAPITAL MURDER IN THE COURSE OF ARSON.

III. WHETHER THE DEATH SENTENCE MUST BE VACATED AND THE CASE REMANDED FOR A NEW SENTENCING PROCEEDING BECAUSE TRIAL COUNSEL GAVE CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL TO RONK AT THE SENTENCING PHASE OF THE TRIAL.

IV. WHETHER THE TRIAL COURT ERRONEOUSLY PERMITTED THE TRIAL JURORS AND ALTERNATES TO BE SELECTED BUT NOT SEQUESTERED UNTIL THE FOLLOWING MORNING.

V. WHETHER RONK'S CONVICTION MUST BE SET ASIDE BECAUSE THE JURY ERRONEOUSLY RECEIVED INADMISSIBLE INFORMATION DURING THE CULPABILITY PHASE OF THE TRIAL.

VI. WHETHER PAYMENT OF EXCESS COMPENSATION TO STATES WITNESS HEATHER HINDALL WAS PROSECUTORIAL MISCONDUCT THAT VIOLATES RONK'S RIGHT TO DUE PROCESS AND TO CONFRONTATION OF WITNESSES.

VII. WHETHER THE SENTENCING PHASE WAS RENDERED FUNDAMENTALLY UNFAIR AND/OR REVERSIBLY ERRONEOUS BY FLAWED INSTRUCTIONS TO THE JURY.

VIII. WHETHER THE DEATH SENTENCE IN THIS CASE MUST BE VACATED BECAUSE IT WAS IMPOSED IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

IX. WHETHER THE DEATH SENTENCE IN THIS MATTER IS CONSTITUTIONALLY AND STATUTORILY DISPROPORTIONATE.

X. WHETHER THE ABOVE ERRORS, ALL CONCERNING VIOLATIONS OF RONK'S CONSTITUTIONAL RIGHTS CANNOT BE CONSIDERED HARMLESS.

XI. WHETHER THE CUMULATIVE EFFECT OF THE ERRORS IN THE TRIAL COURT MANDATES REVERSAL OF THE VERDICT OF GUILT

AND/OR THE SENTENCE OF DEATH.

XII. RONK RESERVES THE RIGHT TO RAISE ANY ISSUES RELATING TO INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL THAT ARE NOT FULLY APPARENT FROM THE RECORD.[4]

Finding no error, this Court affirmed Petitioner's convictions and sentences in a written Opinion published on May 7, 2015.[5] Rehearing was denied on September 17, 2015.[6] The Mandate issued seven days later.[7]

Petitioner then filed a Petition for a Writ of Certiorari in the Supreme Court of the United States.[8] He presented the following three questions for certiorari review:

> Arson felony murder is punishable by death under Mississippi law. Neither conviction of that crime nor the imposition of a death sentences for it requires any intent to kill or other homicidal scienter. Nor, because Mississippi also follows the minority "one continuous transaction/mere afterthought" rule for both conviction and sentencing, is there any requirement that there be arsonous scienter or an act in furtherance of arson at the time of the homicide. All that is required is temporal proximity between the arson and the homicide. This presents three important and related constitutional questions that implicate jurisprudential divisions among the states and therefore need to be resolved by this Court:
>
> 1. Does relieving a state from the burden of establishing either an overt act in furtherance of or intent to commit arson at the time of the homicide violate the United States Constitution by creating irrebuttable presumptions as to elements of the crime charged, and/or by imposing strict liability for a serious, nonregulatory crime?
> 2. Where a state's capital sentencing statute permits an unintentional killing to establish the Enmund scienter necessary to impose a death sentence for felony

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[4] Brief of Appellant, filed Jul. 13, 2012, *Timothy Robert Ronk v. State of Mississippi*, No. 2011-DP-00410-SCT.

[5] The Opinion is reported at 172 So.3d 1112.

[6] Clerk's Notice, issued Sept. 17, 2015.

[7] Mandate, issued Sept. 24, 2015, *Ronk*, No. 2011-DP-00410-SCT.

[8] Petition for a Writ of Certiorari to the Mississippi Supreme Court, *Timothy Robert Ronk v. Mississippi*, No. 15-7479 (U.S. Dec. 16, 2015).

murder, does it violate the Eighth Amendment to eliminate felonious intent from the statutory aggravation necessary to do so, as well?

3. Does a state rule requiring arson felony murder defendant to come forward with affirmative evidence of innocence of the subsequent arson before he can attempt to persuade a jury that homicide was a stand-alone lesser offense deprive him of his constitutionally guaranteed right to present a complete defense grounded in the Due Process, Confrontation and Compulsory Process Clauses or improperly shift the burden of proof of an element of the offense to the accused?[9]

The U.S. Supreme Court denied his Petition on April 18, 2016.[10]

Post-Conviction Proceedings – Preliminary to the Filing of Petitioner's Application

On September 29, 2015, this Court granted Petitioner's Pro Se Motion for Appointment of Post-Conviction Counsel, and directed the Office of Capital Post-Conviction Counsel[11] to select counsel who would assist Petitioner.[12] The Court also ordered the Circuit Court of Harrison County, Mississippi to determine whether Petitioner was indigent, and desired the appointment of post-conviction counsel pursuant to Mississippi Rule of Appellate Procedure 22©.[13] A hearing took place in the trial court on November 9, 2015. At the conclusion of that hearing, the trial court found Petitioner was indigent, desired the assistance of post-conviction counsel, and appointed the Director of the OCPCC as Petitioner's post-conviction counsel.[14]

Petitioner, through post-conviction counsel, filed a Rule 22 statement, and sought the

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[9] *See* note 8, *supra*.

[10] *Ronk v. Mississippi*, — U.S. —, 136 S.Ct. 1657 (Mem), 194 L.Ed.2d 773 (2016).

[11] The abbreviation, "OCPCC", will be used when referring to the Office of Capital Post-Conviction Counsel.

[12] Order, filed Sept. 29, 2015, *Timothy Robert Ronk v. State of Mississippi*, No. 2015-DR-01373-SCT.

[13] *Id.*

[14] Circuit Court Order, filed Nov. 13, 2015, *Ronk*, No. 2015-DR-01373-SCT.

mandatory and discretionary discovery under M.R.A.P. 22(c)(4). The State made the contents of its file available to post-conviction counsel, in accordance with M.R.A.P. 22(c)(4)(ii) and *Russell v. State*, 819 So.2d 1177, 1179-80 (Miss. 2001), and made no attempt to engage in pre-petition discovery in light of *Corrothers v. State*, 189 So.3d 612, 614 (Miss. 2015). Post-conviction counsel did not present the trial court or the State with any estimate of litigation expenses in accordance with M.R.A.P. 22(c)(3).

On March 17, 2016, the trial court filed an Agreed Order Allowing Access,[15] which was entered by post-conviction counsel and counsel for the Mississippi Department of Corrections.[16] According to the Spica Order, it was agreed that Dr. Malcolm Spica, a psychologist, would evaluate Petitioner's mental health.

On April 1, 2016, Petitioner presented the State with a proposed Agreed Order Granting Discovery. That proposed Order provided Petitioner with leave to conduct discovery under the discretionary discovery provisions of Rule 22 for the purpose of obtaining information owned by, and in the possession of several media outlets. The State promptly signed and returned it.

On April 20, 2016, Petitioner presented a second proposed Agreed Order Allowing Access[17] to MDOC. MDOC refused to sign the Agkarhar Order. So Petitioner moved the trial court for an order allowing Bhushan Agharkar, M.D., access to Petitioner for the purpose of conducting a mental evaluation. Petitioner also asked the trial court for an order, requiring MDOC to show cause for refusing to sign the Agharkar Order.

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[15] The State will refer to this Agreed Order Allowing Access as the "Spica Order".

[16] The abbreviation, "MDOC", will be used when referring to the Mississippi Department of Corrections.

[17] The State will refer to this Agreed Order Allowing Access as the "Agkarhar Order".

On May 16, 2016, the trial court filed an Order, directing the State to file a detailed response to include a statement of the State's policy concerning Rule 22 matters and any objections to Petitioner's request for a second mental evaluation. And on June 7, 2016, the trial court heard the arguments of Petitioner, MDOC, and the State pertaining to the Motion for Access. The hearing concluded with the trial court granting Petitioner a second mental evaluation and finding: (1) the State had no standing to object to Petitioner's request for a second mental evaluation; (2) Petitioner sought access, rather than permission for leave to conduct discovery; and (3) Petitioner's request for a second mental health evaluation satisfied the requirements of M.R.A.P. 22(c)(4)(ii). The trial court also refused the State's request that Petitioner be required to make the disclosures required by M.R.A.P. 22(c)(3). On June 17, 2016, the trial court entered the Agkarhar Order, which was signed by post-conviction counsel, counsel for MDOC, and the State.[18]

Post-Conviction Proceedings – Subsequent to the Filing of Petitioner's Application

Petitioner filed an incomplete PCR Application along with several supporting documents on September 23, 2016. In his PCR Application, Petitioner stated his intent to supplement his PCR Application. Several months passed when Petitioner's post-conviction counsel contacted the State to ask whether it would oppose a motion to stay Petitioner's post-conviction proceedings. Post-conviction counsel explained their intent to supplement Petitioner's PCR Application and their need for time to obtain and review information that was necessary to fully support Petitioner's post-conviction claims. The State had no objection, just one request. The State requested that it be allowed to file its response to Petitioner's PCR Application after Petitioner had filed the Supplement

[18] Given its objections, the trial court instructed the State to sign the Agkarhar Order as to form only at the conclusion of the June 7, 2016, motion hearing.

to his PCR Application. On March 14, 2017, Petitioner filed an Unopposed Motion to Stay Post-Conviction Proceedings, which accurately reflected the requests of both parties. On April 6, 2017, this Court granted Petitioner's Motion, and imposed a 90-day stay of post-conviction proceedings.[19] The Court subsequently lifted the stay and re-issued a briefing schedule on July 27, 2017.[20] Petitioner filed his Supplement to Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief with Exhibits and three accompanying exhibits under seal on October 13, 2017. The State now files this Response in Opposition to Petitioner's PCR Application, attached Exhibits, and Supplement thereto.

FRAMEWORK AND SCOPE OF REVIEW

"Direct appeal [is] the principal means of reviewing all criminal convictions and sentences...." Miss. Code Ann. § 99-39-3(2).[21] The Legislature enacted the UPCCRA to "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...." Miss. Code Ann. § 99-39-3(1). The UPCCRA provides "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(2). Its

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[19] Order, filed Apr. 6, 2017.

[20] Order, filed Jul. 27, 2017.

[21] *Grayson v. State*, 118 So.3d 118, 125 (¶ 12) (Miss. 2013); *see Cabello v. State*, 524 So.2d 313, 323 (Miss. 1988) (holding "[d]irect appeal [as] the principal means of reviewing all criminal convictions and sentences...."); *Brown v. State*, 798 So.2d 481, 491 (Miss. 2001) (citing *Turner v. State*, 590 So.2d 871, 874 (Miss. 1991); *Smith v. State*, 477 So.2d 191, 195 (Miss. 1985)); *Foster v. State*, 687 So.2d 1124, 1129 (Miss. 1996).

provisions establish the exclusive procedure for obtaining collateral review of convictions and sentences in this State. *Knox v. State*, 75 So.3d 1030, 1035 (Miss. 2011) (citing Miss. Code Ann. § 99-39-3)). And Petitioner is totally bound by those provisions. *Cole v. State*, 608 So.2d 1313, 1317 (Miss. 1992); *Evans v. State*, 485 So.2d 276, 280 (Miss. 1986); *Dufour v. State*, 483 So.2d 307, 308 (Miss. 1985).

I. The UPCCRA's Pleading Requirements

Filing a PCR application initiates an original civil action. Miss. Code Ann. § 99-39-7. However, the limited nature of collateral review makes post-conviction actions different from other civil actions. These differences are observable at the pleading stage of a post-conviction proceeding because the UPCCRA contemplates fact-pleading as opposed to notice pleading. When a PCR Application has been filed in this Court, the posture of the proceeding is,

> analogous to that when a defendant in a civil action moves to dismiss for failure to state a claim. *See* Rule 12(b)(6), Miss. R. Civ. P.; *Stanton & Associates, Inc. v. Bryant Construction Company, Inc.*, 464 So.2d 499, 504-06 (Miss. 1985). Functionally, Section 99-39-9 is substituted for the pleadings requirements of Rule 8(a) and (e), Miss. R. Civ. P. In relevant part, Section 99-39-9 requires that an application for post-conviction relief contain
>
> © A concise statement of the claims or grounds upon which the motion is based.
>
> (d) A separate statement of the specific facts which are within the personal knowledge of the prisoner and which shall be sworn to by the prisoner.
>
> (e) A specific statement of the facts which are not within the prisoner's personal knowledge. The motion shall state how or by whom said facts will be proven. Affidavits of the witnesses who will testify and copies of documents or records that will be offered shall be attached to the motion. The affidavits of other persons and the copies of documents and records may be excused upon a showing, which shall be specifically detailed in the motion, of good cause why they cannot be obtained. This showing shall state what the prisoner has done to attempt to obtain the affidavits, records and documents, the production of which he requests the court to excuse.

Neal v. State, 525 So.2d 1279, 1280 (Miss. 1987). But unlike other civil actions,

> Notions of notice pleading have no place in post-conviction applications, the very name of which implies that there has been a final judgment of conviction. Respect for the integrity of the judicial process mandates that we require of such applicants a far more substantial and detailed threshold showing, far in excess of that we deem necessary in the case of a plaintiff in a civil action or, for that matter, in the case of the prosecution in a criminal indictment. In this context we understand Section 99-39-9 suggest a regime of sworn, fact pleadings, based upon personal knowledge. The Court upon examination of the application [for post-conviction relief] has the authority to dismiss it outright,
>
> > if it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief.... Miss. Code Ann. §§ 99-39-11(2).
>
> On the other hand, if the application meets these pleading requirements and presents a claim procedurally alive "substantial[ly] showing denial of a state or federal right," the petitioner is entitled to an in court opportunity to prove his claims.[] Miss. Code Ann. § 99-39-27(5) (Supp. 1986).

Neal, 525 So.2d at 1280-81 (footnote omitted).[22]

Petitioner must present a claim that is proper for post-conviction relief and substantially shows the denial of a state or federal right. Miss. Code Ann. §§ 99-39-9(1)(c)-(e); 99-39-27(5); *Neal*, 525 So.2d at 1280-81. "'Unless it appears from the face of the application, motion, exhibits and the prior record that the claims presented by those documents are not procedurally barred under Section 99-39-21 and that they further present a substantial showing of the denial of a state or federal right, the court shall by appropriate order deny the application....'" *Simon v. State*, 857 So.2d 668, 678 (¶ 6) (Miss. 2003) (quoting Miss. Code Ann. § 99-39-27(5)). Petitioner must support the claims in his PCR Application with factual information. If Petitioner is unable to obtain the factual information needed to support his claims, he may excuse any deficiencies by stating, in detail, the

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[22] *Billiot v. State*, 515 So.2d 1234, 1236-37 (Miss. 1987); *see Grayson*, 118 So.3d at 128 (¶ 18) (quoting *Jackson v. State*, 732 So.2d 187, 190 (¶ 9) (Miss. 1999)); *Jordan v. State*, 918 So.2d 636, 648-49 (Miss. 2005); *Bishop v. State*, 882 So.2d 135, 156 (Miss. 2004); *Walker v. State*, 863 So.2d 1, 9-10 (Miss. 2003); *Cole v. State*, 608 So.2d 1313, 1320 (Miss. 1992); *Myers v. State*, 583 So.2d 174, 175-76 (Miss. 1991); *Harris v. State*, 578 So.2d 617, 619 (Miss. 1991); *Wright v. State*, 577 So.2d 387, 389 (Miss. 1991).

reason(s) the information could not be obtained and the efforts taken to obtain it. *Neal*, 525 So.2d at 1280 (quoting Miss. Code Ann. § 99-39-9). If Petitioner meets the requirements of Section 99-39-27(5), then the Court may do one of two things. It may grant all or part of the relief requested, or remand the matter to the trial court for further proceedings under Sections 99-39-13 through 99-39-23. Miss. Code Ann. § 99-39-27(5)-(7); *Neal*, 525 So.2d at 1280-81.

A. The Procedurally Alive Requirement

Petitioner must show each claim in his PCR Application is procedurally alive. To do so, he must provide this Court with information that shows each claim presented in his PCR Application is not subject to the provisions of Section 99-39-21. Miss. Code Ann. § 99-39-27(5); *see* Miss. Code Ann. § 99-39-21(6) (placing "[t]he burden ... 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"). A procedurally alive claim is one that is not subject to the bars listed under Miss. Code Ann. § 99-39-21. 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.

Post-conviction review is not a substitute for trial or direct appeal. Miss. Code Ann. § 99-39-5(3). For that reason, the bars listed under Section 99-39-21 apply to Petitioner's claims unless he shows otherwise. *Brown*, 798 So.2d at 500 (¶ 41) (citing *Cole*, 666 So.2d at 773).[23] To show his claims are procedurally alive, Petitioner must show each claim in his PCR Application could not or should not have been raised at trial or on direct appeal; were not waived at trial, Miss. Code Ann. § 99-39-21(1); are not being relitigated under a different factual or legal theory that could have been argued at trial or on direct appeal Miss. Code Ann. § 99-39-21(2); and were not decided at trial or on direct appeal, Miss. Code Ann. § 99-39-21(3).

1. *Heightened Scrutiny*

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[23] *See Jordan v. State*, 213 So.3d 40, 42 (Miss. 2016) (quoting *Howard v. State*, 945 So.2d 326, 353 (Miss. 2006) (quoting *Jackson v. State*, 860 So.2d 653, 660-61 (Miss. 2003))); *Crawford v. State*, 218 So.3d 1142, 1154 (Miss. 2016) (quoting *Foster*, 687 So.2d at 1129); *Moffett v. State*, 156 So.3d 835, 844-45 (Miss. 2014) (quoting *Powers v. State*, 945 So.2d 386, 395 (Miss. 2006)); *Howell v. State*, 989 So.2d 372, 380 (Miss. 2008); *Spicer v. State*, 973 So.2d 184, 196-97 (Miss. 2007) (quoting *Lockett v. State*, 614 So.2d 898, 902 (Miss. 1992) (citing *Irving v. State*, 498 So.2d 305 (Miss. 1986); *Evans v. State*, 485 So.2d 276 (Miss. 1986))); *Thorson v. State*, 994 So.2d 707, 719 (Miss. 2007) (quoting *Jordan v. State*, 918 So.2d 636, 661 (Miss. 2005) (citing *Bishop v. State*, 882 So.2d 135, 149 (Miss. 2004); *Grayson v. State*, 879 So.2d 1008, 1020 (Miss. 2004))); *Brown v. State*, 948 So.2d 405, 415-17 (Miss. 2006); *Knox v. State*, 901 So.2d 1257, 1260-61 (Miss. 2005) (quoting *Brewer v. State*, 819 So.2d 1165, 1167 (Miss. 2000)); *Gray v. State*, 887 So.2d 158, 172 (Miss. 2004); *Simon*, 857 So.2d at 682; *Woodward v. State*, 843 So.2d 1, 10-11 (Miss. 2003); *Davis v. State*, 743 So.2d 326, 349 (Miss. 1999); *Williams v. State*, 669 So.2d 44, 52 (Miss. 1996); *Moore v. State*, 676 So.2d 244, 245 (Miss. 1996); *Hansen v. State*, 649 So.2d 1256, 1258 (Miss. 1994); *Jordan v. State*, 577 So.2d 368, 369 (Miss. 1990); *Neal*, 525 So.2d at 1280; *Mann v. State*, 490 So.2d 910, 911 (Miss. 1986).

Petitioner argues, that under the Court's heightened scrutiny standard of review, the UPCCRA's procedural requirements are relaxed and all doubts are to be resolved in his favor. (PCR Appl. at 5). He cites *Hansen v. State*, 592 So.2d 114, 142 (Miss. 1991) and *Flowers v. State*, 158 So.3d 1009, 1026 (Miss. 2014), which quotes *Fulgham v. State*, 46 So.3d 315, 322 (Miss. 2010). (PCR Appl. at 5, nn. 15, 16). The State agrees that this Court reviews post-conviction claims under Its heightened scrutiny standard, but disagrees with Petitioner as to the scope and timing the Court applies that standard to PCR claims.

According to Petitioner, this Court reviews post-conviction claims under heightened scrutiny when determining whether those claims are procedurally alive. This is inconsistent with this Court's case law, which clearly states: "If the claims *are not procedurally barred*, '[t]he 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.'" *Grayson v. State*, 118 So.3d 118, 125 (¶ 10) (Miss. 2013) (emphasis added) (quoting *Chamberlin v. State*, 55 So.3d 1046, 1049-1050 (Miss. 2010) (internal citations and punctuation omitted)). *Grayson* involved a successive PCR application. But the standard applied in *Grayson* applies here because both initial and successive PCR applications must satisfy the procedural requirements of Miss. Code Ann. § 99-39-27. *See* Miss. Code Ann. § 99-39-7 ("The procedure governing applications to the Supreme Court for leave to file a motion under this article shall be as provided in Section 99-39-27."). Petitioner is mistaken as to the scope and timing that this Court applies heightened scrutiny to claims presented in a PCR application. *Grayson*, 118 So.3d at 125 (¶ 10). The Court does not apply its heightened scrutiny standard when determining whether a claim is procedurally alive.

In *Hansen*, this Court explained that heightened scrutiny refers to the bundle of appellate

principles the Court applies when reviewing criminal judgements of trials where the death penalty has been imposed.[24] 592 So.2d at 142. The Court said that It reviews trial errors for their cumulative impact; applies the plain error rule with less stringency; relaxes the contemporaneous objection rule, and resolves "*serious doubts*" in the accused's favor. *Id.* (citations omitted). "[W]hat becomes harmless error in a case with less at stake may become reversible error when the penalty is death, *Irving v. State*, 361 So.2d at 1363, as procedural niceties give way to the search for substantial justice because death undeniably is different." *Id.*

Petitioner would have the Court ignore the UPCCRA's pleading requirements by accepting his allegations as true and resolve all doubts in his favor. (PCR Appl. at 5 n. 17, 6 nn. 21, 22). The pleading requirements, particularly those under Miss. Code Ann. § 99-39-21, are in place to ensure that claims presented are proper for post-conviction relief. *See e.g., Cole*, 608 So.2d at 1317. Ignoring them only defeats the underlying purpose of the UPCCRA, which is the resolution of claims, issues, disputes, etc. that could not or should not have been addressed at trial or on direct appeal. And where, as here, a petitioner offers nothing to show each claim presented for PCR relief have not been previously raised, waived, or litigated, then there is no doubt they should be denied. They are not claims properly raised in post-conviction proceedings. Post-conviction review proceedings are limited in nature and not a substitute for direct appeal.

Further, the UPCCRA provides the means to excuse the application of its procedural

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[24] *See Ross v. State*, 954 So.2d 968, 986 (Miss. 2007) (recognizing "'appellate review in capital cases is different from that in other cases'") (quoting *Neal v. State*, 451 So.2d 743, 750 (Miss. 1984)); *Fisher v. State*, 481 So.2d 203, 211 (Miss. 1985) (describing heightened scrutiny as a principle applied in appeals involving the death penalty). But, this Court does "no more than that which the Supreme Court has mandated in cases from *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, 961 (1976), down through and including *Lankford v. Idaho*, 500 U.S. 110, ——, 111 S.Ct. 1723, 1732, 114 L.Ed.2d 173, 187 (1991)." *Hansen*, 592 So.2d at 142.

requirements. It gives Petitioner a fair opportunity to explain and justify his failure provide the Court with the facts needed to carry his burden under Miss. Code Ann. § 99-39-27(5). *See e.g.,* Miss. Code Ann. §§ 99-39-9(1)(e); 99-39-21(4)-(6).[25] Petitioner has failed to do this as well. And the fact that he has begs a couple of questions. One is, why should the Court relax the UPCCRA's pleading requirements when the UPCCRA already provides as much. And another is, why should the Court relax the UPCCRA's pleading requirements and bars for no reason at all.

For more than thirty years now, this Court has consistently held the "[p]rocedural bars of waiver, different theories, and res judicata and exception thereto as defined in the post-conviction relief statute are applicable in death penalty post-conviction relief applications." *Brown*, 798 So.2d at 500 (¶ 41) (citing *Cole*, 666 So.2d at 773).[26] Petitioner cites this Court's case law as authority that allows the Court to ignore Its own case law and the UPCCRA, and in effect, grant him extraordinary relief. The Court is under no obligation to do so. And the heightened scrutiny standard does not modify the UPCCRA's pleading requirements into something more favorable to Petitioner. The *Hansen* Court was careful to point this out when It said:

What is important for today is that we understand none of this means the rules

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[25] Miss. Code Ann. § 99-39-9(1)(e) concerns those facts to be included in a PCR motion that are not within a petitioner's personal knowledge. It states that:

> A specific statement of the facts which are not within the petitioner's personal knowledge. The motion shall state how or by whom said facts will be proven. Affidavits of the witnesses who will testify and copies of documents or records that will be offered shall be attached to the motion. *The affidavits of other persons and the copies of documents and records may be excused upon a showing, which shall be specifically detailed in the motion, of good cause why they cannot be obtained. This showing shall state what the petitioner has done to attempt to obtain the affidavits, records and documents, the production of which he requests the court to excuse.*

Miss. Code Ann. § 99-39-9(1)(e) (emphasis added).

[26] *See* sources cited *supra* at n. 23.

> themselves change as the penalty of death is sought. Neither the contemporaneous objection rule nor any other rule of procedure or substance becomes metamorphosed into something more favorable to the capital defendant. Any contrary thought may be safely branded error.

Hansen, 592 So.2d at 142; *see Williams v. State*, 684 So.2d 1179, 1203 (Miss. 1996) (stating that "heightened appellate scrutiny in death penalty cases does not require abandonment of our contemporaneous objection rule which applies with equal force to death cases"); *Thorson v. State*, 76 So.3d 667, 677 (Miss. 2011) (quoting *Scott v. State*, 878 So.2d 933, 953 (Miss. 2004), *overruled on other grounds by Chamberlin v. State*, 989 So.2d 320 (Miss. 2008)); *Cole v. State*, 666 So.2d 767, 774 (Miss. 1995). "There is thus no change in our treatment of procedural bars and res judicata such as to allow [the petitioner] to somehow avoid these prohibitions to raise certain issues." *Powers v. State*, 945 So.2d 386, 395 (¶ 18) (Miss. 2006).

Petitioner is the only party who has a burden of production in these proceedings. And the standard of review this Court applies in reviewing his claims does not relieve him of that burden. *Carr v. State*, 196 So.3d 926, 930 (Miss. 2016) (citing *Evans v. State*, 725 So.2d 613, 632 (Miss. 1997)); *Billiot v. State*, 655 So.2d 1, 17 (Miss. 1995). The fact that Petitioner has been given information, resources, and assistance of specialized attorneys and staff[27] only bolsters this point—one which this Court has recognized. *See e.g., Puckett v. State*, 834 So.2d 676, 677 (Miss. 2002) (recognizing the reason why the Legislature shortened the statute of limitations from 3 years to 1 for petitioners under sentence of death to file PCR Motions was that those petitioners were assured the assistance of specialized attorneys); *Corrothers*, 189 So.3d at 164 (recognizing the

[27] *See* Miss. Code Ann. § 99-39-101, *et seq.* (creating the Office of Capital Post-Conviction Counsel); M.R.A.P. 22(c) (establishing the procedure for: (1) the appointment of post-conviction counsel to assist indigent petitioners under sentence of death; (2) the mandatory and discretionary disclosure of information to petitioners under sentence of death); *Grayson v. State*, 118 So.3d 118, 124 (Miss. 2013).

purpose for adopting Rule 22 was "to enable petitioners to comply with the Mississippi Uniform Post Conviction Collateral Relief Act's (UPCCRA) substantial burden of production") (citing *Russell v. State*, 819 So.2d 1177, 1179 (Miss. 2001); *Brown v. State*, 88 So.3d 726, 730 (Miss. 2012)).

Petitioner must comply with the UPCCRA by showing the claims in his PCR Application are procedurally alive. This Court and the Legislature have taken considerable measures to ensure Petitioner has access to information, resources, and legal assistance for one purpose—to insure Petitioner has a fair opportunity to comply with the UPCCRA's pleading requirements. *Id.* And yet, Petitioner demands more—more than a fair opportunity. He is not entitled to anything more.

B. The Substantial Showing Requirement

Additionally, Petitioner must support his claims with factual information to substantially show the denial of a state or federal right. Miss. Code Ann. § 99-39-27(5). Petitioner is the only party with a burden of production. *Corrothers v. State*, 189 So.3d 612, 614 (Miss. 2015).[28] To carry it, Petitioner must show the denial of a state or federal right and a reasonable probability that the result of the proceeding would have been different. *See Corrothers v. State*, ── So.3d ──, 2017 WL 452912, *4 (Miss. 2017) (rejecting a claim of ineffectiveness and 14 affidavits supporting, because Petitioner failed to show that "'had the affiants been called to testify, there was a reasonable probability that the result of the proceeding would have been different'") (quoting *Moffett v. State*, 156 So.3d 835, 849 (Miss. 2014) (citing *Spicer v. State*, 973 So.2d 184, 191 (Miss. 2007)); *see Puckett v. State*, 879 So.2d 920, 936-37 (Miss. 2004) (finding Puckett was not entitled to a hearing

[28] The State is not entitled to Rule 22 discovery because it has "no burden of production under UPCCRA." *Corrothers*, 189 So.3d at 614.

for an ineffectiveness claim that lacked specificity); *Woodward v. State*, 635 So.2d 805, 808 (Miss. 1993) (holding that, in order to be entitled to a hearing on a claim of ineffectiveness, "the post-conviction applicant ... must demonstrate with specificity and detail the elements of the claim"); *Howell v. State*, 989 So.2d 372, 387-88 (Miss. 2008) (finding Howell was not entitled to an evidentiary hearing to prove a witness recanted her trial testimony where the witness's affidavit contained general statements that were contradicted by facts in the record); *Smith v. State*, 500 So.2d 973, 979-80 (Miss. 1985) (finding Smith was not entitled to an evidentiary hearing on the issue of whether the State attempted to introduce impeaching evidence that had not been disclosed to Smith prior to trial because that evidence was not inconsistent with other evidence); *Gray v. State*, 887 So.2d 158, 167-70 (Miss. 2004) (holding Gray was not entitled to an evidentiary hearing to prove a claim of intellectual disability for failing to provide affidavits of experts who opined that further testing would likely show he was intellectually disabled).

State law gives petitioners under sentence of death an opportunity to conduct discovery prior to an action actually commencing. This is because "[n]otions of notice pleading have no place in post-conviction applications....." *Neal*, 525 So.2d at 1280; *Grayson*, 118 So.3d at 128 (¶ 18) (quoting *Jackson v. State*, 732 So.2d 187, 190 (¶ 9) (Miss. 1999)); *Cole v. State*, 608 So.2d 1313, 1320 (Miss. 1992); *Myers v. State*, 583 So.2d 174, 175-76 (Miss. 1991); *Harris v. State*, 578 So.2d 617, 619 (Miss. 1991); *Wright v. State*, 577 So.2d 387, 389 (Miss. 1991); *Billiot*, 515 So.2d at 1234, 1236-37; *see also Corrothers*, 189 So.3d at 614 (explaining that M.R.A.P. 22 was adopted, in part, to help petitioners under sentence of death obtain the information necessary to meeting the UPCCRA's substantial burden of production). This type of discovery provides the petitioner with a fair opportunity to comply with the UPCCRA's pleading requirements, specifically the substantial

showing requirement. *Corrothers*, 189 So.3d at 614.

In this case, Petitioner suggests that this Court adopt a new standard for determining whether the substantial showing requirement has been met. He relies on the Dissent in *Hewes v. Langston*, 853 So.2d 1237 (Miss. 1997) and *In re Internal Sys. & Controls*, 693 F.2d 1235 (5th Cir. 1982), as authority that defines what it means to make a substantial showing under the UPCCRA. (PCR Appl. at 6, n. 20). Under *Hewes* and *In re Internal Sys. & Controls*, Petitioner believes he carries his substantial burden of production by stating a claim for relief and supporting it with enough "'[evidence] [s]uch as will suffice until contradicted and overcome by other evidence . . . [a] case which has proceeded upon sufficient proof to that stage where it will support [a] finding if evidence to the contrary is disregarded.'" (PCR Appl. at 6) (alterations in the original) (quoting *Hewes*, 853 So.2d at 1270 (McRae, P.J., dissenting)).

The Court should flatly reject his proposal for several reasons. First, the Dissent in *Hewes* is not authority and has absolutely no precedential value. Second, *Hewes* and *In re Internal Sys. & Controls* are not post-conviction cases. They do not address the UPCCRA's pleading requirements whatsoever. *Hewes* and *In re Internal Sys. & Controls* are pre-trial interlocutory appeals from a lower court's discovery rulings on whether a *prima facie* claim of fraud would allow a party to obtain confidential information through the "crime-fraud" exception to the attorney-client privilege or work product doctrine. *Hewes*, 853 So.2d at 1244-49; *In re Internal Sys. & Controls*, 693 F.2d at 1241-42. And third, the *prima facie* definition he asks this Court to adopt and apply will not square with plain language of the UPCCRA or this Court's precedent. The Court does not review a claim for relief and the information offered to support it in a vacuum. *Cole*, 608 So.2d at 1320. The UPCCRA requires this Court to examine "[t]he original motion, *together* with all files, records, transcripts and

correspondence relating to the judgment under attack...." Miss. Code Ann. § 99-39-27(4) (emphasis added); *see Cole*, 608 So.2d at 1320. "Respect for the integrity of the judicial process mandates that we require of such applicants a far more substantial and detailed threshold showing, far in excess of that we deem necessary in the case of a plaintiff in a civil action or, for that matter, in the case of the prosecution in a criminal indictment." *Neal*, 525 So.2d at 1280.

Earlier, the State noted the fact that post-conviction actions are unlike other civil actions. Consider the process of conducting discovery in post-conviction proceedings. Generally speaking, the parties may conduct discovery once a complaint is filed. M.R.C.P. 1, 3(a). This is not true in a post-conviction proceeding involving a death sentence. Discovery may be conducted months before an initiating document is filed—but only by petitioners under sentence of death. *Corrothers*, 189 So.3d at 613-14. The only reason this one-sided discovery is available prior to the commencement of a post-conviction action is so that petitioners under sentence of death may "comply with the Mississippi Uniform Post Conviction Collateral Relief Act's (UPCCRA) substantial burden of production." *Id.* at 613-14 (citing *Russell v. State*, 819 So.2d 1177, 1179 (Miss. 2001); *Brown v. State*, 88 So.3d 726, 730 (Miss. 2012)). And yet, even this is not enough for Petitioner. He wants more. But he is not entitled to anything more.

Again, the Court's heightened scrutiny standard of review does not modify the UPCCRA's pleading requirements into something more favorable to Petitioner. The Court applies the heightened scrutiny standard in the search for "substantial justice," not to relieve Petitioner of the burden he must carry. Petitioner has been given all that he is entitled to receive—a fair opportunity to comply with the UPCCRA. He bears the burden to make a substantial showing of the denial of a state or federal right or explain why he cannot do so. As demonstrated below, Petitioner does not

make a substantial showing of the denial of any right or offer any excuse as to why he is unable to do so. Therefore, his claims must be denied.

ARGUMENT

With that in mind, Petitioner presents the Court with six claims, one with several sub-claims, for collateral review and relief. He claims: (1) that trial counsel was ineffective at both phases of trial (PCR Appl. at 6-39); (2) that his sentence is disproportionate (PCR Appl. at 39-44); (3) that Mississippi's death penalty statute is arbitrarily and unconstitutionally applied (PCR Appl. at 44-48); (4) that cumulative error at trial entitles him to a new trial (PCR Appl. at 48-49); (5) that trial counsel failed to preserve the record (PCR Appl. at 50-52); and (6) that post-conviction counsel must supplement his Motion for Leave in order to be effective (PCR Appl. at 52-54). Petitioner is not entitled to relief for the claims presented in the Motion for Leave and Supplement thereto.

I. Was Petitioner Denied the Right to Counsel?

Petitioner raises several issues with trial counsel's performance. Most of his issues concern counsel's performance during the sentencing phase of trial. (PCR Appl. at 7-38). He takes issue with trial counsel's: investigation into mitigating evidence; examination of Dr. Beverly Smallwood; decision not to call a second expert witness to confirm Dr. Smallwood's testimony; and opening and closing arguments during the sentencing phase of trial. (PCR Appl. at 7-38). Each issue is individually addressed below. Not one of them shows Petitioner was denied the right to effective assistance of counsel.

This Court reviews a claim of ineffectiveness under the standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Stringer v. State*, 454 So.2d 468 (Miss. 1984) (adopting *Strickland's* standard for determining ineffective assistance of counsel claims). And that standard

applies to every allegation of ineffectiveness in Petitioner's PCR Application.[29] "'The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Corrothers*, 2017 WL 452912, *3 (¶ 14) (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). Petitioner must show (1) trial counsel made a serious mistake, one that no reasonable attorney would make, and (2) that mistake prejudiced Petitioner's defense of the case. *Id.* (citing *Strickland*, 466 U.S. at 687). Both showings must be made to succeed on a claim of ineffectiveness. *Id.* (citing *Stringer v. State*, 454 So.2d at 477 (citing *Strickland*, 466 U.S. at 687)). If the claim fails on either of the *Strickland* prongs, the proceedings end. *Neal*, 525 So.2d at 1281.

This Court measures the adequacy of trial counsel's actions against an objective standard of reasonableness that is based on accepted professional norms. *Strickland*, 466 U.S. at 688. Every effort must 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." *Stringer*, 454 So.2d at 477 (citing *Strickland*, 466 U.S. at 689). For that reason, the law presumes counsel rendered effective assistance, and places the burden of proving otherwise on Petitioner to prove counsel's decision was unreasonable. *Strickland*, 466 U.S. at 689. "Even under de novo review, the standard for judging counsel's representation is a most deferential one." *Premo v. Moore*, 562 U.S. 115, 122 (2011) (internal quotation marks and italics omitted).

The test is whether trial counsel's decision was consistent with a viable trial strategy, not

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[29] The Court's decision on any federal claim, properly raised in these proceedings, must be based on clearly established Federal law, as announced by United States Supreme Court. The only precedent to be considered, other than the precedent of this Court, is that of the United States Supreme Court. Case law from other states or federal courts of appeal should only be given persuasive authority. 28 U.S.C. § 2254(d)(1); *Bell v. Cone*, 535 U.S. 685 (2002); *Williams v. Taylor*, 529 U.S. 362 (2000).

whether alternative courses of action were more reasonable. *Strickland*, 466 U.S. at 689. Stated differently, the question is: Did trial counsel make a mistake that no reasonable attorney would make under the same set of facts. Counsel enjoys broad discretion in making tactical and strategic decisions. The filing of motions, calling witnesses to be called, questions to be asked, and objections to be made are strategic decisions, which is considered trial strategy and virtually unchallengeable. *Cole*, 666 So.2d at 777. If there is a reasonable basis for a challenged decision, the claim must fail.

Petitioner also bears the burden of demonstrating individual instances of actual prejudice. The question is: Would the result of the proceeding have been different absent counsel's mistake. In this case, Petitioner must show, absent trial counsel's mistake, the death penalty would not have been imposed. *Cole*, 666 So.2d at 775; *Strickland*, 466 at 694-95. Unsupported boilerplate allegations are legally insufficient to support the granting of relief for a claim of ineffective assistance. The right to effective assistance of counsel entitles a defendant to competent—not perfect—counsel. *Parker v. State*, 30 So.3d 1222, 1233 (¶ 38) (Miss. 2010) (citing *Stack v. State*, 860 So.2d 687, 696 (Miss. 2003); *Cabello*, 524 So.2d at 315; *Mohr*, 584 So.2d at 430).

Counsel has been found effective in the following cases: *Turner v. State*, 953 So.2d 1063 (Miss. 2007) (counsel not ineffective for calling additional witnesses during sentencing; such claims typically disfavored); *McGilberry v. State*, 843 So.2d 21 (Miss. 2003) (counsel effective despite blanket assertions of inexperience, failure to pursue appointment of investigator, and failure to renew request for mental health expert; although counsel lacked experience in capital representation, counsel filed approximately 40 pretrial motions); *Clark v. State*, 834 So.2d 747 (Miss. Ct. App. 2003) (counsel effective even though he spent only ten minutes with defendant on two prior occasions in preparation for a murder trial; defendant informed judge of satisfaction with counsel's

services, and decisions not to file certain motions fell within ambit of trial strategy); *Cole*, 666 So.2d 767 (Miss. 1995) (defendant who alleges counsel's failure to investigate constituted ineffectiveness must state with particularity what investigation would have revealed and how it would have altered outcome or significantly aided his cause at trial); *Brown*, 798 So.2d 482 (counsel not ineffective for failing to obtain funding for expert analysis, in absence of indication of what such expert might have discovered and presented); *Chase v. State*, 699 So.2d 521 (Miss. 1997) (counsel not ineffective despite failure to further investigate psychological reports examining defendant's IQ; evidence of defendant's minimal education, illiteracy and deprived childhood was made known to the jury).

A. Reasons for Denying Further Review and Relief

The Court should deny Petitioner's first claim for the reasons stated below.

1. *Defenses under Miss. Code Ann. § 99-39-21*

Petitioner is quick to note that "[t]his issue was argued by direct appeal counsel and addressed by this Court on direct appeal." (Motion for Leave at 6-7). He is correct. The Majority Opinion entered on direct appeal reads, in part, as follows:

> **III. Whether Ronk received ineffective assistance of counsel during the sentencing phase of trial.**
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> ¶ 36. A claim of ineffective assistance of counsel requires proof of two elements. First, the defendant must prove that his counsel's performance was deficient. *Irby v. State*, 893 So.2d 1042, 1049 (Miss. 2004) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To establish deficient performance, the defendant must show that his counsel's representation fell below "an objective standard of reasonableness." *Davis v. State*, 897 So.2d 960, 967 (Miss. 2004) (citing *Williams v. Taylor*, 529 U.S. 362, 390-91, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). Second, the defendant must prove that such deficient performance prejudiced the defense of the case. *Ross v. State*, 954 So.2d 968, 1003 (Miss. 2007) (citing *Irby*, 893 So.2d at 1049). "To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different." *Id*. at 1003-04 (citing *Davis*, 897 So.2d at 967). Where ineffectiveness is established in the sentencing phase of a capital

> proceeding, the resulting death penalty must be vacated and a new sentencing proceeding held. *Doss v. State*, 19 So.3d 690, 709 (Miss. 2009).
>
> ¶ 37. Generally, ineffective-assistance claims are more appropriately brought during post-conviction proceedings. *Archer v. State*, 986 So.2d 951, 955 (Miss. 2008). However, a claim of ineffectiveness may be raised on direct appeal "if such issues are based on facts *fully apparent from the record*." Miss. R. App. P. 22(b) (emphasis added). Where, as here, the defendant's appellate counsel did not represent the defendant at trial, failure to raise such issues on direct appeal will bar consideration of the issue in post-conviction proceedings. *Id*.
>
> ¶ 38. Ronk asserts that his trial attorney's performance during the sentencing phase of trial was deficient for four reasons. First, Ronk claims that his attorney suffered from significant medical problems throughout the course of his representation of Ronk, impeding his performance and perhaps his judgment. Second, Ronk claims that his attorney enlisted the assistance of an expert witness who was not equipped to perform a mitigation study in a capital case and who presented inadmissible prejudicial evidence to the jury. Next, Ronk argues that his counsel impermissibly failed to request jury instructions on statutory mitigating factors supporting the defense's mitigation theory. Finally, Ronk contends that his attorney made a prejudicially inadequate closing argument at the completion of the sentencing phase of trial. He also points to various other alleged errors under other issues in his brief and asks this Court to view those errors alternatively as claims of ineffective assistance. We find that these claims are not based on facts fully apparent from the record, and it would be inappropriate for this Court to attempt to dispose of them on direct appeal. Accordingly, we dismiss this claim of error without prejudice to Ronk's ability to raise it properly in a post-conviction relief proceeding.

Ronk, 172 So.3d at 1130-31 (¶¶ 36-38). Petitioner has demonstrated his issues with counsel's medical problems; enlistment and examination of Dr. Smallwood during sentencing; and counsel's opening and closing arguments are not subject to the provisions of Section 99-39-21. Because the Court dismissed them without prejudice, those issues are procedurally alive. *Parker*, 30 So.3d at 1232 (¶ 36) (quoting *Archer v. State*, 986 So.2d 951, 955 (Miss. 2008)).

2. *Petitioner does not show counsel were deficient for failing to conduct an investigation of mitigation evidence*

Petitioner's first ineffective assistance issue challenges trial counsel's efforts in investigating mitigation evidence. (PCR Appl. at 7-22). As an initial matter, the State would be remiss if it did

not call the Court's attention to two, important facts. The first is that Petitioner was represented by a team of four defense attorneys—G. Eric Geiss, Charles Stewart, Dawn Stough, and Matthew Busby. (Exhibit 2 ¶ 7 to PCR Appl.).[30] This fact is particularly important because Petitioner's claim of ineffectiveness is largely predicated on allegations that only challenge the performance of Eric Geiss, the attorney who served as lead counsel for the defense. Except in passing, Petitioner does not take issue with his other three attorneys' efforts.

The second important fact is Petitioner's reliance on *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539, 360 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005). He believes those cases all but expressly recognize the ABA Death Penalty Guidelines as the source that defines the standard of reasonableness for counsel's performance in capital murder cases. (PCR Appl. at 7-15, 21). Petitioner is mistaken. "[T]he Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (quoting *Roe v. Flores–Ortega*, 528 U.S. 470, 479 (2000). The ABA Death Penalty Guidelines do not define reasonableness. They "are 'only guides' to what reasonableness means, not its definition." *Bobby*, 558 U.S. at 8 (quoting *Strickland*, 466 U.S. at 688). The objective standard of reasonableness "is necessarily a general one." *Id.* at 16. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 688-89.

That said, Petitioner contends that had Mr. Geiss conducted no investigation for mitigation evidence because serious health issues prevented him from doing so; and that had Mr. Geiss

[30] Affidavit of Matthew Busby, ESQ., dated Jun. 16, 2016.

conducted an investigation into mitigation evidence, he would have uncovered considerable mitigation evidence that should have been presented to the jury. (PCR Appl. at 13; 31-34). He relies heavily on the Affidavit of Matthew Busby (Ex. 2 to PCR Appl.), the Affidavit of Ramiro Orozco (Ex. 6 to PCR Appl.), and the Affidavit of Sheldon M. Hersh, M.D. (Ex. 31 to PCR Appl.) as evidence that proves Mr. Geiss's medical infirmities prevented him from conducting an investigation into mitigation evidence. The State would begin by addressing the affidavits executed by Mr. Busby, Mr. Orozco, and Dr. Hersh.

Matthew Busby was one of four attorneys who represented Petitioner at trial, a fact that he readily admits. In his Affidavit, Mr. Busby states that he was an attorney in private practice who "approached the Office of the Public Defender and volunteered to serve on [Petitioner's] defense team[] ... to become qualified to serve as defense counsel in capital-murder cases." (Ex. 2 ¶ 5 to PCR Appl.). According to Petitioner, Mr. Busby is the only attorney who investigated and obtained any mitigation evidence. (PCR Appl. at 13-14). Mr. Busby is extremely critical of Mr. Geiss. (Ex. 2 to PCR Appl.). His criticism is based on his personal observations of Mr. Geiss. In his affidavit, Mr. Busby expressly states: "I believe that Mr. Geiss would have been a good defense attorney if he had been *healthy*...." (Ex. 2 ¶ 13 to PCR Appl.). It is apparent from his affidavit that Mr. Busby believes that his allegations of ineffectiveness do not impute him. He is mistaken. "[T]he lead attorney's performance is imputed to all attorneys involved in the case." *Jordan v. State*, 213 So.3d 40, 43 (¶ 12) (Miss. 2016) (citing *Archer v. State*, 986 So.2d 951, 956 (Miss. 2008)). The allegations of ineffectiveness that challenge Mr. Geiss's representation impute to Mr. Busby. Further, Mr. Busby's affidavit is virtually silent on his efforts and those of the other two attorneys who represented Petitioner.

Ramiro Orozco, an attorney who was employed by the Harrison County Public Defender's Office beginning at some time in 2006 to some time in 2008, has also executed an affidavit. Like Mr. Busby's, Mr. Orozco's affidavit contains personal observations of Mr. Geiss and his opinions of Mr. Geiss's performance in other trials. Mr. Orozco's affidavit reads, in part, as follows:

> 6. During my time there, I had occasion to work with Assistant Public Defender Eric. Geiss and to observe him closely.
>
> 7. Mr. Geiss was always ill. I believe it was a serious, chronic illness, or illnesses. I do not know the exact nature of his maladies, but I do know he was under the treatment of a physician for heart related matters and was deteriorating at the time of my leaving the Public Defender's office in 2008. I was aware that Mr. Geiss began to be hospitalized frequently after my departure.
>
> 8. A few weeks after I began working at the Public Defender's office, I was assigned as second chair on a murder trial. Mr. Geiss was first chair.
>
> 9. I was able to observe Mr. Geiss and his poor health was apparent, to the point that on the first day of trial he showed up to the wrong court room.
>
> 10. Mr. Geiss did not meet with the client until the Friday before the Monday start of the trial and now that I have been practicing for several years I am of the opinion that his performance was substandard.
>
> 11. On the first morning of the trial, at about 9:15, Mr. Geiss still had not appeared in the courtroom, keeping everyone waiting. I went to look for him. I found him sitting in an empty courtroom. No one else was in that room. He did not seem to realize that he was in the wrong room. He looked ill.
>
> 12. Mr. Giess called no witnesses, he failed to make objections and made inappropriate comments during his closing argument.
>
> 13. I believe that Mr. Geiss health issues had a detrimental effect in his ability to effectively prepare, present and defend matters for trial. His lack of awareness, stamina and mental clarity were always at issue.

(Ex. 6 ¶¶ 6-13 to PCR Appl.).[31]

Sheldon M. Hersh—a medical doctor who specializes in Internal Medicine, Geriatrics, Disability Medicine, and interestingly, testifying as an expert witness—has executed a thirty-page

[31] Affidavit of Ramiro Orozco, ESQ., dated Sept. 22, 2016.

affidavit, which is attached as Exhibit 31 to Petitioner's Post-Conviction Application. (Ex. 31 and Ex. 31A to PCR Appl.).[32] In his affidavit, Dr. Hersh gives his opinion that Mr. Geiss was not capable of providing the "high quality legal representation" as described in the American Bar Association's (ABA) *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. Dr. Hersh bases his opinion on his Mr. Geiss's purported medical instabilities, neurological and cognitive impairments, and polypharmacy. (Ex. 31 at 4-26; 29 to PCR Appl). His opinion is also based on the ABA's the *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, his review of 4, 686 pages[33] of Mr. Geiss's medical records, statements in the affidavit of Matthew Busby, as well as those in the affidavits of Ramiro Orozco, Alexander Kassoff, and Vanzetta Williams—three attorneys who had absolutely no involvement in Petitioner's capital murder trial.[34] (Ex. 31 at 2; 28-29 to PCR Appl.).

After giving his credentials and identifying the records he reviewed, Dr. Hersh gives the legal standard that he applied in forming his medical opinion on the legal issue of whether Mr. Geiss was medically—both physically and mentally, not capable of effectively representing Petitioner at trial.

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[32] Affidavit of Sheldon M. Hersh, MD, dated Aug. 31, 2017. (Ex. 31 at 2 to PCR Appl.). Dr. Hersh's *Curriculum Vitae* is attached to his affidavit as Exhibit A. (Ex. 31A to PCR Appl.).

[33] Dr. Hersh states that he reviewed 4,686 pages of Mr. Geiss's medical records, including records from Garden Park Medical Center, Gulfport, Mississippi (GPMC), Mr. Geiss's death certificate, records from Memorial Hospital at Gulfport, Mississippi, Petitioner's PCR Application, and the affidavits of Matthew Busby and Ramiro Orozco to be the medical records of Mr. Geiss. (Ex. 31 at 2 to PCR Appl.). Mr. Geiss's death certificate, the PCR Application, and the Busby and Orozco affidavits are not medical records. There are medical records attached to Mr. Busby's affidavit, but they are Petitioner's. The records from GPMC and MHG are Mr. Geiss's medical records. They total 4,475 pages, not 4,686.

[34] Indeed, Mr. Kassoff and Ms. Williams would have been prohibited from participating in Petitioner's capital murder trial. *See* Miss. Code Ann. § 99-39-107 ("The attorneys appointed to serve in the Office of Capital Post-Conviction Counsel ... shall in no manner, directly or indirectly, participate in the trial of any person charged with capital murder or direct appeal of any person under sentence of death in the state....").

Under a section titled "The Legal Standard of Practice in Capital Cases[,]" Dr. Hersh refers to the ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*" as the standard of practice in complex capital cases. According to Dr. Hersh, this standard insures petitioners under sentence of death "high quality legal representation". (Ex. 31 at 3 to PCR Appl.) (internal punctuation omitted). Dr. Hersh does not define high quality legal representation. He does believe that defense counsel must be "medically able to perform his or her duties[]" in order to provide high quality legal representation. (Ex. 31 at 3 to PCR Appl.). According to Dr. Hersh, an attorney who is medically unstable, and neurologically and cognitively impaired probably will not be able to provide high quality legal representation. (Ex. 31 at 3 to PCR Appl.). Dr. Hersh predictably states that Mr. Geiss was medically unstable, and both neurologically and cognitively impaired. It is Dr. Hersh's opinion that Mr. Geiss "was medically unable to meet the standard of practice to provide high quality legal representation...." (Ex. 31 at 4 to PCR Appl.). The State disagrees with Dr. Hersh's opinion because it is flawed.

First, Dr. Hersh's opinion is based on his application of guidelines proposed by the ABA. Dr. Hersh mistakenly believes the ABA guidelines establish the standard that defines effective assistance. The Supreme Court of the United States announced the standard of effective assistance more than thirty years ago. *Strickland v. Washington*, 466 U.S. at 687-89. Since then, the U. S. Supreme Court has repeatedly refused to recognize the ABA guidelines as rules that define counsel's conduct. *Id.* at 688-89. The ABA guidelines are merely "guides to what reasonableness means, not its definition." *Bobby*, 558 U.S. at 8 (quoting *Strickland*, 466 U.S. at 688). This is because "the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Id.* (quoting *Flores–Ortega*, 528 U.S. at 479). The constitutional standard is "necessarily

a general one[,]" because effective assistance cannot be defined with duties and obligations—including the one Dr. Hersh proposes. *Id.* at 16. Dr. Hersh believes defense counsel is obligated to be medically able to perform his or her duties.

Dr. Hersh's opinion is based on what he believes counsel should do in order to provide high quality legal representation, which makes it subjective. It is flawed for that reason. Precedent teaches: "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 688-89. Imposing a duty like the one Dr. Hersh proposes will almost certainly result in significant and unintended consequences—the figurative first step down a slippery slope. What is the definition of "high quality legal representation"? Can that definition be objectively applied without restricting counsel's choices or conduct? When is an attorney medically able to provide high quality legal representation? When is he not? And, who makes that determination—a healthcare professional... a court... an attorney who believes he is capable of providing high quality legal representation? Dr. Hersh's opinion is flawed because it is subjective and cannot be reconciled with *Strickland* and its progeny.

Second, Dr. Hersh provides an opinion on the law, which is not within the scope of his purported field of expertise. The effectiveness of trial counsel's assistance is a legal issue. With all due respect to Dr. Hersh, this Court is the authority on the effectiveness of counsel's assistance. *See, e.g., Havard*, 988 So.2d at 341 (¶¶ 64-65). Dr. Hersh is a physician, not a legal expert. A review of his *Curriculum Vitae* indicates Dr. Hersh has no legal education, experience, or training. (Ex. 31A to PCR Appl.). His opinion on Mr. Geiss's trial performance is based on his mistaken belief that the ABA's guidelines set *the* standard that defines effective assistance. And his opinion is based

on reasoning that is contrary to well-established, controlling precedent.

Third, there are significant discrepancies with the documents Dr. Hersh reviewed and his opinion. He does not state, or even indicate, how Mr .Geiss's medical problems, or neurological and cognitive impairments prevented Mr. Geiss from making reasonable choices. In fact, Dr. Hersh does not discuss Petitioner's capital murder trial and Mr. Geiss's performance at trial. Dr. Hersh discusses Mr. Geiss's medical problems and their possible effects based on his review of medical records from April of 2009 to March 2011. (Ex. 31 at 4-6 to PCR Appl.). He then concludes that Mr. "Geiss was unable to provide high quality legal representation required for complex and demanding capital cases." (Ex. 31 at 6 to PCR Appl.). Dr. Hersh gives no reason that explains why or how Mr. Giess's medical problems prevented him from providing constitutionally effective assistance. His opinion is contradicted and undermined by facts contained in the record. The same is true for Dr. Hersh's assertions that Mr. Geiss was neurologically and cognitively impaired.

According to Dr. Hersh, Mr. Geiss was unable to provide the high quality legal representation because he suffered from chronic respiratory failure with hypercapnia or carbon dioxide retention, Opioid Use Disorder, chronic renal failure with uremia, and the effects from taking a multitude of prescription medications. (Ex. 31 at 6-20 to PCR Appl.). It is important to note that Dr. Hersh's assertions and opinion are based on a limited review of Mr. Geiss's medical records from two hospitals, Garden Park Medical Center and Memorial Hospital. (Ex. 31 at 2 to PCR Appl.). Between 2009 and 2011, Mr. Geiss was periodically seen and/or admitted as a patient at the two hospitals for a sum total of 135 days.

There are serious concerns with Dr. Hersh's sworn statements. And the State would focus its discussion on Dr. Hersh's Opioid Use Disorder diagnosis to illustrate these concerns. With

respect to Opioid Use Disorder, Dr. Hersh makes this diagnosis based almost entirely on his limited review of Mr. Geiss's medical records. Dr. Hersh has never seen, examined, or treated Mr. Geiss. He makes this diagnosis based on the findings he made in reviewing less than two years worth of Mr. Geiss's medical records. He found evidence of symptoms that he believes meets the criteria of Opioid Use Disorder. According to Dr. Hersh, Mr. Geiss exhibited the behavior that met the following four criteria of the diagnostic features of Opioid Use Disorder. Some initial points are worth noting. One is that the DSM-V replaces the references, substance abuse and substance dependence with substance use disorder. Opioid Use Disorder is one of several substance use disorders. Point two is that a substance use disorder diagnosis must be based on *evidence*. Evidence that will support an Opioid Use Disorder diagnosis includes: pharmacological criteria, evidence of impaired control, social impairment, and risky usage.

It is also important to note the diagnostic features of Opioid Use Disorder. Opioids are taken to reduce pain perception. There are side-effects associated with opioid consumption. Opioids may cause drowsiness, confusion, and depending on the amount ingested, depressed respiration. Signs and symptoms of Opioid Use Disorder:

> reflect compulsive, prolonged self-administration of opioid substances that are used for no legitimate medical purpose or, if another medical condition is present that requires opioid treatment, that are used in doses greatly in excess of that amount needed for that medical condition. (For example, an individual prescribed analgesic opioids for pain relief at adequate dosing will use significantly more than prescribed and not only because of persistent pain.) Individuals with opioid use disorder tend to develop such regular patterns of compulsive drug use that daily activities are planned around obtaining and administering opioids. Opioids are usually purchased on the illegal market but may also be obtained from physicians by falsifying or exaggerating general medical problems or by receiving simultaneous prescriptions from several physicians. Health care professionals with opioid use disorder will often obtain opioids by writing prescriptions for themselves or by diverting opioids that have been prescribed for patients or from pharmacy supplies. Most individuals with opioid use disorder have significant levels of tolerance and will experience

> withdrawal on abrupt discontinuation of opioid substances. Individuals with opioid use disorder often develop conditioned responses to drug-related stimuli (e.g., craving on seeing any heroin powder–like substance)—a phenomenon that occurs with most drugs that cause intense psychological changes. These responses probably contribute to relapse, are difficult to extinguish, and typically persist long after detoxification is completed.[35]

According to the Substance Abuse and Mental Health Services Administration, some symptoms of Opioid Use Disorder are: (1) a strong desire for opioids, (2) an inability to control or reduce consumption, (3) continued use that may interfere with major obligations or social functioning, (4) increased consumption amounts, as well as (5) spending increased amounts of time and effort obtaining and consuming opioids.[36] Withdrawal symptoms include: (1) negative mood, (2) muscle aches, (3) diarrhea, (4) fever, (5) nausea, and (6) insomnia.[37]

> The DSM-V provides the following Opioid Use Disorder diagnostic criteria:
>
> A problematic pattern of opioid use leading to clinically significant impairment or distress, as manifested by at least two of the following, occurring within a 12-month period:
>
> 1. Opioids are often taken in larger amounts or over a longer period than was intended.
> 2. There is a persistent desire or unsuccessful efforts to cut down or control opioid use.
> 3. A great deal of time is spent in activities necessary to obtain the opioid, use the opioid, or recover from its effects.
> 4. Craving, or a strong desire or urge to use opioids.
> 5. Recurrent opioid use resulting in a failure to fulfill major role obligations at work, school, or home.

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[35] See Opioid Use Diagnostic Criteria. Available online at **pcssmat.org/wp-content/uploads/2014/02/5B-DSM-5-Opioid-Use-Disorder-Diagnostic-Criteria.pdf**. (last visited on Jan. 27, 2018).

[36] **samhsa.gov/disorders/substance-use** (last visited on Jan. 27, 2018).

[37] Id.

6. Continued opioid use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of opioids.
7. Important social, occupational, or recreational activities are given up or reduced because of opioid use.
8. Recurrent opioid use in situations in which it is physically hazardous.
9. Continued opioid use despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by the substance.
10. Tolerance, as defined by either of the following:
    a. A need for markedly increased amounts of opioids to achieve intoxication or desired effect.
    b. A markedly diminished effect with continued use of the same amount of an opioid.

       Note: This criterion is not considered to be met for those taking opioids solely under appropriate medical supervision.
11. Withdrawal, as manifested by either of the following:
    a. The characteristic opioid withdrawal syndrome (refer to Criteria A and B of the criteria set for opioid withdrawal).
    b. Opioids (or a closely related substance) are taken to relieve or avoid withdrawal symptoms.

       Note: This criterion is not considered to be met for those individuals taking opioids solely under appropriate medical supervision.[38]

In his affidavit, Dr. Hersh states he found evidence that met Criterion One of the American Psychiatric Association's (APA) Opioid Use Diagnostic Criteria. He states, "[o]pioids are often taken in larger amounts or over a longer period of time than intended. Mr. Geiss used increasing doses of opioids for several years." (Ex. 31 at 13 to PCR Appl.). From thousands of pages of medical records, Dr. Hersh cites seven instances to support his finding. (Ex. 31 at 14-15 to PCR Appl.). And even then, only four of the seven instances occurred prior to Petitioner's October 4,

[38] Opioid Use Diagnostic Criteria. Available online at **pcssmat.org/wp-content/uploads/2014/02/5B-DSM-5-Opioid-Use-Disorder-Diagnostic-Criteria.pdf**. (last visited Jan. 27, 2018).

2010 capital murder trial. The seven instances Dr. Hersh cites can be whittled down to four instances in 2009 because: (1) Petitioner does not challenge trial counsel's post-trial assistance, and (2) trial counsel did not represent Petitioner on direct appeal. Dr. Hersh does not offer an opinion as to when Mr. Geiss became addicted to opioid medications, but his reliance on information that post-date trial suggest that time would be after trial.

The four pre-trial instances Dr. Hersh cites are as follows:

- On April 14, 2009, Mr. Geiss was taking hydrocodone five milligrams. He stated he was taking hydrocodone "eight times a day."
- On October 2, 2009, Mr. Geiss' hydrocodone was increased from five milligrams to 10 milligrams, and he was started on fentanyl patch 25 micrograms/hour.
- In February 24, 2010, Mr. Geiss' fentanyl patch was increased from 25 micrograms/hour to 50 micrograms/hour, along with the hydrocodone 10 milligrams.
- On August 22, 2010, Mr. Geiss was taking hydrocodone 10 milligrams "eight times a day" and fentanyl 50 micrograms/hour patch every three days.

(Ex. 31 at 14 to PCR Appl.).

Dr. Hersh first cites a Memorial Hospital of Gulfport's Patient Activity Sheet, dated April 14, 2009. (Ex. 31 at 14 to PCR Appl.). The Activity Sheet contains several notes made by the attending nurse. One note states that Mr. Geiss complained of pain, requested medication, and stated that he took "'hydrocodone up to 8 times a day.'" (Ex. 34 at 003551 to PCR Appl.). A second note indicates that Mr. Geiss told the attending nurse, "he always has pain and has to take multiple pain pills to get relief." (Ex. 34 at 003551 to PCR Appl.). Dr. Hersh's opinion and Opioid Use Disorder diagnosis (*i.e.,* opioid abuse, dependence, or addiction) are based entirely on this type of uncorroborated, insufficient information. "Opioid abuse is the intentional, nontherapeutic use of a

drug product or substance, even once, to achieve a desired psychological or physiological effect."[39]

The four instances he cites as evidence of Criterion One for Opioid Use Disorder do not show Mr. Geiss was using increasingly large amounts of opioids; or that he was using opioids for longer than intended based. The portions of those records he quotes are vague statements attributed to Mr. Geiss. He relies on them without context or corroboration. According to his sworn statement, Dr. Hersh's review is strictly limited to Mr. Geiss's medical records from two Gulfport hospitals. It does not appear that Dr. Hersh has reviewed any other medical record, such as a clinician who prescribed opioid pain medication to treat Mr. Geiss's chronic pain. And there is absolutely no evidence that even suggests Mr. Geiss illicitly used or obtained opioids, which strongly suggests one thing: Mr. Geiss was prescribed opioid medication.

Mr. Geiss's medical records do not support Dr. Hersh's opinion. Rather, they show hospital healthcare professionals administering opioid medications in a manner consistent with prescription drug manufacturer recommendations and the practice of medicine. High-dose, long-term opioid therapy was, and is, a frequently prescribed treatment option for managing both acute and chronic pain.[40] Further, Mr. Geiss was using Lortab 5, which is an immediate-release combination product that contains hydrocodone, an opioid and Schedule II narcotic, and Acetaminophen. Mr. Geiss could only consume four grams of Acetaminophen in a twenty-four hour period. So his physicians decided to decrease the combination product and manage his pain through the extended release of fentanyl,

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[39] Available online at **mypcnow.org/fast-fact-329** (last visited on Jan. 30, 2018).

[40] See Deborah Dowdell, M.D., Tamara M. Haegerich, Ph.D., Roger Chou, M.D., *CDC Guideline for Prescribing Opioids for Chronic Pain – United States 2016*, MMWR vol. 65 Recomm. Rep. No. 1, p. 2 (Mar. 18, 2016) (an estimated 3-4% of the nation's adult population were prescribed long-term opioid therapy in 2005). Available online at **cdc.gov/mmwr/volumes/65/rr/pdfs/rr6501e1.pdf** (last visited Jan. 28, 2018).

also an opioid and Schedule II narcotic. Before they could do so, Mr. Geiss's physicians had to know that he was opioid-tolerant to the dosage equivalent of fentanyl 25mcg/h. (Resp't's Ex. 1).[41] This tolerance requirement is clearly labeled on fentanyl transdermal system packaging (Resp't's Ex. 1). Once his tolerance was confirmed, Mr. Geiss initially received fentanyl in a 25 mcg/h dose *via* transdermal patch and increased to 50 mcg/h to manage his pain, according to his tolerance. He also continued taking hydrocodone 10mg to treat break through pain not managed by the fentanyl. The records Dr. Hersh cites indicate healthcare professionals gave hydrocodone-Acetaminophen, a short-acting immediate release (IR) opioid, as needed (PRN) by mouth/orally (PO) in either four or six hour increments in a twenty-four hour period.

The State would also call the Court's attention to Dr. Hersh's citation to a comment attributed to Mr. Geiss, which appears in a Discharge Med Reconciliation Order, dated August 22, 2010. On page one, the Discharge Med Reconciliation Order states that Mr. Geiss reported using "10mg/650mg of hydrocodone-Acetaminophen eight times a day, as needed." (Ex. 34 at 002177 to PCR Appl.). Dr. Hersh cites that comment as evidence of Criterion One. But there is more. The six-page order contains the ordering physician's instructions for administering hydrocodone-Acetaminophen. The instructions appear as the final entry on the fourth page of the order. That entry reads, in part, as follows:

HYDROCODONE-ACETAMINOPHEN 10-500 MG

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[41] The increased amount of hydrocodone that Mr. Geiss's was ingesting—5mg to 10mg—is evidence of tolerance, not addiction. Opioid Use Disorder or addiction "is a problematic pattern of opioid use leading to clinically significant impairment or distress." *See* source cited *supra* note 40 at p. 2. Opioid addiction is different from tolerance, which can exist "without a diagnosed disorder." *Id.* Tolerance is: "[a] need for markedly increased amounts of opioids to achieve intoxication or desired effect[; or] "diminished response to a drug with repeated use." Opioid Use Disorder Diagnostic Criteria at 1. Available online at **pcssmat.org/wp-content/uploads/2014/02/5B-DSM-5-Opioid-Use-Disorder-Diagnostic-Criteria.pdf**.

(HYDROCODONE-ACETAMINOPHEN)

Instructions:

DO NOT EXCEED 4 GRAMS PER 24 HOURS OF ACETAMINOPHEN IN ANY MEDICATION COMBINATION

ADULT MAX: *5 TABLETS/DAY*

(Ex. 34 at 002180 at PCR Appl.) (emphasis added). The instructions conflict with Mr. Geiss's purported comment because they limit the maximum number of hydrocodone-Acetaminophen tablets that could be given in a twenty-four hour period to a maximum of 5. Additionally, the discontinue column for that entry is clearly marked with a handwritten, "X". (Ex. 34 at 002180 at PCR Appl.). The comment that Dr. Hersh cites is directly contradicted by the prescribing physician's instructions. The State has found no record in Petitioner's Exhibits 33 or 34 that documents a single instance where Mr. Geiss ingested 10mg of hydrocodone eight times within a twenty-four hour period.

Current medical literature states that an Opioid Use Disorder diagnosis should be based on evidence—reliable, credible information.[42] Dr. Hersh's diagnosis is based on his interpretation of small portions of Mr. Geiss's medical records that are either taken out of context, contradicted by orders and instructions in the same record, or inconsistent with manufacturer labeling and prescribing information. The information Dr. Hersh relies on does not meet Criterion One of the diagnostic criteria for Opioid Use Disorder. It does not show Mr. Geiss used opioids in an increasingly large amount, or for longer than intended.

Dr. Hersh also finds evidence that meets Criterion Five. (Ex. 31 at 13 to PCR Appl.). Criterion Five is "[r]ecurrent opioid use resulting in a failure to fulfill major role obligations at work, school, or home." (Ex. 31 at 13 to PCR Appl.). Once again, Dr. Hersh goes beyond the scope of

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[42] *Guideline for Prescribing Opioids for Chronic Pain – United States 2016*, MMWR vol. 65 Recomm. Rep. No. 1, at 2. Available online at **cdc.gov/mmwr/volumes/65/rr/pdfs/rr6501e1.pdf**.

his medical expertise in concluding that Mr. Geiss's Opioid Use Disorder prevented him from providing high quality legal representation. (Ex. 31 at 13-19 to PCR Appl.). Dr. Hersh states that opioids caused Mr. Geiss to become neurologically and cognitively impaired by worsening his respiratory failure and mental alertness. He explains that "[o]pioids cause sedation, respiratory depression with hypercapnia, and decreased mental alertness." (Ex. 31 at 16 to PCR Appl.). He then points to notes in Mr. Geiss's medical records.

Mr. Geiss's medical records do not show opioid usage interfered with his roles at home or work. His records do not show obtaining and consuming opioids took priority over Mr. Geiss's legal practice at the Harrison County Public Defender's Office, including his representation of Petitioner. The State Court Record of Petitioner's capital murder trial contains facts that show Mr. Geiss was coordinating Petitioner's defense throughout trial proceedings, even when hospitalized. And his records do not show Mr. Geiss engaging in drug-seeking or abusive behavior, such as refusing to undergo appropriate medical examination, claiming to have lost prescriptions, or tampering with prescriptions. What Dr. Hersh asserts as evidence of Criterion Five will not support that finding.

Dr. Hersh also finds evidence of Criterion Nine, which is the "[c]ontinued use despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by opioids." (Ex. 31 at 13 to PCR Appl.). Dr. Hersh states that Mr. Geiss never stopped using opioids even though they exacerbated his respiratory insufficiency, made him lethargic and drowsy, and impaired his mental and neurological functioning. (Ex. 31 at 15 to PCR Appl.). He cites six instances where a physician recommended decreasing or discontinuing Mr. Geiss's opioid medications and fourteen instances where Mr. Geiss ignored those recommendations. (Ex. 31 at 15; 16-17 to PCR Appl.).

But the records that Dr. Hersh cites do not show Mr. Geiss knew his reoccurring medical problems were probably caused or exacerbated by his opioid usage. It is true that hospital physicians recommended Mr. Geiss decrease or discontinue taking opioid pain medicines. It is also true that physicians continued to order these medications for Mr. Geiss. Two important facts concerning Dr. Hersh's citations to medical records or portions of medical records must be noted. First, all six instances that Dr. Hersh cites—those where a physician recommended decreasing or discontinuing opioid use—occurred *after* trial, beginning on November 10, 2010. (Ex. 31 at 15 to PCR Appl.). And second, eleven of the fourteen instances—those where Mr. Geiss purportedly ignored physicians' recommendations—occurred *before* November 10, 2010, and *before* any physician made any recommendation on Mr. Geiss's opioid intake. (Ex. 31 at 16-17 to PCR Appl.). How could Mr. Geiss ignore or refuse a recommendation that had not been made? The remaining three instances where Mr. Geiss allegedly ignored a physician's recommendation occurred *after* Petitioner's trial—November 10, 2010, December 13, 2010, and December 24, 2010. (Ex. 31 at 17 to PCR Appl.). Dr. Hersh has diagnosed Mr. Geiss with Opioid Use Disorder based on events that either could not have taken place or took place after trial. The records of these events do not show Mr. Geiss knew opioid medications were causing or exacerbating his medical problems and ignored recommendations to discontinue their use.

Finally, Dr. Hersh finds evidence that meets Criterion Ten. He states that, "According to DSM-5, a person must have at least two of 11 diagnostic symptoms within a 12-month period to be diagnosed with OUD. Gordon Geiss met four criteria for OUD." (Ex. 31 at 13 to PCR Appl.) (footnote omitted). He affirmatively represents the following as Criterion Ten, listed in the DSM-V:

- *Criteria #10 Tolerance, with a need for markedly increased amounts of opioids to achieve intoxication or desired effect.* Mr. Geiss required increasing amounts

of opioids for his reported symptoms.

(Ex. 31 at 13 to PCR Appl.) (emphasis in the original). Because Dr. Hersh does not, the State will quote Criterion Ten in its entirety. Criterion Ten of the diagnostic features for Opioid Use Disorder in the DSM-V reads as follows:

> 10. Tolerance, *as defined by either of the following*:
>
> a. A need for markedly increased amounts of opioids to achieve intoxication or desired effect.
>
> b. *A markedly diminished effect with continued use of the same amount of an opioid.*
>
> ***Note:*** *This criterion is not considered to be met for those taking opioids solely under appropriate medical supervision.*[43]

When read in its entirety, Criterion Ten is crystal clear: "This criterion is not considered to be met for those taking opioids solely under appropriate medical supervision."[44] His records show that Mr. Geiss received care at both Garden Park Medical Center (GPMC) and Memorial Hospital (MHG) in Gulfport several times, beginning in April of 2009 through March of 2011. Those records also show more often than not that Mr. Geiss was admitted as a patient. (Ex. 33, 34 to PCR Appl.). He was given more than one opioid, including hydrocodone and fentanyl, at both hospitals on more than one occasion.

Dr. Hersh has found evidence of Criterion Ten. He has managed to do this by ignoring most the language under Criterion Ten of the diagnostic criteria for an Opioid Use Disorder diagnosis. Mr. Geiss's medical records show he took opioid medications as ordered solely under appropriate medical supervision. This necessarily means Criterion Ten cannot be met. But even if this were not

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[43] Opioid Use Disorder Diagnostic Criteria at 1. Available online at **pcssmat.org/wp-content/uploads/2014/02/5B-DSM-5-Opioid-Use-Disorder-Diagnostic-Criteria.pdf** (emphasis added).

[44] *See* source cited *supra* note 43.

true, the increase in opioid medication is not evidence of addiction. Dr. Hersh bases his opinion is not based on evidence that will support a finding of Criterion Ten of the DSM-V's diagnostic criteria for Opioid Use Disorder.

With that in mind, Petitioner's first ineffective assistance issue challenges trial counsel's efforts in investigating mitigation evidence. (PCR Appl. at 7-22). He contends that Mr. Geiss conducted no investigation for mitigating evidence because serious health issues prevented him from doing so; and that had Mr. Geiss conducted an investigation into mitigation evidence, he would have uncovered considerable mitigation evidence that should have been presented to the jury. (PCR Appl. at 13; 31-34). The mere presence of illness alone is insufficient to support a claim of ineffectiveness.

The habeas petitioners in *Buckelew v. United States*, 575 F.2d 515 (5th Cir. 1978), claimed their trial attorney was "too old and sick" to effectively represent them. 575 F.2d 520. They argued that trial counsel refused to call "an out-of-state witness because he wanted to shorten the trial for his health's sake...." *Id.* at 521. In rejecting that contention, the Fifth Circuit noted three things: (1) that the petitioners failed to show "what helpful testimony that witness could have provided[,]" and (2) that "complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and ... [(3) that] allegations of what a witness would have testified are largely speculative." *Id.* (citations omitted).

In *Berry v. King*, 765 F.2d 451 (5th Cir. 1985), the Fifth Circuit Court of Appeals spoke to the issue of counsel's alleged impairment—drug impairment—during trial in that case. The Fifth Circuit held that, "under *Strickland* the fact that an attorney used drugs is not, in and of itself, relevant to an ineffective assistance claim. The critical claim is whether, for whatever reason, counsel's performance was deficient and whether that deficiency prejudiced the defendant." 765

F.2d at 454. The issue, for *Strickland* purposes, is not whether trial counsel was suffering from outside problems, but whether those externalities affected the sentencing portion of Petitioner's trial. *See Hodges v. State*, 949 So.2d 706, 721 (¶¶ 37-39) (Miss. 2006) (defendant must show deficiency and prejudice; attempts to explain why counsel was ineffective, *e.g.*, bipolarism, drug use, suicidal tendencies, and mental illness, do not independently prove that counsel was ineffective).[45]

Here, Petitioner is arguing that he was denied the right to counsel because Mr. Geiss was in poor health. That is exactly what he and the information supporting his contention says. In his PCR Application, Petitioner states: "These affidavits, along with the other evidence, show that the failure to do a mitigation investigation was not a strategic decision—and that *counsel's health* was likely *the explanation*." (PCR Appl. at 21) (emphasis added). "It is apparent ... that the failure to investigate was due to *counsel's illness and its effects*." (PCR Appl. at 21). In his affidavit, Mr. Busby expressly states: "I believe that *Mr. Geiss* would have been a good defense attorney if he had been *healthy*...." (Ex. 2 ¶ 13 to PCR Appl.). Whether Mr. Geiss was in poor health is not the issue. The issue is whether those issues affected the sentencing portion of Petitioner's trial. *Hodges*, 949 So.2d at 721. Petitioner does not draw a specific connection between Mr. Geiss's health issues and any alleged failings in trial counsel's performance. And Petitioner makes no mention of the three other attorneys who represented him. When a "defendant was represented by multiple attorneys, an ineffective assistance challenge is particularly difficult to mount." *United States v. Dunfee*, 821 F.3d 120, 128 (1st Cir. 2016); *Havard*, 988 So.2d at 345-46 (¶¶ 83-86).

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[45] The District Court, in *Hodges v. Epps*, 2010 WL 3655851, **30-39 (N.D.Miss. 2010) (unreported), granted habeas relief granted in part, and denied in part on the issue of ineffective assistance. The district court found that trial counsel was ineffective at sentencing, but based that decision on specific actions of counsel during that phase of trial. The court did not find that counsel was ineffective due to the mere existence of alleged mental or physical health issues.

According to Petitioner, the record clearly shows Mr. Geiss's health issues prevented him from directing co-counsel or otherwise discharging his duties as lead counsel. (PCR Appl. at 22). His argument is directly contradicted by portions of the record. For example, during a March 29, 2010 motions hearing, Mr. Geiss appeared before the trial court and explained why duplicate pre-trial motions had been filed. Mr. Geiss explained that during a hospital stay, he contacted two attorneys and asked that they make certain filings to insure Petitioner's motions were timely. (Tr. 24-25). This is evidence of Mr. Geiss's participation in Petitioner's defense.

The record also reveals that on March 15, 2010, the trial court entered an Order, which gave the defense the permission and funding needed to employ the services of Dr. Beverly Smallwood. That Order reads, in part, as follows:

> This matter having come before the Court upon the *motion of the Defendant* in the above styled and numbered cause to authorize the Defendant to employ the services of a Psychologist to evaluate the Defendant to determine whether the Defendant knew right from wrong at the time of the alleged crimes, whether the Defendant is competent to assist counsel in his defense, *to prepare a mitigation study*, to determine the level of the defendant's intelligence and to assist counsel at the trial of this matter....
>
> ....
>
> Therefore, it is ORDERED, that the Defendant is hereby authorized to employ the services of Dr. Beverly Smallwood, P.O. Box 17918, Hattiesburg, MS 39404 to evaluate the Defendant to determine whether the Defendant knew right from wrong at the time of the alleged crimes, whether the Defendant is competent to assist counsel in his defense, *to prepare a mitigation study*, to determine the level of the defendant's intelligence and to assist counsel at the trial of this matter and the Court hereby authorizes payment for her services not to exceed $3,000.00 to conduct the aforesaid professional services and to assist Defendant's counsel in the defense of the Defendant.

(C.P. 92-93) (emphasis added).

Petitioner's assertion, that Mr. Busby—the attorney with the least amount of capital litigation experience—took it upon himself to obtain Petitioner's medical records, is also undermined by the

record. The record suggests that Mr. Busby's efforts had more to do with the timing of the entry of the trial court's Order, above, and Dr. Smallwood's evaluations of Petitioner, rather than Mr. Busby's pure initiative. On March 15, 2010, the trial court entered the Order allowing the defense to hire Dr. Smallwood for the purposes specified in the Order. (C.P. 92-93). Dr. Smallwood evaluated Petitioner on April 1, 2010, approximately two weeks after the trial court entered the Order. (Ex. 8 at 1 to PCR Appl.). Four days later, on April 5, 2010, Mr. Busby formally requested the disclosure of Petitioner's medical records. (Ex. 2 at 6 to PCR Appl.).[46] Dr. Smallwood evaluated Petitioner a second time on April 23, 2010. (Ex. 8 at 1 to PCR Appl.). The requested medical records were shipped to Mr. Busby's law office on June 22, 2010—prior to Dr. Smallwood being called as a witness. (Ex. 2 at 5 to PCR Appl.). And, the fact that Mr. Busby obtained these documents is evidence that shows the defense conducted an investigation for mitigation evidence.

It is also apparent from the record that Mr. Geiss was present at all times during the sentencing phase. He participated in all portions of the sentencing phase—including the submission of jury instructions (on which Mr. Stewart, one of Petitioner's defense attorneys, took point). Petitioner was fully represented at sentencing by four attorneys, who filed at least fourteen motions directly relevant to the sentencing phase; requested nine jury instructions; argued against the State's submission of certain jury instructions; argued against the aggravating factors the State intended to use at sentencing; requested and received a twenty-four hour cooling off period for the jury; secured the expert assistance of Beverly Smallwood, Ph.D., a licensed psychologist with thirty years of experience; elicited from Dr. Smallwood detailed testimony regarding Petitioner's bipolarism,

[46] Approximately 150 pages of Petitioner's medical records are attached to Mr. Busby's affidavit as Exhibit A. Those pages are unnumbered. To avoid confusion, the State cites the sixth *consecutive* page of Exhibit A to Mr. Busby's affidavit—a written request for medical records that is dated April 5, 2010.

ADHD, and conduct disorder; and used Dr. Smallwood's testimony to argue Petitioner's mental deficit as a mitigating factor against the death penalty.

Mr. Geiss's illness and its effects do not independently prove his performance was deficient, much less the other attorneys who represented him. *Hodges*, 949 So.2d at 721 (¶ 39); *Barry*, 765 F.2d at 454; *Buckelew*, 575 F.2d at 521. "The critical claim is whether, for whatever reason, counsel's performance was deficient and whether that deficiency prejudiced the defendant." *Berry*, 765 F.2d at 454. Petitioner does not draw a specific connection between Mr. Geiss's illness and its effects with any alleged failings in trial counsel's performance. He does not show counsel failed to conduct an investigation for mitigating evidence.

But even if he had, Petitioner cannot show actual prejudice. This Court addressed a similar argument in *Moffett v. State*, 156 So.3d 835 (Miss. 2014). In doing so, the Court stated that:

> Moffett further asserts that defense counsel was unaware that family members were willing to testify on his behalf, and as a result, the decision not to call family members cannot be considered strategic. To prevail on this claim, Moffett must show that, had the affiants been called to testify, there was a reasonable probability that the result of the proceeding would have been different. *Spicer v. State*, 973 So.2d 184, 191 (Miss. 2007) (citing *Mohr*, 584 So.2d at 430).
>
> > "To assess the probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweighs it against the evidence in aggravation." *Sears v. Upton*, ___ U.S. ___, 130 S.Ct. 3259, 3266, 177 L.Ed.2d 1025 (2010). The United States Supreme Court has stated that there "is no prejudice when the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decision maker...." *Id*. at 3266.

156 So.3d at 849 (¶ 25) (quoting *Chamberlin v. State*, 55 So.3d 1046, 1054 (Miss. 2010)).

Petitioner's first issue with counsel's performance is based on Mr. Geiss's "illness and its effects." (PCR Appl. at 21). He cites Mr. Geiss's "illness and its effects" as the reason for trial

counsel's failure to conduct an investigation into mitigation evidence. (PCR Appl. at 21-22). Petitioner also relies on affidavits executed by James Garbarino, Ph.D. (Exhibit 3 to PCR Appl.), Petitioner's adoptive mother (Exhibit 4 to PCR Appl.), Petitioner's biological mother (Exhibit 5 to PCR Appl.), Bhushan Agharkar, M.D. (Exhibit 7 to PCR Appl.), and Dr. Beverly Smallwood's 2010 mental evaluation report (Exhibit 8 to PCR Appl.) as evidence that trial counsel would have found had they conducted an investigation into mitigating evidence. "'[C]laims that additional witnesses should have been called are disfavored.'" *Corrothers*, 2017 WL 452912, at *4 (¶ 17) (quoting *Turner v. State*, 953 So.2d 1063, 1074 (Miss. 2007)). "There 'is no prejudice when the new mitigating evidence would barely have altered the sentencing profile presented to the decision maker.'" *Id.* (quoting *Chamberlin*, 55 So.3d at 1054 (quoting *Sears v. Upton*, 561 U.S. 945, 954 (2010))). The information in the affidavits of Dr. Garbarino, Mrs. Ronk, Ms. Burrell, Dr. Agharkar, and Dr. Smallwood's report are cumulative to that which was presented at trial. As demonstrated below, had this information been presented during the penalty phase, it would not have altered the profile presented to the jury.

a. Affidavit of James Garbarino, Ph.D.

James Garbarino, a developmental psychologist, has executed an affidavit on Petitioner's behalf. In his affidavit, Dr. Garbarino states what he would have testified to had trial counsel hired him and called him as an expert witness during the penalty phase of Petitioner's trial. He would have testified as follows:

> [Petitioner] is best understood as a troubled child inhabiting a young man's body. His troubled development appears to flaw from some combination of temperamental vulnerabilities combined with disrupted family relationships linked to parental rejection. Despite the generally positive family end community environment provided by his adoptive parents, the unresolved issues of his adoption and his reaction to that adoption had a serious negative effect on [Petitioner]'s emotional life

> and development. His problems with attachment and a resulting "emotional neediness" and oppositional and defiant behavior flowed from this disconnect and deteriorated in adolescence. This in turn led to chronic maladjustment, substance abuse, and delinquent behavior leading up to the crime for which he was sentenced (to death row). His developmental problems came to fruition during adolescence and early adulthood as very serious issues with identity, socio-emotional immaturity, deceitfulness, substance abuse, an depression.
>
> ....

(Ex. 3 at 3, 15 to PCR Appl.).[47] Dr. Garbarino would have also pointed out the fact that Petitioner recalled an instance where he overheard his adoptive parents:

> at age six he overheard h is parents talking about him, and that he heard them say that "I was the biggest mistake in their whole lives." And, "I wish you were never born." And, "I wish we had never adopted you." At age 9, he remembers his mother saying, "the biggest mistake I ever made was adapting you." These combine the two most devastating things any child can hear from a parent (wishing you were never born in general, and wishing that an adopted child had not been adopted). They convey the essence of the parental rejection as explored in Ronald Rohner's research. They give rise to profound sadness (which may manifest as depression) and rage (which may manifest as aggression). In [Petitioner]'s case, both were present: he suffered from serious issues of depression, and on more than one occasion "attacked" his parents—leaving them to install dead bolt locks on the inside of their bedroom because they were afraid of [Petitioner].

(Ex. 3 at 9 to PCR Appl.).

The jury would have heard Dr. Garbarino opine that:

> ... [Petitioner]'s behavior in the attack on Michelle is best understood as the product of developmental disruptions that began in childhood and escalated in adolescence and adulthood, disruptions that created a person who is both extremely "emotionally needy" and in chronic conflict with society. His experience was already "at risk" by virtue of the fact that he was an adopted child. It was undermined significantly by his perception of being rejected by his adoptive parents and compared negatively with his sister, who was also adopted. As [Petitioner] put it, "She was the good child and I was the bid child." His temperament and attachment issues appeared to have launched him on an increasingly negative path in childhood that became a pattern of chronic alienation, disengagement, anti-social behavior, and substance abuse in adolescence and adulthood, which culminated in the crime for which he is currently

[47] Affidavit of James Garbarino, PH.D, dated Sept. 22, 2016.

incarcerated.

(Ex. 3 at 15 to PCR Appl.).

b. Affidavit of Susan Ronk

Susan Ronk, Petitioner's adoptive mother and New Jersey resident, has executed an affidavit nearly six years after Petitioner's capital murder trial. Her affidavit summarizes what she would have testified to had she been called as a witness. According to Mrs. Ronk, Mr. Geiss did not contact her or her husband to discuss Petitioner's background, mitigation evidence, or individuals who might be potential sources of mitigation evidence. (Ex. 4 ¶¶ 9, 10 to PCR Appl.).[48] She says that "[w]hen [Petitioner]'s *attorney* called, it was *usually* to ask us to help him convince [Petitioner] to accept a plea bargain." (Ex. 4 ¶ 11 to PCR Appl.) (emphasis added). And yet, Mrs. Ronk offers little insight into Petitioner's background and fails to identify a single source of mitigation evidence.

Had she been called, Mrs. Ronk would have told the jury that she and her husband adopted Petitioner and raised him as their biological son, but made certain that he understood what it meant to be adopted. (Ex. 4 ¶ 2 to PCR Appl.). The Ronks raised Petitioner in the Church, took him on family vacations and trips, and allowed him to participate in various extracurricular activities. (Ex. 4 ¶ 2 to PCR Appl.). The jury would have heard that Petitioner excelled in school at an early age. (Ex. 4 ¶ 3 to PCR Appl.). The jury would have also heard that, when Petitioner was older (after turning 18), he wanted to meet his biological mother. (Ex. 4 ¶ 5 to PCR Appl.). The jury would have learned that the Ronks provided Petitioner with the means to do so. (Ex. 4 ¶ 5 to PCR Appl.). Mrs. Ronk would have told the jury that the meeting left Petitioner feeling rejected. (Ex. 4 ¶ 5 to PCR Appl.). The jury would have heard about the Ronks placing Petitioner in counseling to help

[48] Affidavit of Susan Ronk, dated Sept. 21, 2016.

him cope with his feelings to no avail. (Ex. 4 ¶ 6 to PCR Appl.). And, the jury would have heard that Petitioner's behavioral problems only progressed as he grew older. (Ex. 4 ¶¶ 6-8 to PCR Appl.).

c. Affidavit of Jackie Burrell

Jackie Burrell, Petitioner's biological mother and Mississippi resident, has executed an affidavit that summarizes the testimony she could have given had she been called as a witness. She swears that none of Petitioner's attorneys contacted her at any time until March 31, 2016, when post-conviction counsel got in touch with her. (Ex. 5 ¶ 12 to PCR Appl.).[49] Had she been called, Ms. Burrell would have told the jury that, in the late 70s, she was living with her parents in on the campus of French Camp Academy. (Ex. 5 ¶ 6 to PCR Appl.). The jury would have learned that her father served as the chaplain for French Camp Academy—a school for youth who were experiencing difficulty in their lives. (Ex. 5 ¶ 7 to PCR Appl.). She would have told the jury that she was raped by a student named, Eddie King; that Mr. King was Petitioner's father; and that Ms. Burrell had no contact with Mr. King after he dropped out of school and moved away from French Camp. (Ex. 5 ¶¶ 8-9 to PCR Appl.). The jury would have also heard that Ms. Burrell arranged Petitioner's adoption before he was born, and did not have any contact with him throughout his childhood. (Ex. 5 ¶¶ 4-5, 11 to PCR Appl.).

d. Affidavit of Bhushan S. Agharkar, M.D.

In his PCR Application, Petitioner asserts "[t]rial counsel should have engaged the services of a qualified expert such as Dr. James Gabrino." (PCR Appl. at 31). He further states that his "post-conviction counsel commissioned a report from Dr. Gabrino on the recommendation of the psychiatrist who evaluated [him] during the post-conviction investigation." (PCR Appl. at 31). Dr.

[49] Affidavit of Jackie Burrell, dated Sept. 1, 2016.

Bhushan Agharkar, who the State believes is the psychiatrist Petitioner is referring to, has executed an affidavit on Petitioner's behalf. Dr. Agharkar's affidavit states as follows:

> 1. I am over the age of twenty-one, and I am competent to give this affidavit and to testify regarding the matters in this affidavit.
> 2. At the request of the Mississippi Office of Capital Post Conviction Counsel, I interviewed [Petitioner] on July 7, 20l6, for approximately two hours.
> 3. It appeared to me that his history involved one of trauma and abandonment.
> 4. Further, the symptoms as he reported may be consistent with Bipolar Disorder or at least a major mood condition.
> 5. I will need more time to review his social history as it develops as well as conduct further interviews in order to confirm my clinical suspicions and make further determinations.
>
> Further affiant sayeth naught.

(Ex. 7 ¶¶ 1-5 to PCR Appl.).[50]

e. Dr. Smallwood's 2010 Report of Psychological Evaluation of Petitioner

As for Dr. Smallwood's mental evaluation report, Petitioner relies on a couple of statements in Dr. Smallwood's report. (Exhibit 8 to PCR Appl.). In her report, Dr. Smallwood notes "that many variables which may provide mitigation are reportedly found in this man's psychological and medical history." (Ex. 8 at 24 to PCR Appl.). She then disclaims the fact that she did "not have the benefit of these records[,]" and recommends "that these and other relevant records be secured and that collateral witnesses be interviewed." (Ex. 8 at 24 to PCR Appl.). She states that her 2010 mental examination "is not a mitigation study...." (Ex. 8 at 24 to PCR Appl.).

After presenting Dr. Smallwood to the jury as a reliable expert in the field of psychology, counsel next elicited the following mitigation testimony, which is most clearly set forth in the

[50] Affidavit of Bhushan S. Agharkar, MD, dated Sept. 23, 2016. Dr. Agharkar does not give his education, training, profession, or field of expertise. See Ex. 7 to PCR Appl.

exchange between Mr. Geiss and Dr. Smallwood herself. But for the convenience of the Court, the following points were relevant to the penalty phase of trial:

- Dr. Smallwood inquired into Petitioner's history.
- She evaluated Petitioner with regard to problems in his past and at the time of the murder.
- She reviewed Petitioner's medical records from Mountainside Hospital in New Jersey.
- After talking with Petitioner, Dr. Smallwood confirmed his symptoms and diagnoses were the same as listed in his medical records.
- Dr. Smallwood spoke to Petitioner's parents.
- She learned that Petitioner started demonstrating "significant problems" when he was 10.
- Petitioner had a lifelong history of impulsive behavior, aggression, and not thinking before making decisions.
- Petitioner demonstrated hallmark symptoms of manic depressive disorder and ADHD.
- Petitioner had been hospitalized numerous times for mental problems.
- Petitioner had a nearly lifelong substance abuse problem, and began abusing drugs when he was just a child.
- Petitioner was adopted at three days old. He had feelings of resentment about his adoption; he felt he was a mistake, and took his anger out on his adoptive parents.
- Petitioner became curious about his background when he was a child living in New Jersey. When Petitioner was ten years old, his adoptive parents took him to visit Mississippi, where his biological family lived. Around this same time, Petitioner's mental problems began to manifest.
- Petitioner suffers from bipolarism and ADHD.
- Bipolarism is not a common disorder. Only .4 to 1.6% of population is actually bipolar.
- Bipolarism is a serious mental disorder based on an imbalance in a person's brain chemistry. The person suffering has severe depression and also mania. Bipolarism is more than the "little ups and downs of normal everyday life. Both of these can create serious life disruption."
- ADHD involves a pattern of inattention and the inability to stay with something, as well as an impulsivity and a failure to make good choices, based on a break down in a person's thought process.
- Petitioner suffers from major depressive episodes. His symptoms have included daily depression, diminished interest in daily activities, significant weight fluctuations, insomnia and/or hypersomnia, psychomotor aggravation or retardation, fatigue and loss of energy nearly every day, feelings of worthlessness or excessive or inappropriate guilt, diminished

ability to think or concentrate, indecisiveness, and recurrent thoughts of death or suicidal ideation.

- Petitioner attempted to commit suicide on several occasions.
- Petitioner's bipolarism also includes episodes of mania (the opposite of severe depression). Petitioner has experienced distinct periods of abnormally and persistently elevated, expansive or irritable moods that lasted more than a week at a time. Symptoms have included inflated self-esteem, extreme optimism leading to irrational behavior, decreased sleep, racing thoughts, distractibility, flights of ideas, an increase in goal directed activity regardless of the effect on others, and excessive involvement in things that have short-term pleasure.
- Petitioner's bipolarism needs to be treated with medication because it involves problems with his brain chemistry.
- Petitioner's bipolarism also needs to be treated with therapy to allow him to learn coping skills to think and make better choices.
- Petitioner did not follow through with receiving treatment for his mental disorders. He did not follow through on treatment recommendations or stay in his treatment programs.
- As a child, Petitioner was given Ritalin for ADHD, but would spit it out and not take it.
- Non-compliance with the treatment of his bipolarism and ADHD was, in itself, symptomatic of Petitioner's mental disorders.
- People can outgrow ADHD. But, many adults have ADHD. As an adult, Petitioner displayed symptoms of ADHD, including impulsivity, one of the major symptoms.
- Although not documented in his medical records, Dr. Smallwood's study of Petitioner's history, her interviews, and testing showed Petitioner suffered from a conduct disorder that started in his childhood.
- Conduct disorder is not, "a little bad behavior, which a lot of kids have." It is a persistent pattern of behavior in which basic rights of others or age appropriate norms are violated. Petitioner's conduct disorder included aggression, property destruction, and deceitfulness.
- His conduct disorder was classified as "very severe", dating "many, many, many years back."
- Petitioner's conduct disorder is evident today.
- His bipolarism and ADHD make it "much more difficult" for him to control his actions.
- Petitioner did not have a mental disorder than overpowered him to the point that he did not know right from wrong. But when confronted with stressful situations, he was vulnerable to making the wrong decisions. This was something he could "not totally" control.
- Petitioner had a mental IQ of 114. He was tested for malingering and, out of 8 tests, he passed 2, failed 2, and was tested inconclusive on the other 4.
- Dr. Smallwood took every piece of evidence into consideration, including Petitioner's mental tests and findings of malingering in making her diagnoses and evaluating his mental status.

- Dr. Smallwood's diagnoses were based on a comprehensive evaluation, which included the good and the bad. She accounted for the fact that Petitioner was not entirely truthful during the evaluation. Her diagnoses were not altered by those findings.

(Tr. 673-690).

Petitioner cannot show a reasonable probability he would have been sentenced differently had the information been presented to the sentencing jury because the statements in the affidavits of Dr. Garbarino, Mrs. Ronk, Ms. Burrell, and Dr. Agharkar are cumulative to Dr. Smallwood's testimony at trial. Petitioner admits as much in his PCR Application. For example, on pages 33 and 34 of his PCR Application, Petitioner argues that the analysis and opinion found in Dr. Garbarino's affidavit would have given the jury "more detail and analysis of [Petitioner]'s disorders stemming from his troubled childhood...." (PCR Appl. at 33-34). Whether Dr. Garbarino would have given "more detail and analysis to Petitioner's disorders" is admittedly cumulative to what was presented at trial. To demonstrate actual prejudice, Petitioner "must show that, had the affiants been called to testify, there was a reasonable probability that the result of the proceeding would have been different." *Moffett*, 156 So.3d at 849 (citing *Spicer*, 973 So.2d at 191 (citing *Mohr*, 584 So.2d at 430)). The information attached to his PCR Application was presented to the sentencing jury.

Counsel's decision to limit mitigation witnesses to Dr. Smallwood was not simply trial strategy—it was a smart move. Sure, counsel could have tried to secure additional funds for expert witnesses, to interview Petitioner, and review and opine on all of his medical records—although it is pure speculation to suggest that such a request would have been granted. But even assuming that such a motion had been granted, the testimonies of witnesses that Petitioner relies on in these proceedings are no different from what Dr. Smallwood testified to: that Petitioner was adopted when he was three days old; suffered from longstanding mental and emotional deficits and disorders,

including at the time he killed Michelle Craite; and his adoption and feelings of rejection appear to be linked to his mental and emotional deficits and disorders. Yes, trial counsel could have moved to bring in all of Petitioner's doctors who examined him over the course of his twenty year history of mental problems. And they would have testified to what? The same disorders and deficits that Dr. Smallwood testified to during the penalty phase of Petitioner's capital murder trial.[51]

Petitioner is not entitled to relief for his contention that trial counsel were ineffective for failing to investigate mitigating evidence. He has not shown trial counsel were deficient. He has presented no evidence demonstrating the testimony of additional experts would not have been redundant. Whether one of the attorneys who represented him at trial had health issues is not evidence of deficient performance—especially given the fact that Petitioner was represented by four attorneys. Further, based on his allegations and the exhibits supporting them, Petitioner cannot show actual prejudice as a result of trial counsel's performance. This is especially true in that Dr. Smallwood agreed with the doctors and medical experts who had examined him in the past; she relied on their records and on Petitioner's medical history (including that given to her by Petitioner and his family); she used their diagnoses to support her own. She served as the expert voice at sentencing. To have additional experts confirm Dr. Smallwood's confirmation would have been cumulative, expensive, and unnecessary. *Puckett v. State*, 879 So.2d 920, 941 (¶ 72) (Miss. 2004). Further, "[n]ot calling witnesses who will testify negatively for a client or who will testify to matters cumulative in nature is not deficient performance by counsel." *Havard*, 988 So.2d at 337 (¶ 52).

Petitioner's first issue with counsel's performance must fail. He cannot show the information

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[51] Dr. Agkarhar's opinion is certainly consistent with Dr. Smallwood's opinion. See e.g., Ex. 7 ¶ 4 to PCR Appl.

supporting his contention that trial counsel were deficient for failing to investigate mitigating evidence. And, the evidence he claims should have been presented during the penalty phase of trial is cumulative to what was presented at trial. It does not show a reasonable probability that the result of the proceeding would have been different.

3. *Examination of Dr. Smallwood*

Petitioner's next issue concerns Mr. Geiss's decision to call Dr. Smallwood as an expert mitigation witness. First, he argues Mr. Geiss was ineffective for eliciting "bad acts" testimony from Dr. Smallwood. (PCR Appl. at 23-30). He faults Dr. Smallwood for introducing bad acts evidence—behavioral history characterized as a repetitive and persistent pattern of impulsive, aggressive, and violent behavior. (PCR Appl. at 24-30). "Bad acts" evidence is governed by Mississippi Rule of Evidence 404(b), which, at the time of trial, read as follows:

> **Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

It must also be noted that the Comment to the Rule stated that the 404(b) was an exception to the general prohibition of "producing evidence of prior offenses or actions." M.R.E. 404 cmt.

Petitioner misses a critical point, which is: "bad acts" evidence requires an act. *See Ballenger v. State*, 667 So.2d 1242, 1256 (Miss. 1995) ("Generally, evidence of any crime other than the one for which the defendant is being tried is not admissible." MRE 404(b) provides an exception to this rule). Petitioner faults Dr. Smallwood for introducing bad acts evidence, including his history of impulsive behavior and aggression. These statements do not constitute bad acts, because they are not crimes, offenses, wrongs, or "acts" of any discernible sort. They may be character traits, but that

is not what Petitioner is arguing.

Petitioner also objects to the State's attempt to capitalize on Dr. Smallwood's testimony by discussing, on cross examination, an escape attempt Petitioner had considered making. (PCR Appl. 27). This is the only possible "bad act" evidence introduced; and Dr. Smallwood did not mention this act on direct. Here, in making the assertion that both Mr. Geiss and the State committed error in Dr. Smallwood's testifying regarding this escape idea, Petitioner forces the State to piece together his argument. The record reflects four, limited facts: (1) the State cross-examined Dr. Smallwood regarding a letter, written by Petitioner, that Dr. Smallwood's records suggest she reviewed as part of her psychological examination; (2) said letter, referring to some sort of escape plan, was not introduced into evidence but was instead given to Dr. Smallwood for reference after the State and defense counsel engaged in a nineteen minute bench conference, which conference is not part of the trial record; (3) after referring to the letter, Dr. Smallwood stated that a plan to escape from jail would be conduct "not in conformity with the norms of society"; and (4) after Dr. Smallwood made this statement, neither the State nor the defense mentioned the escape issue again.

Here is what the record does not reflect. The record does not reflect which letter the State is discussing. The record does not show what escape attempt the State is referring to. The record does not show the details of the nearly twenty minute bench conference that occurred prior to the State discussing this letter. This necessarily means that Petitioner cannot show trial counsel failed to object to the use of the letter and the reference to the escape idea. Indeed, had the State simply requested, without objection, to use the letter to cross-examine Dr. Smallwood about an escape plan, it is doubtful the bench conference would have lasted longer than a minute or two. The fact that this bench conference instead lasted nineteen minutes is evidence that the parties were in discussion

about something substantive.

Petitioner bears the burden of proving ineffectiveness based on controlling legal authority and evidence. And, based on the record it is clear that Dr. Smallwood had already testified on direct that Petitioner's mental deficits caused him to engage in conduct not in conformity with the norms of society. (Tr. 675-89). Dr. Smallwood had already given examples of such conduct as part of her direct examination. The State was not, therefore, going beyond the scope of direct in cross examining Dr. Smallwood as to whether an escape plan was also consistent with nonconformist behavior.

Petitioner cannot prove deficiency of trial counsel in not objecting, as the bench conference on this issue was not recorded. He cannot prove deficiency of trial counsel in opening the door for the State to question Dr. Smallwood (in proper rebuttal) about this escape, as Dr. Smallwood's testimony stemmed from her psychological evaluation of Petitioner. And in that psychological evaluation, just as on direct examination and during cross, Dr. Smallwood consistently testified that she found Petitioner to be suffering from compromising mental health problems.

The State characterized this escape plan as a bad behavior choice; it was entitled to do so. *See Howell v. State*, 860 So.2d 704, 757 (¶ 193) (Miss. 2003) (reaffirming precedent holding "'the State is allowed to rebut mitigating evidence through cross-examination, rebuttal evidence, or by argument'") (quoting *Wiley v. State*, 750 So.2d 1193, 1202 (Miss. 2000) (quoting *Turner v. State*, 732 So.2d 937, 950 (Miss. 1999))). That does not make trial counsel deficient for characterizing all of Petitioner's actions as the result of chemical imbalances and a history of untreated mental and psychological problems. In *McGilberry v. State*, 843 So.2d 21 (Miss. 2003), the defendant argued counsel was ineffective for not objecting when his own expert testified that McGilberry had once

been accused of sexually molesting a child. This Court found that trial counsel was not ineffective; that he had intentionally elicited this testimony "as part of a showing that McGilberry's psychological instability was evident at an earlier age." *McGilberry*, 832 So.2d at 31-32 (¶¶ 25-26). Just as in *McGilberry*, trial counsel's "choice of whether to ask certain questions or make certain objections falls within the realm of trial strategy and does not amount to ineffective assistance of counsel." *Id.* at 31 (¶ 26).

In *Hodges v. State*, during the penalty phase, the State cross-examined the defendant's sister about the defendant escaping from jail on two separate occasions. On both direct appeal and post-conviction Hodges argued such evidence was irrelevant and improperly influenced the jury to consider his future dangerousness. In rejecting this argument, this Court held that the introduction of these two prior jail escapes, while damaging, was not error. The defendant's sister testified on direct examination that "Hodges' character was good, that he respected his elders and did not disobey his parents, and that he was not a violent person and never fought." *Hodges*, 912 So.2d at 755 (¶ 35). Therefore, her direct examination testimony opened the door for the State to seek competent rebuttal evidence. *Id.* (citing *Hansen v. State*, 592 So.2d 114, 148 (Miss. 1991); *Simpson v. State*, 497 So. 2d 424, 428-29 (Miss. 1986)), *habeas corpus granted in part and denied in part on other grounds, Hodges v. Epps*, 2010 WL 3655851 (N.D. Miss. 2010); *Hodges v. State*, 949 So. 2d 706 (Miss. 2006).

In *Hansen*, on which *Hodges* relies, this Court held there was no error in using prior statutory convictions, including those for felony escape, to prove Hansen "lacked the ability to conform his behavior to the norms society demands." *Hansen*, 592 So.2d at 145. This Court ruled that the evidence of those escapes came in the form of proper rebuttal evidence by the State, in response to

Hansen's mitigation evidence. Hansen was given "great leeway in proving by way of mitigation the assorted troubles and difficulties of his youth, and, as well, positive points regarding his behavior while incarcerated. These ten prior convictions are as much a part of Hansen's life story as the proof he offered himself." *Id.* The prosecution in *Hansen* did not use this evidence for aggravation, and the jury was not instructed it could consider it in aggravation, just as in this case . The State's use was in the nature of proper rebuttal evidence. *Id*. There was no error.

Returning to the issue of Dr. Smallwood's testimony as a whole, Petitioner has failed to make a coherent argument as to why such testimony was either bad or underdeveloped (or both), thereby causing counsel's performance to be deficient. He relies on *Ross v. State*, 954 So.2d 968 (Miss. 2007), and *Doss v. State*, 19 So.3d 690 (Miss. 2009), to support his position; however, neither of those cases is persuasive.

In *Ross*, trial counsel was held to be ineffective in failing to "develop mitigating evidence based on potential psychological problems." *Ross*, 954 So. 2d at 1006. Counsel knew Ross had been evaluated at the Mississippi State Hospital at Whitfield; he knew the results of the evaluation included findings that Ross suffered psychological problems as a result of physical and sexual abuse, alcoholism, hallucinations, the death of his ex-wife and four children, and the murder of his sister. He also knew that Ross was on medications for depression and anti-psychotic behavior. However, during sentencing, counsel did not present any expert testimony regarding these psychological problems. Instead, he presented only Ross and his mother. They testified to the alcoholism, child abuse, and family tragedy, but they did not testify "how those events had affected Ross psychologically." *Id*. Counsel's only reasoning for his decision not to investigate was a "single declaration" by Ross that he was not "crazy". *Id.* This Court held such reasoning to be

unreasonable. *Id.*

The *Ross* Court took issue with the fact that counsel failed to present evidence showing how defendant's tragic history affected him psychologically; it also took issue with the fact that counsel-in the face of clear psychological mitigation-discounted that evidence based solely on the fact that Ross stated he was not crazy. Moreover, this Court found "far more problematic" the fact that Ross's attorney failed completely to investigate Ross's negative record as a prison inmate. Thus, when counsel characterized Ross as a "good inmate," it opened the door for the State to explore in depth Ross's history of habitual criminality. *Id.*

This factual scenario is not aligned with Petitioner's case. Here, trial counsel employed a psychological expert, who not only testified to the existence of psychological problems but also elaborated on how those problems directly affected Petitioner. Counsel did not discount Petitioner's mental deficits; he used them, expounded on them, and argued they were cause to reject the death penalty.

In *Doss v. State*, counsel used the defendant's mother as the only mitigation witness. And the whole of her testimony stemmed from the following narrow set of questions by trial counsel:

- Where was Doss born?
- Who was Doss's father?
- Were Doss's parents married?
- Did Doss attend school, and for how long?
- Did Doss hold a job?
- What kind of home did Doss have?
- What kind of income did Doss's mother have?
- What type of person was Doss?
- Did Doss suffer a head injury at some point in his life, and was it serious?

- Did Doss's mother notice a change in him after that head injury?

Doss, 19 So.3d at 702-04.

This was the entirety of Doss's mitigation evidence. In finding ineffective assistance, this Court ruled that trial counsel chose to conduct only a cursory examination of a single mitigation witness, despite the fact he had access to records evidencing "several possible mitigation leads." *Id.* at 707. Those leads included evidence that Doss had suffered from alcohol addiction since childhood, had tried drugs, was in special education classes and had a low IQ, possibly suffered from psychological disorders, and that his mental difficulties may have had an "organic basis." *Id*. Trial counsel failed to investigate these leads. And because such mitigation evidence might have influenced the jury's appraisal of Doss's culpability, trial counsel's deficiency resulted in prejudice.

In this case, the only similarity between Petitioner's trial counsel and Doss's trial counsel was the decision of both to use only one witness during the sentencing phase. However, Doss's trial counsel failed to put on any mitigation concerning known psychological issues and a difficult background; instead, he had Doss's mother testify to evidence which did little more than identify Doss. At most, he asked only three questions-regarding Doss's home, the type of person he was, and whether he had suffered a head injury-which explored Doss's psychological or emotional deficits. Even a cursory comparison of Dr. Smallwood's testimony to that of Doss's mother shows there is no comparison.

This case is more aligned with *Brown v. State*, 798 So. 2d 481 (Miss. 2001). In *Brown*, the defendant claimed trial counsel were ineffective for failing to develop mitigation evidence during sentencing. Brown contended that his expert improperly and insufficiently attested to mitigation evidence when she had been retained only to give an opinion on competence. However, the expert

informed the jury at trial that Brown was mentally retarded and had a history of drug abuse. This Court found Brown had made no showing that further evaluations would "have produced more favorable mitigation evidence" or that additional mitigation evidence would have altered the jury's decision. *Brown*, 798 So.2d at 499. In the Court's opinion, Brown was attempting to argue that his expert's testimony was itself ineffective, which he was not allowed to do. According to the Court's ruling, Brown was "not constitutionally entitled to the effective assistance of an expert witness." *Id*. (citing *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998)).

Regardless of whether Petitioner is claiming counsel presented incomplete testimony at sentencing, or whether counsel presented improper testimony at sentencing, the claim itself is invalid for purposes of *Strickland* review. Consider the sentencing phase as a whole. The State presented no witnesses. Instead, it introduced one additional exhibit into evidence—a certified copy of an order sentencing Petitioner to ten years in prison for a 2008 grand larceny conviction. It then employed a strategy of painting Petitioner as a nameless, faceless killer who was on house arrest at the time he killed Michelle Craite. (Tr. 690-702). The State argued against Dr. Smallwood's testimony, spinning it as an attempt by defense counsel to blame bad behavior, and therefore Craite's death, on Petitioner's psychological problems.

Trial counsel on the other hand, in focusing on Dr. Smallwood, was able to craft an argument that showed Petitioner did not make choices the way normal people do. This allowed trial counsel to show Petitioner's actions were caused by his mental and psychological problems. It was logical and strategic to use Dr. Smallwood's testimony to show a pattern of mental unhealthiness that mitigated against Petitioner's crimes. It was logical and strategic to paint Petitioner as a man with

a history of bad behavior based, not on him being "evil," but on being sick.[52] Petitioner was a sick little boy who got lost in the mental health system and became a sick young man. This is mitigating.

Petitioner has presented no evidence of deficiency. He makes no suggestion as to how trial counsel's argument (*via* Dr. Smallwood, his witness) could have been more coherent, specific and persuasive. He has presented no facts to support his theory that trial counsel did not investigate or consider using additional experts. And Petitioner has presented no evidence that those experts could, would, or should have been able to limit their testimony to those elements of Petitioner's psychological problems which were most sympathetic (assuming bipolarism, ADHD and conduct disorder are not, in themselves, sympathetic).

The record simply does not contain information as to whether trial counsel investigated these additional avenues of mitigation (and what decisions were made based thereon). Trial counsel were effective in using Dr. Smallwood to paint a sharp picture of Petitioner as a man suffering from emotional trauma and mental deficits since childhood. Trial counsel were also effective in using Dr. Smallwood as an expert, who was able to effectively testify to the litany of mental, emotional and physical problems that Petitioner had suffered for two decades. Therefore, there was no deficiency in counsel's performance during sentencing.

Petitioner has failed to submit how, absent trial counsel's alleged deficiency in using Dr. Smallwood as his only mitigation witness, the jury would have found he did not deserve death, thereby giving rise to *Strickland* prejudice. Indeed, based on his contradictory argument, this

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[52] Even Dr. Smallwood's classification of Petitioner as suffering from anti-social personality disorder (something the State characterized as sociopathy) was rooted in his psychological problems. At all times, Dr. Smallwood clearly testified that Petitioner was sick, not bad. There is a difference. And trial counsel stressed that difference to the jury.

testimony of Dr. Smallwood which Petitioner finds so abhorrent and prejudicial is the same testimony he suggests should have been expounded upon in order for mitigation to have been effective. Notwithstanding the paradox Petitioner presents to this Court in the way of argument, the record does not support his theory that limiting mitigation to Dr. Smallwood's testimony resulted in *Strickland* prejudice.

Briefly, the State would call attention to Petitioner's assertion that trial counsel endorsed Petitioner's untruthfulness before the trier of fact by eliciting testimony from Dr. Smallwood on redirect examination. (PCR Appl. at 29-30). He states that, "In response to defense counsel's final question, Dr. Smallwood left the jury with the clear impression that there was no 'probably' about it. She testified that she '*knew* [Mr. Ronk] wasn't being completely truthful." (PCR Appl. at 29-30) (emphasis in the original) (quoting Tr. 703). He argues, "a lawyer's endorsing his client's untruthfulness before the trier of fact as 'an independent violation of the Sixth Amendment' and 'an evil of such magnitude that no showing of prejudice is necessary for a reversal.'" (PCR Appl. at 30) (quoting *Ferguson v. State*, 507 So.2d 94, 97 (Miss. 1987)). Mr. Geiss did not endorse Petitioner's untruthfulness, and the record bears this out.

On cross-examination, the State asked Dr. Smallwood a line of questions, concerning Petitioner's scores on standardized psychological tests, including the scores that measured test-taking effort. The record reflects that the State asked Dr. Smallwood:

> Q. ... You mentioned, and I think it's important -- not what I think, but it is important if I'm understanding your profession to know whether or not the person you're conducting your interview with is deceiving you?
>
> A. Correct.
>
> Q. And is being forthright?
>
> A. Correct.

Q. I believe you said on your direct examination y'all medically call that is the person malingering?

A. Malingering.

Q. Leading down the path that I want this person to think I'm straight or I want this person to think I'm crazy, whatever their ulterior motive is?

A. Correct.

Q. And in testing for malingering tell us again what was –

A. Structured interview of reported symptoms, SIRS.

Q. SIRS. And it's eight separate?

A. Subtest.

Q. And he or you determined based upon your evaluation and your experience as a Ph.D. in psychology that two of those he was probably feigning?

A. Correct.

Q. Would it be fair to say he was probably lying to you?

A. Yes. Same thing. Well exaggerating is the way that it is said.

Q. Two you classified as him being honest?

A. The test did, right. It's a standardized scoring system whereby you ask a lot of questions. It's not like you look at and say, do I think he's being honest, but it's a very standardized way, and the tests classified those as being honest.

Q. And then the remainder of them, I guess is four, were intermediate?

A. Intermediate.

Q. Could be feigning, could be honest?

A. Right.

Q. So it's fair to say that according to your tests he wasn't, over the course of your two days, maybe it was just one day, but over the whole evaluation he wasn't completely honest with you?

A. Correct.

(Tr. 693-94).

On redirect, Mr. Geiss attempted to rehabilitate Dr. Smallwood by asking her a line of questions that went to the weight she gave to Petitioner's SIRS scores for effort and her diagnosis.

(Tr. 702). Mr. Geiss began:

> Q. Doctor, I don't want to rehash all of this, but everything that we have talked about today including what Mr. Schmidt talked to you about, you took all of this into consideration in making your evaluation and diagnosis?
>
> A. Correct.
>
> Q. I want to specifically ask because he dwelled on it, *the malingering test*?
>
> A. Yes.
>
> Q. You took into consideration the fact that he could have been exaggerating or even lying?
>
> A. Yes.
>
> Q. And that still did not change your diagnosis?
>
> A. The diagnosis was made early in his life, and it doesn't change my observations of whether he met the criteria.
>
> Q. In other words, he didn't pull the wool over anybody's eyes, did he?
>
> A. We knew that he was not being completely truthful.
>
> Mr. Geiss: That would be about it, Your Honor. Thank you, Dr. Smallwood.

(Tr. 702-03) (emphasis added).

Petitioner says Mr. Geiss's redirect of Dr. Smallwood makes his case analogous to *Ferguson v. State*, 507 So.2d 94 (Miss. 1987). (PCR Appl. at 30, n. 119). Even a cursory reading of *Ferguson* makes clear that his reliance on that case is misplaced. The *Ferguson* Opinion states that there was a "troubled relationship between Ferguson and his court-appointed lawyer[;]" that throughout trial Ferguson moved to have trial counsel replaced; and that after one of Ferguson's requests and an inquiry by the trial court about the State withholding discoverable information that, "[t]rial counsel replied: 'Not a thing, I have been lied to by my client and I do not feel I can even sit here with him, and I regret it, but it is a fact and I think the court ought to know it.'" *Ferguson*, 507 So.2d 95. The Opinion also notes an instance where Ferguson told the trial court that counsel led him to believe

that he had information that Ferguson could use to impeach a State's witness. *Id.* "When trial counsel heard this he immediately said, 'Your Honor, he is lying, and I am getting tired of it.'" *Id.*

On appeal, this Court noted the fact that the Sixth Amendment right has "many components and corollary rights." *Id.* at 97. And that in most cases where a corollary right—such as the right to effective assistance—has been violated, the amount of resulting prejudice must be calculated. *Id.* The Court noted, however, that some cases involve violations of these corollary rights that "are so flagrant that no punctilious calibration of prejudice is necessary." *Id.* As an example, the Court stated that a defendant completely deprived of counsel would fit into this category of violations. *Id.* It then held, "We are of the opinion that an independent violation of the Sixth Amendment occurred in the present case when Ferguson's lawyer denounced him as a liar in open court before the trier of fact, and that this was an evil of such magnitude that no showing of prejudice is necessary for a reversal." *Id.* This case is nothing like *Ferguson*. Mr. Geiss was not endorsing Petitioner's untruthfulness; but was emphasizing the fact that Dr. Smallwood's opinions were unchanged.

Petitioner has not shown how introduction of additional evidence would have altered the jury's decision. He presents no argument as to how Drs. Agharkar and Garbarino would have presented information beyond that presented by Dr. Smallwood, and would have been able to present only the good side of mental illness and avoid the bad side. He has presented no evidence that the jury's verdict was based entirely on the negative aspects of his psychological disorders. He has presented no evidence the verdict was based on a single rebuttal statement regarding an escape idea that was possibly objected to, was not read to the jury, and is not provided to this Court for examination. Accordingly, Petitioner has presented no reasonable probability that the jury's sentence would have been different, there is no resulting *Strickland* prejudice. Petitioner has failed to meet

either the deficiency or prejudice prong of *Strickland*. This issue must be denied.

4. *Failure to hire an expert qualified to conduct a mitigation study*

Next, Petitioner claims trial counsel was ineffective for failing to hire "an expert qualified to assist in [his] defense." (PCR Appl. at 30-31). Petitioner argues that, although the trial court ordered counsel to secure a mitigation study, counsel limited the mitigation evidence presented to Dr. Smallwood's testimony, who did not and was not qualified to conduct a full mitigation study. He argues this case is analogous to *Evans v. State*, 109 So.3d 1044, 1048-49 (Miss. 2013), wherein "this Court reversed the defendant's murder conviction because the trial court denied the defendant's request for funds to hire an expert in post-traumatic stress disorder (PTSD)." (PCR Appl. at 30, n. 120). On one hand, Petitioner contends that trial counsel permitted Dr. Smallwood to present inadmissible evidence rather than present actual mitigation evidence. But on the other, he claims that trial counsel should have presented additional witnesses to support and elaborate on Dr. Smallwood's testimony. (PCR Appl. at 30-31).

On March 1, 2010, Petitioner filed a pre-trial motion for a psychiatric and/or evaluation. Petitioner's motion requested the assistance of Dr. Smallwood to determine: (1) if Petitioner knew right from wrong at the time of the crime; (2) if Petitioner was competent to assist counsel at trial; and (3) if a psychological evaluation would reveal any mitigating circumstances. (C.P. 78-80). As noted above, the trial court entered an Order that gave the defense the permission and funding needed to employ the services of Dr. Beverly Smallwood. That Order reads, in part, as follows:

> This matter having come before the Court upon the *motion of the Defendant* in the above styled and numbered cause to authorize the Defendant to employ the services of a Psychologist to evaluate the Defendant to determine whether the Defendant knew right from wrong at the time of the alleged crimes, whether the Defendant is competent to assist counsel in his defense, *to prepare a mitigation study*, to determine the level of the defendant's intelligence and to assist counsel

at the trial of this matter....

....

> Therefore, it is ORDERED, that the Defendant is hereby authorized to employ the services of Dr. Beverly Smallwood, P.O. Box 17918, Hattiesburg, MS 39404 to evaluate the Defendant to determine whether the Defendant knew right from wrong at the time of the alleged crimes, whether the Defendant is competent to assist counsel in his defense, *to prepare a mitigation study*, to determine the level of the defendant's intelligence and to assist counsel at the trial of this matter and the Court hereby authorizes payment for her services not to exceed $3,000.00 to conduct the aforesaid professional services and to assist Defendant's counsel in the defense of the Defendant.

(C.P. 92-93) (emphasis added). Even though the motion contained only three tasks that the expert would be tasked to accomplish, the trial court's March 15, 2010, contained five tasks the expert. The trial court's Order tasked the expert with five requests. The trial court did not impose an additional duty on Dr. Snallwood. It granted that which it believed Petitioner requested. But even if the trial court had, knowingly, granted more than what Petitioner requested, the trial court could not order trial counsel to prepare and present a mitigation study. The trial court would have been guiding the defense in its strategy in the presentation of its case.

Trial counsel employed Dr. Smallwood to conduct a psychological evaluation of Petitioner, and to testify on Petitioner's behalf during the penalty phase. In undertaking Petitioner's psychological evaluation, Dr. Smallwood acknowledged the fact that additional mitigating factors might be found by reviewing Appellant's medical records and interviewing other witnesses; and that she believed further investigation should be performed. (Def.'s Ex. 2).[53] Dr. Smallwood also stated that some of the information she reviewed in performing her evaluation was relevant to the penalty phase of trial. (Tr. 678).

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[53] Dr. Smallwood's 2010 Report of Psychological Evaluation of Petitioner.

Dr. Smallwood's testimony was both relevant and effective. That counsel chose to use only Dr. Smallwood during sentencing was a strategic decision that was neither deficient nor resulted in prejudice to Petitioner. In his examination of Dr. Smallwood, Mr. Geiss was able, from the start, to give the Dr. Smallwood's psychological examination of Petitioner both veracity and import. He began by eliciting testimony from Dr. Smallwood, regarding her own expertise. Dr. Smallwood had thirty years of experience as a clinical psychologist. She founded The Hope Clinic, a family counseling center based out of Hattiesburg. She was experienced in conducting forensic examinations (like the one done for Petitioner). She was trained in forensic examination by the American Board of Forensic Psychology. She had achieved peer recognition and success in writing two books, and being published in at least 20 reference journals and numerous publications and interviews.

As stated above, counsel's decision to limit mitigation witnesses to Dr. Smallwood was a smart move. Counsel could have tried to secure additional funding for expert witnesses, such as Drs. Agkarhar and Garbarino, to do what Dr. Smallwood did. There was no guarantee a second request would have been granted—to suggest otherwise is bald speculation. But even assuming additional funds had been secured, the testimonies of witnesses that Petitioner relies on in these proceedings are no different from Dr. Smallwood's trial testimony: that Petitioner was adopted when he was three days old; suffered from longstanding mental and emotional deficits and disorders, including at the time he killed Michelle Craite; and his adoption and feelings of rejection appear to be linked to his mental and emotional deficits and disorders.

Counsel were not deficient in relying on Dr. Smallwood—a highly educated, yet relatable professional, a psychologist from the Mississippi community who spoke candidly and in great detail

about Petitioner's highs and lows, and the psychological problems that battered him and how those psychological problems affected his actions. Trial counsel could have made mitigation sterile, clinical, and redundant. Instead, Mr. Geiss focused directly on what he asked the jury to do (*via* his opening statement during sentencing)—get to know Petitioner and his history before deciding his sentence. (Tr. 670). Presenting other witnesses to confirm, elaborate on, and discuss Dr. Smallwood's testimony—in addition to being redundant—would have undermined the defense's strategy by shifting the jury's focus and attention onto what Mr. Geiss referred to as "medicalese" and away from Petitioner, himself. (Tr. 671). To have additional experts confirm Dr. Smallwood's confirmation is cumulative, expensive, and unnecessary. *Puckett*, 879 So.2d at 941 (¶ 72).

Petitioner asserts what counsel should have done. Counsel should have called both lay and expert witnesses to testify. According to him, the jury was not given a complete picture of Petitioner's lifelong mental illness and its contribution to his behavioral problems, which began early in his childhood until at least Michelle Craite's death. (PCR Appl. at 30-31). Just to clarify, Petitioner is not claiming trial counsel was ineffective for failing to secure an expert for mitigation. He had one of those. He is arguing trial counsel was ineffective for failing to secure another expert witness to conduct a comprehensive mitigation study and explain it in terms the jury could understand. This argument is unsupportable.

First, his assertion is contrary to *Strickland v. Washington*. In *Strickland*, the United States Supreme Court warned that:

> 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 of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved conduct, and to evaluate the conduct from counsel[s'] perspective at the

time.

Strickland, 466 U.S. at 689 (internal citations omitted). What counsel should have done is not the proper test for determining counsel's effectiveness.

Second, in *Johnson v. State*, 476 So.2d 1195, 1202 (Miss. 1985), this Court held that the State does not have a constitutional obligation to provide indigent defendants with the costs of expert assistance upon every demand. While expert assistance should be paid for in certain cases, courts address that need "on a case-by case basis to determine whether a defendant is prejudiced by the denial of expert assistance to the extent that he or she is denied a fair trial." 476 So.2d at 1202; *see Townsend v. State*, 847 So.2d 825, 829 (Miss. 2003); *Grayson v. State*, 806 So.2d 241, 254 (Miss. 2001) ("The trial court's decision on a motion for funding for consultants or investigators for an indigent defendant is reviewed for abuse of discretion" (citing *Hansen v. State*, 592 So.2d 114, 125 (Miss. 1991)). In *Yohey v. Collins*, 985 F.2d 222, 227 (5th Cir. 1993), the Fifth Court held that, "[a]n indigent defendant requesting non-psychiatric experts must demonstrate something more than a mere possibility of assistance from a requested expert." In *Brown v. State*, 798 So.2d 48 (Miss. 2001), this Court reiterated its ruling that a defendant must demonstrate a substantial need in order to justify the trial court expending public funds for an expert to assist the defense.

Petitioner has not met the burden of showing trial counsel somehow failed in their duty to secure a second expert witness. However, even if trial counsel did not look into securing a second expert, Petitioner also bears the burden of proving that trial counsel would have been granted one. He has presented no authority under which trial counsel would have been entitled to a second (or third, or fourth) expert. As there is no constitutional right to expert assistance, much less a right to additional expert assistance. Petitioner cannot show counsel were ineffective for not requesting that

to which he was not entitled and had almost no chance of getting.

Third, Petitioner also bears the burden of proving lay witnesses, such as Mrs. Ronk and Ms. Burrell, would have testified on his behalf. While both have executed affidavits, which contain statements that could have been presented to the sentencing jury, neither Mrs. Ronk nor Ms. Burrell state that they would have testified on Petitioner's behalf. Neither Mrs. Ronk nor Ms. Burrell state that they are willing to testify on their son's behalf. (See Ex. 4 and 5 to PCR Appl.). The reason for this is contained in State's Exhibit 51, which is a letter that Petitioner wrote. In that letter, he describes his relationship with members of his family:

> I stole from my family, conned the people around me and used anyone and everyone I could to try and get what I want. That is why my family will not help with anything, cause I have used them and taken advantage of them and stole from them in the past. I have burned every bridge that I have ever had....
>
> I called my sister (biological) in Gulfport and made plans to come and crash here for a few days. I made it to her house with $10 in my pocket my car on [illegible] and nowhere to go afterwards. When my time was up there, I robbed her blind, everything I could get my hands on and took off.

(St.'s Ex. 51). By Petitioner's own admission, there was no one else on his side; no one to help him. Petitioner has presented evidence nor legal authority to support his claim that counsel was deficient for failing to call additional witnesses. This is especially true in light of the thoroughness of Dr. Smallwood's testimony.

Petitioner's claim that trial counsel was deficient is, in itself deficient, as he cannot seem to decide whether the his issue with trial counsel's effectiveness lies in the sufficiency of Dr. Smallwood's testimony or its detrimental nature. So, he proposes that the only way for the defense's case in mitigation to have been effective was for trial counsel to call additional witnesses to expound on Dr. Smallwood's testimony. And at the same time, Petitioner objects to the fact that Dr.

Smallwood testified to his history of aggression, threatening behavior, and violence against others.

This did not damage Dr. Smallwood's testimony. But that is what Petitioner argues. He also claims that Dr. Smallwood herself was unqualified. As he sees it, Dr. Smallwood undercut her own testimony, which in turn, rendered trial counsel deficient for presenting it. Petitioner finds fault with Dr. Smallwood's testimony because it spoke negatively to his personality—not because it was underdeveloped.

What Petitioner is arguing is that trial counsel erred by not presenting a secondary witness who could—and would—split the atom of Dr. Smallwood's testimony, so that mitigation discussion would be limited to the sympathetic side of his mental disorders (weight loss, suicidal tendencies, etc.) to the exclusion of the negative behavior that symptomatically accompanies them. Petitioner fails to demonstrate, however, how testimony by any other expert medical professional would have successfully accomplished this, and changed that which was presented to the jury. Consider Dr. Garbarino's opinion related to Petitioner's aggression, which stemmed from the rejection he felt as a child who overheard his parents voicing their regrets in adopting him on more than one occasion. Dr. Garbarino notes this aggression resulted in attacks on the Ronks, which made them fearful of Petitioner and prompted them to install deadbolt locks on the inside of their bedroom door. (Ex. 3 at 9 to PCR Appl.). And it is Dr. Garbarino's opinion that issues in Petitioner's childhood development led him down a negative path, which resulted in "chronic alienation, disengagement, anti-social behavior, and substance abuse". (Ex. 3 at 15 to PCR Appl.).

Like Dr. Garbarino, Dr. Smallwood's testimony included discussion about Petitioner's manic depression, ADHD, conduct disorder, bipolarism. These are serious mental problems. They do not present a rosy picture of Petitioner's life. And the effects of those problems are not self-contained:

Petitioner's bipolarism affected those around him. Petitioner has not presented argument or evidence suggesting that another expert would have been able-or allowed-to testify to Petitioner's suffering from these disorders, but only to the factual extent that suffering would create sympathy for him, and not also for those suffering secondhand. And Petitioner overlooks the fact that the State would have cross-examined any expert witness concerning the more distasteful side of mental illness, including how Petitioner's mental illness affected others. The fact is, the moment any expert opened the door with a discussion of psychological problems, the State had every right to enter. M.R.E. 611(b).

Moreover, a lifelong history suffering from mental problems—as Dr. Smallwood testified—is, as a whole, sympathetic. What parent wants to see a ten year-old boy moved impulsively to act in a threatening manner to others? What jury member wouldn't feel sympathy for a man plagued by aggression as a result of an imbalance in his brain chemistry? Trial counsel recognized, even though Petitioner does not, that his medical conditions required the defense to take the good with the bad. It gave detail and substance to her testimony, and made it more real by making Petitioner more human, more vulnerable. Trial counsel used Dr. Smallwood to show the reason why Petitioner hurt others—because he, himself was hurting and sick. This is not deficient.

Petitioner has not shown how introduction of additional evidence would have altered the jury's decision. He presents no argument as to how his hypothetical "mitigation experts" would have presented information beyond that presented by Dr. Smallwood, and would have been able to present only the "good side" of mental illness and avoid the bad side. He has presented no evidence that the jury's verdict was based entirely on the negative aspects of his psychological disorders. As Petitioner has presented no reasonable probability that the jury's sentence would have been different,

there is no resulting *Strickland* prejudice. Petitioner fails to meet the deficiency and prejudice prongs of *Strickland*. This issue must be dismissed.

5. *Failure to make an opening and closing statement during the penalty phase*

Petitioner's next issue with trial counsel's performance concerns Mr. Geiss's opening statements and closing argument. He claims Mr. Geiss's opening statements and closing argument were prejudicial to his defense. (PCR Appl. at 35-38).

a. Opening Statement

Petitioner argues Mr. Geiss's opening statement was too brief to be effective. (PCR Appl. at 36). He also argues that Mr. Geiss's opening statement failed to explain why the evidence the defense would present warranted a sentence less than death. (PCR Appl. at 36). The State disagrees.

With respect to the brevity of Mr. Geiss's opening statement, it is Petitioner's assertion that Mr. Geiss "should ... have erred on the side of saying too much rather than too little." (PCR Appl. at 36). That assertion is completely subjective, entirely based on hindsight, and one that Petitioner cannot prove. Petitioner cannot prove Mr. Geiss should have said more during opening statements. There is no mandatory minimum number of words or sentences that trial counsel must argument in order to be effective. Further, "'Opening statements are not mandatory. Miss. Code Ann. § 11-7-147. Failure to give an opening statement is not per se ineffective assistance of counsel. *Rushing v. State*, 711 So.2d 450, 458 (Miss.1998).'" *Spicer*, 973 So.2d at 197 (¶ 39) (quoting *Branch v. State*, 882 So.2d 36, 55 (Miss. 2004)). Petitioner forgets the standard for determining counsel's performance is an objective one. He forgets that this Court must presume trial counsel's decisions were reasonable in order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. And he forgets that he bears the burden to overcome that presumption with facts that show trial

counsel's actions were unreasonable. Petitioner offers nothing in an attempt to overcome the presumption of reasonableness. He cannot prove trial counsel were deficient by asserting Mr. Geiss's opening statement was too brief.

Petitioner also asserts that Mr. Geiss's opening statement was unclear. (PCR Appl. at 36). He takes issue with the portion of Mr. Geiss's opening statement where he told the jury,

> You will recall way back Monday when we started this process I talked about them making a decision about whether or not the State should take someone's life. You would want to know as much as possible about that individual, and that is what we're going to try and get across to you today, this morning, we will do that through the testimony of Dr. Beverly Smallwood who was a psychologist—is a psychologist and conducted an evaluation on [Petitioner]. I'm not going to belabor what it is. She will testify, you will hear that yourselves.

(Tr. 670-71). According to Petitioner, it is impossible to "say just what Mr. Geiss had in mind when he said he was not going to belabor what it is." (PCR Appl. at 36) (internal quotation marks omitted). Here too, the State disagrees.

The point of his opening statement is quite clear. His point was: in order to decide whether the death penalty should be imposed, you, the jury, should have the information necessary to make that decision; and that the defense would provide that evidence through the testimony of Dr. Beverly Smallwood, who had conducted a psychological evaluation of Petitioner. (Tr. 670-71). Mr. Geiss did not want to detract from that point by getting into the minutia of psychological testing, evaluations, and diagnoses—medicalese—during opening statements.

Petitioner argues trial counsel should have elaborated on Petitioner's adoption and the effects it had on his life. (PCR Appl. at 37-38). But, Mr. Geiss's opening statement was strategic. He recognized the risk of losing the jury's attention with argument on this subject. The fact that he decided not to take that risk does not render him or co-counsel ineffective. "This Court has held that

an attorney's failure to provide an opening statement is a matter of trial strategy. *Spicer*, 973 So.2d at 197 (¶ 39) (citing *Rushing*, 711 So.2d at 458). As demonstrated above, Dr. Smallwood testified at length on Petitioner's mental and emotional disorders and deficits. Her testimony linked those disorders and deficits to Petitioner's adoption and feelings of rejection. Petitioner disagrees. And yet, he fails to explain what exactly Mr. Geiss should have explained to the jury or otherwise elaborated on when giving his opening statement.

Like the one before it, this assertion must fail because it does not establish deficient performance. Mr. Geiss's opening statement was strategically based. And Petitioner has not offered anything to show Mr. Geiss's acted unreasonably when addressing the jury during opening statements.

The State would also call attention to the fact that Petitioner does not show that he has suffered actual prejudice. As noted above, evidence of Petitioner's adoption and its effects was presented to the sentencing jury. Petitioner's reliance on Dr. Garbarino's affidavit, as a more detailed explanation does not demonstrate actual prejudice. Had Dr. Garbarino's opinion been presented to the jury, it would, at best, have barely altered the sentencing verdict. It does not establish actual prejudice. So even if Mr. Geiss's performance during opening statements at sentencing was deficient, Petitioner cannot show he has suffered actual prejudice as a result.

b. Closing Argument

With respect to Mr. Geiss's closing argument, Petitioner argues that closing argument was too brief to be effective. The crux of Petitioner's argument appears to be the fact that Mr. Geiss did not explain fully how the evidence presented during the penalty phase justified a sentence less than death. (PCR Appl. at 36-38). Petitioner then speculates as to the reason for the brevity of closing

argument. According to Petitioner, Mr. Geiss's closing argument was brief because he did not fully understand biopolar disorder. (PCR Appl. at 37). Again, the State disagrees.

Mr. Geiss's closing argument, like his opening statement, was presented in a way to emphasize the point that Petitioner's thought process and decision-making abilities were impeded by mental and emotional disorders. Mr. Geiss chose not to detract from this point by arguing "medicalese." Consider the following points Mr. Geiss made during closing argument at sentencing:

- The jury can and does have the option to sentence Petitioner to life or to death.
- The jury should read the instructions carefully.
- If the jury cannot be unanimous they have not failed in their duty as jurors.
- Regardless of whether the jury imposes the death penalty or not, Petitioner has already forfeited his life (to prison).
- The jury's decision is not a counting exercise.
- The aggravators introduced by the State do not factor into Michelle Craite's death.
- Nothing justifies what happened to Michelle Craite. However, as Dr. Smallwood said, Petitioner "doesn't possess the same tools all of us seem to possess."
- When Petitioner was confronted with the situation with Michelle Craite his responses were "not the same as ours would be."
- Petitioner is not insane. But he is incapable of making rational decisions and acting rationally under the circumstances.
- Many people think they are bipolar. But that's just the "image" of bipolarism. It is a term that is overused and over diagnosed. In this case, Petitioner really is bipolar.
- Petitioner, being bipolar, is in a very small percentage of the population truly suffering from this ailment.
- Petitioner's bipolarism is a "defect of the mind," and a "chemical imbalance."
- Petitioner's bipolarism pushed him "to make all the wrong decisions from the very beginning just as he's probably been making a lot of wrong decisions for most of his life, but it's not something that he wholly controls."
- Petitioner needs to be medicated in order for his bipolarism to be treated. If it's not, it causes Petitioner to act aggressively, impulsively and in a threatening manner. That's what happened here.
- Petitioner acted on impulse, and "because he has a chemical imbalance his impulses were

all wrong."

- The jury must decide whether Petitioner's mental problems actually make his crime worthy of the death penalty or not.
- The jury has three options: a unanimous decision for life in prison, a unanimous decision for the death penalty, or, if they cannot decide, Petitioner will still receive "the deprivation of the rest of his life" in prison.
- If a juror cannot be persuaded by his fellow jurors in making a decision on sentencing, his oath requires that juror to "stick to your guns. And I tell you you can do that in conscience because that in and of itself will be a decision for this Court to follow."
- The jury must follow its conscience.

(Tr. 736-40).

Under the *Strickland* standards, there was neither deficiency nor prejudice in this closing argument. Counsel repeatedly reminded the jurors that Petitioner was mentally different from the normal populous, that he suffered from a clinically diagnosed chemical imbalance of the brain, that he needed to be medicated and under the treatment of a therapist, and that it was Petitioner's untreated mental deficit which caused him to react violently in the situation with Michelle Craite. Counsel repeatedly encouraged the jurors to read Dr. Smallwood's report, and specifically informed them of their duty to determine whether Petitioner's bipolarism was cause to avoid a death sentence.

Counsel also reminded jurors that it was understandable and acceptable if they could not agree on a sentence for Petitioner; and on more than one occasion counsel reminded jurors that Petitioner's life was already forfeit—thereby demonstrating that the jury did not have to sentence Petitioner to death to end his life. According to counsel life in prison was, on its own, "the deprivation of the rest of his life."

"[C]losing argument falls under the ambit of defense counsel's trial strategy." *Havard v. State*, 928 So.2d 771, 796 (¶ 52) (Miss. 2006) (citing *Pruitt v. State*, 807 So.2d 1236, 1240 (Miss. 2002)). Trial counsel has wide latitude in addressing the jury at closing. *Havard*, 928 So.2d at 796

(¶ 52) (quoting *Brewer v. State*, 704 So.2d 70, 73 (Miss. 1997) (quoting *Clemons v. State*, 320 So.2d 368, 371-72 (Miss. 1975)). This Court is "consistently hesitant to vacate a death sentence based on closing arguments by defense counsel. Standing alone, this error, if any indeed exists, is harmless as far as its ultimate effect on the outcome of the trial." *Id.* at 796 (¶¶ 51-52) (finding no ineffectiveness during closing argument at sentencing, where counsel conceded an aggravating circumstance, and failed to argue mitigators beyond commenting that mitigators allow jurors to lessen the impact of aggravators). Further, this Court has found a strategy, such as the one that trial counsel in this case employed, of pleading for mercy is not a poor strategic choice in light of the existing facts. *See Powers v. State*, 883 So.2d 20, 35 (¶¶ 61-62) (Miss. 2003) (finding trial counsel was not ineffective for begging for mercy rather than arguing about his familial and educational difficulties) (citing *Manning v. State*, 735 So.2d 323, 347-48 (Miss.1999)).

The State can do nothing more than direct this Court to read the closing as a whole; in such light, the State submits there was no *Strickland* deficiency in counsel's argument. Petitioner seeks to make closing argument an outlined check list of requirements instead of a persuasive appeal by trial counsel. There is no error here.

6. *Petitioner does not show counsel were ineffective during the guilt phase of trial*

Finally, Petitioner also claims that trial counsel was ineffective during the guilt phase of trial. (PCR Appl. at 38-39). He argues that "[t]here are indications that counsel's illness and resulting lack of focus and preparation impaired not only the sentencing hearing but also the culpability phase." (PCR Appl. at 38). He gives two examples. The first is Mr. Geiss's statement to the jury that, "[W]e are hard pressed to tell you this is a good solid defense case...." (PCR Appl. at 38). According to Petitioner, there is no explanation for this statement. But, then he gives one. He surmises that

"Perhaps [Mr. Giess] was feeling too ill to mount a vigorous argument and just needed to finish and sit down." (PCR Appl. at 38). The second example he cites is Mr. Geiss's performance at the jury instruction conference. (PCR Appl. at 38-39). He argues that had the trial court given an instruction on self-defense, the Petitioner would not have been guilty of murder. (PCR Appl. at 39).

To begin, Petitioner cites no authority to support his position. His failure to do so serves as a bar to review of this issue. "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 v. State*, 857 So.2d 668, 681 (¶18) (Miss. 2003) (quoting *Brown v. State*, 798 So.2d 481, 497, 506 (Miss. 2001) (citing *Holland v. State*, 705 So.2d 307, 329 (Miss. 1997))).[54] "'This Court has continually considered issues of error not supported by citation or authority as abandoned.'" *Puckett v. State*, 879 So.2d 920, 932 (¶ 26) (Miss. 2004) (quoting *Thibodeaux v. State*, 652 So.2d 153, 155 (Miss. 1995)). Petitioner is obligated "to provide authority and support of an assignment of error." *Puckett*, 879 So.2d at 932 (¶ 26) (citations omitted). And because he fails to cite any authority, Petitioner does not invoke the fundamental rights exception. "'[M]erely asserting a constitutional-right violation is insufficient to overcome the procedural bars.'" *Fluker v. State*, 170 So.3d 471, 475 (¶ 11) (Miss. 2015) (quoting *Means v. State*, 43 So.3d 438, 442 (Miss. 2010)). "'There must at least appear to be some basis for the truth of the claim before the [procedural bar] will be waived.'" *Fluker*, 170 So.3d at 475 (¶ 11) (quoting *Means*, 43 So.3d at 442 (quoting *Crosby v. State*, 16 So.3d 74, 79 (Miss. Ct. App. 2009))).

Second, and as previously stated, Mr. Geiss's illness and its effects do not independently

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[54] The failure to cite authority is not an absolute bar to review. *Simon*, 857 So.2d at 681 (¶ 18) (citing *Gary v. State*, 760 So.2d 743, 754 (Miss. 2000)).

prove his performance was deficient, much less the other attorneys who represented him. *Hodges*, 949 So.2d at 721 (¶ 39); *Barry*, 765 F.2d at 454; *Buckelew*, 575 F.2d at 521. "The critical claim is whether, for whatever reason, counsel's performance was deficient and whether that deficiency prejudiced the defendant." *Berry*, 765 F.2d at 454. Petitioner does not draw a specific connection between Mr. Geiss's illness and its effects with any alleged failings in trial counsel's performance. He does not show how Mr. Geiss's illness and its effects caused trial counsel to be deficient during the guilt phase of trial.

And third, Petitioner cannot show prejudice in spite of his assertion that "[i]f the jury had decided that it was self-defense, then Mr. Ronk would not have been guilty of murder." (PCR Appl. at 39). The first claim of error this Court addressed on direct appeal was Petitioner's multi-faceted claim concerning jury instructions. The Majority's Opinion in *Ronk*, 172 So.3d 1112 (Miss. 2015) states as follows:

> **I. Whether the trial court erred in giving or failing to give certain jury instructions during the culpability phase of trial.**
>
> ¶ 19. At trial, Ronk requested jury instructions supporting three theories of defense: self-defense, imperfect-self-defense manslaughter, and deliberate-design murder. Ronk also submitted a jury instruction on heat-of-passion manslaughter, but he later withdrew that instruction. The trial court granted Ronk's self-defense and murder instructions but denied his imperfect-self-defense manslaughter instruction. At the State's request, and over Ronk's objection, the trial court also instructed the jury on arson as a separate lesser offense. In addition, the trial court instructed the jury on the one-continuous-transaction doctrine applicable to felony-murder cases. On appeal, Ronk argues that the trial court erred in denying his imperfect-self-defense instruction, in giving the State's arson instruction, and in giving a one-continuous-transaction instruction.
>
> ¶ 20. "It is well settled that jury instructions generally are within the discretion of the trial court, so the standard of review for the denial of jury instructions is abuse of discretion." *Newell v. State*, 49 So.3d 66, 73 (Miss. 2010) (citing *Davis v. State*, 18 So.3d 842, 847 (Miss. 2009) (internal citations omitted)). When considering whether error lies in granting or refusing a jury instruction, the instructions actually given must be read as a whole and in context. *Ruffin v. State*, 992 So.2d 1165, 1176 (Miss.

2008) (citations omitted). No reversible error exists if the instructions fairly, though not perfectly, announce the law of the case and create no injustice. *Rubenstein v. State*, 941 So.2d 735, 784–785 (Miss. 2006) (citations omitted). "A defendant is entitled to have jury instructions given which present his theory of the case[;] however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence." *Agnew v. State*, 783 So.2d 699, 702 (Miss. 2001) (citations omitted). "In homicide cases, the trial court should instruct the jury about a defendant's theories of defense, justification, or excuse that are supported by the evidence, no matter how meager or unlikely [.]" *Manuel v. State*, 667 So.2d 590, 593 (Miss. 1995). We address each of Ronk's arguments regarding jury instructions separately.

A. Whether the trial court erred in failing to grant an instruction on imperfect-self-defense manslaughter.

¶ 21. Instruction D–17 embodied Ronk's theory of imperfect self-defense. This instruction asked the jury to find Ronk guilty of manslaughter if it found that Ronk "did willfully kill Michelle Lynn Craite, without malice, under the bona fide belief, but without reasonable cause therefore, that it was necessary for him so to do in order to prevent Michelle Lynn Craite from inflicting death or great bodily harm upon him[.]" The trial court denied this instruction, finding that a reasonable jury could not acquit Ronk of capital murder and convict him of manslaughter based on the evidence presented at trial. Ronk now argues that this instruction was supported by his statements to Hindall concerning his altercation with Craite on the day of her death. Because no weapons were found inside Craite's house, but two shotguns were found in the studio apartment behind the house, Ronk argues that a reasonable jury could find him guilty of imperfect-self-defense manslaughter, rather than capital murder.

¶ 22. Unlike true self-defense, imperfect self-defense is not a defense to a criminal act. Rather, under the theory of imperfect self-defense, "an intentional killing may be considered manslaughter if done without malice but under a bona fide (but unfounded) belief that it was necessary to prevent death or great bodily harm." *Wade v. State*, 748 So.2d 771, 775 (Miss. 1999) (citing *Lanier v. State*, 684 So.2d 93, 97 (Miss. 1996)). The Legislature has determined that manslaughter is a lesser-included offense to both capital murder and simple murder, "and the jury may be properly instructed thereon ... in any case in which the giving of such instruction would be justified by the proof, consistent with the wording of the applicable manslaughter statute." Miss. Code Ann. § 99–19–5(2) (Rev. 2007) (emphasis added). This Court has held that a jury instruction on a lesser-included offense should be granted where a rational jury could find the defendant "not guilty of the principal charge made in the indictment but guilty of a lesser included offense[.]" *Fairchild v. State,* 459 So.2d 793, 800 (Miss. 1984) (citing *Knowles v. State*, 410 So.2d 380, 382 (Miss. 1982)). In making this determination, this Court must "tak[e] the evidence in the light most

favorable to the accused, and conside[r] all reasonable inferences which may be drawn in favor of the accused from the evidence[.]" *Harper v. State*, 478 So.2d 1017, 1021 (Miss. 1985). Keeping this standard in mind, we find that Ronk was not entitled to an instruction on imperfect-self-defense manslaughter.

¶ 23. Ronk was charged with capital murder under Section 97–3–19(2)(e) of the Mississippi Code, which provides, in relevant part, "The killing of a human being without the authority of law by any means or in any manner shall be capital murder ... [w]hen done with or without any design to effect death, by any person engaged in the commission of the crime of ... arson [.]" Miss. Code Ann. § 97–3–19(2)(e) (Rev. 2014). "Unlike other sections of the capital murder statute, Subsection 2(e) does not require the prosecution to prove the elements of murder, only that a killing took place while the accused was 'engaged in the commission' of the enumerated felonies." *Layne v. State*, 542 So.2d 237, 243 (Miss. 1989). *See also Gray v. State*, 351 So.2d 1342, 1348 (Miss. 1977) (holding that malice, premeditation, or deliberation are not elements of felony murder). Thus, Ronk's case is distinguishable from those in which the defendant was charged either with simple murder or a different category of capital murder, which require the State to prove malice. *See, e.g., Maye v. State*, 49 So.3d 1124, 1129–33 (Miss. 2010) (holding that the trial court erred in denying defendant's defense-of-others instruction, where defendant was charged with capital murder of a police officer under Section 97–3–19(2)(a)); *Williams v. State*, 53 So.3d 734 (Miss. 2010) (holding that the trial court erred in denying defendant's assisted-suicide instruction, where defendant was charged with simple murder); *Cole v. State*, 118 So.3d 633 (Miss. Ct. App. 2012) (holding that trial court erred in denying defendant's heat-of-passion manslaughter instruction, where defendant was charged with simple murder). If the jury found that Craite's death occurred while Ronk was engaged in the commission of an arson, the fact that the killing was a manslaughter rather than a murder would have no effect on his guilt under Section 97–3–19(2)(e).

¶ 24. Likewise, Ronk's case is distinguishable from other felony-murder cases in which the defendant offered a true defense to the underlying felony. For example, in *Banyard v. State*, 47 So.3d 676, 682 (Miss. 2010), the defendant was charged with capital murder while engaged in a robbery. The defendant argued at trial that he had participated in the robbery under duress, but his proffered jury instruction on duress was denied. *Id.* On appeal, this Court found that the evidence supported both a duress instruction for the underlying robbery and a manslaughter instruction, reasoning, "[I]f the jury found that Banyard was indeed acting under duress, he could not be found guilty of the robbery of Ballard, one of the essential elements of the capital-murder charge." *Id.* at 683.

¶ 25. Unlike the defendant in Banyard, Ronk did not offer a defense to the underlying felony of arson. If the jury accepted Ronk's theory that he stabbed Craite while acting in imperfect self-defense, he would still be guilty of manslaughter, a "killing of a human being without the authority of law." *See* Miss. Code Ann. §

97–3–19(2) (Rev. 2014). Contrary to *Banyar*d, Ronk's proffered theory of imperfect self-defense does not eliminate an essential element of his capital-murder charge. *See, e.g., Jacobs v. State*, 870 So.2d 1202, 1209 (Miss. 2004) ("Therefore, because Jacobs was found guilty of robbery, and the death resulted in the commission of the robbery, Jacobs is guilty of capital murder regardless of whether a lesser-included offense instruction [on manslaughter] is given.").

¶ 26. Finally, Ronk relies on a single statement of dicta in *Gause v. State*, 65 So.3d 295, 299 (Miss. 2011), rejected on other grounds, *Hall v. State*, 127 So.3d 202, 207 (Miss. 2013). In *Gause*, the defendant was charged with capital felony murder but was convicted of heat-of-passion manslaughter and burglary. *Id.* On appeal, the defendant argued that the trial court had erred in instructing the jury on burglary as a lesser-included offense to capital murder. *Id.* at 300. Though the propriety of the manslaughter instruction was not an issue on appeal, the *Gause* Court began its discussion of the case by noting that "it is undisputed that Gause was entitled to a heat-of-passion manslaughter instruction, based on the evidence." *Id.*

¶ 27. Ronk argues that, under *Gause*, a manslaughter instruction is warranted in a felony-murder case even when the evidence of the underlying felony is largely undisputed. But the above-quoted dicta in *Gause* does not stand for such a proposition. The *Gause* Court provided no authority, other than the statute generally defining lesser-included offenses, to support its statement regarding the propriety of a manslaughter instruction in that case. Moreover, the statement in question is mere dicta, as the propriety of a manslaughter instruction was not an issue on appeal in *Gause*. Finally, and most importantly, the statement was incorrect. As the defendant in *Gause* conceded, manslaughter, if committed during the course of a burglary, would constitute capital murder, because "capital murder does not require intent to kill, but only that a killing have occurred during the commission of an enumerated felony." *Id*. As explained above, the same reasoning applies in this case. Even if the jury accepted Ronk's theory of imperfect self-defense, such a finding would lower his culpability for Craite's death to manslaughter, which is a "killing of a human being without the authority of law." *See* Miss. Code Ann. § 97–3–19(2) (Rev. 2014). No evidence was presented which would have allowed the jury to separate the killing from the arson and convict Ronk only of manslaughter. Accordingly, we hold that the trial court did not err in denying Ronk's imperfect-self-defense manslaughter instruction.

B. Whether the trial court erred in allowing the jury to consider a verdict of arson as a lesser-included offense of capital murder.

¶ 28. At the conclusion of trial, Ronk sought a jury instruction on deliberate-design murder under the theory that the arson and the killing were distinct and unrelated crimes. Although the trial court clearly harbored doubts about the evidentiary basis for such an instruction, it granted the instruction "out of an abundance of caution." Concerned that Ronk would escape punishment for the admitted arson if the jury returned a verdict finding him guilty of only simple murder, the State asked the court

to include a lesser-offense instruction on arson. The court asked Ronk if he agreed with giving an arson instruction. Ronk initially disagreed, simply stating, "There's no basis for doing so." The court ordered the State to draft an arson instruction and submit it to the defense for review. Then, after further deliberation on other instructions, the following exchange occurred:

> THE COURT: Then as I understand from the off-the-record discussions we have D–11, which the Court granted, which was the lesser included concerning murder. We have S–103, which is the one that the state has now submitted concerning the arson elements, and then we've tried to combine those into what is now known as D–11A. If I'm understanding correctly, defense, you would withdraw D–11. State, you would withdraw, S–103, and both parties would agree, based on the court's other rulings concern [sic] the lesser included and the arson, that D–11A would be the proper instruction. State?
>
> STATE: We would.
>
> THE COURT: Defense?
>
> DEFENSE: That's correct, Your Honor.

D–11A combined Ronk's murder instruction and the State's arson instruction.

¶ 29. On appeal, Ronk argues that the trial court erred in granting instruction D–11A, because arson is not a lesser-included offense of capital murder. Thus, he argues that instruction D–11A effectively constituted a substantive amendment to his indictment. We find this issue to be procedurally barred. "It is incumbent on the party asserting error to make a contemporaneous objection and obtain a ruling in order to preserve the objection." *Brown v. State*, 965 So.2d 1023, 1029 (Miss. 2007). Ronk agreed to the submission of D–11A. Thus, he has waived any argument concerning this instruction.

¶ 30. Procedural bar notwithstanding, this argument is without merit, as the trial court's decision to give an arson instruction could not have contributed to the jury's verdict in this case. In *Conley v. State*, 790 So.2d 773, 792–93 (Miss. 2001), a capital-murder defendant argued on appeal that the trial court had erred in giving the State's manslaughter instruction, which failed to fully define culpable negligence. The Court agreed with the defendant but found that the trial court's error did not contribute to the verdict, "as the jury unanimously agreed that Conley murdered Whitney Berry while engaged in the crime of kidnapping." *Id*. at 793. Here, because the jury convicted Ronk of capital murder, any alleged error in instructing the jury separately on arson would be harmless beyond a reasonable doubt. "This Court will deem harmless an error where 'the same result would have been reached had [it] not

existed.' " *Pitchford v. State*, 45 So.3d 216, 235 (Miss. 2010) (quoting *Tate v. State*, 912 So.2d 919, 926 (Miss. 2005)). Accordingly, this argument is without merit.

C. Whether the trial court erred in instructing the jury on the "one continuous transaction" theory of capital felony murder.

¶ 31. Ronk argued at trial that he could not be convicted of capital murder because Craite's death did not occur while Ronk was "engaged in the commission" of an arson. At the conclusion of the trial, over Ronk's objection, the trial court accepted the State's instruction S–101, which defined the one-continuous-transaction doctrine applicable to felony-murder cases. The instruction provided, in relevant part: "[A] killing occurring while engaged in the commission of an arson includes the actions of the defendant leading up to the arson, the arson and the flight from the scene of the arson." On appeal, Ronk argues that the trial court erred in giving instruction S–101 because the evidence does not support a finding that Craite died "as a result of the arson."

¶ 32. We find that the trial court did not err in instructing the jury on the one-continuous-transaction doctrine, which was adopted by this Court to define the requisite causal nexus between a killing and the underlying felony in a capital felony-murder case. *Fisher v. State*, 481 So.2d 203, 212 (Miss. 1985). This Court repeatedly has approved of instructions in felony-murder cases with language identical to instruction S–101. *See Batiste v. State*, 121 So.3d 808, 832–33 (Miss. 2013); *Fulgham v. State*, 46 So.3d 315, 328–29 (Miss. 2010). Thus, instruction S–101 was a correct statement of the law governing capital felony-murder cases. Ronk's arguments here relate more to the sufficiency of the evidence, rather than the legality of S–101 as a general matter. We address those arguments below.

Ronk, 172 So.3d at 1125-30 (¶¶ 19-32).

This Court has already addressed the underlying claim of Petitioner's issue with trial counsel's efforts during the guilt phase of trial. The Court found no merit to Petitioner's claims with respect to the jury instructions related to his self-defense, imperfect-self-defense manslaughter, and deliberate-design murder jury instructions. *Id.* Therefore, Petitioner cannot show actual prejudice. This issue is merely an attempt to relitigate an issue that was decided adversely to Petitioner. He is barred from doing so. "Rephrasing direct appeal issues for post-conviction purposes will not defeat the procedural bar of *res judicata*." *Havard*, 988 So.2d at 333 (¶ 33) (quoting *Lockett*, 614 So.2d

at 893 (citing *Irving*, 498 So.2d 305; *Rideout*, 496 So.2d 667; *Gilliard*, 446 So.2d 590)).

In conclusion, as Petitioner has failed to meet either the deficiency or prejudice prong of *Strickland*, his first claim for relief should be denied.

II. Is Petitioner's Death Sentence Proportionate?

Next, Petitioner claims his death sentence is excessive and disproportionate. (PCR Appl. 39-44.) He specifically claims that his sentence is disproportionate when compared to those cases that "were more factually similar to [his]: that is, cases in which the defendant was accused of a killing and an arson (and sometimes of other crimes as well)." (PCR Appl. at 40). He supports his claim with a discussion of some 137 cases that involved murder and arson, which were decided either by this Court or the Mississippi Court of Appeals. (PCR Appl. at 40-44; Appendix to PCR Appl.).

A. Reasons for Denying Further Review and Relief

The Court should deny Petitioner's second claim for any and all of the reasons given below.

1. *Petitioner fails to cite authority*

Petitioner asks the Court to consider the proportionality of his death sentence in a way that is contrary to well-established case law. "This consideration 'requires a review of similar cases in which the death penalty was imposed and reviewed by this Court since *Jackson v. State*, 337 So.2d 1242 (Miss.1976).'" *Ronk*, 172 So.3d at 1148 (¶ 106) (quoting *Manning v. State*, 765 So.2d 516, 521-22 (Miss. 2000) (citing *Wiley v. State*, 691 So.2d 959, 966 (Miss. 1997))). "In making this assessment, we must consider both the crime and the defendant." *Id.* (citing *Wilcher v. State*, 697 So.2d 1087, 1113 (Miss. 1997) (citing *Cabello*, 471 So.2d at 350)). Petitioner fails to cite any authority that requires this Court to consider cases that Petitioner believes are more factually similar to his case. His failure to cite authority to support his contention bars 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 (¶18) (quoting *Brown*, 798 So.2d at 497, 506 (citing *Holland*, 705 So.2d at 329)).[55] "'This Court has continually considered issues of error not supported by citation or authority as abandoned.'" *Puckett*, 879 So.2d at 932 (¶ 26) (quoting *Thibodeaux*, 652 So.2d at 155). This Court conducted the proportionality review that Miss. Code Ann. § 99-19-105(3)© required on direct review.

2. *The doctrine of res judicata bars review*

The Court should deny Petitioner's third claim because it was decided on direct appeal. Accordingly, the doctrine of *res judicata* bars further review. Miss. Code Ann. § 99-39-21(3); *Corrothers v. State*, — So.3d — , —, 2017 WL 452912, at **9-10 (¶¶ 46-51) (Miss. Feb. 2, 2017); *Walker*, 863 So.2d at 28-29, 30 (¶¶ 86, 89); *see also Jordan v. State*, 213 So.3d 40, 43 (¶¶ 13-14) (Miss. 2016) (apply the *res judicata* provision of Section 99-39-21 to a proportionality claim raised on two prior occasions) (citing *Bishop v. State*, 882 So.2d 135, 153 (Miss. 2004). The Court's written Opinion, affirming Petitioner's convictions and sentences on direct review, reads, in pertinent part, as follows:

> Section 99-19-105 requires this Court to conduct an examination of Ronk's death sentence, considering the following factors:
>
> > (a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; (b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 99-19-101; [and] © whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant[.]

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[55] The failure to cite authority is not an absolute bar to review. *Simon*, 857 So.2d at 681 (¶ 18) (citing *Gary v. State*, 760 So.2d 743, 754 (Miss. 2000)).

Miss. Code Ann. § 99-19-105(3)(a)-© (Rev. 2007). While Ronk challenges only the proportionality of his sentence here, we now take the opportunity to consider each factor in turn.

A. Whether the death penalty was imposed under the influence of passion, prejudice, or any other arbitrary factor.

¶ 103. The record before us includes no evidence that Ronk's sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and Ronk has not pointed to any evidence of prejudicial or arbitrary conduct by the trial court, the jury, or the prosecution.

B. Whether the evidence supports the jury's finding of statutory aggravating circumstances.

¶ 104. The jury found beyond a reasonable doubt the existence of three statutory aggravating circumstances: (1) the capital offense was committed by a person under a sentence of imprisonment, (2) the capital offense was committed while Ronk was engaged in the commission of an arson, and (3) the capital offense was especially heinous, atrocious, or cruel. *See* Miss. Code Ann. § 99-19-101(5)(a), (d), (I) (Supp. 2014).

¶ 105. At Ronk's sentencing the State produced evidence that Ronk had been convicted of grand larceny and sentenced to ten years' imprisonment three weeks prior to Craite's death. The evidence indicated that Ronk was serving house arrest in Craite's home at the time of the capital offense. Thus, sufficient evidence supports the jury's finding as to the first aggravator. In addition, for the reasons previously stated in this opinion, we find that the evidence supports the jury's finding of the second and third aggravators.

C. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

¶ 106. This consideration "requires a review of similar cases in which the death penalty was imposed and reviewed by this Court since *Jackson v. State*, 337 So.2d 1242 (Miss. 1976)." *Manning v. State*, 765 So.2d 516, 521-22 (Miss. 2000) (citing *Wiley v. State*, 691 So.2d 959, 966 (Miss. 1997)). In making this assessment, we must consider both the crime and the defendant. *Wilcher v. State*, 697 So.2d 1087, 1113 (Miss. 1997) (citing *Cabello v. State*, 471 So.2d 332, 350 (Miss. 1985)).

¶ 107. The Legislature's inclusion of arson as a capitalizing felony represents a recognition of the extreme risk to human life associated with the commission of that felony. As the United States Supreme Court concluded, "reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.' " *Tison*, 481 U.S. at 157, 107 S.Ct. 1676 (citation omitted). The practical effect of this reasoning is exemplified in this case. The evidence reflects that Ronk stabbed an unarmed victim multiple times in the back, took the time to change

> clothes and search the victim's house for items of value, poured a trail of gasoline through the victim's house and into the room where the victim lay incapacitated, and left the victim to suffer in the blaze as he fled to another state, seemingly destroying any evidence of his crime. While Ronk contends that his culpability is diminished because he was unaware that Craite was still alive when he committed the arson, his conduct is nevertheless analogous to the *Tison* Court's example of "the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim[.]" *Id*.
>
> ¶ 108. After considering the circumstances of Ronk's crime and comparing it to the cases included in the appendix below, we find that the jury's imposition of the death penalty in the instant case is not excessive or disproportionate.

Ronk, 172 So.3d at 1147-48 (¶¶ 102-108). The passage above confirms this claim was raised and decided on direct appeal. Aside from that, Petitioner recognizes this Court performed the proportionality review that Miss. Code Ann. § 99-19-105(3) required. (PCR Appl. 39-40, n. 160-162). "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); *Corrothers*, 2017 WL 452912, at **9-10 (¶¶ 46-51); *Walker*, 863 So.2d at 28-29, 30 (¶¶ 86, 89); *see also Jordan*, 213 So.3d at 43 (¶¶ 13-14) (Miss. 2016) (citing *Bishop*, 882 So.2d at 153). Petitioner litigated the proportionality of his sentence on direct appeal. But even if he had not, the Court conducted a proportionality review of Petitioner's sentence on direct appeal in accordance with Miss. Code Ann. § 99-19-105.

Petitioner must show his claim is procedurally alive. Miss. Code Ann. § 99-39-21(6); *Corrothers*, 2017 WL 452912, at *1 (¶ 2) (citing Miss. Code Ann. § 99-39-27(5)). To do so, he must allege facts that demonstrate the doctrine of *res judicata* does not bar review of this claim. Miss. Code Ann. § 99-39-21(6). The *res judicata* provision of Section 99-39-21 "is not subject to the cause and actual prejudice test." *Walker*, 863 So.2d at 27 (¶ 80) (Miss. 2003) (citations omitted). And "[r]ephrasing direct appeal issues for post-conviction purposes will not defeat the procedural

bar of *res judicata*." *Havard*, 988 So.2d at 333 (¶ 33) (quoting *Lockett*, 614 So.2d at 893).

Petitioner makes no attempt to show his third claim is procedurally alive. That said, "an alleged error should be reviewed, in spite of any procedural bar, only where the claim is so novel that it has not previously been litigated, or, perhaps, where an appellate court has suddenly reversed itself on an issue previously thought settled." *Id.* (citations and quotation marks omitted). This claim is not novel. And Petitioner cites no case where this Court or the Supreme Court of the United States has suddenly reversed itself on the constitutionality of Mississippi's capital sentencing scheme. Because no exception applies, the doctrine of *res judicata* bars review of Petitioner's third claim.

3. *Petitioner waived review*

As demonstrated above, Petitioner litigated the proportionality of his death sentence. *Ronk*, 172 So.3d at 1147-48 (¶¶ 102-108). He took issue with: arbitrary factors that may have resulted in the jury returning a verdict recommending the imposition of the death penalty; the evidence supporting the jury's findings of the statutory aggravators; and the death sentence is excessive or disproportionate considering both the crime and the defendant. *Id.* at 1147-48 (¶¶ 102-108). The discussion of cases he now relies on was capable of being presented to this Court on direct appeal. His failure to present these issues to the Court on direct appeal bars further review of this claim in post-conviction proceedings. *Howard v. State*, 945 So.2d 328, 365 (¶ 87) (Miss. 2006) (citing Miss. Code Ann. § 99-39-21(1)). To the extent that there are new issues here, there is no conceivable reason that these claims could not have been brought ... before now." *Jordan*, 213 So.3d at 43 (¶ 13). The issues under his second claim have "been raised previously on direct appeal, [Petitioner] has waived reexamination of these facts under different legal theories." *Simon*, 857 So.2d at 681 (¶ 17) (citing Miss. Code Ann. § 99-39-21(2)); *Grayson*, 118 So.3d at 133-34 (¶¶ 35, 37).

Petitioner makes no attempt to show his third claim falls under an exception to the provisions of Section 99-39-21(1)-(2). He does not show cause or actual prejudice in an effort to excuse any waiver. *Grayson*, 118 So.3d at 134-35 (¶ 35) (quoting Miss. Code Ann. § 99-39-21(2)). Neither this Court nor the United States Supreme Court has reversed itself on this issue. Consequently, no exception to the bars under Section 99-39-21 applies. Petitioner's second claim is not properly before the Court.

4. *Petitioner fails to show the denial of a right to proportionality review*

In addressing the merits of this claim, the State would call the Court's attention to Its recent Opinion in *Evans v. State*, 226 So.3d 1 (Miss. 2017). There, the Court disposed of a similar claim, stating that:

> Evans argues that the death sentence was disproportionate to other sentences in similar cases. He argues that, in conducting proportionality review, this Court must consider not only cases in which the death sentence was imposed, but also cases in which it was not imposed. We already have rejected this argument. *See Lester v. State*, 692 So.2d 755, 802 (Miss. 1997), overruled on other grounds by *Weatherspoon v. State*, 732 So.2d 158 (Miss. 1999) ("We hold that the current guidelines are sufficiently specific, and we find no reason to undertake the overwhelming task of considering all death eligible cases in our review.").... 226 So.3d at 40 (¶ 109);

Cox v. State, 183 So.3d 36, 60 (¶ 93) (Miss. 2015) (quoting *Batiste v. State*, 121 So.3d 808, 872 (¶ 180) (Miss. 2013)).

The Eighth Amendment does not give Petitioner a right to proportionality review of his sentence. *Walker v.* State, 863 So.2d 1, 29-30 (¶¶ 87-89) (Miss. 2003) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 306-07 (1987); *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984)). And, this Court performed the statutorily-required proportionality review of Petitioner's death sentence on direct review. *Ronk*, 172 So.3d at 1148 (¶¶ 106-108). Petitioner fails to show the denial of a right to proportionality review during post-conviction proceedings. Miss. Code Ann. § 99-39-27(5). His

second claim must be denied.

III. Does Mississippi's Capital Sentencing Scheme Offend the Eighth Amendment?

In his third claim, Petitioner challenges the constitutionality of Mississippi's Capital Sentencing Scheme. (PCR Appl. at 44-48). He claims Mississippi's Capital Sentencing Scheme violates his right to be free from cruel and unusual punishment under the Eighth Amendment to the Constitution of the United States because capital punishment is arbitrarily and capriciously imposed across the nation and in this State. (PCR Appl. at 44-48). Petitioner cites absolutely no authority that supports his position. And, he fails to show, or even argue, how the death penalty was arbitrarily or capriciously imposed in his case. Petitioner simply asks that the Court "declare Mississippi's death penalty statute unconstitutional." (PCR Appl. at 48). The State disagrees entirely.

A. Reasons for Denying Review and Relief

The Court should deny Petitioner's third claim, challenging the constitutionality of Mississippi's Capital Sentencing Scheme for any and all of the reasons given below.

1. *Petitioner fails to cite authority*

The Court should deny Petitioner's third claim because he cites no authority that holds the death penalty or Mississippi's Capital Sentencing Scheme violates the Federal or State Constitutions. See PCR App. 44-48. "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 v. State*, 857 So.2d 668, 681 (¶18) (Miss. 2003) (quoting *Brown v. State*, 798 So.2d 481, 497, 506 (Miss. 2001) (citing *Holland v. State*, 705 So.2d 307, 329 (Miss. 1997))).[56]

[56] The failure to cite authority is not an absolute bar to review. *Simon*, 857 So.2d at 681 (¶ 18) (citing *Gary*, 760 So.2d at 754).

"'This Court has continually considered issues of error not supported by citation or authority as abandoned.'" *Puckett*, 879 So.2d at 932 (¶ 26) (quoting *Thibodeaux*, 652 So.2d at 155). Petitioner fails to cite any authority that holds the death penalty or Mississippi's Capital Sentencing Statute is unconstitutional. His failure to do so bars further review.

2. *The doctrine of res judicata bars review*

The Court should deny Petitioner's third claim because it was decided on direct appeal. Accordingly, the doctrine of *res judicata* bars further review. *Corrothers v. State*, ── So.3d ── , ─, 2017 WL 452912, at **9-10 (¶¶ 46-51) (Miss. Feb. 2, 2017); *Jordan v. State*, 912 So.2d 800, 821 (¶ 73) (Miss. 2005). The Court's written Opinion, affirming Petitioner's convictions and sentences on direct review reads, in pertinent part, as follows:

> **VIII. Whether the imposition of the death penalty in this case violates the United States Constitution.**
>
> ¶ 86. Under this assignment of error, Ronk makes various arguments that the imposition of the death penalty in this case violates the United States Constitution. We address each argument separately.
>
> ....
>
> **E. Additional Arguments**
>
> ¶ 97. In his final argument concerning this issue, Ronk argues that Section 99-19-105 of the Mississippi Code, as applied by this Court, fails to provide for adequate or meaningful appellate review in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Section 99-19-105 governs this Court's mandatory review of death sentences and requires this Court to determine, among other things, "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in other cases, considering both the crime and the defendant." Miss. Code Ann. § 99-19-105(3) (Rev. 2007).
>
> ¶ 98. Ronk argues that Section 99-19-105(3) allows for the arbitrary imposition of the death penalty because it does not require this Court to review cases where death has been imposed to cases where death is sought, but not imposed. However, Ronk provides this Court with "no controlling authority requiring this Court to change Mississippi's proportionality review." *See Lester v. State*, 692 So.2d 755, 801-02 (Miss. 1997), *overruled on other grounds by Weatherspoon v. State*, 732 So.2d 158 (Miss. 1999) (declining to "undertake the overwhelming task of considering all death

> eligible cases in our review"). In the absence of some intervening precedent, we hold that Mississippi's capital sentencing scheme is entirely constitutional. *See Woodward v. State*, 726 So.2d 524, 528 (Miss. 1997) (citations omitted).
>
> ¶ 99. Ronk also argues that the death penalty is imposed in a discriminatory manner in violation of the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment, in that it is imposed disproportionately against males, indigent defendants, and those accused of killing females. The Eighth Amendment is violated when a penalty is imposed selectively on minorities, "whom society is willing to see suffer though it would not countenance general application of the same penalty across the board." *Furman v. Georgia*, 408 U.S. 238, 245, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Douglas, J., concurring). This Court has considered this issue and held that "Mississippi's statutory sentencing scheme in capital cases complies with the requirements of *Furman* and its progeny." *Underwood v. State*, 708 So.2d 18, 38 (Miss. 1998) (citations omitted).
>
> ¶ 100. Ronk's equal-protection claim also fails. To succeed on such a claim, the defendant must show "that the decisionmakers in his case acted with discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 292, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). Statistical evidence alone is insufficient to prove discrimination. *Id*. at 292–297, 107 S.Ct. 1756. Ronk provides no evidence that his sentencing jury acted in a discriminatory manner, but he relies on unsupported allegations of general discrimination. As previously discussed, Mississippi's sentencing scheme includes numerous safeguards to ensure that the death penalty is not imposed arbitrarily or in a discriminatory manner, not the least of which is this Court's mandatory proportionality review. *See generally* Miss. Code Ann. §§ 99-19-101 (Supp. 2014), 99-19-105(3)© (Rev. 2007). These arguments are without merit.

Ronk, 172 So.3d at 1144, 1146-47 (¶¶ 86, 97-100). The passage above confirms this claim was raised and decided on direct appeal. "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); *Corrothers*, 2017 WL 452912, at **9-10 (¶¶ 46-51).

Petitioner must show his claim is procedurally alive. Miss. Code Ann. § 99-39-21(6); *Corrothers*, 2017 WL 452912, at *1 (¶ 2) (citing Miss. Code Ann. § 99-39-27(5)). To do so, Petitioner must allege facts that demonstrate the doctrine of *res judicata* does not bar review of this claim. Miss. Code Ann. § 99-39-21(6). The *res judicata* provision of Section 99-39-21 "is not subject to the cause and actual prejudice test." *Walker v. State*, 863 So.2d 1, 27 (¶ 80) (Miss. 2003)

(citations omitted). And "[r]ephrasing direct appeal issues for post-conviction purposes will not defeat the procedural bar of *res judicata*." *Havard*, 988 So.2d at 333 (¶ 33) (quoting *Lockett*, 614 So.2d at 893).

Petitioner makes no attempt to show his third claim is procedurally alive. That said, "an alleged error should be reviewed, in spite of any procedural bar, only where the claim is so novel that it has not previously been litigated, or, perhaps, where an appellate court has suddenly reversed itself on an issue previously thought settled." *Id.* (citations and quotation marks omitted). This claim is not novel. And Petitioner cites no case where this Court or the Supreme Court of the United States has suddenly reversed itself on the constitutionality of Mississippi's Capital Sentencing Scheme. Because no exception applies, the doctrine of *res judicata* bars review of Petitioner's third claim.

3. *Petitioner waived review*

On direct appeal, Petitioner raised this claimed, that the imposition of the death penalty was unconstitutional. *Ronk*, 172 So.3d at 1144-47 (¶¶ 86-101). He took issue with: the indictment; the contemplated lethal force factor of Miss. Code Ann. § 99-19-101(7); the dual use of evidence an aggravating circumstance; Mississippi's lethal injection procedure; the proportionality review of Miss. Code Ann. § 99-19-105(3); prosecutorial discretion; and the Heinous, Atrocious, or Cruel (HAC) aggravating circumstance. *Id.* a I 1146-47 (¶¶ 87-100). Petitioner has waived review of any issue that challenges the constitutionality of the State's Capital Sentencing Scheme imposition of the death penalty and was capable of being raised at trial or on direct appeal. *Evans v. State*, 441 So.2d 520, 523 (Miss. 1983). Petitioner "has waived reexamination of these facts under different legal theories." *Simon*, 857 So.2d at 681 (¶ 17).

Petitioner makes no attempt to show his third claim falls under an exception to the provisions

of Section 99-39-21(1)-(2). He does not show cause or actual prejudice in an effort to excuse any waiver. Neither this Court nor the United States Supreme Court has reversed itself on this issue. Consequently, no exception to the bars under Section 99-39-21 applies. Further, he does not show cause or actual prejudice for failing to raise this claim necessary to overcome the bars listed at Miss. Code Ann. § 99-39-21(1), (2).

4. *Petitioner fails to show the State's Capital sentencing scheme is unconstitutional*

In addition, Petitioner's fails to substantially show the denial of his Eighth Amendment right to be free from cruel and unusual punishment. Petitioner claims the death penalty is an unconstitutional form of punishment because the decision to impose the death penalty is based on subjective factors such as, race, gender, and geography. (PCR Appl. at 44-48). Petitioner's third claim challenges the death penalty as a form of punishment—one that is imposed arbitrarily.

When a claim challenges the form of a punishment the question is, whether that "punishment may ever be imposed as a sanction for [an offense]...." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). To comply with Section 99-39-27(5), Petitioner must substantially show death is a "punishment [that] may [n]ever be imposed a sanction for murder...." *Gregg*, 428 U.S. at 173. He must do so even though " history and precedent strongly support a negative answer...." *Id.* at 176.

With respect to history and precedent, the U. S. Supreme Court has repeatedly rejected claims similar to this one. *See Glossip v. Gross*, ── U.S. ──, ──, 135 S.Ct. 2726, 2739 (2015) (noting the Court had "time and again reaffirmed that capital punishment is not *per se* unconstitutional"). "[I]t is settled that capital punishment is constitutional...." *Glossip*, 135 S.Ct. at 2732; *see Baze v. Rees*, 553 U.S. 35, 47 (2008) ("We begin with the principle, settled by *Gregg*, that capital punishment is constitutional."); *Gregg*, 428 U.S. at 177, 187; *State of Louisiana ex rel. Francis v.*

Resweber, 329 U.S. 459, 464 (1947); *In re Kemmler*, 136 U.S. 436, 447 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1878). Justice Scalia underscored this point by emphasizing the Court's historical consistency on this issue when he wrote:

> not once in the history of the American Republic has this Court ever suggested the death penalty offends the constitution impermissible. The reason is obvious: It is impossible to hold unconstitutional that which the Constitution explicitly contemplates. The Fifth Amendment provides that "[n]o person shall be held to answer for a capital... crime, unless on a presentment or indictment of a Grand Jury," and that no person shall be "deprived of life... without due process of law."

Id. at 2747 (Scalia, J., concurring) (brackets and alterations in the original).

The same is true of this Court. It too has consistently rejected claims similar to Petitioner's third claim. *See Corrothers*, 2017 WL 452912, *9 (¶ 50) ("The death penalty is constitutional.") (citing *Glossip*, 128 S.Ct. at 1530 (citing *Baze v. Rees*, 553 U.S. 35, 48 (2008))); *Gillett v. State*, 56 So.3d 469, 525 (Miss. 2010) (rejecting the claim that Mississippi's capital sentencing scheme offends the Eighth and Fourteenth Amendments); *Walker v. State*, 740 So.2d 873, 889-90 (Miss. 1999) (rejecting the allegation that "the [death] sentence imposed by the jury [wa]s cruel and unusual punishment in violation of the eighth amendment to the United States Constitution"); *Smith v. State*, 419 So.2d 563, 566 (Miss. 1982) (reaffirming the holding "the death penalty is not *per se* unconstitutional") (citing *Bullock v. State*, 391 So.2d 601, 611 (Miss. 1980); *Washington v. State*, 361 So.2d 61, 66 (Miss. 1978)); *Coleman v. State*, 378 So.2d 640, 647 (Miss. 1979) (same); *Jackson v. State*, 337 So.2d 1242, 1249 (Miss. 1977) ("The death penalty is not per se unconstitutional.").

In *Corrothers v. State*, 148 So.3d 278 (Miss. 2014), the Court disposed of a similar claim, recognizing that It had previously addressed Mississippi's death-penalty scheme in relation to discrimination:

> Lastly, Galloway claims Mississippi's death-penalty scheme is

> applied in a discriminatory and irrational manner in violation of the of the Eighth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment and corresponding clauses of the Mississippi Constitution. The United States Supreme Court rejected an almost identical argument in *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). There, Warren McCleskey argued that Georgia's capital- punishment statute violated equal protection, based upon a study showing that black defendants were more likely to be sentenced to death than white defendants, and defendants murdering whites were more likely to be sentenced to death than defendants who murdered blacks. *Id*. at 291-92, 107 S.Ct. 1756. The Court held that, in order to raise a successful claim of an equal-protection violation, the criminal defendant must prove that "the decisionmakers in his case acted with discriminatory purpose." *Id*. at 292, 107 S.Ct. 1756. McCleskey's only proof supporting his claim was the results of the study. The Court determined that, due to the number of variables inherent in capital sentencing and the discretion allowed trial courts in implementing criminal justice, the use of statistical evidence was insufficient to prove purposeful discrimination. *Id*. at 292-97, 107 S.Ct. 1756.
>
> *Galloway v. State*, 122 So.3d 614, 680-81 (Miss. 2013). Like Galloway, Corrothers simply points to statistical evidence as evidence of discrimination and fails to demonstrate that the decision-makers in his case acted with a discriminatory purpose. Therefore, this argument is without merit.

Corrothers, 148 So.3d at 322-23 (¶ 27).

And in *Jordan v. State*, this Court disposed of a claim that was based on a similar equal protection argument. The Court rejected Jordan's claim because he:

> is not challenging a specific law or statute, nor is he asserting that he is a member of a class to which the death penalty is unfairly imposed. Instead, he is arguing that he is entitled to post-conviction relief because other inmates, once on death row, have been resentenced to life in prison. This Court has held that "... a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.' " *Scott v. State*, 878 So.2d at 993 (citing *Whitus v. Georgia*, 385 U.S. 545, 550, 87 S.Ct. 643, 646, 17 L.Ed.2d 599 (1967)). Likewise, Jordan must prove the purposeful discrimination "had a discriminatory effect" on him and the decision-makers in his case acted with discriminatory purpose. *Wayte v. United States*, 470 U.S. 598, 608, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985); *Scott v. State*, 878 So.2d at 993.
>
> Jordan offers no evidence specific to his own case that would support an inference

> that the decision-makers acted with a discriminatory purpose. He asserts only that because others have been given life sentences, he should be given a life sentence. Jordan does not meet the burden of proving an equal protection violation. Therefore, this claim is without merit.

912 So.2d at 821 (¶¶ 75-76).

It is clear that Petitioner cannot comply with Section 99-39-27(5), which requires him to substantially show the denial of a right. Petitioner relies entirely upon statistical data to support his contention that the death penalty is irrationally and arbitrarily imposed. As he appreciates it, this data suggests that race, gender, and geography are factors that determine whether the death penalty is imposed. He then applies his interpretation of this statistical data to his case in an attempt to support his theory that his death sentence was arbitrarily imposed because he is a Caucasian male who happened to be prosecuted in Harrison County, Mississippi.

Petitioner's theory is based on the fallacy of an irrelevant denominator. He—like Corrothers, Jordan, Galloway, and others—does not show purposeful discrimination existed, that it had any effect on him, or that the decision-makers acted with discriminatory purpose. *Corrothers*, 148 So.3d at 322-23; *Jordan*, 912 So.2d at 821 (¶¶ 75-76); *Galloway*, 122 So.3d at 680-81 (¶ 240); *McCleskey v. Kemp*, 481 U.S. 279, 292-319 (1987). The statistical data that Petitioner cites does not show the death penalty is a form of punishment that is arbitrarily imposed. *McCleskey*, 481 U.S. at 308-319.

Further, Petitioner's third claim does not comply with the UPCCRA's pleading requirements. His third claim is wholly unsupported. He does not offer "any sworn proof as is required by Section 99-39-9(1)(e)." *Spicer*, 973 So.2d at 207 (citing *Jordan*, 918 So.2d 636, 662 (Miss. 2005)). Petitioner gives no explanation as to the evidence he would offer or testify he would elicit at an evidentiary if given the opportunity to prove his third claim. He fails to "provide this Court with any affidavit which legitimately questions" the application of the death penalty in this State. *Id.*

And, he "fails to assert specific errors made supported by relevant citations" to the record. *Brawner v.* State, 947So.2d 254, 270 (¶ 45); *Neal*, 525 So.2d at 1280-81.

Petitioner is not entitled to any relief for his third claim. First, review of Petitioner's third claim is subject to the provisions of Section 99-39-21. Those provisions bar review of his third claim. But even if his claim was not subject to those provisions, Petitioner fails to substantially show Mississippi's capital sentencing scheme is arbitrarily applied. He does not even show how he would prove his claim if the Court granted him the opportunity to do so. Petitioner's third claim entitles him to no relief. Accordingly, the Court must deny Petitioner's third claim.

IV. There are No Reversible Errors, Cumulative or Otherwise.

Fourth, Petitioner claims the cumulative effect of trial errors requires reversal of his conviction and sentence and entitles him to a new trial. (Mot. for Leave at 48-49). Petitioner argues that "the foregoing litany of errors makes clear, the factual and legal arguments concerning which are incorporated into this assignment of error by reference, is one of those cases where, even if there are doubts about the harm of any one error in isolation, the cumulative-error doctrine requires reversal." (PCR Appl. at 49). "[T]he error presented in the arguments above all concern significant violations of [Petitioner]'s constitutional rights under both the United States and Mississippi constitutions." (PCR Appl. at 49). He concludes his five paragraph argument by asserting: "Simply put, if this Court deems any of the errors noted in the issues above harmless, the errors, when taken in concert, resulted in cumulative error, and Mr. Ronk is entitled to relief." (PCR Appl. at 49).

A. Reasons for Denying Review and Relief

The Court should deny Petitioner's fourth claim for the reasons stated below.

1. *The doctrine of res judicata bars review*

Petitioner challenged the cumulative effect of trial errors on direct appeal. This Court reviewed his cumulative error argument and rejected it, stating that in the past It:

> has held that "individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial." *Ross v. State*, 954 So.2d 968, 1018 (Miss. 2007). Ronk urges this Court to find that the cumulative effect of the errors in this case requires reversal of his conviction and sentence.
>
> We have found two arguable errors in the instant case, both of which are barred from consideration due to Ronk's failure to object at trial. Thus, after considering each of Ronk's claims, we hold that the cumulative effect of all alleged errors was not such that Ronk was denied a fundamentally fair trial. *See Wilburn v. State*, 608 So.2d 702, 705 (Miss. 1992).

Ronk, 172 So.3d at 1148-49 (¶¶ 110-111). The Court also noted that:

> "A criminal is not entitled to a perfect trial, only a fair trial." *McGilberry v. State*, 741 So.2d 894, 924 (Miss. 1999) (citing *Sand v. State*, 467 So.2d 907, 911 (Miss. 1985)). Thus, even in a capital case, an error may be considered harmless "if it is clear beyond a reasonable doubt that it did not contribute to the verdict." *States v. State*, 88 So.3d 749, 758 (Miss. 2012). We have found two arguable errors in Ronk's trial: the trial court's instruction on arson as a lesser-included offense of capital murder, and the admission of Craite's bank records. Because the jury convicted Ronk of the principal charge of capital murder, and not the lesser offense, this error had no effect on the jury's verdict. *See Conley*, 790 So.2d at 792-93. And Ronk failed to object to the admission of the bank records, so we cannot hold the trial court in error for an issue not raised at trial. Accordingly, even in light of our heightened standard of scrutiny in capital cases, we find that these alleged errors did not deprive Ronk of a fair trial.

Id. at 1148 (¶ 109). This claim was addressed on the merits and decided adversely to Petitioner on direct appeal. The UPCCRA now bars him from re-litigating this claim in these proceedings to the extent the errors he now complains of were decided on direct appeal. Miss. Code Ann. § 99-39-21(3). *Corrothers*, 2017 WL 452912, at *9; *Jordan*, 2016 WL 7280243, at *3 (citing *Bishop*, 882 So.2d at 153; Miss. Code Ann. § 99-39-21(3)).

Petitioner apparently believes it is the State's responsibility to make his arguments for him.

He does not develop his own argument beyond citing a number of cases without any explanation as to their application in this case. He does not even specify what he relies on in making this argument. Petitioner does not set forth which errors from "the foregoing litany" resulted in cumulative error and entitles him to relief. (PCR Appl. at 49). In any event, most of Petitioner's claims are related to his lead counsel's performance at trial—the sentencing phase in particular. "Rephrasing direct appeal issues for post-conviction purposes will not defeat the procedural bar of *res judicata*." *Havard*, 988 So.2d at 333 (quoting *Lockett*, 614 So.2d at 893 (citing *Irving*, 498 So.2d 305; *Rideout*, 496 So.2d 667; *Gilliard*, 446 So.2d 590)). "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); *Scott*, 938 So.2d at 1249, *overruled on other grounds by Lynch*, 951 So.2d 549.

2. *Petitioner waived reviewed*

To the extent he has altered his claim from the one he raised on direct appeal, Petitioner is barred from litigating his altered claim unless shows an applicable exception. Miss. Code Ann. § 99-39-21(2).[57] Petitioner "carries the burden of demonstrating that his claim is not procedurally barred[,]" not the State. *Havard*, 988 So.2d at 333 (quoting *Lockett*, 614 So.2d at 893 (citing Miss. Code Ann. § 99-39-21(6); *Cabello*, 524 So.2d at 320)); *see Spicer*, 973 So.2d at 197-97, 204 (same).

He makes no attempt to show his fourth claim is procedurally alive. His fourth claim is not a novel one. *Spicer*, 973 So.2d at 205 (citations omitted). Neither this Court nor the United States Supreme Court has reversed itself on this issue. He does not give cause or show actual prejudice necessary to overcome the bars listed at Miss. Code Ann. § 99-39-21(1), (2). *Byrom*, 927 So.2d at 724-25. Consequently, no exception to the bars under Section 99-39-21 applies. *Havard*, 988 So.2d

[57] *See* note 24, *supra*.

at 333; *Locket*, 614 So.2d at 893 (quoting *Irving*, 498 So.2d at 311). Accordingly, Petitioner's fourth claim is not properly before the Court and should be denied.

3. *Petitioner fails to show counsel were ineffective*

As the State has demonstrated, Petitioner has utterly failed to show deficient performance of counsel, or any other errors committed during guilt or sentencing phases of trial. Indeed, Petitioner has failed to show any error at all. Therefore, no prejudice can be shown individually or cumulatively. In a case such as this, with Petitioner confessing to every crime with which he was charged, disputing only the connection between the crimes; with Petitioner's decision not to testify at trial; with no evidence and no legal authority to support his intent-based theories of defense, his fourth claim is simply specious. Moreover, with ample mitigation evidence showing Petitioner's difficult background and mental health problems, and a closing argument at sentencing which tied back to that mitigation, regardless of the jury's decision to vote for the death penalty there simply can be no error.

As the State has demonstrated in this Response, Petitioner has failed to demonstrate ineffectiveness of trial counsel or any other errors during the pretrial proceedings, or the guilt and sentencing phases of trial. Therefore, no prejudice can be shown individually or cumulatively. "This Court may reverse a conviction and/or sentence based upon the cumulative effect of errors that independently would not require reversal." *Jenkins v. State*, 607 So.2d 1171, 1183-84 (Miss. 1992); *Hensen v. State*, 592 So.2d 114, 153 (Miss. 1991). "It is true that in capital cases, although no error, standing alone, requires reversal, the aggregate effect of various errors may create an atmosphere of bias, passion and prejudice that they effectively deny the defendant a fundamentally fair trial." *Conner v. State*, 632 So. 2d 1239, 1278 (Miss. 1993) (citing *Woodward v. State*, 533 So. 2d 418, 432

(Miss. 1988)).

However, a review of the record shows there were no individual errors which required a reversal and no aggregate collection of minor errors that would, as a whole, mandate a reversal of either the conviction or sentence. All Petitioner's claims and issues "are either without merit or are procedurally barred. This issue itself is, therefore, without merit." *Brown v. State*, 798 So.2d at 505. "'[W]here there is no reversible error in any part,... there is no reversible error to the whole.'" *Simmons v. State*, 805 So.2d 452, 508 (¶ 164) (Miss. 2001) (alterations in the original) (quoting *Doss v. State*, 709 So.2d 369, 401 (Miss. 1996)). "Additionally, this Court has held that a murder conviction or a death sentence will not warrant reversal where the cumulative effect of alleged errors, if any, was procedurally barred." *Id.* (citing *Doss*, 709 So. 2d at 401).

V. Was Trial Counsel Ineffective for Failing to Preserve the Record so that Petitioner Might Make a *Batson* Challenge for the First Time in Post-Conviction Proceedings?

Next, Petitioner claims trial counsel failed to preserve the record for review. (PCR Appl. 50-52). He argues that trial counsel's failure to object to the State's use of strikes for cause and peremptory strikes prevented both appellate and post-conviction counsel from comparing the "percentage of African-American venire members struck with the percentage of white venire members struck, or even determine the percentage of African-Americans in the jury venire itself." (PCR Appl. 52). "The Defense raised no objection to any of the State's strikes." (PCR Appl. 52) (footnote omitted). Rather than request relief, Petitioner argues that "[w]ithout a complete transcript or equivalent picture of the trial proceeding no meaningful post-conviction proceeding can be had." (PCR Appl. 52) (footnote and internal punctuation omitted).

A. Reasons for Denying Further Review and Relief

The Court should deny Petitioner's fifth claim for relief for the following reasons:

1. *Counsel was not ineffective for failing to make a Batson challenge*

As the State appreciates it, Petitioner claims trial counsel was ineffective for failing to raise a *Batson v. Kentucky*,[58] challenge.[59] He asserts: "[Trial Counsel] made no official record of the race of any venire member. Nowhere in the trial record is there any evidence of the race of all qualified venire members."[60] (PCR Appl. 50) (footnote omitted). After stating the procedure for raising, litigating, and reviewing a claim of purposeful discrimination under *Batson* and its progeny, Petitioner asserts that:

> Upon information and belief, the jury in [Petitioner's] case was all white with one African-American male as an alternate. The State used four strikes for cause and eight peremptory strikes. The Defense raised no objection to any of the State's strikes. Neither appellate counsel nor post-conviction counsel could compare the percentage of African-American venire members struck with the percentage of white venire members struck, or even determine the percentage of African-Americans in the jury venire itself. Without a complete "transcript or equivalent picture of the trial proceeding" no "meaningful post-conviction proceeding can be had."

(PCR Appl. 51-52) (footnotes omitted).

With respect to *Strickland's* first prong, Petitioner must show trial counsel was deficient for not objecting to the State's use of its peremptory strikes. Problematic for Petitioner is that "the decision to make certain objections falls within the realm of trial strategy and is not grounds for a claim of ineffective assistance of counsel." *Spicer*, 973 So.2d at 203. Under this Court's precedent,

> the decision to make a *Batson* challenge falls within counsel's trial strategy and the

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[58] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[59] *Batson* challenges are utilized to contest whether one side is utilizing its peremptory challenges to exclude potential jurors because of some discriminatory basis. *Wilcher v. State*, 863 So.2d 719, 755-56 (¶ 137) (Miss. 2003) (citing *McGilberry v. State*, 741 So.2d 894, 923 (Miss. 1999).

[60] It is interesting to note that here, Petitioner claims both of his trial attorneys, including Mr. Busby, were ineffective. "*They* made no official record of the race of any venire member." (PCR Appl. 50) (emphasis added).

> wide latitude given to him. *See Strickland*, 466 U.S. at 686, 104 S.Ct. 2052; *Hiter v. State*, 660 So.2d 961, 965 (Miss. 1995). For example, the defense may find it strategic to forego a *Batson* challenge and allow the State to exercise one of its peremptory challenges on a juror that the defense finds less favorable than a juror further down the list when, by all accounts, the defense attorney could have actually prevailed on a *Batson* challenge. Defense counsel is presumed competent. *Johnson v. State*, 476 So.2d at 1204.

Wilcher v. State, 863 So.2d 776, 819 (Miss. 2003).

Petitioner fails to show his trial counsel was deficient for failing to make a *Batson* challenge, which necessarily means that he "has not overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Wilcher v. State*, 863 So.2d 719, 756 (¶ 141) (Miss. 2003) (some internal punctuation omitted) (quoting *Stringer*, 454 So.2d at 477 (quoting *Strickland*, 466 U.S. at 689)). "'[I]n order to receive a hearing on [a] claim of ineffective assistance, the post-conviction applicant to this Court must demonstrate with **specificity and detail** the elements of the claim.'" *Foster v. State*, 687 So.2d 1124, 1141 (Miss. 1996) (emphasis and brackets in the original) (quoting *Woodward v. State*, 635 So.2d 805, 808 (Miss. 1993)); *see Wilcher*, 863 So.2d at 824 (¶ 167). "[T]here is no ... requirement in the law[]" that trial counsel "indicate the racial composition of the jury[.]" *Walker*, 863 So.2d at 28 (¶ 85).

As for *Strickland's* second prong, Petitioner must show he has suffered actual prejudice as a result of trial counsel's performance. Petitioner fails to do. But even if assuming Petitioner had shown deficient performance, he does not claim to have suffered any prejudice from the failure to object to the State's peremptory strikes. He complains that:

> Neither appellate counsel nor post-conviction counsel could compare the percentage of African-American venire members struck with the percentage of white venire members struck, or even determine the percentage of African-Americans in the jury venire itself. Without a complete "transcript or equivalent picture of the trial proceeding" no "meaningful post-conviction proceeding can be had."

(PCR Appl. 51-52) (footnotes omitted).

Petitioner does not plead or even attempt to show actual prejudice as a result of counsel's failure to object. He must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[]" in order to demonstrate actual prejudice. *Wilcher*, 863 So.2d at 734 (¶ 30) (internal citations and quotation marks omitted) (quoting *Foster*, 687 So.2d at 1129-30). A reasonable probability refers to one that is "sufficient to undermine the confidence in the outcome." *Id*. Petitioner "has presented no evidence of prejudice ... other than speculation due to the racial composition of [Petitioner]'s jury...." *Bell v. State*, 66 So.3d 90, 92 (¶ 4) (Miss. 2011); *see e.g., Wilcher*, 863 So.2d at 756 (¶ 140) (explaining that even if the Court were to assume Wilcher's assertion that four of thirteen stricken jurors were African-American that, "Wilcher ha[d] not proven that he was prejudiced in any fashion by his attorney's decision not to assert a *Batson* challenge"). "This Court has held that, '[a]lthough the defendant does have a right to be tried by a jury whose members were selected pursuant to a nondiscriminatory criteria, the *Batson* court noted that the Sixth Amendment to the Constitution of the United States has never been held to require that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the populations.'" *Wilcher*, 863 So.2d at 756 (¶ 140) (quoting *Simon v. State*, 688 So.2d 791, 806 (Miss. 1997)).

The Court should deny Petitioner's fifth claim. Petitioner fails to demonstrate the deficient performance with any specificity or detail. He also fails to show actual prejudice. Accordingly, he is not entitled to a hearing on whether counsel were ineffective for failing to preserve the record by objecting to the State's use of its peremptory strikes. *See Wilcher*, 863 So.2d at 824 (¶ 167); *Foster*, 687 So.2d at 1141 (quoting *Woodward*, 635 So.2d at 808). His assertions do not, and cannot,

support a claim of ineffectiveness. *Id.* at 824 (¶ 169).

Petitioner cites to and relies on this Court's Decision in *Chapman v. State*, 167 So.3d 1170 (Miss. 2015), and the Court of Appeals's Decision in *Brown v. State*, 187 So.3d 667 (Miss. Ct. App. 2016), as authority that guarantees him an opportunity to return to the trial court and expand the trial court record with a *Batson* challenge that was never made. (PCR Appl. 52, n. 222). But neither *Chapman* nor *Brown* hold the implied proposition that Petitioner asserts.

Chapman, who had been sentenced to life imprisonment, never had an appellate court review the merits of several claims because the trial court record allegedly had been destroyed. *Id.* at 1171 (¶ 1). Chapman raised several issues in multiple PCR motions to no avail—his most recent PCR motion contained a *Batson* claim and two that implicated his constitutional rights. *Id.* at 1172 (¶¶ 4-5). His PCR motions had been summarily denied on procedural grounds. *Id.* at 1171 (¶ 2). This Court granted Chapman *certiorari* review of his most recent PCR motion, and reversed the trial court's decision to dismiss Chapman's PCR motion that had been affirmed by the Court of Appeals. *Chapman*, 167 So.3d at 1171-72, 1175 (¶¶ 2, 15).

In doing so, the Court noted the "lack of a trial record and transcript[,]" his attorney's failure to file an appeal on Chapman's behalf, and Chapman's allegations that trial record and physical evidence used to conviction him had been improperly destroyed after his conviction. *Id.* at 1172-73 (¶¶ 6-8). The Court found that without a record before It, Chapman was unable to adequately appeal his conviction. And because he had an "'absolute right'" right to appeal, the fact that there was no record before the Court was a potential violation of that right. In reversing the trial court and Court of Appeals, the Court said: "Under these extraordinary circumstances—lack of a direct appeal, lack of a court record, his attorney's alleged failure to obtain a transcript, lack of appellate review of the

merits of his claims—we find Chapman is entitled to an evidentiary hearing so that the trial court can determine what, if anything, of the trial record exists, and to provide Chapman and the State an opportunity to locate or reconstruct the trial record and transcript, or to produce an equivalent picture." *Id.* at 1174 (¶ 12).

As for *Brown v. State*, that decision actually supports the State's position. In that case, Brown appealed a trial court's dismissal of the claims raised in his PCR motion after it found all of Brown's claims were without any factual or legal basis, or with one exception, time-barred. *Brown*, 187 So.3d at 670 (¶ 3). The Court of Appeals noted that fundamental claims, including ineffective assistance claims, exempt from the UPCCRA's procedural bars. *Id.* at 670-71 (¶ 7). The Court of Appeals, in passing, also noted that this Court had "recently concluded that under 'extraordinary circumstances' ... trial counsel's failure 'to ensure [the] defendant c[ould] adequately appeal his conviction' excepted his PCR motion from the statutory time-bar." *Id.* at 671 (¶ 7) (alterations in the original) (quoting *Chapman*, 167 So.3d at 1173-74 (¶¶ 10-13)). The Court of Appeals then proceeded to review the record and the trial court's decision. *Id.* at 671-74 (¶¶ 8-20). And based on Its review, the Court of Appeals affirmed the trial court's decision to dismiss Brown's PCR motion. *Id.* at 674 (¶ 21).

The extraordinary circumstances in *Chapman* are not present in this case. Petitioner's attorneys did not fail to obtain a transcript of his trial proceedings. This Court reviewed the assignments of error that Petitioner raised on direct appeal. There are no allegations that the trial court record was improperly destroyed. And no portion of the trial court record is missing. *Chapman* has no present application. Petitioner asks that the Court to grant him leave for no reason at all. Based on what he has presented, Petitioner will be at the evidentiary hearing without having

to show his assertions have any merit on a *Batson* claim that does not meet the UPCCRA's pleading requirements so that he may go fishing for evidence. And this Court should refuse to grant his request for extraordinary relief. *Chapman* and *Brown* do not support Petitioner's position.

2. *Petitioner waived review*

The State realizes that Petitioner's ineffective assistance claim is a type of claim ordinarily raised in post-conviction proceedings. However, this ineffective assistance claim challenges trial counsel's performance for failing to make a *Batson* claim during trial. *Batson* challenges are raised at trial. If not, they are waived. "'[A] party who fails to object to the jury's composition before it is empaneled waives any right to complain thereafter.'" *Thorson v. State*, 895 So.2d 85, 119 (Miss. 2004) (quoting *Bell v. State*, 725 So.2d 836, 844 (Miss. 1998) (citing *Hunter v. State*, 684 So.2d 625, 631 (Miss. 1996); *Myers v. State*, 565 So.2d 554, 557 (Miss. 1990); *Puckett v. State*, 443 So.2d 796, 799 (Miss. 1983))). "Since no objection was made, this issue is not properly preserved for review before this Court." *Thorson*, 895 So.2d at 119 (citing *Cannaday v. State*, 455 So.2d 713, 719 (Miss. 1984); *Ratliff v. State*, 313 So.2d 386 (Miss. 1975); *Pittman v. State*, 297 So.2d 888 (Miss. 1974); *Myers v. State*, 268 So.2d 353 (Miss. 1972)).

Now, Petitioner wants to litigate that which does not exist under the guise of ineffective assistance. *Id.*; *see Walker*, 863 So.2d at 26-27 (citing *Foster*, 687 So.2d at 1129, 1138, 1140; *Wiley v. State*, 517 So.2d 1373, 1377 (Miss. 1987)). "[P]ost-conviction relief is not granted upon facts and issues which could or should have been litigated at trial and on appeal." *Cole*, 666 So.2d at 773 (citing *Smith v. State*, 434 So.2d 212, 215 n. 2 Miss. 1983)). Claims such as this one, which "'could have been presented on direct appeal or at trial are procedurally barred and cannot be relitigated under the guise of poor representation by counsel.'" *Wilcher*, 863 So.2d at 735 (quoting *Foster*, 687

So.2d at 1129). With respect to claims similar to this one, the Court has opined as follows:

> We are compelled to note that in the instant case, as is all too often the case in similar post-conviction relief efforts which come before this Court, the petitioner is in actuality merely seeking to relitigate his case. Such is not the proper function of post-conviction relief proceedings in Mississippi. The fair and orderly administration of justice dictates that a person accused of a crime be afforded the opportunity to present his claims before a fair and impartial tribunal. **It does not require that he be given multiple opportunities to "take a bite at the apple." Likewise, the orderly administration of justice does not require this Court to "lead a defendant by the hand" through the criminal justice system. It is this Court's responsibility to provide a meaningful opportunity for defendant to raise his claims and have them adjudicated.**

Id. at 773 (emphasis in the original) (quoting *Smith*, 434 So.2d at 220).

The *Batson* challenge underlying Petitioner's fifth claim was waived at trial when Petitioner failed to raise it. Review is now barred by Section 99-39-21(1) without exception as Petitioner fails to show cause and actual to excuse his waiver. Accordingly, it must be denied.

VI. Petitioner's Request to Supplement His PCR Application.

Petitioner's sixth and final claim is moot. Petitioner, without opposition from the State, was granted a ninety-day stay of these proceedings. He was also given permission to supplement his PCR Application with argument and exhibits. The State would address the assertions he makes, even though it, like the one before it, is not a claim at all. Petitioner blames the Attorney General's Office for defending the State's interests in this case. (PCR Appl. 52-54). First, Petitioner blames the Attorney General's Office for challenging the qualifications of two staff attorneys with the OCPCC, who sought to be appointed as Petitioner's post-conviction counsel. Both attorneys admitted that they did not meet the qualifications under the previous version of M.R.A.P. 22(d), which was in effect at the time they were seeking to be appointed to represent Petitioner. The litigation of counsel's qualifications could have been avoided entirely had the OCPCC simply

complied with the Court's rules. The OCPCC's decisions cannot be attributed to the State. The State plays absolutely no part in the OCPCC's hiring decisions.

Additionally, Petitioner enjoys the right to effective assistance of post-conviction counsel. *Grayson*, 118 So.3d at 126. By challenging counsel's qualifications, the State was taking the preemptive steps to prevent present and future error. The State was in no way attempting to delay the proceedings or hinder Petitioner's efforts. It is no secret that post-conviction counsel's representation is fertile ground for raising ineffective assistance claims in subsequent collateral review proceedings, as evidenced by the growing number of ineffective assistance claims filed in this Court (*e.g., Justin Underwood v. State of Mississippi*, No. 2015-DR-01378-SCT; *Joseph Patrick Brown v. State of Mississippi*, No. 2015-DR-01099-SCT; *Jordan*, 2016 WL 7280243 (No. 2015-DR-01802-SCT); *Walker v. State*, 131 So.3d 562, 563 (Miss. 2013); *Grayson*, 118 So.3d 118).

The State benefits by avoiding error, not ignoring it. The State did not hinder Petitioner's efforts by advocating for its interests or Petitioner's. The State is not to blame for decisions it had no part in making. The State's challenges led to a modification of M.R.A.P. 22(c), which was promulgated to protect his interests.

Petitioner also alleges that the State hindered his ability to investigate and present claims for post-conviction relief by challenging a second request for expert access in this case. He has attached a motions hearing transcript, believing it shows his request for access was delayed by the State. It does not.

During the pre-petition proceedings in this case, the State responded to a motion for access that was filed in the trial court on Petitioner's behalf. The trial court heard arguments from post-conviction counsel, the State, and MDOC on Petitioner's second motion for expert access. The trial

rejected the State's position, that it was entitled to notice and should be given an opportunity to be heard this motion for access. As the motions hearing transcript shows, the State challenged this second request for access because Petitioner was not merely requesting access. He was asking the trial court to direct MDOC to make several exceptions to its policy concerning visitation and access. The State argued that Petitioner was seeking an order that required MDOC to act contrary to its written policy. And because the trial court was invoking its compulsory process under M.R.A.P. 2(c), the State argued it was entitled to notice and an opportunity to be heard on the matter pursuant to M.R.A.P. 22(c) and this Court's precedent.

As the State argued, the trial court's authority to grant Petitioner's motion for access derived entirely from the provisions of M.R.A.P. 22(c)(4)(ii). *See Corrothers*, 189 So.3d at 613 (recognizing that "M.R.A.P. 22(c)(4), which governs the time between the appointment of counsel and the filing of a petition for post conviction relief, allows the petitioner's lawyers access to 'discovery and compulsory process' for the purpose of gaining access in support of the petition for post-conviction relief ... [;] [and that] Rule 22 clearly provides that '[d]iscovery and compulsory process may be allowed *the petitioner*'") (emphasis in the original) (quoting M.R.A.P. 22(c)(4)(ii)). The State argued that the provisions of M.R.A.P. 22(c)(4)(ii) were promulgated with the intent that a petitioner's attorneys have discovery and compulsory process. And by invoking that authority under M.R.A.P. 22(c)(4)(ii), the trial court was either granting discovery or compelling process. Either way, the State was entitled to notice and an opportunity to be heard. *See Howard*, 945 So.2d at 360 (reaffirming prior precedent, holding "'[t]he rule recognizes the burden placed on the inmate to file fully developed post-conviction pleadings. At the same time, the State is entitled to resist unwarranted discovery as well as unnecessary awards of investigative expenses, which will, at least

implicitly, condone the areas of inquiry to be pursued in the investigation'") (quoting *Russell*, 819 So.2d at 1178-80). The State maintains that position.

The State alternatively argued that it had been denied the notice and the opportunity to be heard on the matter of litigation expenses, including expert assistance, under the provisions of M.R.A.P. 22(c)(3).[61] The access motion hearing transcript bears this out as well. But, the trial court dismissed that argument because it found the State failed to call the matter up for hearing in spite of the Rule's terms, which clearly read:

> (3) Compensation of Appointed Counsel and Expenses of Litigation. Compensation for attorneys appointed under this section and expenses of litigation shall be governed by Miss. Code Ann. § 99-15-18. Prior to the approval of expenses for litigation, *the petitioner shall present to the convicting court, with notice to the Attorney General and an opportunity for the Attorney General to be heard, a request estimating the amount of such expenses as will be necessary and appropriate in the matter, and the court will determine and allow such expenses as are justified upon hearing of the request for expenses. In requesting such expenses, the petitioner shall make a preliminary showing that such expenses are necessary to the presentation of his case and that they relate to positions which may reasonably be expected to be beneficial.* To the extent that the court may find that the disclosure of identity of experts or other factual matters may hinder a fair preparation of the petitioner's case, the disclosure thereof may be presented in camera without disclosure to the State. All orders initially allowing litigation expenses shall be subject to review and reconsideration from time to time as the court may find necessary, and payment under such order will be approved only upon the submission of specific detailed invoices and review by the court. Should the court find that such invoices contain information which if disclosed to the State would unfairly disclose information detrimental to the petitioner's fair presentation of his case, the court shall consider those portions in camera without disclosure to the State.

M.R.A.P. 22(c)(3) (emphasis added). Under M.R.A.P. 22(c)(3), Petitioner was required to present litigation expenses to the trial court with notice to the Attorney General's Office, as a matter of

[61] To date, Petitioner has filed absolutely nothing with the Circuit Court of Harrison County, Mississippi, in compliance with M.R.A.P. 22(c)(3).

course. Under Rule 22, the Attorney General's Office has no obligation to call out the fact that Petitioner has never presented the State with notice, or given it any opportunity to be heard on the matter of litigation expenses. Nevertheless, the State challenged Petitioner's access in the trial court because it was denied the notice and the opportunity to be heard to be heard on litigation expenses.

The State would also call the Court's attention to another point raised. Petitioner asserts that the State lacked standing to argue these positions. "Post-conviction proceedings in which the defendant is under sentence of death shall be governed by rules established by the Supreme Court as well as the provisions of this section." Miss. Code Ann. § 99-39-27(11). With respect to litigation expenses, M.R.A.P. 22(c)(3) expressly names the "Attorney General", twice, as being entitled to notice and an opportunity to be heard on the issue of litigation expenses. Does the Rule not mean what it says? And as it relates to discovery and compulsory process, this Court's precedent holds that Rule 22(c) "governs the time between the appointment of counsel and the filing of a petition for post conviction relief...." *Corrothers*, 189 So.3d at 613 (citing M.R.A.P. 22(c)(4)(ii)). "'Ex parte presentation should be available in proceedings for expenses and discovery, but only after a determination that disclosure to the State is incompatible with a meaningful opportunity to prepare the defendant's case. This necessarily entails service on the *Attorney General* of pleadings and notice of hearings.'" *Howard*, 945 So.2d at 360 (emphasis added) (quoting *Russell*, 819 So.2d at 1178-80). M.R.A.P. 22(c) undeniably names the Attorney General as the party who is entitled to notice and an opportunity to be heard on discovery and/or compulsory process and litigation expenses. The State has been denied this right in this case and in many others.

It is also worth noting that the State did not oppose the ninety-day stay that Petitioner recently

requested.[62] Prior to filing an Unopposed Motion to Stay Post-Conviction Proceedings, Petitioner's post-conviction counsel contacted undersigned and asked whether the State had any objection(s) to Petitioner's request for a stay of these proceedings. The State communicated its willingness to work with post-conviction counsel's efforts to obtain nearly 4,500 medical records for purposes of filing a supplemental petition for post-conviction relief.

The assertions advanced under Petitioner's sixth claim fail to state an actual claim for relief. Those assertions are just that, assertions. The State is in no way responsible for any delays that may have occurred during the pre-petition proceedings of this case.

CONCLUSION

For the reasons stated above, the State respectfully requests that the Court deny Petitioner Timothy Robert Ronk's Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief filed in the above styled and numbered case.

Respectfully submitted

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

JASON L. DAVIS
Special Assistant Attorney General

by: s/ *Brad A. Smith*
BRAD A. SMITH
Special Assistant Attorney General
Miss. Bar No. 104321

[62] See Unopposed Motion to Stay Post-Conviction Proceedings, filed Mar. 14, 2017, *Ronk*, No. 2015-DR-01373-SCT.

CERTIFICATE OF SERVICE

This is to certify that I, Brad A. Smith, Special Assistant Attorney General for the State of Mississippi, electronically filed the foregoing Response in Opposition to Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief and Respondent's Exhibit 1 with the Clerk of the Court, using the MEC system, which sent notice of this filing to the following:

Scott A. Johnson, Esq.
Alexander D. M. Kassoff, Esq.
The Office of Capital Post-Conviction Counsel
239 North Lamar Street, Suite 404
Jackson, Mississippi 39201

This, the 14th day of February, 2018.

s/ *Brad A. Smith*
BRAD A. SMITH
Special Assistant Attorney General

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