BEFORE THE MISSISSIPPI COURT OF APPEALS
No 2016-CA-01230-COA

JOHN PHINIZEE — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT
LOWNDES COUNTY, MISSISSIPPI

BRIEF OF THE APPELLANT

ORAL AGRUMENT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that all listed persons have an interest in the outcome of this case. The representations are made in order that this Court may evaluate possible disqualifications or recusal.

John Phinizee, Appellant

State of Mississippi,, Appellee

Blewett William Thomas, Attorney for the Appellant

Scott Colom, Esq., Lowndes County District Attorney

Honorable James T. Kitchens, Jr., Lowndes County Circuit Court Judge

Submitted this the 22nd day of June, 2017.

JOHN PPHINIZEE

By: *Blewett Thomas*
BLEWETT WILLIAM THOMAS
ATTORNEY FOR APPELLANT

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STATEMENT OF THE ISSUES

This appeal challenges the determination of the Lowndes County Circuit Court that the Appellant JOHN PHINIZEE ("Phinizee"), in disregard of the psychological opinions submitted by the experts for both the State of Mississippi and Phinizee, had a rational as well as factual understanding of the nature and object of the legal proceedings against him, and that he had sufficient ability to consult with his attorney in the preparation of his defense.

The Circuit Court Judge further determined that, in disregard of undisputed testimony showing that Phinizee's trial lawyer did not conduct any pre-trial investigation and that trial counsel only learned Phinizee had mental disabilities after the trial commenced, Phinizee had not received ineffective assistance of counsel during the trial.

The August 10, 2016 Order denying Phinizee's petition for post-conviction relief was manifestly against the overwhelming weight of the evidence. Further, the Order evidences an intent by the Circuit Court Judge to override the psychological opinions presented by the experts of Phinizee and the State, and instead rely upon his personal and unsubstantiated lay opinion in order to deny Phinizee post-conviction relief. Under the facts of this case, the Circuit Court Judge's reliance on his own unsubstantiated lay opinion to the exclusion of the opinions presented by psychological experts constitutes plain-error and requires reversal of the Circuit Court's Order.

STATEMENT OF THE CASE

On the morning of December 9, 2003 the Lowndes County Sheriff's Department conducted a surveillance operation as a result of both anonymous letters received by the department during July 2001 and April 2002 and a meeting with the husband of a Mary Power, a/k/a Georgia Whitmire, during October 2003. Officers testified that they witnessed actions that were consistent with a drug transaction between Whitmire and the Appellant Phinizee at approximately 10 o'clock that morning. He was arrested shortly thereafter. At the time of his arrest, Phinizee was in possession of less than 2 grams of cocaine, which he is alleged to have possessed with the intent to distribute, for which was also charged.

After being in police custody since 10 am, and having been denied the opportunity to place a call to his family or an attorney during his custody, at approximately 6 pm that evening Phinizee was taken by the Lowndes County Sheriff's Department to a pool hall owned by third-persons[1] and ordered by law enforcement officers to unlock the door to the poll hall. During the search of the poll hall, cocaine was found, although Phinizee contended that this cocaine was not his. On the basis of the evidence seized at the pool hall, Phinizee was additionally charged with a second count of possession of cocaine with intent to distribute. He was subsequently indicted on these three charges.[2]

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1 Appellant's Record Excerpt RE-14.

2 Appellant's Record Excerpt RE-6.

After returning from the search of the pool hall, the Lowndes County Sheriff's Department prepared a typewritten statement, which Phinizee signed at approximately 9:53 pm on the evening of December 9, 2003. The fact that Phinizee was held in isolation for 12 hours and forced to sign a prepared statement becomes significant when it is considered that Phinizee has an IQ of less than 70[3] and has been determined by experts of the State of Mississippi to only have the ability to read at the level of a kindergartner.[4]

Upon being indicted on these charges in Lowndes County Circuit Court in Cause No. 2004-0244-CR1, Phinizee hired Gary Goodwin to defend these charges. As shown by Mr. Goodwin's testimony at the post-conviction hearing, he had very limited conversations with Phinizee concerning either the underlying facts of the case or its defense.[5] In fact, Mr. Goodwin's pre-trial investigation of this case was so minimal and deficient that he did not learn of Phinizee's mental disabilities and that he was essentially unable to read and write **until after the State of Mississippi rested it case at trial**.[6] Mr. Goodwin acknowledge during his testimony at the post-conviction relief hearing that nothing precluded him from a motion to determine Phinizee's mental competency on the morning of the trial.[7]

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[3] Appellant's Record Excerpt RE-18, p. 291, ll. 9-15, and RE-19, p. 22, ll. 9-10.
[4] Appellant's Record Excerpt RE-19, p. 33, ll. 21-27.
[5] Appellant's Record Excerpt RE-17, p. 218, ll. 25-27.
[6] Appellant's Record Excerpt RE-16, p. 361, ll. 10-19; RE-17, p. 222, l. 28, p. 223, ll. 3-8 and p. 224, ll. 4-6, 25.
[7] Appellant's Record Excerpt RE-17, p. 227, ll. 10-16.

After his indictment, Phinizee filed a motion to suppress his statement and the evidence presented against him,[8] and a hearing was conducted on April 19, 2005, before Circuit Court Lee Howard. On September 12, 2005, Judge Howard denied the suppression motion. Mr. Goodwin subsequently testified at the post-conviction hearing that the had based he suppression motion was solely upon claims that Phinizee's arrest was illegal, and therefore any evidence seized pursuant to his arrest should be suppressed. In fact, Mr. Goodwin acknowledged at the post-conviction relief hearing that his defense rested entirely upon him winning his suppression motion, and he had not made any further preparation to defend Phinizee either at trial or during the sentencing hearing.[9] As further evidence of Mr. Goodwin's effective assistance in this matter, he also testified that he made no attempt to prepare Phinizee to testify at trial[10] or at the suppression hearing.[11]

Had Mr. Goodwin conducted even a rudimentary investigation of Phinizee's Social Security records,[12] he would have learned that Phinizee is of limited intelligence, having been tested as having a WAIS-R Full Scale score IQ of between 54 and 58 (which places him in the lower limits of the mild range of mental retardation), and that he suffers from organic brain damage. Further, Phinizee Social Security records confirm that he has a medical history seizures

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8 Appellant's Record Excerpt RE-12.

9 Appellant's Record Excerpt RE-17, p. 228, ll. 232-6.

10 Appellant's Record Excerpt RE-17, p. 228, ll. 5-10.

11 Appellant's Record Excerpt RE-17, p. 229, ll. 2-4.

12 Mr. Goodwin acknowledged that he was advised before trial that Phinizee was receiving Social Security disability benefits as a result of a prior brain injury. See Appellant's Record Excerpt RE-17, p. 215, l. 27 and p. 216, 2-3.

and brain surgery dating back to 1985, and he has been committed for treatment of visual delusions.[13]

On the basis of his medical records, the suppression motion should have also alleged that Phinizee's impaired mental capacity undermined his ability to understand the implication of the waiver of his *Miranda* rights, and that Phinizee's impaired mental capacity could have rendered him subject to manipulation or undue influence due his isolation for a prolonged period after his arrest. Clearly, sufficient evidence existed to allege that Phinizee was mentally incapable of both understanding and asserting his rights, and that he was coerced into giving access to the pool hall and signing the statement prepared by the Lowndes County Sheriff's Department. However, none of these issues concerning Phinizee's mental impairments were raised before the Circuit Court in the suppression motion, and the motion was denied upon the basis that Phinizee's arrest was in fact legal.

On February 14, 2006 Appellant went to trial on the indictment before Circuit Court Judge James T. Kitchens, Jr.[14] On February 16, 2006, the jury reached a verdict of guilty on all counts, and Phinizee was sentenced to a term of 30 years on each count, with counts two and three running concurrent for a total of 60 years. Significantly, the sentencing hearing was conducted in the late afternoon immediately after the jury's verdict was returned, and Phinizee's trial counsel did not present any mitigation evidence during sentencing. Again, Mr.

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[13] See Appellant's Record Excerpts RE-9, RE-10 and RE-11.

[14] Judge Howard assigned the case to Judge Kitchens for trial due to an injury Judge Howard suffered to his back.

Goodwin was ineffective at the sentencing hearing, as he allowed the State to introduce hearsay evidence that Phinizee had previously been convicted in Alabama on federal alcohol charges. Additionally, the transcript of the sentencing hearing provides little justification for imposing two consecutive terms of thirty 30 years, which is the maximum sentence for the charges in the indictment.

Phinizee filed post-trial motions for a judgment notwithstanding the verdict or in the alternative a new trial and a motion for reconsideration of sentence. All post-trial motions were denied. Phinizee filed a timely appeal of his conviction and sentence, but both the Mississippi Court of Appeals and Supreme Court denied him any relief.

Thereafter on May 29, 2011, Phinizee filed his Motion for Post-Conviction Relief with the Mississippi Supreme Court pursuant to the provisions of Miss. Code Ann. § 99-39-1 *et seq.*, specifically alleging that he was entitled to relief under subsections (a), (e) and (i) of Miss. Code Ann. § 99-39-5. In support of his claim of ineffective assistance of counsel, Phinizee alleged the following matters under oath in his May 2011 Petition to the Mississippi Supreme Court:

a. After he was arrested on the morning of December 9, 2003, Phinizee was taken to the sheriff's office and questioned. Phinizee asked to call his wife at the time of arrest, but he was not allowed to make any calls. Additionally, Phinizee asserted under oath that he was not advised at any time after his arrest that he could call a lawyer or that he didn't have to talk with the officers;

b. Phinizee was asked by the deputies if they could go search Bernard's Pool Hall. He responded that the pool hall belonged to Willie Barksdale and they needed to ask him about that. Phinizee was told that it would be all right if he let them go into the pool hall, and Phinizee was scared to argue about this with the deputies;

c. Phinizee was also questioned about who was selling dope at the pool hall, and Phinizee stated that he didn't know anything about what went on around the pool hall or who was going down there at night;

d. Phinizee was taken out to Bernard's Pool Hall by deputies roughly 8 hours after his arrest and told to unlock the door to the pool hall. Phinizee alleges that he didn't agree to give law enforcement any statement after they returned to the sheriff's office, and that he thought he had to sign the statement if he wanted to get a bond. At the time Phinizee signed the papers, he did not understand his rights regarding communications with the police or his entitlement to a lawyer.

e. During the time Phinizee was at the sheriff's office after his arrest, nobody explained to him that he had any specific rights because he had been arrested;

f. Phinizee never owned or ran Bernard's Pool Hall. His son Bernard owned it at first, and afterwards Willie Barksdale took it over. The only thing Phinizee ever did at the pool hall was to cook.

On August 31, 2011, the Supreme Court granted Phinizee's request to seek post-conviction relief, and it remanded this case to the Lowndes County Circuit Court for an evidentiary hearing in order to determine the validity of Phinizee's claims. On September 2, 2011, Phinizee filed his petition for post-conviction relief,[15] which specifically alleged that:

a. he was denied effective assistance of counsel during his trial, as Phinizee's lack of intelligence and related brain disorders were relevant issues that should have been raised both at the suppression hearing and as mitigating evidence at trial;

b. he was denied effective assistance of counsel at trial due to the fact that his documented lack of intelligence and organic brain damage constituted both mitigation evidence and relevant considerations as to whether he was in fact capable of engaging in such extensive drug activities, which was supposedly the trial judge's justification for the imposition of the 60-year sentence; and

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[15] Appellant's Record Excerpt RE-4.

c. he was denied effective assistance of counsel at trial due to the fact that Mr. Goodwin failed to conduct a reasonable or even cursory pre-trial investigation into Phinizee's limited ability to read and write, his various mental disabilities and other related health issues, which precluded Phinizee from presenting various witnesses at trial and sentencing that could substantiate that i) Phinizee did not own or operate Bernard's Pool Hall, ii) Phinizee lacked the intelligence and ability to operate any business venture, and iii) there was no "crime epidemic" in the Plum Grove community as perceived by Judge Kitchens.

Subsequent to filing the petition for post-conviction relief, Phinizee's family hired Dr. Stan Brodsky, a forensic psychologist who teaches that the University of Alabama,[16] to examine Phinizee and prepare an opinion concerning Phinizee's mental capacity. On May 15-16, 2013, Dr. Brodsky examined Phinizee at the Leakesville prison. Dr. Brodsky observed that although Phinizee might occasionally ask the meaning of words, he would typically act as if he understood. On he Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV), Phinizee attained a Full Scale I.Q. of 65, with his lowest scores being in the areas of Verbal Comprehension (61) and Processing Speed (62), while his highest scores were in Perceptual Reasoning (79) and Working Memory (80). Dr. Brodsky opined that these results yielded a picture of a man functioning in the mildly disabled range of intellectual disability, which used to be called mild mental retardation. Dr. Brodsky's testing further revealed that Phinizee ability to read words was at the level of the 4th month of kindergarten level, his sentence comprehension was at the level of beginning kindergarten and his spelling level was also at the level of beginning kindergarten. Phinizee's nonverbal behavior, the consistency of his answers, and his approach to the tasks indicated that there

[16] Referencing Dr. Brodsky's Vita, submitted as Appellant's Record Excerpt RE-8.

were no signs of malingering of pathology or retardation. Dr. Brodsky further found that "The inability of Mr. Phinizee to understand and appreciate issues related to competency to stand trial is compelling. While he is currently able to address many aspects of *Miranda* rights, his overall low functioning raises questions about whether he could understand them and willingly waive them at the time of his interrogation." Dr. Brodsky's written report was filed of record with the Circuit Court on July 29, 2013, and it has been submitted as Appellant's Record Excerpt RE-7.

On August 30, 2013, the Circuit Court conducted the initial hearing on Phinizee's petition for post-conviction relief. At the hearing, Dr. Brodsky was accepted by the Circuit Court as an expert in the field of forensic psychology.[17] He reiterated matters contain in his written opinion and testified to the following matters concerning Phinizee's mental deficiencies:

a. when Dr. Brodsky asked Phinizee to repeat what he was told about the lack of confidentiality in the statements made to Dr. Brodsky, Phinizee could not explain what had been said in his own words,[18] and this made it apparent to Dr. Brodsky that Phinizee did not have an independent understanding of what he had been told;[19]

b. Phinizee's IQ scores from 1986, 1990 and 2013 place him in the same range of mild intellectual disability;[20]

c. the results of the McArthur Competency Assessment tool was consistent with the other deductions Dr. Brodsky had independently made about Phinizee, and that Phinizee's scores on the reasoning and understanding aspect of the MacCat-CA indicated that he had a great deal of difficulty

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17 Appellant's Record Excerpt RE-18, p. 281, ll. 2-24,

18 Appellant's Record Excerpt RE-18, p. 286, ll. 6-18.

19 Appellant's Record Excerpt RE-18, p. 286, ll. 23-27.

20 Appellant's Record Excerpt RE-18, p. 291, ll. 9-15.

understanding the legal process and his responses were indicative of significant impairment;[21] and

d. Phinizee demonstrated a passive nature and appeared to want to be knowledgeable about matters when in fact he did not adequately understand what he was being told.[22]

Based upon his testing and evaluation of Phinizee, Dr. Brodsky testified that in his professional opinion, Phinizee was unable to understand and assist in his defense at trial during 2006 because of his intellectual disabilities,[23] Phinizee was not competent to stand trial in 2006,[24] and that his opinion regarding the competency to stand trial was based upon Phinizee's major impairments and intellectual disabilities.[25]

The hearing was continued due to the fact that State moved on the day before the hearing for a mental evaluation of Phinizee. Eventually, Drs. Reb McMichael and Rob Storer conducted a mental evaluation of Phinizee at the State Hospital on December 21, 2015.[26] Dr. Storer's report was subsequently filed of record with the Circuit Clerk on January 14, 2016, and it was also admitted into evidence at the May 13, 2016 hearing.

In his report, Dr. Storer stated that he was unable to form an opinion to a reasonable degree of psychological certainty was to whether Phinizee had sufficient ability leading up to and at the time of the February 2006 trial to consult with his attorney to a reasonable degree of rational understanding in the

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21 Appellant's Record Excerpt RE-18, p. 295, ll. 1-4 and p. 296, l. 1 to p. 297, l. 2.
22 Appellant's Record Excerpt RE-18, p. 298, l. 18 to p. 300, l. 20.
23 Appellant's Record Excerpt RE-18, p. 310, l. 28 to p 311, l. 21.
24 Appellant's Record Excerpt RE-18, p. 312, ll. 21-29.
25 Appellant's Record Excerpt RE-18, p. 314, ll. 23-29.
26 Dr. Storer conducted an initial interview with Phinizee on December 11, 2015.

preparation of his defense. Dr. Storer further opined that he was unable to form an opinion to a reasonable degree of psychological certainty was to whether during this same period of time, Phinizee had a rational as well as factual understanding of the nature and object of the legal proceedings against him. Additionally, Dr. Storer stated that he was unable to form an opinion to a reasonable degree of psychological certainty was to whether Phinizee was able to understand the questions presented to him by the Lowndes County Sheriff's Department on the evening of December 9, 2003, and contained in his statement signed on that date.[27]

On May 13, 2016, Dr. Storer testified before the Circuit Court in the post-conviction proceedings. Referencing Phinizee's consistently low IQ scores, Dr. Storer stated that the average IQ score is 100 with a standard deviation being 16. "Below 70, you're talking about somebody having sub-average intellectual functioning."[28] Dr. Storer further testified that Phinizee has deficits in his ability to knowingly and intelligently give a statement due to his sub-average intellectual functioning and his reading level being around the kindergarten level.[29] He additionally stated that Phinzee's verbal IQ scores were consistent from 1985 through 2015, being in the range of 61 to 63 on the respective tests.[30]

As to any claims that Phinizee currently evidences an understanding of the legal system, Dr. Storer confirmed that Phinizee developed his current

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27 Appellant's Record Excerpt RE-20, p. 55.
28 Appellant's Record Excerpt RE-19, p. 19, ll. 22-25.
29 Appellant's Record Excerpt RE-19, p. 33, ll. 21-27.
30 Appellant's Record Excerpt RE-19, p. 36, ll. 1-9.

"understanding" of the legal system in large part from watching the TV shows "Matlock" and "Perry Mason" while imprisoned, and that an understanding of TV legal shows does not meet the legal criteria of being able to effectively assist one's attorney in the defense of criminal charges.[31] Dr. Storer also opined that the fact the post-conviction proceedings had been going on for five years would have helped Phinizee's understanding of the criminal legal process.[32]

Dr. Storer further observed that Phinizee had intellectual deficits in his ability to process information, formulate a judgment and then respond. He also observed that Phinizee had difficulty in understanding spoken language as it became more complex.[33]

Dr. Storer concurred that Phinizee was incapable to reading the statement he signed at the time of his arrest, and that he had experienced difficulty explaining the statement to Phinizee during the interview. He further stated that Phinizee had told him that he did not know what was in the statement until it was read during the suppression hearing.[34] It was Dr. Storer's opinion that Phinizee's intellectual disabilities and his full scale IQ score of 68 would have made it difficult for Phinizee to knowingly and intelligently waive his rights at the time the December 2003 statement was given.[35]

Dr. Storer also testified that in a survey of those defendants having verbal IQ scores between 60 and 70, those defendants who were determined to be

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31 Appellant's Record Excerpt RE-19, p. 45, l. 23 to p. 46, l. 21.
32 Appellant's Record Excerpt RE-19, p. 49, ll. 1-10.
33 Appellant's Record Excerpt RE-19, p. 48, ll. 11-22.
34 Appellant's Record Excerpt RE-19, p. 49, l. 11 to p. 50, l. 2.
35 Appellant's Record Excerpt RE-19, p. 50, ll. 3-16.

legally competent had a mean verbal IQ score of 65.5, while those who were determined to be legally incompetent had mean verbal IQ scores of 60.2. he confirmed that Phinizee had consistently tested at a verbal IQ score of 61 to 63 between 1986 and 2015.[36]

During his testimony, Dr. Storer reiterated his opinion stated in his written report, to-wit, that he is not able to provide an opinion that Phinizee was legally competent to stand trial during 2006.[37]

On August 10, 2016, Circuit Court Judge James Kitchens[38] entered his Order on Phinizee's post-conviction relief petition.[39] In his Order, Judge Kitchens denied Phinizee any and all relief sought under his petition. In his Order, Judge Kitchens undertook to render his own opinion as to Phinizee competency and able to assist counsel in the defense of these charges. Specifically, Judge Kitchens found that "At trial and all previous and subsequent hearings, Petitioner has appeared to be able to communicate with his attorney and understand the court proceedings against him."[40] This is in contradiction to the expert opinions presented by both Phinizee and the State. In essence, Judge Kitchens gave his subjective and unsubstantiated lay opinion undue weight in order to disregard the experts' determinations and the legal effect that those opinions would have on Phinizee's entitlement to post-conviction relief under his petition.

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36 Appellant's Record Excerpt RE-19, p. 47, ll. 6-17.

37 Appellant's Record Excerpt RE-19, p. 55, ll. 26-28 and p. 56, ll. 8-10.

38 Judge Kitchens was also the trial judge in the 2006 criminal proceedings against Phinizee.

39 Appellant's Record Excerpt RE-2.

40 Appellant's Record Excerpt RE-2, p. 336.

Judge Kitchen's exclusive reliance on his personal opinion is not an instance in which a trial judge makes an independent and reasoned evaluation of facts. On the contrary, Judge Kitchens disregarded the psychological opinions of both Drs. Brodsky and Storer, and without any scientific basis he ruled that Phinizee was in fact competent in all matters during trial **based solely upon his personal observations of Phinizee during the court proceedings**. This constitutes plain-error.

STANDARD OF REVIEW

Phinizee submits that the Circuit Court Judge committed plain-error when he elected to disregard the respective opinions offered by the psychological experts of both the State and Phinizee, and instead the Circuit Court Judge relied exclusively upon his personal observations of Phinizee during course of court appearances dating back to 2005 as the basis for determining the issue of Phinizee's competency.

This Court employs the plain-error rule only when a defendant's substantive or fundamental rights are affected. *Lafayette v. State,* 90 So.3d 1215, 1220 (Miss. 2012). To determine if plain error has occurred, this Court must determine if the trial court has deviated from a legal rule, whether that error is plain, clear, or obvious, and whether that error was prejudicial. *Id*. at 1220.

As the Circuit Court Judge was not qualified to render a psychiatric or psychological opinion concerning Phinizee's competency, such an opinion on Phinizee's competency by the trial judge would be review as the opinion of a lay witness. This Court reviews a trial court's decision to admit such lay opinion testimony for an abuse of discretion. *See Davis v. State*, 904 So.2d 1212, 1215 (¶7) (Miss. Ct. App. 2004).

STATEMENT CONCERNING ORAL ARGUMENT

Counsel for the Appellant believes that oral argument would be of assistance to the Court in resolving the issues presented in this appeal.

SUMMARY OF THE ARGUMENT

Phinizee was denied effective assistance of counsel at trial, as his intellectual disabilities and related mental disorders should have been raised in advance of trial through a motion to determine his competency to stand trial. Further, Phinizee was denied effective assistance of counsel due to the fact that trial counsel failed to conduct a reasonable pre-trial investigation into Phinizee's various mental disabilities, which have shown that Phinizee was not capable of assisting counsel in the defense of the criminal charges. Subsequently, Phinizee's psychological expert Dr. Stan Brodsky testified that it was his opinion that Phinizee was not capable of assisting his attorney at trial[41] and that Phinizee was not competent to stand trial in 2006,[42] The State's psychological expert Dr. Rob Storer testified that he could not render an opinion concerning Phinizee's competency to stand trial on February 16, 2006.[43] When the record is replete with information that, when objectively considered, raises doubt as to a petitioner's competency to stand trial, the conviction should be vacated, with the petitioner to either be retried or institutionalized following a mental evaluation and competency hearing under Rule 9.06 of the Uniform Rules of Circuit and County Court. *Brasso v. State*,195 So.3d 856, 864 (¶¶ 30-31) (Miss. Ct. App. 2016). In those instances where a competency hearing was not conducted in advance of trial, the appropriate remedy for failure to hold a competency hearing is a new trial. *Smith*

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41 Appellant's Record Excerpt RE-18, p. 310, l. 28 to p 311, l. 21.
42 Appellant's Record Excerpt RE-18, p. 312, ll. 21-29.
43 Appellant's Record Excerpt RE-19, p. 55, ll. 26-28.

v. State, 149 So.3 1027, 1035 (¶19) (Miss. 2014), citing *Coleman v. State*, 127 So.3d 161, 168 (Miss. 2013).

ARGUMENT

ISSUE NO. 1: The Record Confirms That Phinizee Is Mentally Disabled And That These Disabilities Precluded Him From Assisting His Attorney At Trial

A criminal defendant has a federal constitutional due process right not to be tried while incompetent. *Pate v. Robinson*, 383 U.S. 375, 385 (1966). The Mississippi Constitution also protects this right. *Williams v. State*, 205 Miss. 515, 524, 39 So.2d 3, 4 (1949) (citing Miss. Const. art. 3, § 26). This right is fundamental to an adversary system of justice. *Drope v. Missouri*, 420 U.S. 162, 172 (1975). The standard for competency to stand trial is "whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402-403 (1960) A competent defendant is one

> (1) who is able to perceive and understand the nature of the proceedings; (2) who is able to rationally communicate with his attorney about the case; (3) who is able to recall relevant facts; (4) who is able to testify in his own defense if appropriate; and (5) whose ability to satisfy the foregoing criteria is commensurate with the severity of the case.

Hollie v. State, 174 So.3d 824, 830 (Miss. 2015).

The right not to be tried while incompetent is protected by Uniform Rule of Circuit and County Court Practice 9.06, which provides, in pertinent part, that:

> If before or during trial the court, of its own motion or upon motion of an attorney, has reasonable ground to believe that the defendant is incompetent to stand trial, the court shall order the defendant to submit to a mental examination by some competent psychiatrist selected by the court in accordance with § 99-13-11 of the Mississippi Code Annotated of 1972.

URCCC 9.06

By its explicit terms, Rule 9.06 both contemplates and mandates that a medical professional determine a defendant's competency. It does not in any manner allow for a trial judge to undertake in any manner the ultimate determination of a defendant's mental competency.

A defendant must show incompetency by a preponderance of the evidence. *Ross v. State*, 954 So.2d 968, 1007 (Miss. 2007). Phinizee has done this. In response to Dr. Brodsky's opinion that Phinizee was not competent to assist his attorney during the 2006 trial, the State's expert Dr. Storer did not refute that opinion. Further, the testing and subsequent opinions rendered by Dr. Brodsky and Storer concur that Phinizee has various mental disabilities and intellectually functions at the level of a kindergartner.[44] The State submitted no additional evidence that would refute the findings of the respective experts. On this basis, Phinizee has proven his incompetency by a preponderance of the evidence.

As evidence of the extent of his intellectual disabilities at the time of trial, Phinizee presented the testimony of Stanley L. Brodsky, Ph.D., who testified as an expert in the field of forensic psychology. Dr. Brodsky had conducted

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[44] Referencing the respective mental evaluations submitted as RE-7 and RE-20.

extensively testing of Phinizee, and his report stated the following matters in support of the claim that the Phinizee's intellectual disabilities rendered him incompetent to stand trial during February 2006:

i. Phinizee showed approximately the same intellectual deficits that appeared in his earlier evaluations (i.e., I.Q. levels of less than 70), that he has a paucity of knowledge about subjects that most of the population knows, that he lacks the ability to reason at an abstract level, and that his intellectual deficits interfere with his ability to understand and appreciate most legal issues and processes;

ii. Phinizee's limitations on spelling, reading, and comprehension are sufficiently low that one may safely conclude that he understands no written material;

iii. Phinizee does not have the ability to understand and appreciate issues related to competency to stand trial is compelling. While he is currently able to address many aspects of *Miranda* rights, his overall low functioning raises questions about whether he could understand them and willingly waive them at the time of his post-arrest interrogation.

In response to Dr. Brodsky's report, the State requested that the Phinizee be examined by the staff at the State Hospital. The examination by the State was subsequently conducted by R. McMichael, M.D. and Robert M. Storer, Ph.D., Dr. Storer issuing a written report on the evaluation of Phinizee. Although Dr. Storer's report stated that Phinizee's intellectual disabilities had improved somewhat over the pre-trial IQ test results, no opinion was offered showing that Phinizee did not currently suffer from any significant intellectual disabilities. Significantly, Dr. Storer could not offer an opinion, either during his hearing testimony or in his report, that Phinizee was legally competent to stand trial during February 2006.

The law of the State of Mississippi is quite clear on issue of mental competency in post-conviction relief proceedings such as this. When the record

is replete with information that, when objectively considered, raises doubt as to a petitioner's competency to stand trial, the conviction should be vacated, with the petitioner to either be retried or institutionalized following a mental evaluation and competency hearing under Rule 9.06 of the Uniform Rules of Circuit and County Court. *Brasso*, 195 So.3d at 864 (¶¶ 30-31). In those instances where a competency hearing was not conducted in advance of trial, the appropriate remedy for failure to hold a competency hearing is a new trial. *Smith*, 149 So.3 at 1035 (¶19). In view of the clear and controlling law on the issues presented by the Petitioner, this Court has no option but to vacate the Petitioner's convictions in Cause No. 2004-0244-CR1 and order a new trial.

In view of both the respective experts' opinion regarding Phinizee's mental competency and the legal authority cited above, Judge Kitchens was required to set aside Phinizee's conviction and order a new trial. Instead, he disregarded the experts' opinion and made a personal determination that Phinizee was competent at all phases of the criminal trial and post-conviction proceedings. There is no evidence in the record to support Judge Kitchens' ruling. A trial judge's determination that a defendant is competent to stand trial will be reversed if it is manifestly against the overwhelming weight of the evidence. *Dickerson v. State*, 175 So.3d 8, 15 (Miss. 2015).

ISSUE NO. 2: The Record Confirms That Phinizee Was Prejudiced By Ineffective Assistance Of His Trial Attorney

The test for an ineffective-assistance-of-counsel claim is "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." *Brown v. State*, 798 So.2d 481, 493 (¶14) (Miss. 2001) (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). A defendant must prove, under the totality of the circumstances that 1) his attorney's performance was defective and 2) the deficiency deprived the defendant of a fair trial. *Carr v. State*, 873 So.2d 991, 1003 (¶27) (Miss. 2004). "Prejudice" in this instance means that but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Brown*, 798 So.2d at 493-94 (¶14).

Further, a defendant must show that there is a reasonable probability that, but for the errors of his counsel, the judgment would have been different. *Fisher v. State*, 532 So.2d 992, 997 (Miss.1988). Finally, the appellate court must determine whether trial counsel's performance was both deficient and prejudicial to the defense based upon the "totality of the circumstances." *Carr*, 873 So.2d at 1003. Clearly, Mr. Goodwin's failure to challenge Phinizee's December 2003 statement on the basis of Phinizee's mental disabilities was prejudicial and further, it cannot be stated conclusively that Phinizee would not have prevailed on the claim that this statement was not knowingly and voluntarily given.

In this instance, Phinizee's trial counsel was clearly lax and negligent in both the investigation and preparation of Phinizee's trial defense. Defense counsel premised his entire defense upon winning a suppression motion, but he failed to any investigation, which would have disclosed Phinizee's mental disabilities and the potential defense that Phinizee was mentally incapable of

waiving his Miranda rights without conferring with an attorney. Further, Mr. Goodwin admitted during the post-conviction relief hearing that he made no preparation for Phinizee to testify at either the suppression hearing or at trial, and that he did not learn of Phinizee's mental disabilities under after trial had commenced.

Dr. Brodsky's opinion supports a finding that Phinizee was mentally incapably of intelligently, knowingly and voluntarily giving a statement to the Lowndes County Sheriff's Department after he had been held in isolation for 12 hours after his arrest. When it is further considered that the statement was prepared by the Sheriff's Department and that Phinizee's reading level has tested at the level of a kindergartner, Phinizee was clearly prejudiced by his trial attorney's failure to assert that the statement was not intelligently, knowingly and voluntarily given. Accordingly, Phinizee has substantiated his claim that but for his trial counsel deficient performance, there is a reasonable probability that the outcome of both the suppression motion and the trial would have been different.

For a statement to be admissible against an accused, the accused must knowingly and voluntarily waive his Fifth Amendment right to remain silent and his Sixth Amendment right to counsel. *Miranda v. Arizona,* 384 U.S. 436 (1966); *Morgan v. State*, 681 So.2d 82, 86 (Miss. 1996). Once a defendant alleges that his confession was coerced, he secures a due-process entitlement to a reliable determination that his confession was not given as a result of coercion, inducement, or promises. *Id.* The State shoulders the burden of proving beyond a

reasonable doubt that the confession was voluntary. *Id.* "The voluntariness of a waiver, or of a confession, is a factual inquiry that must be determined by the trial judge from the totality of the circumstances." *Kircher v. State,* 753 So.2d 1017, 1023-24 (¶ 28) (Miss. 1999). As interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the "voluntariness" calculus. *Colorado v. Connelly,* 479 U.S. 157, 164 (1986).

In order for a statement to meet the Fifth Amendment standard of voluntariness, it must be sufficiently an act of free will that would purge it of any taint. Demonstrating that the statement was not an act of free will can be proven through circumstantial evidence, with the burden of persuasion being on the State. *Keller v. State*, 138 So.3d 817, 852 (¶ 79) (Miss. 2014). Relevant considerations include observance of *Miranda,* the temporal proximity of the arrest and the confession, and, particularly, the purpose and flagrancy of any official misconduct. *Kaupp v. Texas,* 538 U.S. 626, 633 (2003). In this instance, Phinizee's mental disabilities and his isolation for 12 hours after arrest were valid defenses that should have been alleged in support of the suppression of his statement. He was prejudiced by his trial counsel's failure to raise these issues and present expert option in support of the claim that the statement was involuntary. Instead, trial counsel premised the suppression motion entirely upon claims that the statement was the product of an illegal arrest.

ISSUE NO. 3: It Was Plain Error For The Trial Judge To In Effect Render A Superceding Opinion Concerning Phinizee's Competency

As referenced previously, a trial judge's determination that a defendant is competent to stand trial will be reversed if it is manifestly against the overwhelming weight of the evidence.[45] The judgment of the Lowndes County Circuit Court is not supported by the evidence. In fact, the trial judge's findings are in direct contradiction to the expert opinions provided by the forensic psychologist represented by both the State of Mississippi and Phinizee.

In *Harden v. State*, 59 So.3d 594, 601 (Miss. 2011), the Mississippi Supreme Court stated:

> On review, the pertinent question is whether "the trial judge received information which, objectively considered, should reasonably have raised a doubt about defendant's competence and alerted him to the possibility that the defendant could neither understand the proceedings, appreciate their significance, nor rationally aid his attorney in his defense."

Any attempt by the trial judge to render what was effectively an expert opinion on Phinizee's competency and ability to assist in his defense should be held to be plain error. The Mississippi Supreme Court recognized in *Billiot v. State*, 655 So.2d 1, 13-14 (Miss. 1995), a four-part test concerning the admissibility of expert testimony that was enunciated in *Christophersen v. Allied-Signal Corp.,* 939 F.2d 1106, 1110 (5th Cir.1991). To-wit, the following matters must be considered:

a. whether the witness is qualified to express an expert opinion:

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[45] *Dickerson v. State*, 175 So.3d at 15.

b. whether the facts upon which the expert relies are the same type as are relied upon by other experts in the field;

c. whether in reaching his conclusion, the expert used a well-founded methodology, as required under *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923); and

d. assuming that the expert's testimony meets the aforesaid requirements, the testimony's potential for unfair prejudice substantially outweighs its probative value.

Judge Kitchens does not qualify to provide an expert opinion under this criteria. Clearly, he was not qualified to render what was effectively a superceding expert opinion on Phinizee's competency to assist his attorney based on his personal observation of Phinizee during the court proceedings.

In sum, Judge Kitchens made a biased, unsubstantiated and self-serving determination that Phinizee was competent to assist his attorney during the 2005 trial, and he rejected the opinions submitted by both the State and Phinizee in order to deny Phinizee relief under his post-conviction relief petition. This was plain error by the trial judge.

CONCLUSION

The record in this matter shows that the Appellant's trial counsel was exceedingly lax and deficient in his defense of the criminal indictment against Phinizee. Not only did trial counsel fail to investigate the underlying related to the statement Phinizee signed after being held in custody for 12 hours, trial counsel did not learn until trial that Phinizee was unable to read and had severe intellectual disabilities. A cursory investigation of Phinizee's medical history would have disclosed these matters. However, the failure to assert these matters in

conjunction with Phinizee's suppression motion essentially doomed the defense of this case, as trial counsel had no alternative defense theory other than the suppression of Phinizee's statement on the basis that it was the product of an illegal arrest.

During the post-conviction proceedings, both Phinizee and the State's experts concurred that Phinizee's IQ was below 70. As the State's expert Dr. Storer testified, "Below 70, you're talking about somebody having sub-average intellectual functioning." Phinizee's expert Dr. Brodsky opined that, based upon Phinizee's major impairments and intellectual disabilities, Phinizee was unable to understand and assist in his defense at trial during 2006 because of his intellectual disabilities, and additionally that Phinizee was not competent to stand trial in 2006. Dr. Storer offered no opinion on Phinizee's mental competency during 2006.

In disregard of the experts' testimony and opinions concerning Phinizee's impairments and intellectual disabilities, the trial judge James Kitchens ruled that based upon his personal observations of Phinizee during the course of the various court proceedings, he found Phinizee appeared to be able to communicate with his attorney and understand the court proceedings against him. There was no evidence to support this determination, other that Judge Kitchens' subjective lay opinion. It was plain-error of the trial judge to impose his personal, unsubstantiated lay opinion in disregard of the findings of the experts that testified at trial.

For the reasons set forth herein and those matters substantiated by the record, the August 10, 2016 Order of the Lowndes County Circuit Court should be reversed and the Appellant's 2006 conviction set aside, with this case being remanded to the Circuit Court with directions that the Appellant be granted a new trial.

This the 22nd day of June, 2017.

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CERTIFICATE OF SERVICE

I, BLEWETT W. THOMAS, do hereby certify that I have mailed this day true and correct copies of the Appellant's Brief to the following counsel of record and the presiding trial judge:

Honorable Jim Hood
Mississippi Attorney General
Jackson, Mississippi

I further certify that I have this day mailed a true and correct copy of the Appellant's Brief to the following:

Honorable James T. Kitchens, Jr.
Lowndes County Circuit Court Judge
PO Box, 1387
Columbus, MS 39703

This the 22nd day of June, 2017.

Blewett Thomas
BLEWETT W. THOMAS