NO. 2007-CA-00429-SCT

IN THE SUPREME COURT OF MISSISSIPPI

ANTHONY DOSS, *Appellant*

versus

STATE OF MISSISSIPPI, *Appellee*

BRIEF OF APPELLEE

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TABLE OF CONTENTS

page

TABLE OF AUTHORITIES

Statutes *page*

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ANTHONY DOSS, Appellant

versus **NO. 2007-CA-00429-SCT**

STATE OF MISSISSIPPI, Appellee

BRIEF OF APPELLEE

The case at bar is an appeal from the denial of relief after a post-conviction evidentiary hearing ordered by this Court to determine whether trial counsel was ineffective in failing to present a sufficient case in mitigation and whether petitioner was mentally retarded within the meaning of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). *See Doss v. State*, 882 So.2d 176, 197, ¶ 60 (Miss. 2004).

STATEMENT OF THE CASE

This case arises from the capital murder conviction and sentence of death imposed on petitioner, Anthony Joe Doss, by the Circuit Court of Grenada County, Mississippi. Doss was indicted on July 19, 1991, by the grand jury of said county for the May 6, 1991, murder of Robert C. "Bert" Bell, during the commission of an armed robbery in violation of MISS. CODE ANN. § 97-3-19(2)(e). A jury was impaneled and Doss was put to trial on the indictment on March 29, 1993. After hearing the evidence presented, the jury returned a verdict of guilty of capital murder. Thereafter, the jury heard evidence and arguments in aggravation and mitigation of the sentence and the jury returned a verdict of death in the

following form:

> We the jury unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder:
>
> (3) That the defendant, Anthony Doss, intended the killing of Robert C. "Bert" Bell take place, &
>
> (4) That the defendant, Anthony Doss, contemplated that lethal force would be employed during the commission of the crime of armed robbery.
>
> We, the Jury, unanimously find that the aggravating circumstances(s) of:
>
> (1) The defendant, Anthony Doss, was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.
>
> (2) The capital murder of Robert C. "Bert" Bell was committed while the defendant was engaged or was an accomplice, in the commission of armed robbery.
>
> (3) The capital murder of Robert C. "Bert" Bell was committed for the purpose of avoiding or preventing a lawful arrest.
>
> are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstance(s), and we further find unanimously that the defendant, Anthony Doss, should suffer death.
>
> CP. 134-35 – Tr. No. 93-DP-00509-SCT.

Doss was sentenced to death and May 5, 1993, was set as the date for execution of the sentence. After denial of post-trial motions defendant timely perfected his automatic appeal to this Court. In his direct appeal to this Court petitioner raised the following claims of error:

> I. Anthony Doss was entitled to a lesser included offense instruction under the federal and state Constitutions and Mississippi

law.

II. Jury instructions No. S-3 and No. S-4 at the guilt phase relieved the state of the burden of proving all the elements of the crime with which Anthony Doss was charged, thereby violating the United States and Mississippi Constitutions and Mississippi law.

III. During the selection of the jury the trial court impermissibly instructed the jury that a valid statutory mitigating factor is irrelevant and immaterial, in violation of Mississippi law and the United States and Mississippi Constitutions.

IV. The trial court, in violation of Doss' rights under the United States and Mississippi Constitutions, discouraged potential jurors from disclosing any personal racial bias.

V. Because of the leading questions by the trial judge during jury selection, Doss' rights under the United States and Mississippi Constitutions and Mississippi law were violated.

VI. The trial court erred in excusing jurors Lumas and Moore for cause in violation of Mississippi law and the United States and Mississippi Constitutions.

VII. The trial court erred in failing to excuse for cause juror Susan Honeycutt, in violation of the United States and Mississippi Constitutions and Mississippi law.

VIII. The admission of ten gruesome photographs of the deceased violated Rule 403 of the Mississippi Rules of Evidence and the state and federal Constitutions.

IX. The trial court erred in giving instruction S-1 at the guilt phase which constructively amended the indictment by failing to require that the jury find that the killing be done with malice aforethought where the indictment charged killing with malice aforethought, violating the federal and state Constitutions and state law.

X. The trial court erred in allowing the statement of Anthony Doss into evidence, in violation of the United States and Mississippi Constitutions and Mississippi law.

XI. The trial court erred in not redacting from the transcript of the taped confession the portion dealing with other crimes of Anthony Doss, in violation of Doss' rights under the federal and state Constitutions and state law.

XII. The trial court violated the United States and Mississippi Constitutions and Mississippi law in submitting the avoiding arrest aggravating circumstance to the jury.

XIII. The trial court erred in submitting to the jury the robbery-murder aggravating circumstance in violation of the United States Constitution and Mississippi law.

XIV. The trial court erred in submitting to the jury the aggravating circumstance that Doss had been convicted of another capital offense, in violation of Doss' rights under the United States Constitution and Mississippi law.

XV. In not fully informing the jury of Doss' sentence of imprisonment imposed by the State of Tennessee and the ramifications of a life sentence in this case, the trial court violated Doss' rights under the federal and state Constitutions and Mississippi law.

XVI. The trial court's anti-sympathy instruction coupled with denial of a mercy instruction violated the United States Constitution and the Mississippi Constitution and Mississippi law.

XVII. The trial court erred in denying defendant's instruction D-S4 telling the jurors that they need not be unanimous in finding mitigating circumstances and also in improperly instructing them that they had to be unanimous before the could find a mitigating circumstance.

XVIII. The trial court erred in instructing the jury at sentencing that it could consider the "detailed circumstances of the offense."

XVIX. The trial court erred in instructing the jury that in order to return a sentence of life imprisonment it had to find that the mitigating factors outweigh the aggravating circumstances.

XX. The trial court erred in submitting to the jury in the sentencing phase of the trial the form of the verdict as contained in sentencing

instruction C-1.

XXI. The findings by the jury at the sentencing phase were too uncertain and unreliable to support the sentence of death, violating Doss' rights under the United States and Mississippi Constitutions and Mississippi law.

XXII. The improper closing argument by the prosecution violated Anthony Doss' rights under the United States and Mississippi Constitutions and Mississippi law.

XXIII. The death penalty is disproportionate punishment here given the circumstances of the crime.

XXIV. The aggregate error in this case requires reversal of the conviction and death sentence

After briefing and oral argument, this Court affirmed Doss' conviction and sentence on May 23, 1996. *See Doss v. State*, 709 So. 2d 369 (Miss. 1996). Doss then filed a petition for a writ of certiorari with the United States Supreme Court. The Supreme Court denied certiorari on May 4, 1998. *See Doss v. Mississippi*, 523 U.S. 1111,118 S.Ct. 1684, 140 L.Ed.2d 821 (1998).

Thereafter, on February 26, 1999, Robert McDuff, Esquire, was appointed to represent petitioner in his post-conviction litigation.[1] On May 20, 2003, petitioner filed an application for leave to file a post-conviction petition in the trial court with this Court. In this application

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[1]M.R.A.P., Rule 22(d)(4) states the following with regard to counsel:
(4) Have not previously represented the capital petitioner in the case either in the trial court *or in the direct appeal*, unless the petitioner and counsel *expressly request continued representation and waive all potential issues that are foreclosed by continued representation* . . .
Mr. McDuff represented petitioner during the direct appeal of this case. However, the State can find no express waiver of his continued representation as required by Rule 22 (d)(4).

petitioner raised the following claims:

1. THE CONVICTION IS DUE TO BE REVERSED DUE TO JUROR DISHONESTY AND FAILURE OF PROSECUTION TO CORRECT THE PROBLEM.

2. THE CONVICTION IS DUE TO BE REVERSED DUE TO PETITIONER'S BEING SHACKLED DURING THE TRIAL.

3. TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT OR PUNISHMENT PHASE FOR FAILING TO RAISE VARIOUS ISSUES UPON WHICH THIS COURT IMPOSED A PROCEDURAL BAR ON DIRECT APPEAL.

4. THE SENTENCE IS DUE TO BE VACATED AS THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE OF THE TRIAL.

    A. Family History Of Poverty And Violence

    B. Family History Of Mental Illness And Trauma

    C. Anthony Doss's Mental Illness

    D. Anthony's Positive Traits

    E. Domination By Co-Defendant Freddie Bell

    F. Evidence Was Easily Available

    G. Other Problems

    H. Case Law

5. THE SENTENCE IS DUE TO BE VACATED UNDER THE PRINCIPLE ANNOUNCED IN *ATKINS V. VIRGINIA*.

6. THE SENTENCE IS DUE TO BE VACATED DUE TO THE USE OF THE AVOIDING ARREST AGGRAVATING CIRCUMSTANCE.

    A. *Taylor v. State* Requires That The Avoiding Arrest Aggravating

Factor Be Set Aside.

B. This Court's Application Of The Avoiding Arrest Aggravating Factor Is Unconstitutional.

7. THE FACTS OF THIS CASE WARRANT A REVERSAL OF PETITIONER'S SENTENCE.

8. CUMULATIVE ERROR REQUIRES REVERSAL.

On July 15, 2004, this Court rendered a decision on the post-conviction application in that decision the Court denied relief in part and granted relief in part.[2] The Court granted Doss an evidentiary hearing on his claims of whether trial counsel rendered ineffective assistance during sentencing phase by failing to investigate and present evidence in mitigation and whether he was mentally retarded. Relief was denied on all other grounds. *See Doss v. State*, 882 So.2d 176 (Miss. 2004). Petitioner then filed a petition for writ of certiorari with the United States Supreme Court seeking relief from this Court's decision. On May 31, 2005, the United States Supreme Court denied the petition for writ of certiorari. *Doss v. Mississippi*, 544 U.S. 1062, 125 S.Ct. 2513, 161 L.Ed.2d 1113 (2005).

Pursuant to the mandate of this Court the Circuit Court of Grenada County held a two day evidentiary hearing in this case on September 6 and 7, 2006. After the hearing the Circuit Court took the case under advisement. On December 12, 2006, the Circuit Court entered an order denying "any and all relief" in this post-conviction matter. C.P. 11. On that same date, the Circuit Court also entered a thirty-seven page opinion denying post-conviction relief on the claims of mental retardation and ineffective assistance of counsel. C.P. 12-48.

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[2]Rehearing was denied on September 30, 2004.

Petitioner filed a motion to alter or amend the opinion and judgment on December 22, 2006. C.P. 50-67 & 69-86. On February 16, 2007, the Circuit Court filed an order denying the motion to alter or amend the Opinion and Judgment. C.P. 87.

This case is now before this Court on petitioner's appeal from the denial of relief by the Circuit Court.

STATEMENT OF FACTS

The facts of this case were fully set forth by this Court in the direct appeal opinion, those facts were repeated in the post-conviction opinion. *See Doss v. State*, 709 So.2d 369, 375-77, ¶¶ 5-15 (Miss. 1998)(direct appeal); *Doss v. State*, 882 So.2d 176, 178-80, ¶ 1 (Miss. 2004). Because the historical facts of this case are not in dispute in the case before the Court the State would adopt the Court's rendition of the facts as its own in this appeal.

SUMMARY OF THE ARGUMENT

The petitioner failed to demonstrate that counsel was ineffective in failing to conduct further investigation into mitigation evidence in this case. And failed to demonstrate that trial counsel was ineffective in failing to obtain a mental health expert to testify during the mitigation phase of this case.

The trial court properly found that the test for mental retardation was that announced by this Court in *Chase v. State* instead of the test employed by petitioner's expert. The court's experts reading *Chase* felt bound by this Court's adoption of the test announced there. Petitioner's expert failed to administer any "test" to determine malingering as required by *Chase*.

ARGUMENTS

I. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCE PHASE OF HIS TRIAL.

Petitioner's first contention is that the Circuit Court erred when it found that he was not denied the effective assistance of counsel at the sentencing phase of this capital murder trial. The State would assert that the circuit court's finding that trial counsel did not render ineffective assistance of counsel at the sentencing phase of petitioner's trial is not clearly erroneous.

The Court recently reiterated the standard by which a circuit court's decision on a claim of ineffective assistance of counsel is to be assessed on an appeal of the denial of post-conviction relief in *Loden v. State*, 971 So.2d 548 (Miss. 2007). There the Court held:

> ¶ 61. "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. In evaluating counsel's performance:
>
> > [f]irst, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.
>
> *Id.* at 687, 104 S.Ct. 2052 (emphasis added). "[T]here is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697, 104 S.Ct. 2052. *This Court finds that the circuit court was not "clearly erroneous" in finding that counsel's performance was not deficient. Brown,*

731 So.2d at 598.

971 So.2d at 573-574. [Emphasis added.]

In *Brown v. State*, 731 So.2d 595 (Miss. 1999), this Court held:

> ¶ 6. When reviewing a lower court's decision to deny a petition for post conviction relief this Court will not disturb the trial court's factual findings unless they are found to be clearly erroneous. *Bank of Mississippi v. Southern Mem'l Park, Inc.*, 677 So.2d 186, 191 (Miss.1996). However, where questions of law are raised the applicable standard of review is *de novo*. *Id.*
>
> 731 So.2d at 598.

In *Holland v. State*, 587 So.2d 848 (Miss. 1991), this Court held that mixed questions of law and fact are to be assessed as follows:

> . . . In other words: (1) if the judge based his finding upon appropriate principles of law; (2) and the finding is supported by the facts (*i.e.*, by substantial evidence); (3) then this Court may not reverse. *Schmitt v. State*, k560 So.2d 148, 151 (Miss.1990) . . .
>
> 587 So.2d at 860.

It is with these standards of review in mind that we proceed to discuss the trial court's findings regarding whether petitioner was denied the effective assistance of counsel at the sentence phase of his trial.

It is clear from the circuit court's opinion denying relief that the court based his finding on the appropriate principles of law. The circuit court held:

> In the case of *Strickland v. Washington*, 466 U.S. 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a two part test was devised for courts to use in determining whether a criminal defendant had ineffective assistance of counsel. First, a determination must be made as to whether the defense counsel's performance was deficient when measured by the objective standard of reasonable professional competence? And if so, a defendant must then

show that it is reasonably probable that but for the attorney's errors, the result would have been different.

C.P. at 19.

Clearly, the trial court based its findings on the appropriate principles of law and the findings were not clearly erroneous.

This Court held in *Bell v. State*, 879 So.2d 423 (Miss. 2004):

> ¶ 8. To establish a claim for ineffective assistance of counsel the petitioner must prove that under the totality of circumstances (1) the counsel's performance was deficient and (2) the deficient performance deprived the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Benson v. State*, 821 So.2d 823, 825 ¶ 5 (Miss.2002); *Burns v. State*, 813 So.2d 668, 673 ¶ 14 (Miss.2001). "The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Burns v. State*, 813 So.2d at 673 ¶ 14 (quoting *Strickland*, 466 U.S. at 686, 104 S.Ct. at 2063).
>
> ¶ 9. With regard to the showing of deficient performance, the inquiry focuses on whether counsel's performance fell below an objective standard of reasonableness. *Williams v. Taylor*, 529 U.S. 362, 391, 120 S.Ct. 1495, 1511, 146 L.Ed.2d 389 (2000); *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2064. That is, consider whether the assistance was reasonable under all the circumstances seen from counsel's perspective at the time, and the prevailing professional norms for attorneys. *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065; *Burns*, 813 So.2d at 673 ¶ 14; *Neal v. State*, 525 So.2d 1279, 1281 (Miss.1988). Defense counsel is presumed competent, and because of the distorting effects of hindsight, there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Burns*, 813 So.2d at 673 ¶ 14.
>
> ¶ 10. Regarding the deprivation of a fair trial, the petitioner must show how counsel's errors prejudiced the defense. *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067; *Burns*, 813 So.2d at 673-74 ¶ 14. The petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at

691-94, 104 S.Ct. at 2066-68; *Burns*, 813 So.2d at 673-74. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

¶ 11. If the petitioner is challenging the conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. *Id.* If the petitioner is challenging the sentence, the question is whether there is a reasonable probability that, absent the errors, the sentencer-including an appellate court to the extent it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *Id.*

879 So.2d at 430-31.

The case at bar is not similar to that found in *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), or *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). In those cases, there was a wealth of information to be found in court records and social services records that counsel did not bother to obtain or consider. That is not the situation in the case at bar. Here the information available to counsel were two 1988 reports, one from the University of Mississippi Psychological Services Center and one from the North Mississippi Medical Center. Both of these reports were the result of referrals from the Youth Court because of petitioner's legal problems for burglaries and possession of marijuana. Neither of these reports found petitioner to be retarded.[3]

Looking to the live evidence introduced at the evidentiary hearing we find that petitioner offered the testimony of his trial counsel, Hugh Lee Bailey, Jr., his mother Sadie Doss, his first cousin, Q. T. Doss, Sandra Price, and his natural father, Sam Phillips. He also

[3]These reports will be discussed more fully *infra*.

offered the testimony of Dr. Criss Lott, Dr. David Grant and Dr. Timothy Summers.

HUGH LEE BAILEY

Considering the testimony of Lee Bailey we find that he had not represented a defendant in a death penalty case prior to that time, nor has he done so since that time. Tr. 56. He stated that he had given an affidavit to post-conviction counsel about five years prior to the hearing. Tr. 56.[4] He agreed that his affidavit stated that he did not obtain any school, medical or mental health records pertaining to petitioner. He stated that since the time that he had given the affidavit, in preparation for the evidentiary hearing that he had discovered other records which make statements in the affidavit incorrect. The materials he found were the school, medical, and mental health records of petitioner. Therefore the statement in his affidavit that he did not obtain these records was incorrect. Tr. 56-57. Bailey stated that he was in contact with petitioner's attorney in Tennessee, Caroline Watkins. Tr. 58. He stated that he got some records from Watkins, but they were not in the regular file. Tr. 58. Bailey, after reviewing the records stated that the records appeared to be records from the North Mississippi Medical Center, some Shelby County records from Joyce King, legal investigator, and some records from Bethany Hospital in Chicago. Tr. 59-60. Counsel for petitioner pointed out that there were pages missing from the reports obtained from Memphis. Tr. 61-62. Bailey was asked if he ever contacted the Memphis office to obtain copies of the missing page. Bailey stated that he could not remember. Tr. 62-63. Bailey was next shown the report from the University of Mississippi, he stated that he did not get pages

[4]This would have been some eight years after the trial of the case.

2, 4 or 6 of the report. He stated that he could not recall if he requested these pages from the Memphis lawyers. Tr. 63.

Bailey stated that he did not seek the assistance of a mental health expert. He stated that he did not request funds for such an expert nor did he ask for any type of mental health evaluation. Tr. 69. Bailey explained that in his conversations with petitioner he found that petitioner had no problems discussing the case with him. Bailey stated that petitioner explained everything about the case to him. He stated that petitioner explained how he grew up and he took notes about his early life. Bailey stated that he did not have those now, but he did remember taking those notes. He also remembered discussing different aspects of the case with him. Tr. 69-70. Bailey testified that from these conversations that he felt petitioner was competent to stand trial. Tr. 70.

Bailey stated that he asked the trial court to appoint an investigator and the court appointed Kevin Winbush. Winbush was also appointed as an investigator for Freddie Bell, his co-defendant. Tr. 70-71. Bailey stated that Winbush furnished some written reports to him. Tr. 71. These reports consisted of pages with one or two paragraphs on each sheet. Tr. 72. Asked if he ever asked Winbush to follow up on any of these witnesses, he stated "[n]ot that he could remember." Tr. 72. He stated he did not consider that it would be a conflict of interest for Winbush to be an investigator for both defendants. Bailey replied "[n]o." Tr. 72-73. Bailey stated that he did not ask Winbush or anyone else to do any investigation in Chicago. Tr. 73. He stated that he did not request funds for any investigation in Chicago. Tr. 73. Asked if there was any strategic reason for not doing an investigation in Chicago, he

stated that he had talked to Miss Doss and that he had an investigator in Winbush. He stated that he would tell Winbush people that he needed to contact and Winbush wold go off on his own and talk to people and bring back his report. Winbush reported to him that these were the only people that he could find that had anything to say about petitioner. Tr. 73-74. He stated that he told Winbush that he needed to find some witnesses for the mitigation phase of the trial. Tr. 74. Asked what he told Winbush to look nor in the way of mitigation he stated that he did not remember. Tr. 74.

Bailey testified that he attempted to put Mark Hendricks on as a mitigation witness during the trial. However, he ultimately decided not to do so. Tr. 74. He stated that in talking with petitioner he had told him that he had been a confidential informant for Hendricks, who was the chief of police in Derma, Mississippi. Tr. 74-75. He spoke with Hendricks and he stated that he would be "happy to testify." Tr. 75. The only problem was that Hendricks could testify as to some bad acts of petitioner. Tr. 75. Bailey filed a motion in limine to try and keep this information out, but he motion was overruled by the trial court. Tr. The discussed this with Anthony and they decided not to call him. Tr. 75.

Bailey testified that he had several telephone conversations with Sadie Doss, but did not remember meeting her prior to trial. Tr. 75. He stated that although the time sheet only one or two calls that he talked to Miss Doss more times than that. Tr. 75. He stated that he did not recall if he met her before trial. Tr. 75-76. He stated that his time records showed that he spoke with Sadie Doss and petitioner's aunt on the telephone November 23 for about thirty minutes. Tr. 76-77. He stated that he personally met with Miss Doss shortly before

he called her as a witness. Tr. 77.

Bailey was then questioned regarding the question he asked of Miss Doss regarding the length of petitioner's incarceration if he was sentenced to life. Tr. 77. Bailey asked Miss Doss:

> You realize if the jury should sentence him, give him life, that it will be a long time before he comes back. Do you realize that?
>
> Tr. 77.[5]

Asked why he asked this question, Bailey stated that under his reading of the law that he wold not be in prison for ever as he was eligible for parole. Tr. 77-78. Post-conviction counsel asked if Bailey was aware any decision of this Court which stated that there should be no discussion of the possibility of parole in a death penalty case. Bailey replied "[n]o." Tr. 78.

Bailey concluded his direct testimony by stating that he had never done a case like this before. Tr. 78.

On cross-examination Bailey testified that at the time of this trial he had some fifteen years of experience as an attorney and that a large part of his practice was criminal defense work. Tr. 79.

Bailey was then questioned about his affidavit in this case. He stated that when contacted by the state he really did not remember doing an affidavit, but got a copy from petitioner's post-conviction counsel. Tr. 80. Upon receiving a copy of the affidavit and

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[5]Trial transcript at 289.

reading it his thought was "whoa, this is stout." Tr. 80. He then stated:

> But I have no idea what was going through my mind. I would – I would think that there was a sense of allegiance to Anthony but, you know, I can't remember. That's been a goo while.
>
> Tr. 80.

Bailey stated that part of the trouble he had in reconstructing things is that he has not had his file in years. Tr. 80. He stated that he had forgotten who got his file. Tr. 81. He stated that he only got his file the day before the evidentiary hearing. Tr. 81. At that point he told post-conviction counsel to just keep it as he did not have time to go through it at that point. Tr. 82.

He stated that in his opinion he did everything he could to prevent petitioner from getting the death penalty. He stated that he did try and find mitigation witnesses. He stated that he talked with petitioner and got the name of Mark Hendricks. He stated that petitioner did not have "real good spots." Tr. 82. He stated that he was able to get an instruction in mitigation on several factors. *See* States Exhibits 1 and 2. Bailey then read the mitigation factors contained in these instructions. Tr. 84-85.

Bailey stated that the portion of his affidavit that stated that he did not attempt to obtain any school, medical, mental health or other records regarding petitioner was not true. Tr. 85.

Bailey stated that at the time he signed the affidavit it was eight years after the trial and that he did not have his file before he signed it. Tr. 86 Bailey stated that the information he received from the Memphis lawyer had information about petitioner that he did not want

the district attorney to know. He stated that there was information in the records relating to a robbery that petitioner committed. Tr. 86-87. He did not want the prosecution to know about these robberies, about being sent for drug treatment by the youth court. Tr. 87.

These records also showed that petitioner had an I.Q. of 80. Tr. 87. Bailey stated that in talking with petitioner he had no problems communicating with him. Bailey thought that the only thing wrong with him was that he was an "angry young man." Tr. 87.

Bailey stated that he did not investigate anything in Chicago because he was never given any names of anyone in Chicago that may have been helpful. Neither petitioner or his mother ever mentioned anyone in Chicago that would form the basis of a request for investigation there. Bailey stated that he had no reason to believe that there was anyone in Chicago that would be helpful to petitioner. Tr. 88- 89.

When asked about the several statements that he had no strategic reasons for his actions in the affidavit, Bailey stated that at the time of trial he did have reasons for his actions. He stated that he wanted to present petitioner in " a good light before the jury." Tr. 89.

Bailey stated that while it is conceivable that having the same investigator as his Freddie Bell, he never noticed that Winbush anything like that on his part. Tr. 90. He stated that Winbush just could not find any body with anything good to say about petitioner. Tr. 90-91.

Bailey was then asked about the testimony of Sadie Doss. He stated that he had to rely on her testimony as the truth. Tr. 91. He had to rely on her testimony that they had a

loving home and that petitioner had never been in any trouble. Tr. 91. Bailey stated the Miss Doss characterized their home as a "beautiful home." Tr. 92. He stated that she testified that they moved from Chicago even though they were getting a lot of money through benefits. He stated that she testified that they were not getting much in Mississippi. Tr. 92. Bailey stated that Miss Doss stated that petitioner's brothers and sisters were present at trial. Tr. 92-93. He also stated that he talked with petitioner's aunt about testifying, but she did not want to testify. Tr. 93. Bailey stated that she stated that she could not testify to anything other than what his mother would testify to. Tr. 93.

He was asked about putting on Mark Hendricks and stated that the reason he did not put Hendricks on the stand because the state could have brought out that he was not working voluntarily for Hendricks. That he was working for Hendricks because he got caught committing crimes and was working for Hendricks to help himself out of that trouble. Tr. 94. He stated that the decision was made after the trial court denied his motion in limine to keep out the part about why he was working for Chief Hendircks. Tr. 94.

Bailey was then asked about his cost bill. He stated that things were different at the time of petitioner's trial. He stated that all you could get for the trial was $1,000.00. He stated that you also got $25.00 per hour over and above the $1,000.00 for overhead. He stated that he tried to put everything down, but a lot of things were not put down. Tr. 94.

Bailey also stated that he spoke with Jim Craig with the capital defense resource group in Jackson on at least three occasions. Tr. 94. He said the resource group sent him note books containing motions and the law. He also stated that these note books contained

possible mitigators, "[e]verything. Aggravators. Everything. Everything. They gave us floppy disk." Tr. 95. He had access to the people in this group, but he could not remember what he talked to them about. Tr. 95. He stated that he used the notebook and the floppy disk because "they were important." Tr. 95.

He stated that contrary to his affidavit that he thought that he had presented everything that would make petitioner look good. He stated that he did not get a psychologist or mental health expert because he just did not see the need of one. He stated that he still did not see the need for such an expert. Tr. 96-97.

On redirect Bailey stated that he turned his filed over to post-conviction counsel. Tr. 95. Several questions were asked regarding when Bailey requested that his file be returned to him and the arrangements that had been made to get the file to him. Tr. 98-100. He was also asked if he had access to his file prior to signing the affidavit. Petitioner then went over Bailey's affidavit asking if what he said was true. He stated that other than the part about the Memphis files, at the time he signed the affidavit he thought it was true. Tr. 100-02. Bailey stated that did not remember having his file prior to signing the affidavit. Tr. 102.

Bailey was asked about the I.Q. scores in the records from the North Mississippi Medical Center and the University of Mississippi. He stated that he saw the 80 and the 71 I.Q. listings, but he was under the impression that his I.Q. was 80. He stated that he could not remember his thinking at the time 13 years ago. Tr. 103-04.

Bailey was then asked about the investigation by Winbush and whether he shared the information with Bell's counsel. Bailey stated that the only thing that Winbush would state

was whether he found any one to testify in favor of petitioner, that he did not discuss what the witnesses he interviewed said in front of Bell's counsel. Tr. 104-05.

Petitioner pointed out that the questions asked of Miss Doss about the type of home they had referred to Calhoun City and not Chicago. Bailey agreed. Tr. 105. Petitioner also got Bailey to admit that the meeting with petitioner's family members was a brief meeting between the guilt and sentencing phases of the trial. Tr. 106.

The trial court asked Bailey a question regarding his affidavit concerning his statement about failing to undertake the essential functions of properly investigating mitigation and presenting a defense at the penalty phase of the trial. The court asked whether on reflection did he stand by that statement. Tr. 107. Bailey stated:

> Now, if I had been more experienced, maybe there is something else that could have come in. But based on what I had, what investigator – we were fortunate to get an investigator because at that time they didn't allow you to have investigators. But having what I had from the investigator, having what I had from Anthony and his mother, there just wasn't a whole lot out there fro me to put on. I put on mitigation of I wanted the jury to understand he did not have a gun that would fire, that he saved a guy's life. I wanted the officer from Derma to testify but we couldn't get that in. We could have but I didn't want it because they would have gone into other things. Then we had his mother to testify. We put on what we had.
>
> Tr. 107-08.

Bailey stated that he thought that he did an adequate job. Tr. 108.

When everything is considered, counsel did not fail in his duty to investigate for and present mitigation evidence. Considering the testimony of the witnesses that were put on at the evidentiary hearing there is no reasonable probability that the result of the sentencing trial

would have been different. *Strickland.*

Q. T. DOSS

Petitioner presented the testimony of Q. T. Doss, petitioner's first cousin. Q.T. testified that petitioner would come down to visit during the summer when he was aged eleven or twelve and they would spend some time together while he was here visiting. He stated that they would play together and mow and rake lawns together while he was visiting. Tr. 213-14. He then recounted that petitioner had moved from Chicago to Mississippi and that petitioner and his mother lived in the same apartment complex that he lived in for a while. Q. T. stated that he and petitioner renewed their friendship and mowed the grass at the apartment complex to make money. Tr. 214. He stated that petitioner was more "distant" and stayed "to himself more." Tr. 214-15. At some point thereafter, Q. T. and his family moved out of the complex and he only saw petitioner "on and off." Tr. 215.

Q. T. testified that petitioner began hanging out with Freddy Bell and Bernard Gladney. He stated that Gladney was a quite type like petitioner, but that Bell "was one of those guys who stayed in trouble." He testified that Bell was a "bully" and "would always start stuff, you know, jumping on people." Tr. 215. Q. T. then testified that petitioner was not a person who would influence anybody, that he was a follower. Tr. 216. Q. T. stated that he did not want to be around people like Bell, but that even after petitioner knew how he was he continued to hang around with them. Tr. 216.

Q. T. concluded his direct testimony by stating that he had attended petitioner's trial. He stated that he was in the group of people that Bailey spoke with prior to the sentencing

phase of the trial. He stated that Bailey never interviewed him before the trial and that he was not asked to testify. Tr. 217.

On cross-examination Q.T. stated that when petitioner would come to visit in the summer he would stay with his family and not where his mother stayed. Tr. 217. Q. T. then testified that the language in his affidavit about things moving to slow down here, meaning in Mississippi was not true. Tr. 218-20. He testified that petitioner and his brother Randy, did not get along and that Randy would start fights with petitioner. Tr. 220. Q.T. could not explain what he meant in his affidavit that petitioner got really mad when he broke up with his girl friend in Bruce. Tr. 220-21. He testified that petitioner never told him that he wanted to go back to Chicago. Tr. 222. Q. T. testified that even though he was "real close" to petitioner he did not know that he was selling drugs. Tr. 222. Q. T. also stated that petitioner knew how to defend himself in a fight. Tr. 223.

Q. T. testified that he never told petitioner that he needed to quit hanging around Bell, Gladney, and Coffee. He stated that he knew that those guys were "trouble", but did not think they would do something like the crime in this case. Tr. 225. He stated that he knew that Gladney has shot someone in the past. Tr. 225.

The trial court then asked of Q. T. regarding their mowing of lawns and getting paid for doing so. Q. T. stated that petitioner was a "tightwad" and would only spend a small portion of his earnings. He stated that petitioner did not have any problem making change or understanding amounts of money. He stated that petitioner understood the "basic functions of life" and did not have any "disabilities getting along in society." Tr. 227.

The testimony of Q. T. Doss is hardly what one would call mitigation evidence. This testimony alone or in conjunction with the other proposed mitigation evidence petitioner forwarded at the evidentiary hearing do not create a reasonable probability that the result of the sentencing phase of this trial would have been different.[6]

The trial court found that while Q. T. has some positive things to say about Anthony, his testimony also showed that the reason he moved to Mississippi was a fight between he and his brother. It would have also shown that petitioner knew how to defend himself in a fight. The testimony would also have shown that petitioner began associating with his co-defendant and others who were bad characters that Q. T. refused to associate with. This would have shown that petitioner was "making a conscious decision to associate with persons of bad character." Opinion at 12. The findings of the trial court are not clearly erroneous. *See Loden, supra*; *Brown, supra.* Considering Q. T.'s testimony in conjunction with that of Sadie Doss, Sandra Price and Sam Phillips it cannot be said that petitioner has raised a reasonable probability that the result of the sentence phase would have been different.

SADIE DOSS

Petitioner then called his mother, Sadie Doss, to the stand. Miss Doss' testimony is interesting in the fact that so long as she was testifying about the points in mitigation counsel wanted to make she could answer every leading question that was asked. However, when

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[6]In addition, Q. T. Doss' testimony undercuts petitioner's assertion showing that he made money, saved money, had not trouble understanding money or making change. This testimony calls into question any claim that petitioner was mentally retarded prior to the age of 18.

she had to come up with an answer on her own without the answer being suggested to her by the leading questions she could not give a clear answer.[7] On cross-examination she repeatedly stated that she could not remember or did not know anything about what was being asked.

On direct Miss Doss stated that she had five children, all by different fathers. Tr. 230. She stated that she was sent to Chicago by her mother to take care of a sick sister because she was the only one that was not married. She stated that she left her oldest three children in the care of their grandmother who raised them. Tr. 230-31. She stated that her sons Randy and Anthony were born in Chicago and that Sam Brown was the natural father of Randy.

Sadie Doss testified that Sam Brown was a "violent" man who treated her "mean" while she was pregnant with Anthony. She stated that Brown did not want her to go anywhere and would hit her and beat her if she even walked out of the house. She stated that Brown hit her in the head and in the stomach and beat her up all the time. Tr. 231-32. She stated that she was drinking Crown Royal and beer "[j]ust about everyday" while she was pregnant because she though it was helping the pain of being beat up. Tr. 232. She testified that she contracted gonorrhea while she was pregnant with petitioner. Tr. 232. She testified that she had to go to the hospital after one beating because Brown "bust my mouth up and

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[7]Counsel repeatedly objected to the leading questions being asked. The trial court sustained these repeated objections. One example is found on page 235 of the transcript. After being admonished to ask non-leading questions counsel asked:

Q. When he was growing up, how were you acting with Anthony?

A. Well, I wouldn't know how to act when you been beat up.

bruised so bad, eyes blood shot and stuff." Tr. 232-33. She stated that she started bleeding one time and almost lost the baby. Tr. 233.

After petitioner was born she stated that things got worse. She stated that Brown beat her almost every day and that she could not leave. She said that these beatings continued as petitioner was growing up and started beating petitioner and his brother Randy. She stated that he would whip the boys with an extension cord and if they tried to protect her he would just knock them down. She stated that Brown did not have to have a reason to beat she and the boys. Tr. 233-34. She stated that she was scared and that if she had left he would have found her. Tr. 234.

Miss Doss testified that they were poor. She stated that she had a job at a manufacturing plant. She stated that Brown had a job at some point, but lost it. She stated that Brown got his money by gambling and would spend it on women and drugs. She also stated that Brown took the money she made. Tr. 234.

Miss Doss stated that she quit drinking Crown Royal in 1979 when petitioner was six or seven years old, but she did not stop drinking beer at that time. She stated that she later quit drinking beer. Tr. 236.

She stated that petitioner was a "beautiful child". She explained that this meant that he loved to play ball and that he wanted to try and help her. Tr. 236-37. She testified that petitioner would bring her food when she was sick. That Randy would make the food and petitioner would bring it to her. Tr. 237.

Miss Doss testified that petitioner was sick when he was a baby. She said that he kept

a fever all the time. She stated at age two or three "doctor tested him" and said he had lead poisoning.[8] Tr. 237.

Miss Doss testified again that Brown beat her when petitioner was a child. She stated that she called the police and they took Brown away. But he would "come right back." She stated that on one occasion she heard the police officer tell Brown that he had to leave, but to go back and "beat her ass again." Tr. 238. She stated she finally left Brown after he choked her very bad and she hit him in the fact to make him quit. She said that she called the police on that occasions and "that was it." Tr. 239.[9]

At this point Miss Doss testified that she moved back to Mississippi, but that Brown occasionally called her. She also stated that petitioner would go back to Chicago to visit Brown on occasion. Tr. 239.[10]

She testified that Sam Phillip was petitioner's father, but that she had told him that Sam Brown was his father. Tr. 239.

When asked how petitioner was as a teenager, Miss Doss stated that "[h]e was fine." She also stated that the would play ball. Tr. 239.

She was then asked if she had any mental problems. Her response was that she did.

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[8]We would note that no medical records were produced that verified this assertion.

[9]We would note that no police records were produced to verify this assertion.

[10]Appellee's find it odd that after such maltreatment petitioner would want to go back and visit the man who allegedly beat him all the time during his first fifteen years of life. Could it be that the testimony of Miss Doss regarding this was the same as he sworn testimony at the sentence phase of the trial regarding who petitioner's father was.

She stated that she had been sick since she was young. She stated that she had high blood pressure and nerve problems. Asked if any other people in the family had mental problems she stated that she had two nephews in Jackson. She stated that one of them was "hustling." And she did not know where the other one was other than that he was in Jackson. Tr. 240.[11]

Miss Doss testified that she took Valium while she was pregnant with petitioner. Tr. 240.

She was asked if she would tell people about the beatings by Sam Brown, her being beaten while she was pregnant, or the gonorrhea. She stated that she would not because people had laughed at her before when she did. She stated that did not remember being asked by the psychologist in Oxford about her pregnancy. Tr. 241. She was then asked why she told Mr. McDuff about these things. She stated that he had become just like her own family, and that she thought of him as a "brother." Tr. 242. She then stated that Lee Bailey did not ask her about any of these "private details." Then she stated that she did not feel that she got to know Mr. Bailey. Tr. 243.

When asked who petitioner was living with in Chicago, she stated that he was living with her and her land lady. Tr. 243. She also stated that she was not living with Sam Brown at the time. Then she stated that she left Sam Brown when petitioner was fifteen. Tr. 243.

On cross-examination Miss Doss stated that Sam Brown was her boyfriend for twenty-one years, but they only lived together for five years. However, Miss Doss stated that she

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[11]Evidentialy Miss Doss considers hustling to be a mental problem. Perhaps if he is a male hustler that could be viewed as some people in the family as a mental problem.

could not say what particular five years during their twenty-one relationship that they lived together. Even when the trial court stepped in and attempted to get a straight answer from Miss Doss. The judge asked Miss Doss:

> THE COURT: During the period of Anthony's life, you've said – if you just lived with Sam Brown for five years during that period of thime when Anthony was growing up, what five years was it that you lived with him? Was it when Anthony was a small child? Was it when he was a teenager? When he was a toddler?
>
> THE WITNESS: When he was a teenager. You know, a baby. When he was coming up, like, five years old and up. Then they came back and forth.
>
> Tr. 246.

When the prosecutor again asked Miss Doss what ages Anthony was when she lived with Sam Brown, she stated that "I really don't remember." Tr. 246. She then stated that she was living with Sam Brown when Anthony was born. Tr. 246.

When pressed on her relationship with Sam Phillips, Miss Doss testified that she wasn't "slipping around" on Sam Brown when she became pregnant with petitioner by Sam Phillips. Then she testified that Sam Brown did not know she was having sex with Sam Phillips. She reiterated that this was not "slipping around." Tr. 246-47.

When questioned about when she started drinking so much she said: "I really – after he – the baby." She caught herself and said that it was before she became pregnant, because Sam Brown got on her nerves because he beat her. Tr. 247. She testified that her sleeping around and staying drunk all of the time was not the reason the Sam Brown beat her. Tr. 248.

Miss Doss was then asked about her sworn testimony at trial when she stated that Sam

Brown was petitioner's father. She then said that it was not a lie because Sam Brown helped raise petitioner. She testified that since Sam Phillips was not around it was "just in my mind" that Sam Brown was his father. Tr. 249. When pressed on whether she lied under oath she disputed that and said that she "didn't lie." Tr. 249.

She stated that she had testified, given affidavits and reported in interviews that petitioner was a good child and did not give her any trouble. Tr. 249. When asked if he was not trouble then what was the reason for the counseling meetings where he was evaluated because he was on drugs, on alcohol and because he had been committing robberies and assaults. She at first said that she did not know what the prosecutor was talking about. Then when she was reminded of the meetings in Tupelo regarding these matters. All she remembered was that she went to Tupelo. She denied knowing anything about any robberies "now". Tr. 249-50. Asked is she remembered his gang activity, she replied "[n]ot really." Tr. 250. Then when asked if this part of petitioner's history had evaporated from her mind she stated: "Sometimes things do. And you don't try to make them, but things do leave your mind." When asked again whether she had lied at trial or was lying now, her reply was: "I wasn't lying then to my words." Tr. 250. Then she stated that petitioner was not in any trouble until he went to the counseling meetings in Tupelo. Tr. 251. When she was asked if she remembered talking to any of the counselors, her reply was, "I may not. Like I said, I really haven't. I got problems, sir." Tr. 251.

She was asked about when she began receiving a check because she could not work. She could not answer the question other than to say that she got one. She stated that she

worked and "when you are not working, you can get on. . . . A check." Tr. 251. She stated that she did not know if Sam Brown got checks for his children by his other wife, but she knew that his mother sent he and the children money. She said that Sam Brown took that money. Tr. 252.

When asked if she stayed in bed all the time, she stated that she did not. Referring back to her direct testimony regarding petitioner cooking for her and doing stuff for while she was sick. Miss Doss then said that she was sick but not in the bed all of the time sometime she would sit on the couch or in a chair. Tr. 253. When asked when this was that petitioner cooked for her she retorted that it was petitioner and his brother Randy. Then she said that they were five and six years old. Tr. 254. Asked how long that this went on she explained that she had had surgery. When pressed to give a responsive answer she stated that it was about two months. Tr. 255.

Miss Doss was then asked when petitioner began coming to Mississippi during the summer time. She could not give an answer other than that "[t]hey were babies." Tr. 255.

When asked why she was having such trouble remembering things that were outside the affidavit which she had given her reply was:

> A. Sometime your mind will be the same. My mind may not be the same today or the next few minutes.
>
> Q. Because you are not sure of what your answer needs to be.
>
> A. It may be what my mind may be.

Tr. 256.

Asked why she went to Chicago and left three children here in Mississippi. She responded that her mother sent her to take care of a sick sister. Tr. 256. When asked about the statements in her sister's affidavits which that Sadie had told them that she did not like Mississippi and wanted to be in Chicago, Miss Doss replied that she did "read nobody else's mail." Tr. 256. When asked if she ever told them that she said that she had. Asked why she did not like Mississippi she stated that she did not like the "system." Tr. 256. Asked what was better in Chicago she replied: "The job. I mean I don't know what way you would put it. If I didn't want to be bothering nobody, I could walk to the park. I could go to the gym" Tr. 257. When she was asked if she liked it because she did not have to take care of her children down here in Mississippi she stated that she took care of them. She stated that she took of them but not "in the way you think, but I did." Tr. 257. When the prosecutor stated that they did not live with her or support them. She stated that she supported them. Tr. 257. When asked how she took care of them if she did not see them but one or twice a year, she objected saying that she saw them more often than that. When asked how many times a year she saw them she said three or four times. Tr. 257. She stated that she would come and "stay a week or two" on her vacation. When asked how may vacations she got a year she stated that she got one. Then she stated that she would come down on the weekend sometimes. Tr. 258-59. She stated that Sam Brown would bring her down and then go on and visit his relatives. Tr. 259.

When questioned about the truth of her claims of being mistreated by Sam Brown she denied this and said to ask his friends. Tr. 259. She was asked what stopped her from

walking out on Sam Brown if all her testimony about him beating her was true. Her answer was that she "couldn't walk" because she was "on the floor." Tr. 260. Asked if his beatings kept her from coming back to Mississippi, she replied that he brought her back to Mississippi. Tr. 260. Asked how many times he brought her and how many time she came on her own, her reply was she did not know. Tr. 260.

Miss Doss was then asked about whether any of her other children ever lived with her, she said that they had, but as was her usual response "I can't say." Tr. 260. When pressed further she said that she could not remember when they lived with her. Tr. 261.

When asked where she got the money to buy the Royal Crown and beer that she was drinking she said that she was working at Sturdy Manufacturing. Tr. 261. When asked if during the time that Anthony was living with her she was drawing a check and not working. Her response was that she worked at times and then did not work at times, that she could only draw so much before she had to go back to work. She stated that she was able to work at times and at times she was not able to work, but of course could not remember when those times were. Tr. 261.

When asked if she did anything to keep Anthony in school, she stated that she did. When asked why petitioner only went to school in Mississippi for one day, she replied "I don't know." When asked why, she, being his mother did not know, her reply was "I'm not him." Tr. 261-62. She said that she did tell him to go to school. She said that she did not know that he quit school after one day in Mississippi. When the prosecutor stated that she really did not care if he went to school she said that she did care, but "I guess he didn't want

to go. I don't know." Tr. 262.

When questioned about her nephews she claimed were in Jackson with mental problems she could not say what was wrong with them other than "mental problems." Tr. 263.[12]

When she was asked why she did not tell Lee Bailey these personal things that she was now testifying to she stated that "[h]e wasn't close enought to talk to me about nothing." Tr. 263. She then said he was supposed to know these things because he was a lawyer. Tr. 263-64. When asked who would have been in a better position to tell petitioner's lawyer something good about his life, she stated "I did." Tr. 264. When asked what she told Bailey about Anthony's life she stated that she told him that he "was a nice person." Tr. 264. When confronted with the fact that such a statement was a lie, she stated that it was not a lie. Tr. 264. When asked why she failed to bring up all the times that he had been in trouble and had given her trouble her reply was "[e]verybody can't think of everything." Tr. 264. It was then was pointed out that she could think of all of the things she later put in her affidavit. The prosecutor pointed out that she had said that petitioner did laundry for her. She said "[y]es, they did." When it was pointed out that the question was about Anthony, she said that Anthony and his brother were doing the laundry. When it was pointed out that she had stated in her affidavit that it was Anthony, she changed her story and said that "when he putting it in the washing machine, he doing it." Tr. 261. She then said that he washed his clothes and other clothes also. She said that he began doing this when he was about five or six. She then

[12]Earlier she had testified that one of them was "hustling."

stated "I don't know." Tr. 264-65.

Miss Doss then stated that Anthony could clean house. Tr. 265. She stated that he liked helping with painting and fixing windows in the apartment building. She said that Anthony helped paint the apartments for the landlord in the building in which they lived. Tr. 265. She did not know how many apartments that he helped paint, but that he started helping paint the apartments when he was about eleven years old. Tr. 265.

Miss Doss was then asked what Anthony did with the money he made working. She said that he kept it to buy his clothes and food. Tr. 265-66. She stated that he knew how to by his own clothes and would go to the store with his brother to do so. She said that he bought nice clothes and that he had good taste. Tr. 266.

When asked about the statement in her affidavit regarding Anthony fixing bicycles, she said that "[t]he children would pay him for fixing the bikes." Tr. 266. She said that he would put them together and to make the "little round wheels to go on them." Tr. 266. She testified that he would take the bicycles out of the box and put them together. She stated that he began doing this when he was about eleven years old. Tr. 266.

When asked what type of cleaning he did around the house she stated that he would sweep the floor, mop and wash dishes. Tr. 267. When asked whether her statement in her affidavit that Anthony had never had a job was true, she said that he had he had a little job, working in the apartments. Tr. 267. When asked about Anthony's job cooking at her landlord's restaurant she could not recall the name of the restaurant and said that she had never eaten there. When asked how long Anthony worked there she stated that the restaurant

stayed open about a year. Tr. 267-68. She stated that Anthony was about eleven years old when he had this job. Tr. 268.

The prosecutor pointed out that she had testified that at age eleven petitioner was able to clean house, do laundry, help paint apartments, fix windows, fix bicycles and put them together and work as a cook at a restaurant. Miss Doss disputed that Anthony was a cook at the restaurant. Tr. 268. She stated that she never said that he was a cook, but cleaned up in the restaurant. Tr. 268. When confronted with petitioner's statement that he cooked while working in the restaurant, she replied that she did not know, because "I wasn't around then." When asked why she would testify that he cleaned instead of cooking, she said that she went to the restaurant at times when petitioner was cleaning. Tr. 268. She stated that she would just walk in and see everybody, but she would not know what everybody was doing. She stated that she did not know who the cook was. Tr. 268.

Miss Doss was then asked at what age petitioner was able to go to town and buy clothes with the money he earned. She stated that he was about eleven. Tr. 269. When asked about her statement in the affidavit regarding Anthony buying her some false teeth she said that he was not working at the time. Asked where he got the money he saved to buy the false teeth she said that he got a check for about $90.00 per month from the state. She said she really didn't know how much it was. She said that he saved the rest of the money. She said that out of this money he bought clothes and food, whatever he decided to spend it on. Tr. 270. She said that if she needed money that Anthony would give it to her from his savings. Miss Doss stated that Anthony would save what he did not spend on clothes, food

and her. Tr. 271. She said that while she did not know how much he saved that "[i]t was in the hundreds." Tr. 271.

Miss Doss was then asked about sending money to Anthony to go back to Chicago with on the day of the murder in this case. She stated that Anthony already had his own money. She was asked about the money she sent by a friend that he was supposed to go back to Chicago with that day. She stated that she did not send any money for him to live on, because he had his own money. Tr. 271-72. She then said that the person that the prosecutor was referring to had her own money and that she gave petitioner some money. Finally, Miss Doss stated that she did send Anthony some money that day, but did not know how much she sent. She was asked to give a ball park figure and she replied that "[i]t wasn't no dollar or two, but I don't know the amount of it was." Tr. 272. She was then asked how much money petitioner had saved up to go to Chicago, she testified that she did not know. She stated that she did not know he was going to Chicago that day. Tr. 272. When asked why she would have asked someone to take him to Chicago, she said that she did not ask anybody to take him to Chicago, but the lady was leaving that day. Tr. 272-73. Miss Doss was then asked if she did not know that this lady was going to pick Anthony up and take him to Chicago, she replied "I don't know. You have to ask her that." Tr. 273. She testified that she did not know if it was true or not that she was taking some money from her to Anthony to go to Chicago. Tr. 273. Asked why she did not know she said "there's a lot of things I don't know." Tr. 273. When asked if it was a lie if somebody said that they were taking money to Anthony from her to go to Chicago on she replied "I don't know what nobody else would

say." Tr. 273. She finally stated that she knew that she sent Anthony some money that day. She said that she gave the lady some money because she was going back to Chicago and needed some money. Tr. 274. She then testified that she did not know why Anthony was going back to Chicago, that you would have to ask him. Tr. 274. She then stated that he would go up and visit his sister in Chicago. She was then asked if he went up to visit Sam Brown. She said that he did. She asked him if this was on a regular basis. Miss Doss said that she only new of a couple of times. Tr. 274.

Miss Doss was asked if Sam Brown and Anthony were pretty close. Her reply was "I don't know. You have to ask them that." She was then asked if Brown and Anthony were involved in drug trafficking together. Her reply was "I don't know. You have to ask him that. I wasn't there." She was asked if she did not pay attention to what her son was doing she stated that "I wasn't there." Tr. 274.

Miss Doss was then asked where she lived when she moved back from Chicago. She stated that it was in an apartment owned by Calhoun County. She said that Anthony was living with her. Asked that if he were living with her why she did not know what he was doing, she stated that she did not know what he was doing when he was out of the house. Tr. 275.

When asked why she just did not stay in Mississippi if everything was so bad in Chicago, she said that she did not know how to answer the question. Tr. 275.

On redirect Miss Doss stated that Bailey did not ask her about the personal details of her life nor did he tell her why it was important to talk about those personal details. Tr. 276.

The Court then asked Miss Doss some questions regarding her drinking while she was pregnant with her other children. She testified that she drank while she was pregnant with Randy. Tr. 276. She also testified that Sam Brown beat her while she was pregnant with Randy. Tr. 277. The Court then asked if Randy had any problems with the law to which she replied, no. Tr. 277.

The Court commented on how much Anthony looked like Miss Doss. The court then asked if Miss Doss' mother was a drinker. Miss Doss stated that she was and that she drank all of the time. However, she could not say whether she drank while she was pregnant with Miss Doss. Tr. 277. The court then asked whether he mother was a strict disciplinarian and Miss Doss stated that she was. Tr. 278. Miss Doss stated that all of the children that were raised by her mother turned out "all right." Then she added, "[b]ut Mavis, she had a nervous breakdown. I forgot about that." Tr. 278.

Petitioner's counsel was allowed to ask one further question on redirct. He asked if Randy had ever gone to prison. Miss Doss stated that he had gone to prison for drugs. Tr. 278.

Miss Doss' testimony was interesting in that she could remember some of what was in her affidavit, and contradicted other things in her affidavit and in her prior testimony. She contradicted things contained in other affidavits that were filed with this Court with the post-conviction application. However, a great deal of her testimony was simply "I don't know" or "I can't remember." Miss Doss is simply not a very credible witness and seemed to tailor her testimony to only know what was thought necessary to achieve the desired ends of this

evidentiary hearing, a new sentencing trial in this case. Once you got outside the narrow areas on which she had been schooled she was at a loss for answers.

From the testimony given at the hearing it is clear that Miss Doss was able only to give cogent answers to the limited items that had been put in the affidavit. Anytime that the questioning varied from the alleged facts in the affidavit she could not give a straight answer or could not remember. She could not put anything in to a time fame that could be nailed down with any certainty. She lived with a man for five years, yet could not give the dates during which she lived with him. She claimed that she was sick for two months requiring petitioner and his brother to cook and clean for her. Other witnesses disputed this fact. She claimed that she drank Crown Royal chased with beer for years, but another witness who lived in the house stated that she never saw her drink. She stated that she would not tell anybody about the alleged horrid conditions in which she lived because she was afraid that someone would laugh at her. She lied about who petitioner's father was at trial and now contends that another man is his father.

The trial court's findings and conclusions regarding the testimony of Sadie Doss are fully supported by the record before this Court. *See* Opinion at 10-12. These findings are not clearly erroneous. *See Loden, supra*; *Brown, supra*.

SANDRA PRICE

Petitioner next called Sandra Price to the stand. This is the woman, who until the day before the evidentiary hearing, had been told that petitioner was her brother. She stated that she was born and had lived all of her life in Chicago. Tr. 280. She stated that she moved in

with Sam Brown and Sadie Doss when she was eight years old. She stated in addition to she, Randy and Anthony her sister, Diane Price, also lived with them. She stated that she was four years older than Anthony. Tr. 280-81.

Ms Price stated that Sam Brown was "[v]ery angry", [a]busive, and "[o]n drugs." Tr. 281. She stated that he would beat her, Sadie, Randy and Anthony with for no reason. She testified that he would use anything he could get his hands on – keys, brooms, extension cords or belts. Price stated that he used very bad words when talking to Sadie, "[l]ike the "B" word, "M" "F", you fat "A", "S". She stated that he was very abusive to Sadie and would be abusive towards her in front of all the children including Anthony. Tr. 281.

Price stated that Sam Brown had a drug problem in that he used cocaine. Tr. 281. Asked how he got money for his drug habit, Price testified that he had a construction job, but the company went out of business. From the time he lost his job she testified that he was taking the welfare money he got for she and her sister as his own. Tr. 281-82. She stated that he spent this money on drugs. Tr. 282.

Price stated that they were very poor. She stated that it was hard to make ends meet on the little money that Sadie got. Tr. 282. She further stated that the neighborhood that they lived in was not safe, there was gang activity, fighting shooting all the time, very violent. Tr. 282.

She stated that when Anthony was little he would keep to himself and was very quiet. Tr. 282. As he got older she stated that he continued to stay to himself, he would go off to be alone. Tr. 282-83.

She stated that Sam Brown was her biological father and that she believed that he was also Anthony's father. She stated that she found out the day before that Sam Brown was not Anthony's father. Tr. 283. She stated that she eventually moved out of Sam Brown's house. She stated that he still came and lived with her from time to time and that she was still having problems with him. Tr. 283. Asked why she let him live with her she stated that he was her father and that she loved him, that he is the only person she had. Tr. 284.

Sandra Price then related an event that occurred in her home in 1989. She stated that she, her daughter, her sister, her father, and Anthony were present in her home. Tr. 284. She stated that she came in about 4:00 a.m. from roller skating and was getting ready for bed when she heard the back door being kicked in. She stated that three or four men came in with guns, put duct tape on everybody's eyes and hands and repeatedly beat everybody, including Anthony. She said the Anthony was saying "please stop" and was asking what the problem was. She stated that she was taken into another room and repeatedly raped and beat. She stated that this went on for about two hours before they left. Tr. 284-85. She stated that the neighbors across the hall eventually called the police. She said that they were all taken to the hospital. Tr. 285.

Price was asked if Anthony had ever told her that he had stolen something from these people. Price stated that he had not. Tr. 285.

On cross -examination Ms. Price stated that she was first contacted by Jerry Eno, petitioner's post-conviction mitigation investigator. She stated that he wanted to know about how Anthony was treated as he was coming up and what went on in the household. Tr. 287.

She was then questioned about her affidavit which stated that Sam Brown was her father and also stated that a Sam Price was her father. Asked why she swore to an affidavit that both men were her father she stated that "[w]ell, maybe it was a mistake." Tr. 288.

She stated that she moved in with Sadie Doss and Sam Brown when she was eight years old. And lived with them for about seven to eight years until she was between fifteen and sixteen years old. She stated that Sadie Doss and Sam Brown lived together this whole time. Tr. 289. She stated that if Sadie Doss had testified that she only lived with Sam Brown for five years that the statement would not be true. Tr. 289-90.

Price stated that she knew that her father used drugs before she was eight years old. She stated, that even though he was a drug addict he was given custody of her because her mother was a "heavy alcoholic" Tr. 290. Asked why she did not tell someone about her father's drug use she said that living with Sadie and Sam was a safer environment. She said even though her father was beating her that she was safer there with Sadie than with her mother. Tr. 290. When asked why it was safer, she replied, "[b]ecause it was." When pressed for an answer she stated that with Sadie and Sam she was being fed, clothed and sent to school. She said that Sadie made sure that she and Anthony went to school. Tr. 291. She could not remember where Anthony went to school for the first grade. Tr. 291.

When asked if she was getting beaten more at her mother's house than with Sam and Sadie, she said "[y]eah, somewhat." Tr. 292. She said that with Sam and Sadie she got beat by her father, but not by her stepmother. She stated that Sadie never bothered her. Tr. 292.

Price was asked if Sadie Doss was ever sick. She replied that there was nothing

serious, "just maybe headaches and stuff like that." Tr. 292. Asked if she was in bed for two months so that Anthony and Randy had to take care of her, Price stated that Sadie was never in bed for two months sick. Tr. 292. Asked what Sadie did all day, Price stated that she took care of the children. Asked what she did while they were in school, she stated that Sadie was at home making sure the meals were prepared and the house was clean. Tr. 293. Asked if the boys did the cleaning and wash, Price stated that Sadie did that. Tr. 293.

Price was asked if she saw Sadie drink a lot, Price's reply was "[n]ot to my knowledge. Tr. 293. Asked if she saw Sadie drink Crown Royal and chase it with beer, Price stated "[n]ot to my knowledge." Tr. 293-94. Asked if that would be true even if Sadie said that she did, Price replied "[n]ot to my knowledge." Asked if Sadie was an alcoholic, she stated, "[n]ot to my knowledge." Asked if Sadie was a drunk, Price replied, [n]ot to my knowledge." Tr. 294. Price was then asked if she ever saw Sadie take any drugs. Price stated "[n]o." Asked if she saw her take any pills, she said that Sadie took "[p]rescriptions prescribed from a doctor." She stated that they were probably pain pills for headaches. Tr, 294. Asked if it could be for anything else, she stated "[n]o." Asked if she ever saw Sadie take Valium, she stated "[n]o." Tr. 294.

She stated that after she moved out that she would go visit once a week and Anthony would always be there. She said that he stayed home all of the time, except for the time he was in school. Tr. 295.

She said that she only saw Anthony "[a]bout twice" after he moved to Mississippi. Asked if she really knew what Anthony was like after he moved to Mississippi, Price stated

that she did because he was her brother, and that they grew up together. Tr. 296. She stated that the man she grew up with was not capable of killing anybody. Tr. 296. When pointed out that he had done so, Price's reply was "I don't know that." Tr. 296. When it was pointed out that the jury had found him guilty, she stated that she did not believe he was guilty. Tr. 296-97. She then stated that he could have been involved, but she did not believe that he killed anybody. Tr. 297. When asked whether she believed that he was involved in the robbery and murder in Memphis, she said "no." Tr. 297. When it was pointed out that petitioner had plead guilty to the charges in Memphis, Priced stated that she did not believe him. Tr. 297.

Price was then asked about the home invasion. She was asked who was taking care of her infant daughter while she was out roller skating until 4:00 a.m. She first stated that her daughter was not an infant, that she was about a year old. She insisted that her daughter was not an infant, but a toddler. Tr. 298-99. When asked if she knew that petitioner was the reason for the home invasion, because he had stolen money from these people, Price replied "[n]o." Tr. 299. When confronted with the fact that Anthony had told someone that he had stolen the money that they came looking for that night. Price stated that she did not believe that he would do that[13]. When asked if she believed that there was nothing bad about her brother, she stated "[y]es, I do, but I don't believe that." Tr. 299.

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[13]The basis of this questioning comes from the Whitfield report which notes that Dr. Glynn's progress notes reflected that "Mr. Doss was at the reporting '. . . a great deal of guilt' about the aforementioned home invasion incident '. . . because he reports that he had robbed the drug dealers of their drugs in order to get high and the reason they were at this [sic] house was his fault." Defendant's Exhibit 1, at 17.

Ms. Price was then asked what she thought was bad about her brother, she gave an non responsive answer. When pressed on what was bad about her brother, Price finally stated "[n]othing." Tr. 298-300. She then changed her testimony and stated that she did not believe there was anything bad about petitioner. Tr. 300. She then stated that she did not believe he was involved in the two murders, not involved in drug dealing, and not involved in house burglaries. Tr. 300.

On redirect, Price stated that even if the involvement in the two murders was true she would not feel any differently about petitioner. Tr. 300-301. Price was asked if she thought people could change, she said yes. She then stated that she was talking about the Anthony that she knew. Tr. 201. Price was then asked if petitioner was responsible for the home invasion how would she feel about him. She stated, "[t]he same way. Because they didn't have to come in my house and did what they did to my family." Tr. 301.

Sandra Price contradicted the testimony of Sadie Doss on several key points. She contradicted Sadie's testimony about her drinking, about her taking Valium and about how long Sadie and Sam Brown lived together. Basically the only positive thing that she had to say about petitioner was that he was a "good kid." She refused to believe that petitioner had been involved in the murders in Mississippi or Memphis. She refused to believe that petitioner was the cause of the home invasion that resulted in her being beaten and raped. She stated that even if those things were true that it would not change her opinion of him.

The trial court's findings regarding the testimony of Sandra Price are not clearly erroneous. *See Loden, supra*; *Brown, supra.* Clearly, Price's testimony, even in conjunction

with that of Sadie Doss and Q. T. Doss would not create a reasonable probability that the result of this trial would have been different. *See Strickland.*

SAM PHILLIPS

Petitioner next called Sam Phillips, petitioner's biological father. He stated that he kept up with the case through Sadie Doss. Tr. 302. Phillips then gave testimony regarding his marriage and family and what his children had accomplished. Tr. 302-04. The State objected to the relevance of this testimony and the trial court sustained the objection. Tr. 304.

On cross-examination Phillips was asked if he ever contacted petitioner's attorney and told him that he was his father. Phillips responded that he did not do so. He said that he spoke with Sadie Doss and kept up with the proceedings with her. He stated that she never asked him to testify for Anthony. He stated that he had known that he was Anthony's father all of petitioner's life. He stated that he was not going with Sadie Doss while she was living with Sam Brown, but that it was a "one-night stand." Tr. 305.

Phillips testified that Anthony meant what any son would mean to a father. Tr. 306. When asked if he meant so much why did he not get involved and try to help at the time of the trial. Phillips first said that he was involved, but he wasn't there. Tr. 306. He was then asked how many times he went to Chicago and tried to get Anthony to come live with him. Phillips replied, "[n]ot, not one time." Tr. 306.

Phillips stated that he told Anthony to get off the streets and stop selling drugs several times. He said that Sadie would call him and tell him that Anthony was in trouble. Tr. 307.

When he got these calls he would go and talk to Anthony. Tr. 307. He stated that one of the things that he talked with Anthony about was not going to school. Tr. 307. He testified that he was involved in Anthony's life to a "certain extent." Tr. 308. He stated that he could not remember when he first told Anthony that he was his father, but it was at some point when he was a teenager. Tr. 308. When asked if he knew that Anthony was planning to go back to Chicago when this murder occurred. Phillips stated that he did not. Tr. 309. When asked what kinds of trouble Anthony was getting into that he talked to him about. Phillips stated that he did not remember. Tr. 309.

The trial court's finding regarding the testimony of Sam Phillips is not clearly erroneous. First, counsel had no way of knowing of his existence because he was told, and Sadie Doss testified under oath, that Sam Brown was petitioner's father. He testified that he knew about the murders and the trial, but was keeping up with it through Sadie Doss. How was petitioner to find out the truth if petitioner or Sadie Doss did not tell counsel. Clearly, whether petitioner would have been better off growing up with Sam Phillips was a matter of rank speculation. The trial court's findings regarding the testimony of Sam Phillips is not clearly erroneous. *See Loden, supra*; *Brown, supra.* Even if trial counsel could have learned the truth and found Sam Phillips, his testimony alone or in conjunction with the other witnesses would not raise a reasonable probability that the result of the sentencing phase would have been different.

MENTAL HEALTH RECORDS AND RECORDS FROM MEMPHIS ATTORNEY AND LACK OF MENTAL HEALTH EXPERT

The trial court found, as was shown by the testimony, that counsel did obtain the mental health records and records from the Memphis attorney. Counsel cannot be held ineffective for failing to discover these records, because he had these records. The trial court's finding on this portion of the claim are not clearly erroneous. *See Loden, supra*; *Brown, supra.*

What do the medical and mental health records show?

Petitioner introduced Exhibit 2 which contains the records from the North Mississippi Medical Center which is dated October 25, 1988. This report states that petitioner was given the Wechsler Intelligence Scale for Children-Revised Short Form on which he obtained an estimated I.Q. score of 80. This placed him in the low average range of intelligence. Not retarded. Def. Ex. 2 at 1. The North Mississippi Medical Center found Anthony to be reading on a third grade level and that his math skills were at the sixth grade level. *Id.* He was given the MMPI, but the report stated that it was of doubtful validity. *Id.* This report states that petitioner had gotten into trouble for a burglary and earlier for possession of marijuana and was on probation. *Id.* at 9. It also shows that petitioner was arrested the day prior to his admission for an attempted burglary. At that point petitioner was given the choice of going to the North Mississippi Medical Center for evaluation or going to Columbia. *Id.*

The discharge summary from the North Mississippi Medical Center (Def. Ex. 3), reported that Anthony was "involved in gangs, that fought, ripped people off and other gang activities." Def. Ex. 3 at 2.

The report from the University of Mississippi Psychological Services Center show that the testing occurred on July 26, 1988 and August 1, 1988. This report shows that according to Sadie Doss her pregnancy and petitioner's delivery were "normal and uneventful". Def. Ex. 4 at 1. That his mother reported that there was no history of mental illness in the family. Def. Ex. 4 at 1. That she had been unemployed since 1977 due to arthritis. *Id.* at 2. That she had received welfare in Chicago, but never SSI. *Id.* That she and Sam Brown dated for twenty-one years and lived together for five of those years. *Id.* This report shows that petitioner was in trouble in Chicago for robbing an elderly man and spent two weeks in the Youth Detention Center. *Id.* It shows that Miss Doss stated that Anthony "skipped a large number of days from school" in 1987 and 1988, without her knowledge. *Id.* at 2-3. Miss Doss told the examiners that she only drank an occasional beer and there was no history of alcohol or drug abuse in the immediate family. *Id.* at 3. Miss Doss also reported that petitioner did not get along with the sister or the brother that were living with them here in Mississippi. The testing done at the University of Mississippi showed that petitioner was on a sixth grade level in arithmetic and below a third grade level in reading and spelling. *Id.* at 4. The report also showed that petitioner was found to have an I.Q. of 71, which falls in the borderline range of intellectual functioning. Again not retarded. *Id.* at 5. There was a comment that there may be some organic basis to petitioner's difficulties. *Id.*

At the time of petitioner's trial in 1993, mental retardation was only a mitigating factor. Neither of the reports found petitioner to be retarded. Counsel was not ineffective in relying on the reports in not seeking a mental health expert to testify in this trial.

The trial court considered the matter of the failure to obtain a mental health expert to testify in petitioner's behalf. The trial court found that Bailey testified that he had no trouble communicating with petitioner and that he did not appear to be insane.

The trial court also considered the school and mental health records and found that nothing in those records indicated that petitioner was mentally retarded or that he had any other mental problems that would suggest the need for a mental health expert. The Court found that Bailey was not ineffective in failing to obtain a mental health expert.

As stated above the standard for assessing a claim of ineffective assistance of counsel is found in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Court in *Strickland* stated that "[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." 466 U.S. at 691.

It has also been held that the duty of trial counsel to investigate is tempered by the information provided to counsel by the defendant. When, as here, the defendant and his family have given petitioner no information on which further mitigation investigation should be conducted, the failure to pursue such an investigation may not later be challenged as unreasonable. *See Carter v, Johnson*, 131 F.3d 452, 465 (5th Cir. 1997) (The duty of trial counsel to investigate is tempered by the information provided to counsel by the defendant.); *Randle v. Scott*, 43 F.3d 221, 225 (5th Cir. 1995); *Gray v. Lucas*, 677 F.2d 1086, 1094 (5th Cir. 1982); *Bell v. Watkins*, 692 F.2d 999, 1009, n. 11 (5th Cir. 1982).

Looking further to the Fifth Circuit's opinion in *Wiley v. Puckett*, 969 F.2d 86 (5th Cir.

1992), we find a more complete discussion of this situation:

> Investigations into mitigating circumstances may reasonably be limited where the defendant fails to call witnesses to his lawyer's attention. *See Burger v. Kemp*, 483 U.S. 776, 794-95, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987) (counsel's interview of only those witnesses called to his attention was reasonable). Our cases, too, have recognized that a defendant who does not provide any indication to his attorneys of the availability of mitigating evidence may not later assert an ineffective assistance claim. For example, in *Byrne*, the habeas petitioner complained of his attorneys' failure to discover evidence of an underlying mental disorder. Assuming for the sake of argument that Byrne in fact suffered from a mental disorder which could have mitigated the death sentence, we held that "Byrne must still demonstrate . . . that his attorneys had some indication that mental impairment might prove a promising line of defense." 845 F.2d at 513 (citations omitted). But Byrne, like Wiley, "[did] not allege that he intimated to his attorneys that he was suffering from a mental disorder." *Id.* Similarly, in *James v. Butler*, 827 F.2d 1006 (5th Cir.1987), *cert. denied*, 486 U.S. 1046, 108 S.Ct. 2044, 100 L.Ed.2d 628 (1988), we rejected an ineffectiveness claim where the petitioner did not alert counsel to the possibility of a defense based on mental impairment due to drugs.
>
> This is not a case like *Loyd v. Smith*, 899 F.2d 1416 (5th Cir.1990), where, despite the fact that the petitioner had been subject to a sanity examination prior to trial, his lawyers failed to investigate his mental impairments any further prior to the sentencing hearing and failed to obtain an independent psychiatric examination to fill in acknowledged "gaps in the record." *Id.* at 1421. Also distinguishable is *Wilson v. Butler*, 813 F.2d 664 (5th Cir.1987), *cert. denied*, 484 U.S. 1079, 108 S.Ct. 1059, 98 L.Ed.2d 1021 (1988). There, we held that an evidentiary hearing on an ineffectiveness claim was necessary where the petitioner alleged that his father had alerted defense counsel to the petitioner's "problems" dating from childhood. *Id.* at 669, 671. We found that this information was sufficient to require competent counsel to further investigate the petitioner's background. *Id.* at 671; *see also Profitt v. Waldron*, 831 F.2d 1245 (5th Cir.1987) (counsel ineffective where he knew defendant had escaped from a mental institution, but did not determine why defendant had been in the institution).
>
> Franks's decision to limit his investigation of potential mitigating evidence to State's witnesses is reasonable to the extent it was supported by a reasonable professional judgment about how to conduct the defense.

> *Strickland*, 466 U.S. at 690-91, 104 S.Ct. at 2066. Because nothing alerted Franks to the possibility of mental impairment as a mitigating factor, we find the decision not to obtain a psychiatric evaluation entirely reasonable. Wiley asserts that he told Franks that he had been under the influence of drugs and alcohol, but this meager information alone would not require the full-scale investigation Wiley suggests was necessary. Although we are of the view that counsel could have made an effort to locate friends and family who could have testified about Wiley's favorable qualities, "'[w]e address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger*, 483 U.S. at 794, 107 S.Ct. at 3126 (citing *United States v. Cronic*, 466 U.S. 648, 665 n. 38, 104 S.Ct. 2039, 2050 n. 38, 80 L.Ed.2d 657 (1984)). Wiley and Franks agree that Wiley did not provide Franks with any leads on witnesses. Franks could reasonably have concluded that the most promising line of defense at the sentencing trial was to force the State's witnesses to tell the jury about Wiley's history of nonviolence, cooperation in the investigation, good behavior as a prisoner, and acceptance of blame for the crime. He could also reasonably have concluded, as the state court noted, that introducing evidence of any adverse psychological background would have contradicted his attempt to portray Wiley as basically a nonviolent person who had no intent to kill Turner. *See Wiley III*, 517 So.2d at 1380. In sum, we do not find that Franks's decisions at Wiley's second sentencing trial were unreasonable, and so we do not address the prejudice component of the inquiry.
>
> 969 F.2d at 99-100.

Looking to the United States Supreme Court's decision in *Berger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987), we find the following:

> The record at the habeas corpus hearing does suggest that Leaphart could well have made a more thorough investigation than he did. Nevertheless, in considering claims of ineffective assistance of counsel, "[w]e address not what is prudent or appropriate, but only what is constitutionally compelled." *United States v. Cronic*, 466 U.S. 648, 665, n. 38, 104 S.Ct. 2039, 2050 n. 38, 80 L.Ed.2d 657 (1984). We have decided that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S., at 690-691, 104 S.Ct., at 2066. Applying this standard, we agree with the courts below that counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment.

It appears that he did interview all potential witnesses who had been called to his attention and that there was a reasonable basis for his strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty. Having made this judgment, he reasonably determined that he need not undertake further investigation to locate witnesses who would make statements about Burger's past. We hold that the Court of Appeals complied with the directives of *Strickland*:

> "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
>
> "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.*, at 691, 104 S.Ct., at 2066.

483 U.S. at 794-95.

The fact that counsel did not uncover or present evidence of an abusive family history is not indicative of a lack of trial preparation where counsel was given no information that would suggest such abuse had been present. *See Burger v. Kemp, supra*; *Carter v. Johnson, supra.*

Petitioner also relies heavily on the reports and testimony from the mental health professionals who testified at the evidentiary hear in an attempt to show ineffective assistance of counsel. What he fails to consider is that petitioner and his family may not have

been so forthcoming had these examinations been done at the time of trial. He relies on Dr. Grant who tested petitioner, but he fails to recognize that Dr. Grant did not interview a single family member and that all of his information came from petitioner or the questionable affidavits furnished by petitioner. Further, petitioner points to the Whitfield report. The same problem exist with the reliance on the questionable affidavits, but the Whitfield staff did speak with family members regarding petitioner. Dr. Summers testimony must be tempered by the fact that he testified that he did not need any test to determine whether someone was retarded, he could look at them and tell. Tr. 193. He further stated that the only quarrel he had with the Whitfield report was the conclusion. Tr. 195. Further, Dr. Summers failed to attempt to make any contact with petitioner's family members to interview them. Tr. 203-04. Looking to the Whitfield report we find a wealth of information that the prosecution would have loved to have had to use at trial. Especially his gang membership and activity in Chicago. *See* Def. Ex. 1 at 8. His selling of drugs at an early age. *Id.* at 12; 26; 27. His selling cocaine here in Mississippi. *Id.* at13. Selling "Sherms," marijuana dipped in embalming fluid. *Id.* at 13. It is clear that petitioner's attorney was present during the evaluation at Whitfield as there is at least one instance in which counsel told petitioner not answer a question. *Id.* at 14.

The State would submit that petitioner has failed to demonstrate that the double edged information he would have obtained from a mental health professional would have created a reasonable probability that the result of the sentencing phase of this trial would have been different. *See Strickland, supra.*

Petitioner finally contends that counsel was ineffective in asking Miss Doss the question regarding the possibility of parole. First, there was no mention of parole by trial counsel. He did ask Miss Doss that if he was sentenced to life that he would not be home for a long time. Respondents would assert that this question does not represent ineffective assistance of counsel.

Respondents would assert here as they asserted in the trial court that this question was no one which was remanded for an evidentiary hearing. This Court's opinion in *Doss v. State*, 882 So.2d 176 (Miss. 2004), remanding this case for an evidentiary hearing, states:

> In the present case, *the inquiry is whether the sentence would have been different if mitigating evidence which was available, but not used, had been presented.* Doss should have the opportunity to present evidence to the trial court in support of his claim that his counsel's failure to investigate and present available evidence in mitigation amounted to ineffective counsel.
>
> 882 So.2d at 189. [Emphasis added.]

The State would submit that the trial court was correct in its assessment that this claim was not remanded as part of the hearing. *See* Opinion at 15-17. In any event, the trial court found that the claim of ineffective assistance of counsel was without merit as there was no mention of the word parole.

In fact, looking to the direct appeal opinion we find that the Court decided a claim contending that petitioner should have been sentenced to life without parole or at least the jury should have been informed what effect the Tennessee conviction wold have on petitioner's sentence in Mississippi. *See Doss v. State*, 709 So.2d 369, 393-94, ¶¶ 101-104 (Miss. 1996).

Petitioner cites *Williams v. State*, 445 So.2d 812 (Miss. 1984), contending that it forbids the mention of parole in a capital sentencing proceeding. Petitioner's counsel is wrong. *Williams* forbids the state from making any argument regarding parole. This Court has never held it to be reversible error for defense counsel to mention parole. This assertion is without merit.

II. THE CIRCUIT COURT'S FINDING THAT PETITIONER IS NOT MENTALLY RETARDED WITHIN THE MEANING OF *ATKINS v. VIRGINIA* SHOULD BE AFFIRMED.

In *Chase v. State*, 873 So.2d 1013 (Miss. 2004), this Court held:

> ¶ 74. We hold that no defendant may be adjudged mentally retarded for purposes of the Eighth Amendment, unless such defendant produces, at a minimum, an expert who expresses an opinion, to a reasonable degree of certainty, that:
>
> > 1. The defendant is mentally retarded, as that term is defined by the American Association on Mental Retardation and/or The American Psychiatric Association;
> >
> > 2. The defendant has completed the Minnesota Multi phasic Personality Inventory-II (MMPI-II) and/or other similar tests, and the defendant is not malingering.
>
> ¶ 75. Such expert must be a licensed psychologist or psychiatrist, qualified as an expert in the field of assessing mental retardation, and further qualified as an expert in the administration and interpretation of tests, and in the evaluation of persons, for purposes of determining mental retardation.
>
> ¶ 76. Upon meeting this initial requirement to go forward, the defendant may present such other opinions and evidence as the trial court may allow pursuant to the Mississippi Rules of Evidence.
>
> ¶ 77. Thereafter, the State may offer evidence, and the matter should proceed as other evidentiary hearings on motions.

> ¶ 78. At the conclusion of the hearing, the trial court must determine whether the defendant has established, by a preponderance of the evidence, that the defendant is mentally retarded. The factors to be considered by the trial court are the expert opinions offered by the parties, and other evidence if limitations, or lack thereof, in the adaptive skill areas listed in the definitions of mental retardation approved in *Atkins*, and discussed above. Upon making such determination, the trial court shall place in the record its finding and the factual basis therefor.
>
> 873 So.2d at 1029.

With this precedent in mind we will proceed to discuss the findings of the trial court.

Petitioner contends that there is no dispute as to whether petitioner meets the intellectual deficit prong of *Atkins*. The State will agree that the key question in this case whether the adaptive functioning prong was met.

QUALIFICATION OF EXPERTS

However, petitioner, instead of launching into a discussion of the adaptive functioning question, petitioner first quibbles over the trial courts finding that none of the experts who were properly qualified as experts in the field of assessing mental retardation and the field of administration and interpretation of test for the purposes of determining mental retardation. Based on this the trial court found that petitioner had failed to demonstrate by a preponderance of the evidence that petitioner was mentally retarded under *Chase*. However, the trial court did not end its discussion there it went on to consider the testimony of each of the expert witnesses and the lay witness testimony to determine whether petitioner was retarded.

The State submits that the trial court was correct in that none of the experts witnesses

were fully qualified under *Chase*. However, the State will not quibble over this point. Since the trial court went on to discuss the merits of the claim the State will rest its argument on those findings also.

TEST FOR MALINGERING

Second, petitioner contends that the circuit court rejected his *Atkins* claim on the basis that no test for malingering was done by petitioner's experts. He argues that Dr. Grant's "consistency of scores" approach qualifies as a test. The State strongly disagrees with this assertion.

In support of this petitioner argues that this Court has held that there "no single prescribed *method* for determining malingering" citing *Lynch v. State*, 951 So.2d 549, 556 (Miss. 2007). [Emphasis added.] However, petitioner misstates the decision in *Lynch.* In *Lynch*, this Court held:

> ¶ 22. This Court, in *Chase v. State*, 873 So.2d 1013, 1029 (Miss.2004), established these guidelines for determining mental retardation.
>
> > We hold that no defendant may be adjudged mentally retarded for purposes of the Eighth Amendment, unless such defendant produces, at a minimum, an expert who expresses an opinion, to a reasonable degree of certainty, that: 1. The defendant is mentally retarded, as that term is defined by the American Association on Mental Retardation and/or The American Psychiatric Association; 2. The defendant has completed the *Minnesota Multiphasic Personality Inventory-II (MMPI-II) and/or other similar tests*, and the defendant is not malingering.
>
> (emphasis added) *Id.* at 1029.
>
> ¶ 23. Accordingly, in Mississippi it is acceptable to utilize the MMPI-II and/or other similar tests. *Id.* at 1029. This Court did not intend by its holding

> to declare *the MMPI-II or any one test as exclusively sufficient.* Having a variety of tests at their disposal, courts are provided with a safeguard from possible manipulation of results and diminished accuracy which might result if courts are limited to one test. The United States Supreme Court mentioned the Wechsler Adult Intelligence Scales Test. *See Atkins*, 536 U.S. at 309 n. 5, 122 S.Ct. 2242. *Other tests, as suggested by mental health experts, include the Structured Interview of Reported Symptoms (SIRS), the Validity Indicator Profile (VIP), and the Test of Memory Malingering (TOMM). See* Douglass Mossman, *Atkins v. Virginia*: A Psychiatric Can of Worms, 33 N.M.L.Rev. 255, 277-78 (Spring 2003).
>
> ¶ 24. The Court's interpretation in this case as to the *proper test to be administered* with regard to an *Atkins* hearing supercedes any contrary decisions. *This Court neither endorses the MMPI-II as the best test nor declares that it is a required test, and decisions that state otherwise are expressly overruled. See, e.g. Scott v. State*, 938 So.2d 1233, 1238 (Miss.2006) (holding that despite the doctor's use of a battery of other tests, administration of the MMPI-II is required prior to an adjudication of a claim of mental retardation); *Goodin v. State*, 856 So.2d 267, 277 (Miss.2003) (declaring that the MMPI-II is to be administered for a determination of mental retardation since it is the best test to detect malingering). *Our trial courts are free to use any of the above listed and approved tests or other approved tests not listed to determine mental retardation and/or malingering by a defendant.*
>
> 951 So.2d at 556-57.

This Court never used the word "method", it repeatedly used the word "test" and listed a number of "test" that could be used. The operative language from *Chase* is "completed."

In fact, when questioned regarding why no test for malingering had been done as required by *Chase*, Dr. Grant stated that he was unaware of the requirements of *Chase* as it related to the giving of a test for malingering. Dr. Grant then he stated that he did not give such test because they were "normed on people that are faking purposely to see if they can

separate our purposeful fakers from non purposeful fakers."[14] Dr. Grant admitted that he gave no test for malingering.

The State felt strongly enough about the wording of the decision in *Chase* requiring that a test for malingering be given to move for a direct verdict when Dr. Grant admitted that he had given no test for malingering. Tr. 165-71. The Court took the motion under advisement and continued with the testimony.

In its opinion the Court found that petitioner had failed to meet its burden of proof because petitioner did not meet the test set forth in *Chase* that petitioner's must be able to state that the petitioner is retarded and that he has "completed" a test to determine malingering. Opinion at 29-30. Respondents would assert that the trial court reading of the plain language of *Chase* is correct.[15] Petitioner failed to meet the standard set forth in *Chase* to prove that petitioner was mentally retarded.

Petitioner continues that since no one else gave any test for adaptive functioning that the trial court had to accept because the latest edition of the AAMR requires such testing be done. Of course the adaptive functioning test that Dr. Grant gave are not normed for a prison population. Looking to the Whitfield report we find the explanation of why not such test was given by the Court's experts. The report reads, in part:

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[14]Dr. Grant had no problem rejecting a test on malingering because of how it was normed, but heartily embraced test for adaptive behavior that are not normed for people in prison or death row.

[15]Dr. Summer did not do a test for malingering. In fact, when asked if he did a test for malingering Dr. Summer testified: "No, sir. I didn't because in my opinion an adult can't malinger mental retardation, because the deficits have to occur prior to age 18. Tr. 192.

> **Clinical Opinion Regarding Adaptive Functioning:** While standardized assessment instruments do exist for measuring adaptive functioning for individuals living in the community (e.g., such as the Vineland Adaptive Behavior Scales), we did not administer this type measure during this evaluation. Such instruments have not been standardized for use with offenders who have been incarcerated for a number of years, particularly those on death row (since the opportunities for involvement in activities measured by such instruments are significantly limited due to the nature of the prison environment). Hence, the administration of a standardized instrument to measure adaptive skills with a death row inmate would yield invalid results (i.e. due to a lack of available norms for this population.) Over the course of our clinical interview with Mr. Doss, we did qualitatively assess his adaptive functioning (both retrospectively and more recently based on his day-to-day activities in prison). We also reviewed a number of affidavits from family members, and conducted telephone interviews with some of those family members, who were able to offer a description of Mr. Doss' pre-incarceration level of functioning.
>
> Def. Ex. 1 at 31-32.

Therefore, the validity of the adaptive functioning test that Dr. Grant administered is highly questionable. The State would submit that the trial court was not in error in refusing to accept Dr. Grant's conclusions from this test without more. The findings from the Court's experts were much more detailed and considered real life situations of this defendant. Both from petitioner, the affidavits and personal contact with family members.

This brings us to the question of what definition forwarded by the AAMR applies to this case. Petitioner contends that the AAMR's 10th edition published in 2002, must be used because it is the latest word on how to diagnose mental retardation. However, the definition used by the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) and by this Court in *Chase* is the definition found in the 9th edition. There are distinct differences in the two definitions.

In *Chase* this Court stated that the test to be employed were:

¶ 69. The Atkins majority cited, with approval, *two specific, almost identical*, definitions of "mental retardation." The first was provided by the American Association on Mental Retardation (AAMR):

> Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, community use, self-direction, health and safety, functional academics, leisure, and work, Mental retardation manifests before age 18.

Atkins, 536 U.S. at 308 n. 3, 122 S.Ct. 2242, citing Mental Retardation: Definition, Classification, and Systems of Support 5 (9th ed.1992). The second was provided by The American Psychiatric Association:

> "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." Diagnostic and Statistical Manual of Mental Disorders 39 (4th ed.2000).

Id.

¶ 70. The Diagnostic and Statistical Manual of Mental Disorders, from which the American Psychiatric Association definition is quoted, further states that "mild" mental retardation is typically used to describe persons with an IQ level of 50-55 to approximately 70. *Id.* at 42-43. The Manual further provides, however, that mental retardation may, under certain conditions, be present in an individual with an IQ of up to 75.[18] *Id.* at 40. Additionally, According to the *Atkins* majority, "[i]t is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, *which is typically considered the cutoff IQ score* for the intellectual function prong of

the mental retardation definition." *Id.* citing 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 2952 (B. Sadock & V. Sadock eds 7th ed.2000) (emphasis added).

¶ 71. *These definitions were previously adopted and approved by this Court in Foster v. State, 848 So.2d 172 (Miss.2003).* This Court further held in Foster that

> the Minnesota Multiphasic Personality Inventory-II (MMPI-II) is to be administered since its associated validity scales make the test best suited to detect malingering. . . . Foster must prove that he meets the applicable standard by a preponderance of the evidence. . . . This issue will be considered and decided by the circuit court without a jury.

Id. at 175.

¶ 72. *These definitions, approved in Atkins, and adopted in Foster, together* with the MMPI-II,[19] *provide a clear standard to be used in this State by our trial courts in determining whether, for Eighth Amendment purposes, a criminal defendant is mentally retarded.* The trial judge will make such determination, by a preponderance of the evidence, after receiving evidence presented by the defendant and the State.

873 So.2d at 1027-28. [Emphasis the Court's and emphasis added, footnotes omitted.]

It is interesting to note that almost simultaneously with the *Atkins* decision the AAMR changed its definition to make it easier to show that one is mentally retarded.[16] The new

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[16]It must be remembered that the AAMR is an advocacy organization. On a web post in AAMR F.Y.I., dated July 2, 2002 the following was found:

> New, 10th Edition Of Mental Retardation: Definition, Classification, And Systems Of Supports Released
>
> AAMR launched the new and updated definition of mental retardation in the 10th edition of Mental Retardation: Definition, Classification and Systems of Supports at the Association's 126th Annual Meeting in Orlando, Florida. The 10th edition *proposes new and creative ways to define, classify, and support an individual with mental retardation.* The 2002 classification system goes

definition reads:

> Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18

Mental Retardation: Definition, Classification, and Systems of Support 5 (10th ed. 2002).

Of course petitioner wants the easier test as he pointed our that Dr. MacVaugh testified that using the new definition could "possibly change the diagnosis because the assessment od adaptive skills deficits would, would look different because the definition fo rthem is different conceptually." Tr. 350. Clearly, the more creative and expanded criteria is what petitioner wants applied. However, the new definition by the AAMR would appear to now conflict with the APA definition. So they are no longer almost identical.

The State would submit that the definition set forth in *Atkins* and in *Chase* are the proper definitions of mental retardation to be used not the new "creative" and "expanded criteria" found in the 2002 definition produced in response to the *Atkins* decision. The trial court was correct in using the definitions as set forth in *Atkins* and *Chase* and not the definition advanced by petitioner. The trial court did not err in following this Court's precedent.

> beyond the AAMR 1992 definition of mental retardation to *provide expanded criteria for diagnosis and classification of mental retardation*, while still retaining an emphasis on intelligence assessment, functional orientation, and supports. *The 2002 Manual is a timely and important resource to the states as they review their mental retardation criteria in view of the U.S. Supreme Court decision yesterday, outlawing the execution of people with mental retardation.* [Emphasis added.]

http://www.aaidd.org/FYI/fyi_vol_2_no_1.shtml

DR. GRANT

Petitioner launches into a lengthy defense of Dr. Grant. Relying on things not in the record regarding whether Dr. Grant required advanced payment. There is no record support of this other than counsel's assertions and must be disregarded. Counsel attacks the trial court for the findings he made with regard to Dr. Grant. However, he does not ever really challenge the findings made by Dr. Lott, Dr. MacVaugh and Dr. McMichael. His only argument appears to be that the Court's experts used the wrong test. The state would assert that they did not.

In *Atkins* the United States Supreme Court stated:

> As was our approach in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.*, at 405, 416-417, 106 S.Ct. 2595.
>
> 536 U.S. at 317.

This Court in *Chase* set forth the test to be employed. The doctors from Whitfield followed the dictates of *Chase*. Dr. Grant did not. The trial court used the test set forth in *Chase* by this Court. Petitioner now wants to change the test because he thinks he has found one that is more favorable to him. The State that this is not grounds to reverse the findings of the circuit court. Until this Court changes the test set forth in *Chase* the trial courts are not free to adopt their own or different test.

The circuit court was the finder of fact in this case. The circuit court assessed the credibility of the witnesses and made a decision which was not in petitioner's favor.

While the doctors from Whitfield did agree that the testing did show petitioner to have intellectual disabilities they found that he did not have any deficits in adaptive functioning either now or before the age of 18. Therefore, they all stated positively that petitioner was not retarded. The record in this case does clearly shows that the circuit court was not clearly erroneous in its decision that petitioner was not retarded. Petitioner has failed to demonstrate that the findings of the circuit court were wrong.

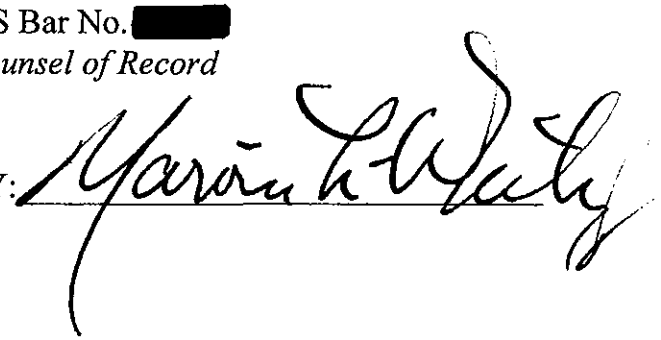
CONCLUSION

For the above and foregoing reasons the State would assert that the decision of the circuit court in denying post-conviction relief in this case should be affirmed.

Respectfully submitted,

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
MS Bar No. [redacted]
Counsel of Record

BY: 

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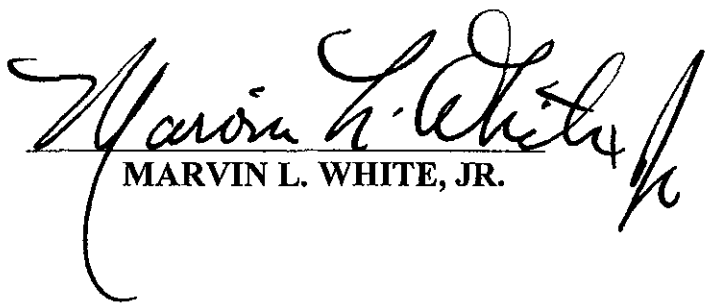
CERTIFICATE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mail, first-class postage prepaid, a true and correct copy of the foregoing **BRIEF FOR APPELLEE** to the following:

Robert B. McDuff, Esquire
767 North Congress Street
Jackson, Mississippi 39202

This the 25th day of February, 2008.



MARVIN L. WHITE, JR.

NO. 2007-CA-00429-SCT

IN THE SUPREME COURT OF MISSISSIPPI

ANTHONY DOSS, *Appellant*

versus

STATE OF MISSISSIPPI, *Appellee*

AMENDED CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mail, first-class postage prepaid, a true and correct copy of the foregoing **BRIEF FOR APPELLEE** to the following:

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MARVIN L. WHITE, JR.