NO. 2007-CA-00429-SCT

---

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

---

ANTHONY DOSS,

Appellant,

vs.

STATE OF MISSISSIPPI,

Appellee.

---

# REPLY BRIEF OF THE APPELLANT

---

ORAL ARGUMENT REQUESTED

ROBERT B. MCDUFF
[redacted]
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

Counsel for Appellant

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Anthony Doss, Appellant;

2. Robert B. McDuff, Attorney for Appellant;

3. State of Mississippi, Appellee;

4. Marvin L. White, Jr., Office of the Attorney General, Attorney for the Appellee;

This the 16th day of April, 2008.

Robert B. McDuff

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

*CASES*

***STATUTES AND RULES***



***OTHER AUTHORITIES***

## INEFFECTIVE ASSISTANCE OF COUNSEL

The State's brief does not respond to many of the major points of our brief. With respect to those contentions that it does make, we reply to them by addressing first, the trial attorney's failure to meet an objective standard of reasonableness and second, the resulting prejudice.

### *The Failure to Meet an Objective Standard of Reasonableness*

The State argues that the defense attorney, Mr. Bailey, met an objective standard of reasonableness because, according to the State, (1) he obtained certain mental health and school records from the Memphis attorney, (2) nothing in those records indicated Mr. Doss was mentally retarded or suggested the need for a mental health expert, (3) Bailey had no trouble communicating with Mr. Doss and did not think Mr. Doss was insane, and (4) Mr. Doss and his family gave Mr. Bailey no information on which further mitigation investigation should be conducted. (State's brief at pp. 49-51). These erroneous suppositions are addressed in turn.

The State says (p. 49) that "counsel cannot be held ineffective for failing to discover these records because he had them." However, Mr. Bailey did not have all of the pages in the records and apparently never followed up and secured the missing pages. Given that he did not do so, and given that the pages he did have were not a part of his regular case file, it appears he may not have even read any of these records. Even if he did read them, he did not act on them. All of these things fall below the objective standard of reasonableness in a capital case, which requires of counsel "efforts to discover *all reasonably available* mitigating evidence." *Wiggins*, 539 U.S. 510, 524 (2003) (emphasis added) (citing ABA

Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(c) (1989)).

The State next claims (p. 50) that neither of the mental health reports in Bailey's possession "found petitioner to be retarded" and that Bailey "was not ineffective in relying on the reports in not seeking a mental health expert at trial." Of course, it is hard to say that Bailey "rel[ied] on the reports in not seeking a mental health expert" since he did not have all of the pages and it does not appear he read them. Moreover, those records, combined with the school and hospital records that also had been sent by the Memphis attorney, contained a number of references to mitigating evidence that should have led trial counsel to consult with a psychologist or psychiatrist and conduct a more thorough mitigation investigation.

The University of Mississippi report — detailing an evaluation conducted when Anthony was 15 — included testing showing that he had a full-scale IQ of 71 and had achieved sixth grade level in arithmetic and below third grade level in reading and spelling. The report also indicated the possibility of organic brain damage, saying the Bender Motor Gestalt test results "revealed that there may be some organic basis to Anthony's difficulties." The report recommended special education for Anthony, saying he "would probably benefit from some special education classes in his local school district." As mentioned before, Mr. Bailey's copy was missing pages 2, 4, and 6, which Bailey apparently never tried to obtain. His copy included only 1, 3, 5, and 7. (See, Tr. 62-63; Ex. D-2 at exhibit record page numbers 114-117 — which are pages 1, 3, 5, and 7 from Bailey's file; Ex. D-4, which is a complete copy of the report placed in evidence by post-conviction counsel.) It was page 5

of that report, which Bailey did have, that stated Anthony had an IQ of 71 and "there may be some organic basis for Anthony's difficulties." It was page 7, which he also had, that stated Anthony would benefit from special educational classes. Page 4, which Bailey did not have, explained that Anthony read and spelled at a level below third grade. Ex. D-4.

Mr. Bailey's documents also included a discharge summary regarding Mr. Doss from the North Mississippi Medical Center, but Mr. Bailey's copy did not contain the second page of the two-page summary. This report also showed Anthony reading at a third-grade level. Ex. D-3.

The other documents that Mr. Bailey received from the Memphis attorney included medical records from an injury when Mr. Doss was hit in the head with a pipe at age 13, records from the Faraday Elementary School in Chicago listing his grades and noting that he received Learning Disabilities Resource Services at that school, and a Chicago high school record showing he failed four out of five classes in the ninth grade.

Thus, if Mr. Bailey had obtained a complete set of materials they would have revealed that Mr. Doss had a borderline IQ, read at the third grade level, had been placed in special education classes in Chicago, had done very poorly in the Chicago schools, had failed four out of five classes in the ninth grade, had been recommended for special education classes in Mississippi, had been hit in the head with a pipe at age 13, and most importantly, might have suffered from organic brain damage that was the cause of many of his problems ("there

may be some organic basis for Anthony's difficulties").[1] These records clearly called for further investigation and development, including consultation with a mental health expert.[2]

The State next attempts (pp. 50-51) to justify Mr. Bailey's omissions by claiming that Mr. Doss is not mentally retarded and by citing the trial judge's reference to Mr. Bailey's testimony that he did not think Mr. Doss was insane. Of course, mitigation evidence is not limited to insanity and retardation. The Whitfield report prepared by the court-appointed experts demonstrates the mitigation that easily could have been developed if Mr. Bailey had read these records and followed up on them by consulting with a psychologist or psychiatrist, who could have pursued further inquiry and additional testing and inquiry, which would have led to — among other things — a diagnosis of Organic Brain Dysfunction. This is set forth more fully at pp. 6-18, 35-36 of our opening brief.[3]

---

[1] Mr. Doss's first IQ test from the University of Mississippi yielded a score of 71, ex. D-4 at p. 5, while a subsequent test from North Mississippi Medical Center yielded an 80. Mr. Bailey testified that it was the 80 that stuck in his mind. He also testified that if he had actually seen the 71 in the University of Mississippi report, he would have taken notice of it. Had he done so and followed up with a mental health professional, subsequent and more thorough testing such as that done by Whitfield would have resulted in the court-appointed experts' analysis that Mr. Doss had I.Q. scores and intellectual functioning deficits in the mentally retarded range, even if he did not have the adaptive functioning deficits. *See.* Tr. at 18 (Dr. Lott testimony about Mr. Doss's IQ score of 70 on the testing conducted by Whitfield).

[2] The States points out in its brief (p. 12) that the two psychological reports were the result of youth court referrals. However, as explained in the section of this brief discussing prejudice, the evidence of mitigation contained within them could have been admitted into evidence without disclosing the youth court troubles. *See, Edwards v. State*, 737 So. 2d 275, 290 (Miss. 1999). Indeed, Mr. Bailey, the trial attorney here, testified that he knew he could have moved in limine to keep out evidence of the youth court cases themselves. Tr. 104.

[3] In *Ross v. State*, 954 So.2d 968 (Miss. 2007), this Court held that counsel was ineffective for failing to present psychological or psychiatric evidence in support of the mitigation case. The Court noted that defense counsel in that case said he did not do this because the defendant "maintained he wasn't 'crazy.'" According to the Court, "[d]efense counsel's failure to investigate beyond this single declaration cannot be considered reasonable given the serious mitigating issues evident in the post-trial

The State next argues (p. 51) that trial counsel's duty to investigate was "tempered by the information provided by the defendant," and that "the defendant and his family have given [trial counsel] no information on which further investigation should be conducted.." However, the State is mistaken, both in terms of its analysis of the law and its characterization of what happened in this case.

Before turning to this, it is important to note that Mr. Bailey was apprised of the existence of the mental health, medical, and school records that were obtained from the Memphis attorney. It is unclear whether he learned about those in his brief conversations with Mr. Doss and his mother, or whether he learned of them directly from the Memphis attorney. Either way, his shortcomings in failing to follow through on those cannot be laid at the feet of Mr. Doss and his mother.[4]

In making its contention that counsel's duty was "tempered by the information provided by the defendant," the State quotes at length (pp. 53-54) from *Burger v. Kemp*, 483 U.S. 776 (1987). However, there are at least two key differences between *Burger* and the present case that illustrate the folly of the State's argument here. First, the trial attorney's

---

competency hearing." *Id.* at 1106. Mr. Bailey's failure to investigate mental health defenses in the present case because the defendant did not appear "insane" is similarly unreasonable. As this Court explained in *Ross*, "[w]hile counsel is not required to exhaust every conceivable avenue of investigation, he or she must at least conduct sufficient investigation to make an informed evaluation about potential defenses." *Id.* at 1105. As detailed in our opening brief, Mr. Bailey conducted no investigation of the mental health issues that lurked here and very little investigation for potential lay witnesses.

[4] While the Circuit Judge attempted to blame Bailey's failure to call more lay witnesses on Anthony and his mother (R.E. 2 at 9), he never made such a claim with respect to Bailey's failure to consult a psychologist or psychiatrist. Indeed, he could not have done so given that Bailey had access to the mental health and school records and some of the hospital records showing head injuries. We respond to the Judge's statement regarding the lay witnesses at pp. 29-33 of our opening brief.

investigation in *Burger* was much more extensive than here. This will be discussed in a moment. Second, and most importantly, the trial attorney in *Burger* made what the Court called a "strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty." *Id.* at 794. Here, there was no such decision, and in fact, the trial attorney specifically requested jury instructions regarding mitigating factors relating to Anthony's life history — mitigating factors that he apparently discovered during his brief conversations with the defendant and his family. So while Mr. Bailey decided to raise mitigating factors with the jury, the problem was that he presented woefully inadequate proof of that mitigation and failed to pursue and present available evidence that would have been much more powerful in the effort to persuade at least one juror not to vote to execute Anthony. This also will be discussed shortly.

As to the first of these differences — the extent of the investigation — the lawyer in *Burger* spoke with the petitioner's mother on several occasions (his bill demonstrated two conferences of a total of three and a half hours duration prior to the first trial and four conferences of unstated duration prior to the retrial), retained and consulted with a psychologist, reviewed psychologists' reports, interviewed an attorney in another state who had befriended the defendant and his mother in earlier years, and interviewed the co-defendant and other men who were on the military base where the defendant committed the crime at issue when he was a private in the army. *Id.* at 790-791 & n. 8. By contrast, as explained in our opening brief (pp. 32-33), the trial attorney's investigation here was limited to a less than 30 minute conversation with Anthony's mother and one of Anthony's aunts;

some phone calls with Anthony's mother (only one of which is documented in his time records); a conversation with Anthony's mother right before he put her on the stand that lasted "some minutes" but was not very long; a pretty short conversation with a group of family members outside the courtroom during the brief interim between the guilt and sentencing phases; the collection of some school, medical, and psychological records that were stored separately from his case file, that had missing pages, and that apparently were never reviewed by trial counsel; and the hiring of an investigator with no capital mitigation experience who produced minimal summaries of interviews that did not touch on Anthony's background and that included at least two people who were talking not about Anthony but about his co-defendant. Trial counsel here did not consult with a psychologist or psychiatrist, and neither trial counsel nor the investigator ever interviewed anyone from Chicago, where Anthony had lived most of his life.[5]

As to the second of these differences, the central premise of the Court's holding in *Burger* was that "there was a reasonable basis for [trial counsel's] strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty." 483 U.S. at 794. Here, by contrast, no such strategic decision was ever made. As noted at pp. 27-28 & n. 8 of our opening brief, trial counsel here actually obtained jury instructions on mitigating factors including "Grew up in a poverty environment," "Lack of significant

[5] At one point, the State suggests (p. 17) that Bailey did not have access to his case file when he signed the affidavit that was attached to the post-conviction petition. However, Bailey made it clear in his testimony that he did have access to that file and that he and post-conviction counsel reviewed it thoroughly prior to signing the affidavit. Tr. 97-98, 103.

father figure," "Suffered head injuries which changed personality" and "Lack of Education." In light of the wealth of available evidence related to these and other issues, counsel clearly had an obligation to dig deeper, to consult with a mental health expert (as did the attorney in *Burger v. Kemp*), and to do more than have the defendant's mother testify very briefly about them. In *Leatherwood v. State*, 473 So.2d 964, 970 (Miss. 1985), this Court said "[d]efense counsel may make a strategic choice as to which defense to pursue and how to pursue it...yet, it is another matter when counsel chooses a defense and then does not follow through on his chosen strategy." This Court further said in *State v. Tokman*, 564 So. 2d 1339, 1344 (Miss. 1990), that trial counsel "were unreasonable in not pursuing psychological evidence in support of the defense that Tokman was under [his co-defendant's] domination." As this Court emphasized in *Tokman*, "[p]sychiatric and psychological evidence is *crucial* in the defense of a capital murder case." *Id.* at 1343 (emphasis added). In the present case, defense counsel apparently obtained some mitigating information during his brief conversations with the defendant and his family. He made a choice to present mitigation from the defendant's life history but did not follow through on his chosen strategy, did not conduct a reasonable investigation, did not pursue psychological evidence in support of the defense, and did not present anything beyond six pages of testimony from Anthony's mother even though much more was available.[6]

---

[6] The State (pp. 51-53) also quotes from *Wiley v. Puckett*, 969 F.2d 86 (5th Cir. 1992), but there, the Court stressed that "nothing alerted [defense counsel] to the possibility of mental impairment as a mitigating factor." *Id.* at 99-100. That is very different than the situation here, where Bailey had records and information that should have alerted him to this.

In fact, the mitigation factor of "Suffered head injuries that changed personality" — a factor listed in the jury instructions that trial counsel requested and obtained — clearly required expert mental health evidence. This should have been particularly obvious from the University of Mississippi report that suggested Anthony, at age 15, showed some signs of organic brain problems — "there may be some organic basis for Anthony's difficulties" — which certainly could stem from head injuries. Mr. Bailey had been given one hospital record of a head injury that he never introduced at trial, and a more thorough search could have uncovered at least one more — both of them were discussed in the Whitfield report and could have used by a defense mental health expert. Mr. Bailey also knew Mr. Doss suffered from blackouts (again information he apparently obtained from Mr. Doss or his family). Tr. 69-70. So with respect simply to the head injuries and the blackouts about which Mr. Bailey clearly did know, and the other information from the psychologist reports that were available to him, Mr. Bailey could have done a much more thorough job of presenting mitigation had he consulted with an expert. Moreover, as detailed earlier, experts could have uncovered and presented the wealth of additional mitigating evidence that was included in the Whitfield court-appointed expert report.

The State also quotes (p. 54 of its brief) from the portion of *Burger* that states:

> 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. . . . 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.

483 U.S. at 794-795, *quoting Strickland v. Washington*, 466 U.S. 668, 691 (1984). But the only issue in *Burger* stemming from counsel's conversations with the defendant was counsel's decision not to put the defendant on the stand because of his concern that the defendant "enjoyed talking about the crimes" and that "the jury might regard [the defendant's] attitude on the witness stand as indifferent or worse." 483 U.S. at 792. No one claimed in *Burger* that the lawyer's failure to pursue a particular piece of mitigation was due to the failure of the defendant or his family to tell the lawyer about it. Here, the State is making such a claim and the controlling precedents are the Supreme Court's recent decisions in *Rompilla v. Beard*, 545 U.S. 374, 377 (2005), and *Wiggins v. Smith*, 539 U.S. 510, 532-533 (2003), and this Court's decisions in *State v. Tokman*, 564 So. 2d at 1344, *Leatherwood v. State*, 473 So.2d 964 (Miss. 1985), *Davis v. State,* 743 So.2d 326 (Miss. 1999), and *Burns v. State,* 813 So. 2d 668, 678 (Miss. 2001), all discussed at pp. 30-31 of our opening brief.

As we noted in our opening brief, the Supreme Court has held that an attorney's failure to review and pursue potential sources of mitigating evidence constitutes incompetence "even when a capital defendant's family members and the defendant himself have suggested that *no* mitigating evidence is available." *Rompilla v. Beard*, 545 U.S. at 377. In *Rompilla*, the Court found ineffectiveness in failing to uncover certain mitigating evidence even though the defendant was "uninterested in helping" his trial attorneys, told them that his upbringing and education were "normal," and was "actively obstructive by sending counsel off on false leads." *Id.* at 381. The Court noted there that had the trial attorney in that case examined a particular document, it "would have destroyed the benign conception

of [the defendant's] upbringing and mental capacity defense counsel had formed from talking to [the defendant] himself and some of his family members," and would have led counsel to "go[] further to build a mitigation case." *Id.* at 391. Clearly then, defense counsel's inadequate investigation cannot be justified by claiming that the defendant and his family, untrained in the law of capital mitigation, failed to tell counsel about certain witnesses or items of mitigation.

Indeed, the State never responds to pp. 31-33 of our opening brief, where we point out that an indigent defendant and his family cannot be expected to know what is encompassed by the concept of mitigating evidence in capital cases, or know that they might need to reveal intimate and even embarrassing personal details about their lives to their attorney. The Court-appointed Whitfield expert, Dr. Lott, testified in the present case that lay people do not understand these things and that is important to take the time to explain it to them. Tr. 30-31. The ABA Guidelines confirm it and instruct counsel to remember that people will be reluctant to reveal these sorts of things. The attorney must spend a great deal of time with the client's family building trust and explaining why this sort of personal information is needed. The evidence, discussed at pp. 32-33 of our opening brief, shows that Mr. Bailey did not spend that sort of time (in fact, he spent very little time with the family) and did not explain these things even though he knew the family members had no experience in what was or was admissible in the sentencing phase of a capital case. *See, Tokman*, 564 So. 2d at 1345 ("earlier and more persistent contact with Tokman's family may have led to the discovery of some of the testimony produced by counsel in the post-conviction petition").

that would have made the jury more likely to impose a sentence of death. But we are not contending that the reports themselves should have been introduced into evidence. Instead, the reports that trial counsel received from the Memphis attorney should have alerted him (had he obtained all of the pages and read them) to consult a mental health expert, who then could have developed the sort of mitigation evidence included in the Whitfield report.

The State claims (p. 55) that the Whitfield report includes "a wealth of information that the prosecution would have loved to have had to use at trial," specifically gang activity and the selling of drugs. But we are not saying the Whitfield report itself would be given to a jury, but simply that the mitigating evidence within it could have been presented to a jury. While that mitigating evidence from the Whitfield report would have been admissible at the penalty phase, the law is clear that most or all of this negative information would not have come before the jury. In *Edwards v. State*, 737 So. 2d 275 (Miss. 1999), this Court reversed a death sentence where the prosecutor responded to defense mitigation at the penalty phase by introducing the fact that the defendant had been arrested and held on a rape charge that later was dismissed. According to Justice Roberts' opinion for the Court:

> Aggravating circumstances are to be limited to the eight factors enumerated in Miss.Code Ann. § 99-19-101(5) (Supp.1991). *Lester v. State*, 692 So.2d 755, 800 (Miss.1997). "[T]he state is limited to offering evidence that is relevant to one of the aggravating circumstances included in § 99-19-101." *Stringer v. State*, 500 So.2d 928, 941 (Miss.1986); *See Coleman v. State*, 378 So.2d 640, 648 (Miss.1979). The statutory mandate of § 99-19-101(5) can be no clearer. The eight statutory factors do not include arrests or incarcerations; instead only felony convictions involving the use or threat of violence are admissible. Miss.Code Ann. § 99-19-101(5)(b) (Supp.1998). Therefore, as a matter of law, the trial court erred when it allowed the prosecutor to repeatedly explore the appellant's prior arrest for rape. Under current law, no other

> finding is possible, and this issue requires reversal and remand for a new trial on sentencing.

737 So. 2d at 290. *See also, (Terry) Williams v. Taylor*, 529 U.S. 362, 391 (2000) (finding ineffective assistance in the failure to present mitigating evidence even though "not all of the additional evidence was favorable to [the defendant].").

In many respects, the mitigating evidence that could have been uncovered in this case, and the resulting prejudice, is similar to that in *Rompilla*, where the Supreme Court set aside as unreasonable the state court's finding that the trial lawyer rendered effective assistance. Had the trial lawyer in *Rompilla* pursued the available leads, he would have uncovered existing records showing that the defendant was raised in the slums of Allentown, lived in poverty, was in and out of trouble as a juvenile, over-indulged in alcohol at an early age, tested at a third-grade level after nine years of schooling, lived with parents who had their own substance abuse issues, lived with a father who beat the children and their mother, tested with an IQ in the mentally retarded range, and suffered from organic brain damage. 545 U.S. at 390-393.

Similarly, the mitigating evidence in this case demonstrates that Mr. Doss grew up in the slums of Chicago, lived in poverty and amidst violence in the home and the neighborhood, was in trouble as a juvenile (although not the same level as Rompilla), was involved in substance abuse at an early age, tested at the third-grade reading level after nine years of school, lived with parents beset by drug and alcohol problems, lived with a father-figure who sold drugs from the home and beat the children and their mother, comes from a

family with a history of mental illness, has an IQ that the Whitfield experts agree shows subaverage intellectual functioning for *Atkins* purposes,[8] suffered from multiple head injuries as a child, was evaluated at age 15 by tests which showed "that there may be some organic basis to Anthony's difficulties," was diagnosed with Organic Brain Dysfunction as a result of post-conviction testing, possibly suffers from an traumatically-induced anxiety disorder such as PTSD, was a follower rather than a leader, and has been afflicted with serious neurological problems. (See our opening brief at pp. 6-18, 35-36).[9]

This is comparable to the mitigation that led the Supreme Court to conclude that prejudice existed in the *Rompilla* case. Even if the *Rompilla* mitigation is considered more extensive than here, *Rompilla* in no way sets a floor or a minimal level of what must be proven. Moreover, the extent of Rompilla's involvement in the crime and the aggravating evidence against him, which must be weighed in the prejudice analysis — *see, Wiggins v. Smith*, 539 U.S. 510, 534 (2003) ("In assessing prejudice, we reweigh the evidence in

---

[8] The Whitfield experts concluded that Mr. Doss was not mentally retarded because he did not have adaptive functioning deficits. But they agreed that his IQ was below the intellectual functioning baseline of the *Atkins* definition. *See* Tr. 18 (Testimony of Dr. Lott regarding Mr. Doss's IQ score of 70 on the Whitfield test). The *Rompilla* opinion does not disclose whether the defendant there had adaptive functioning deficits. Presumably he did not, since an *Atkins* finding would have precluded the need for an ineffectiveness evaluation. At any rate, he did have an IQ within that range, which is the same as in the present case and which clearly constitutes potential mitigating evidence, as is confirmed by the mention of it in the *Rompilla* discussion of prejudice.

[9] The point we made in our opening brief at p. 40 n. 8 about Mr. Bailey's injection of the possibility that Mr. Doss might not stay in prison the rest of his life if he receives a life sentence — a possibility that the prosecution is prohibited under the law from raising because it is so prejudicial — is not refuted by anything the State says in its brief (pp. 56-57). This is just another example of the prejudice caused by the fact that Mr. Bailey had no experience in capital defense. It compounds the prejudice that stems from his failure to investigate thoroughly the case for mitigation or to follow up on the indications from the available records that mental health mitigating evidence might exist.

aggravation against the totality of available mitigating evidence") — is much greater than in the present case. Rompilla was the sole culprit and instigator and personally killed the victim, stabbing him repeatedly and setting him on fire. He had a significant history of prior felony convictions involving the use or threat of violence, including a conviction for a violent rape and assault. 545 U.S. at 377, 383. By contrast, everyone agrees Mr. Doss was not the instigator or the triggerperson in the shooting that occurred here, which was committed by Freddie Bell. The jury here concluded that Mr. Doss neither killed nor attempted to kill. *Doss v. State*, 709 So. 2d 369, 373 (Miss. 1996). While Mr. Doss was charged along with Freddie Bell and others in another murder that occurred that evening in Memphis --- for which Mr. Doss pled guilty to second-degree murder and received a 25 year sentence --- there is no evidence that he actually was the triggerperson in that other case. *Id.* at 376 n. 11, 392-393. Several dissenting justices of this Court on direct appeal, fully aware of the Memphis conviction but unaware of the mitigating evidence later produced in post-conviction, nevertheless concluded that Mr. Doss's death sentence should have been vacated because he was not the instigator or triggerperson. *Id.* at 403 (dissenting opinion). Thus, while Mr. Doss was convicted because he accompanied Bell to rob the store where the shooting occurred, his involvement was much less than that of the defendant in *Rompilla*.

When weighing the potential impact of the mitigating evidence against the aggravating evidence for an analysis of prejudice, it is clear the case *for* the death penalty was much stronger against Rompilla than Mr. Doss, and the prejudice from failing to pursue and present the available mitigating evidence was at least as prejudicial in Mr. Doss's case

as it was in *Rompilla*. And as mentioned in the opening brief, if several dissenting justices of this Court thought Mr. Doss's death sentence was inappropriate even though they did not know about the extensive mitigation, surely one juror might reasonably have reached that conclusion if the jury had been told about it.[10]

The State spends much of its brief casting doubt on the value of some of the lay witness testimony in this case. We have already discussed this at p. 36 of our opening brief. We will respond to a few minor points here. The State (p. 19), claims that Anthony's mother, Sadie Doss, told Mr. Bailey that she and Anthony lived in a "beautiful home." But as Bailey clarified in his testimony, tr. 105, she was talking about their home in Mississippi after they moved here, not their home in Chicago. As demonstrated by not only the testimony of Ms. Doss, but the independent testimony of Sandra Price (which was not questioned by the Circuit Court) and also by the Whitfield report, he grew up in a poor and dangerous area in Chicago. The State insinuates (p. 27, n. 10), that it is odd that Anthony, after moving to Mississippi from Chicago, would go back and visit Sam Brown, the abusive father-figure with whom he was raised. However, one of the court-appointed Whitfield experts, Dr. Lott, said that victims of parental abuse "quite frequently" go back and visit their abusive fathers (or father figures) even after they move out. Tr. 53. The State (pp. 28-39) disparages Sadie

---

[10] As indicated in the opening brief at pp. 34-35, the Circuit Court committed legal error by failing to analyze the prejudice stemming from the totality of the mitigating evidence, including the mental health evidence, and from failing to weigh the totality against the case in aggravation. The Circuit Court did not consider that the case in aggravation was diminished by the fact that Mr. Doss was not the instigator or shooter and that the mitigative evidence could have therefore been more likely to influence the jury in this case than in other cases where the aggravation was stronger.

Doss as being imprecise and inconsistent. While we disagree with some of their characterizations, it is true — as the Whitfield report states — that this family has a history of mental illness and that Mr. Doss grew up in an unstable environment. His mother's five children were born of five different fathers. Sadie Doss's imprecision corroborates, in some sense, the difficulties that Anthony had being raised in this setting. As for the testimony of Q.T. Doss that Anthony was a follower rather than a leader and that Freddie Bell was a bully, tr. 215-216, it was unrefuted and corroborated by expert testimony. Tr. 134-135. Finally, the relevance of Sam Phillips' testimony (he is the natural father of Anthony as the result of what he called a "one-night stand") about the success of his other children who grew up in his stable two-parent household, tr. 303, is illustrated by this Court's holding in *Edwards v. State*. There, the trial court excluded evidence about the defendant's brothers, including a younger brother whose life had turned out much better because he was raised under better circumstances. This Court held that this evidence was clearly relevant to mitigation and that the trial court erred in preventing the jury from hearing it. 737 So.2d at 297.

Thus, the lay testimony supplemented the expert mental health testimony. But even if none of this lay testimony had been available, the expert mental health mitigation — particularly as set forth in the court-appointed Whitfield expert report — by itself would have added considerably to the effort to persuade at least one juror to consider a life sentence rather than death.

In summary, a great deal of mitigating evidence could have been presented at Mr. Doss's penalty phase, and it would have made for a much more powerful case than the six

pages of transcript of direct testimony from Sadie Doss that trial counsel provided to the jury. As the Supreme Court said in *Rompilla*:

> This evidence [presented at post-conviction] adds up to a mitigation case that bears no relation to [what was] actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [the defendant's] culpability," *Wiggins*, 539 U.S. at 538 (*quoting, Williams v. Taylor*, 529 U.S. at 398), and the likelihood a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing. *Strickland*, 466 U.S. at 694.

545 U.S. at 393. The same is true here and under the applicable law, the death sentence must vacated so that the sentence in this case can be decided by a jury that is given all of the relevant evidence.

*ATKINS v. VIRGINIA*

In its brief, the State contends (pp. 58-59) that "the trial court was correct in that none of the expert[] witnesses were fully qualified under *Chase*," but offers no explanation of why that was so and no response to our contrary position, which is set forth in our opening brief. Instead, says the State, it "will not quibble over this point." (P. 59). Thus, there is nothing to which we will reply on this question.

Similarly, and fortunately, the State does not discuss or defend the Circuit Court's unwarranted personal attack on Dr. Grant. The State does say (p. 66) that "there is no record support" for certain of the undersigned's statements about the fact that Dr. Grant has not been concerned about money or requested advance payment. But this was not an issue at the

evidentiary hearing. It only came up when the Circuit Court, without any evidence, spoke of "easy fees" and "personal gain" in its opinion after the hearing in which it denied relief. In both a motion for rehearing to the Circuit Court and in the opening brief to this Court, the undersigned has represented that Dr. Grant has never been concerned about money or being paid in this case, has never sought advance payment, and has never inquired about the status of his payment or even if he would be paid. Those statements were made by the undersigned as an officer of the Court in response to the Circuit Court's baseless speculation about Dr. Grant and his motivations. Irrespective of whatever decision this Court makes on the merits, this Court should specifically vacate the unnecessary and improper portion of the Circuit Court's opinion that personally attacked Dr. Grant.

On the issue of malingering, we raised a number of points in our opening brief (pp. 41-42). The only one of these points mentioned by the State (pp. 59-60) relates to this Court's decision in *Lynch v. State,* 951 So. 2d 549 (Miss. 2007). The State quotes the passages in that opinion that mention the word "test," *id.* at 557-557, and contends that a "test" must be given to determine whether malingering has occurred. But the petitioner's expert in the present case, Dr. Grant, gave an entire battery of tests, and the consistency of scores among those tests persuaded him that Anthony Doss was not malingering. So his approach does not run afoul of *Lynch.*

Moreover, all experts in this case agree that Mr. Doss did not malinger on the I.Q. tests. As we pointed out in the opening brief, it is illogical to suspect that although he did not malinger on those tests, he suddenly did malinger on the adaptive functioning tests given

to him by Dr. Grant. The malingering analysis that this Court has prescribed in *Lynch* is not some sort of technical hoop, but instead a practical look at whether a person might be faking retardation. Clearly, it makes no sense, as a practical matter, to believe the petitioner here would fake deficits on one of sort of tests but not the other. There is no basis to conclude that the petitioner was faking anywhere in the entire series of tests given to him.

As for the 9th edition/10th edition issue, the State contends that the 10th edition contains an "easier" standard to meet. That does not necessarily follow from the language the State quotes from the 10th edition or the web post announcing its release, and the State cites no evidence, case law, or scientific authority to support this conclusion. More importantly, the issue here is not the standard itself, but the methodology for diagnosing mental retardation that is prescribed by the 10th edition — a methodology that one of the Whitfield experts, Dr. MacVaugh, testified is the result of the most up-to-date thinking, is something that he is ethically bound to follow in his clinical practice because it is the most authoritative, and is something that "could possibly change the diagnosis" he made in this case regarding mental retardation. Tr. 350, 387-388.

The State complains (p. 61 of its brief) that the tests for adaptive functioning have not been normed on a prison population. But the 10th edition specifically states that the tests must be normed on the *general* population. "[S]ignificant limitations in adaptive behavior should be established through the use of standardized measures normed on the general population including people with disabilities and people without disabilities." The American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and*

*Systems of Supports* 13 (10th ed. 2002). (A copy of this particular page is contained in Ex. D-12 from the post-conviction evidentiary hearing). Dr. Grant was only person to use these standardized measurements and the Circuit Court erred in failing to credit his conclusions.

The Fifth Circuit relied on the 10th edition in granting leave to file a successive federal habeas corpus petition that raised an *Atkins* claim, *In re Hearn*, 418 F.3d 444, 445 (5th Cir. 2005), thus confirming that courts are not required to remain frozen in time and adhere to outdated editions of a medical authority simply because those were the ones in currency at the time a prior case was argued.

Indeed, a rejection of the *Atkins* claim in this case based on the lower court's reasoning — the imposition of overly technical formulas for the qualification of experts and the measurement of malingering, and the refusal to consider methodology from an updated edition of an authoritative medical treatise — would not only be wrong as a matter of substantive law, but would violate the due process clause of the Fourteenth Amendment. *See, Rivera v. Quarterman,* 505 F.3d 349, 357-358 (5th Cir. 2007).

For all of these reasons, the Circuit Court's decision on the *Atkins* issue should be vacated.

*Conclusion*

For the foregoing reasons, and for the reasons set forth in our opening brief, the judgment of the Circuit Court denying post-conviction relief should be reversed.

Respectfully submitted,

ROBERT B. MCDUFF
[redacted]
767 North Congress Street
Jackson, Mississippi 39202

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered by mail to the following:

Marvin L. White, Jr.
Mississippi Attorney General's Office
P.O. Box 220
Jackson, MS 39205

Hon. Joseph H. Loper, Jr.
Circuit Court Judge
P.O. Box 616
Ackerman, MS 39735

This 16th day of April, 2008.

Robert B. McDuff