NO. 2007-CA-00429-SCT

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ANTHONY DOSS,

Appellant,

vs.

STATE OF MISSISSIPPI,

Appellee.

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

ROBERT B. MCDUFF
Miss. Bar No. [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;

5. State of Mississippi, Appellee;

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

This the 5th day of November, 2007.

Robert B. McDuff

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

QUESTIONS PRESENTED

1. In this capital case where trial counsel (a solo practitioner with no death penalty experience appointed to handle the case by himself) presented only one mitigation witness to the jury at the sentencing phase (the defendant's mother) to testify for only eight pages of transcript, including cross-examination, and where counsel did not conduct the thorough mitigation investigation that is a baseline requirement for effective capital defense, and where there was extensive mitigation evidence that could have been presented to the jury, including evidence documented by the court-appointed experts from Whitfield in this case, was there ineffective assistance of counsel that prevented the jury from hearing the relevant evidence before undertaking the awesome burden of deciding whether to sentence a person to death?

2. Does the evidence in this case require that the death sentence be vacated under the decision in *Atkins v. Virginia*, 536 U.S. 304 (2002).

STATEMENT OF THE CASE

Course of Proceedings

Anthony Doss was convicted of capital murder in the Circuit Court of Grenada County, Mississippi. His conviction was affirmed by this Court on direct appeal by a unanimous vote, and his death sentence also was affirmed, but only by a 5-4 vote. *Doss v. State*, 709 So. 2d 369 (Miss. 1996). Certiorari was denied by the United States Supreme Court. *Doss v. Mississippi*, 523 U.S. 1111 (1998). A post-conviction petition subsequently was filed and this Court unanimously granted leave to proceed in the circuit court on the issue of ineffective assistance of counsel at sentencing, and also granted leave, with only one Justice dissenting, to proceed on a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002). *Doss v. State*, 882 So. 2d 176 (Miss. 2004). However, the Circuit Court, Judge Joseph Loper, rejected both the ineffective assistance and *Atkins* claims, and refused

to set aside the death sentence. This appeal follows.

Statement of Facts

As the trial judge's report in this case explained, the victim was shot and killed not by the petitioner, Mr. Doss, but by his co-defendant, Freddie Bell. This Court's direct appeal opinion pointed out that Bell instigated the crime. *Doss v. State,* 709 So. 2d 369, 376 (Miss. 1996). But Mr. Doss's appointed trial counsel, H. Lee Bailey of Grenada, had never handled a death penalty case before. At the sentencing phase, he presented only one witness, Mr. Doss's mother, whose entire testimony, direct and cross, covered only eight pages of transcript. (The entire transcript of the sentencing phase, including bench discussions and what little testimony was presented, is contained in Exhibit D-5 introduced at the post-conviction evidentiary hearing). On appeal, this Court affirmed the death sentence by a 5-4 vote. One of the reasons for the close vote was the view of several of the dissenting justices that Mr. Doss did not deserve the death penalty since he was not the triggerperson and not the instigator of the crime. 709 So. 2d at 403 (dissenting opinion).

The undersigned counsel was appointed to represent Mr. Doss in post-conviction proceedings. Counsel investigated the case, interviewed Mr. Bailey, and obtained an affidavit from him, which was attached to the post-conviction petition. When later reviewing that petition and granting leave to proceed in the Circuit Court, this Court said the following:

> [W]e conclude that Doss has made a sufficient showing under the *Strickland* test that Bailey's efforts fell short of the efforts a counsel should make in a death penalty sentencing trial, so as to entitle Doss to an evidentiary hearing on this claim in the circuit court. This was Bailey's first death penalty case, and he admitted that he did not know what he was doing in the sentencing phase. When counsel makes choices of which witnesses to use or not use, those choices must be based on counsel's proper investigation. Counsel's minimum duty is to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. *Woodward* [*v. State*], 635 So. 2d [805,] 813 [(Miss. 1993)] (Smith, J, concurring in

part).

882 So. 2d at 189 ¶ 31. This Court described Mr. Bailey's affidavit as follows:

> Doss relies first on the affidavit of his trial attorney who states that: Doss's was the first case he had defended where the death penalty was sought; he did not seek any school, medical, mental health or other records, because he did not realize the importance of the records in presenting a defense during the sentencing phase; he did not seek advice from a mental health expert, funds for a mental health expert or any kind of mental health evaluation. . . . Bailey states that he felt he did a good job in defending the case at the guilt phase, but that he did not know what he was doing as to the sentencing phase.

882 So. 2d at 186 ¶ 20.

Mr. Bailey's affidavit also candidly stated that in this, his first and only capital trial: "I failed to undertake the essential functions of properly and thoroughly investigating mitigation and presenting a defense at the penalty phase." Ex. E to the post-conviction petition, ¶ 15.[1] He explained that his failures "were not motivated by any particular strategic reason," but by his "inexperience in this particular type of proceeding." *Id.*

After this Court granted leave to proceed, an evidentiary hearing was held in the Circuit Court. Mr. Bailey testified at that hearing and confirmed that he had never represented a defendant in a death penalty case and has not done so since. Tr. 56. But he made a correction to his affidavit. While the affidavit said that Mr. Bailey "had not sought any school, medical, mental health or other records regarding Mr. Doss," Mr. Bailey testified that two days prior to the evidentiary hearing, he had discovered some records in a "big box that I had old criminal files stored away in." Tr. 58. These had been sent to Mr. Bailey by an attorney in Memphis who represented Mr. Doss on a separate charge there. They had not been stored in the case file that Mr. Bailey compiled on Mr.

---

[1] The post-conviction petition and exhibits are on file in this Court under the case number 1999-DR-00296-SCT.

Doss's case and that is why he never found them during the time of the post-conviction investigation when he submitted his affidavit. *Id.* Moreover, the documents that Mr. Bailey did apparently receive and store in a separate box --- and find two days before the evidentiary hearing --- were not complete. They 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. They also included a seven page report of the University of Mississippi Psychological Services Center regarding an evaluation it conducted of Mr. Doss at age 15, but Mr. Bailey's copy did not contain pages 2, 4, and 6. Mr. Bailey testified at the hearing that he did not recall making any effort to obtain the missing pages so that he would have a complete copy of these documents. Tr. 62-63.

The other documents that Mr. Bailey found in the old file included more psychological records, medical records from an injury when Mr. Doss was hit in the head with a pipe at age 13, a request for records from the Shelby County Public Defender's Office (which represented Mr. Doss in Memphis) to the Faraday Elementary School in Chicago requesting special education records and a response listing his grades and a notation that he received Learning Disabilities Resource Services at that school, and a Chicago high school record showing he failed four out of five grades. These were all introduced into evidence as Exhibit D-2 at the evidentiary hearing. Despite the fact that he apparently had these records, Mr. Bailey never did anything to present the mitigating evidence within them to the jury at the sentencing phase of the trial. Tr. 69-70.

At the post-conviction evidentiary hearing, Mr. Bailey confirmed most of the other things he had said in his affidavit, including the fact that he knew Mr. Doss had been in special education classes and suffered from blackouts, but that he (Bailey) did not consult a mental health expert or request a mental health evaluation of Mr. Doss in preparation for a possible sentencing phase. He

confirmed that he had admitted in his affidavit that there was no strategic reason for this. Tr. 69-70. Mr. Bailey testified that while he obtained funds for a mitigation investigator, Kelvin Winbush, and that he knew Mr. Winbush had never conducted a death penalty mitigation investigation before, he could not remember what he told Mr. Winbush to look for. He knew that Mr. Winbush also was conducting the mitigation investigation for the other person accused in this murder, Freddie Bell, but never considered that there might be a conflict. Mr. Bailey said that he did no mitigation investigation and contacted no family members in Chicago, where Mr. Doss grew up and had lived most of his life, and he did not ask Mr. Winbush to do any investigation there. Tr. 72-74.

Mr. Bailey conceded that according to his time sheet, he spent only thirty minutes **total** talking to Mr. Doss's mother, an aunt, and another person. He confirmed that his time sheets listed no other entries for talking to Mr. Doss's mother or any other family member. Prior to calling Mr. Doss's mother as a witness at the sentencing hearing, he said he spent "some minutes" talking to her there at the courthouse, but this was not a very long conversation. Tr. 76-77. He remembered no other meeting with Ms. Doss, but said he did speak with her on the phone "several" times. Tr. 75. He explained that his contact with Mr. Doss's family was very limited:

> Q. . . . [A]fter the verdict of guilt was returned you just had a very short period of time before sentencing phase, didn't you?
>
> A. I think so.
>
> Q. And you met with a group of family members outside, outside the courtroom; is that right?
>
> A. Correct.
>
> Q. It was a pretty short conversation, wasn't it?
>
> A. Correct.

Q. And you said the aunt was there. And she said she couldn't testify to anything other than what the mother would say.

A. Correct.

Q. And basically, other than the less than 30-minute conversation you had back in November with the mother and the aunt and any phone calls you had with the mother, that was the—that was your only contact with his family members was standing out in the hall with a bunch of people prior to the sentencing phase starting; that correct?

A. Yeah. Other than those phone calls. Yeah. From what I remember. Yeah.

Q. Now, Mr. Bailey, you know that these people weren't lawyers, didn't you?

A. Right.

Q. Okay. You knew that they had no experience about what is or isn't admissible or effective in a death penalty case, did they?

A. No, they didn't.

Q. And you had no experience in a death penalty case, did you?

A. No.

Tr. 105-106.

After the case was remanded by this Court, and before the evidentiary hearing, the Circuit Court appointed the staff of the Mississippi State Hospital at Whitfield to serve as court-appointed experts and provide an opinion on the *Atkins* issue. A thirty-three page single-spaced report was prepared for the Circuit Court by Whitfield by Dr. W. Criss Lott and Dr. Gilbert S. MacVaugh, III. (The report was introduced as Defense Exhibit 1 at the evidentiary hearing). The Circuit Judge later called it "an excellent in-depth thirty-three (33) page report." R.E. 2 at 34.[2] (Circuit Court opinion

[2] This brief will designate the record excerpts as "R.E. __ at __," with the first blank referring to the tab number listed in the table of contents to the Record Excerpts and the second to the internal page number in the document.

on remand). The Whitfield staff concluded that Mr. Doss was not mentally retarded as that term is used in *Atkins*. They believed that he met the subaverage intellectual deficit prong of the *Atkins* test, and their testing showed an IQ score of 70. Tr. 18-19.[3] At the same time, they concluded that he did not have limitations in adaptive functioning that would lead to a diagnosis of mental retardation. The defense experts, Dr. Timothy Summers and Dr. Daniel Grant, agreed with the Whitfield experts that Mr. Doss met the intellectual deficit prong of *Atkins* because of consistently low IQ scores, but disagreed on the adaptive functioning question, believing as the result of his scores on a number of psychological tests, as well as other factors, that his adaptive deficits placed within the current definition of mental retardation.

The remaining facts related to the *Atkins* question will be discussed in greater detail in the argument portion of this brief. Most of the rest of this statement of facts addresses the mitigating evidence that could have been produced at the sentencing phase of the trial, but never was.

Although the court-appointed Whitfield experts concluded in the final analysis that Mr. Doss does not have the sort of the adaptive functioning deficits were not attributable to mental retardation, their evaluation demonstrated a wealth of mitigating evidence that could have been presented to the jury in the sentencing phase of the case and perhaps caused one or more jurors to decline to impose the death penalty. For example, the report from the Whitfield court-appointed experts referred, R.E. 1 at 14-15, to an earlier report from the University of Mississippi Psychological Services Center of an evaluation of Anthony when he was 15. This University of Mississippi report was the same report that Bailey had received prior to the trial from the Memphis lawyer but with several pages

---

[3] The report originally listed the score as a 71, but a mistake was later discovered in the scoring and it was corrected by the Whitfield experts to a 70. Tr. 18.

missing that he neglected to obtain. (A complete copy of the University of Mississippi report was introduced as Exhibit D-4 at the evidentiary hearing). As the Whitfield court-appointed experts noted, the University of Mississippi report included testing showing that Mr. Doss 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 also recommended special education for Anthony, saying he "would probably benefit from some special education classes in his local school district." R.E. 1 at 15.

Indeed, the University of Mississippi report was the one that was included in the records Mr. Bailey found in an old file and that 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 that "there may be some organic basis for Anthony's difficulties," and page 7, which he also had, stated that 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.

In addition to discussing the University of Mississippi evaluation, the Whitfield report also referred to more recent testing by Dr. Michael Gelbort and quoted Dr. Gelbort's report as follows:

> Academic achievement was quite low with sight-reading at the second grade level, spelling at the fifth grade level, and math assessed in a written and timed format at the fourth grade level. Sixth grade performance is typically viewed as the minimum needed for adult activities to be functionally competent. . . . Tests of learning and memory found significant impairments. The patient has notable deficits in the areas

> of sustained and focused attention and concentration. . . . The patient learns much more slowly and is limited in the amount he can learn as compared with his normal peers. . . .

R.E. 5 at 18. The Whitfield report went on to quote Dr. Gelbort's analysis to the effect that "[t]he possibility of a traumatically induced anxiety order such as PTSD clearly exists," and "[b]ased on the current evaluation and historical information reviewed, Mr. Doss does qualify and is diagnosed with Organic Brain Dysfunction. . . ." *Id.* at 18-19.

This was echoed at the evidentiary hearing by Dr. Timothy Summers, a psychiatrist who examined Mr. Doss and reviewed the various records, including the Whitfield report, and said Mr. Doss has long suffered from serious neurological problems. Tr. 183-190. Also, Dr. Daniel Grant, a psychologist who evaluated Mr. Doss, testified that Mr. Doss has organic brain dysfunction, and that his test results and diagnoses demonstrate that he is a follower rather than a leader. Tr. 134-35.

Returning to the Whitfield experts, they said in their report that the mitigating evidence stemming from Mr. Doss's background explains in part why they concluded that he did not have the adaptive functioning deficits that would qualify him for a mental retardation designation under *Atkins*:

> On the surface, Mr. Doss' history might seem to suggest that he has demonstrated significant limitations in some areas of adaptive skills in the community (i.e., functional academics, work, self-direction, health, and safety). However, it is our opinion that these apparent difficulties may be better explained by his history of neglect, abuse, and maladaptive behaviors . . . . Moreover, given the chaotic environment in which Mr. Doss was reared, his history suggests that he was fairly adept in coping with the life demands for someone his age in that environment.

R.E. 5 at 32.

The Whitfield experts also pointed to a history of mental problems in Mr. Doss's family:

> According to records, Mr. Doss' mother has been treated for depression and had two

prior psychiatric hospitalizations in Chicago in 1960 and 1970 . . . .

> Records also indicate that several of Mr. Doss' other family members reportedly have suffered mental health problems. For example, his oldest half-brother, Marvin Doss, was described in previous records as scoring an IQ of "40" as a youth and reportedly spent time at Columbia Training School related to charges of Peeping and Attempted Rape. His older half-sister, Mavis Doss, has reportedly suffered a "lengthy history of mental illness." His older half-brother, Randy Doss, was reportedly treated for a drug overdose in the past. Mr. Doss also has a cousin who has reportedly been hospitalized at MSH for a number of years for unknown reasons.

R.E. 5 at 6. The experts also mentioned Mr. Doss's own school records indicate that he failed the fifth grade, include a notation that he received learning disability resource services while at elementary school, and document that he passed only one of five subjects in the ninth grade. *Id.* at 11. They cite the University of Mississippi Psychological Services Report, which documents Mr. Doss's placement in special education in the Chicago schools. *Id.*

The Whitfield report refers to medical records showing two separate occasions where Mr. Doss suffered head injuries and was treated. R.E. 5 at 9-10. At least some of these records were among those that Mr. Bailey received from the lawyer in Memphis. Exhibit D-2 at exhibit record page number 105.

The Whitfield report also explained:

> As noted in prior records, Mr. Doss previously reported that both he and his half-brother Randy were exposed to chipping paint in one of the apartments in which they lived. Both children (as well as several other children in the community) reportedly tested positive for lead poisoning and received medical treatment as a result.

R.E 5 at 9. The report referred to prior records from Weiss Memorial Hospital showing that Mr. Doss was a victim in a home invasion incident where his half-sister was raped. *Id.* at 10. In addition, the report contains a history of substance abuse that began at age 11. *Id.* at 11.

The Whitfield report points out that Mr. Doss really never had a relationship with Sam

Phillips, his biological father, and that much of his childhood was spent with the man he considered his father, Sam Brown. Anthony's mother lived with Sam Brown in Chicago during a significant portion of Anthony's childhood. Sam Brown and Sadie Doss were the biological parents of Anthony's older half-brother, Randy Doss. R.E. 5 at 6.

The Whitfield experts also wrote about Sam Brown and the home environment and neighborhood in which Mr. Doss was raised:

> Records indicate that shortly after Mr. Brown lost his job as a construction worker, he "collected public assistance and sold drugs from the family home to support his own drug and gambling addiction."

Id. at 6.

> Mr. Doss has previously reported observing Mr. Brown abuse his mother on numerous occasions. Mr. Doss is quoted in prior records as describing how at the age of 7, he first ". . . witnessed his mother 'have to go to the hospital. . . He'd slap her, choke her, pull her hair. . . He'd threaten to kill her all the time . . . When I was at school I'd worry about her all the time. . . I wish I could have done more.'" Mr. Doss was also reportedly a victim of Mr. Brown's physical and emotional abuse throughout his childhood and adolescent years. For example, as noted in prior records, Mr. Doss previously reported that when he attempted to intervene on his mother's behalf, Mr. Brown would ". . . just knock me into a wall or something like that." Mr. Doss previously stated that he was "knocked to the floor" and "hit all over" by Mr. Brown with closed fists, belts, cords, and sticks.
>
> Records indicate that Mr. Doss was exposed to violence from a young age outside of the home as well due to the rough neighborhood in which he lived (Chicago's West-side).
>
> . . .
>
> Records describe Mr. Doss' neighborhood also as being rampant with several street gangs.

Id. at 7-8.

One of the court-appointed Whitfield experts, Dr. Lott, has done a number of evaluations

regarding mitigation in death penalty cases, and has testified both for prosecution and defense in death penalty cases. Tr. 28. He testified in the evidentiary hearing here that there were "a number of mitigating issues or factors" in Mr. Doss's case:

> [T]here are a number of mitigating issues or factors . . . . the history of neglect, the history of abuse, the observing abuse in the family, being abused, being traumatized.
>
> . . .
>
> I think there was a situation where Mr. Doss — there was a home invasion. He reportedly observed a relative being raped. A history of substance abuse. And that's rather extensive. A history of head injury, head trauma. A history of just–I consider to be just neglect both in terms of family, supervision, educational achievement, history of a lack of familial relations or primarily no male role model. There are a number of factors in the report that would address that issue.
>
> Q. Dr. Lott, what, what did your report discuss with respect to the man who was living in Mr. Doss's home when he was growing up?
>
> A. I think he was a drug dealer. I think he had been abusive, at least abusive to the mother.
>
> Q. What, what did your report show with respect to the mother's substance abuse?
>
> A. She had a history of abuse. And it appears from what Mr. Doss told us that he was pretty much on his own, in the street by the time he was 10, 12, 13 years old.
>
> Q. What, what does your report say about records of the mother's mental problems?
>
> A. I think she had a history of addiction and treatment. I don't recall exactly the number of treatments or if we specified.
>
> Q. Okay. What did the records show about mental problems for other family members?
>
> A. I think there were several family members. I can look back and see. But there is a family history of mental illness or substance abuse.
>
> Q. What did the records show about the neighborhood in which he was raised?
>
> A. Described as being rough, dangerous, I guess.

Tr. 29-30.

One of the other witnesses who testified at the evidentiary hearing was Sandra Price, the biological daughter of Sam Brown, the man who lived with Anthony and Anthony's mother during much of the time Anthony was growing up. Ms. Price --- whose mother was someone other than Sadie Doss --- described what life was like when she was living with Sam Brown, Sadie Doss, Anthony Doss, Anthony's half-brother Randy, and Sandra's sister Diane:

> Q. Who is your father?
>
> A. Sam Brown.
>
> Q. Okay. Now, was there a time when you moved in with Sam Brown and Sadie?
>
> A. Yes.
>
> . . .
>
> Q. Who had you been living with before you moved in with Sam Brown and Sadie Doss?
>
> A. My mother.
>
> Q. When, when you moved in with Sam Brown and Sadie Doss, how old were you?
>
> A. Eight years old.
>
> Q. And was Anthony living there then?
>
> A. Yes.
>
> . . .
>
> Q. Okay. Now, how much older than Anthony are you?
>
> A. Four years.
>
> Q. Four years. Okay. Now, during the time that—after you all moved in with Sam Brown and Sadie Doss, what was Sam Brown like?

A. Very angry. Abusive. On drugs and very angry man.

Q. When you say abusive, what do you mean?

A. He used to always beat on Sadie, Anthony, me, Randy. No reasons. Just little things. Keys. Anything he can get his hands on. Keys. Brooms. Extension cord. Belts.

Q. How would he talk to Sadie when—

A. He would say very, very, very bad words. Bad things. Bad. Like the "B" word, "M" "F", you fat "A", "S". You know, all type of things he would say. He was very abusive.

Q. When he was abusive towards her, who else was around?

A. All the children.

Q. Anthony too.

A. Yes.

Q. Okay. Did Sam Brown have any other problems?

A. Drugs.

Q. And what are you talking about?

A. He was a drug user, took cocaine.

Q. Now, how is he making money at this time?

A. Well, at the time he was—he had a job working construction. Some type of way, I don't know what happened, they went out of business. And from there he was receiving welfare for me and my sisters, me and my sister. After due to the fact he lost his job. So that is how he had money.

Q. What would he spend the money on?

A. Drugs.

Q. What kind of financial shape were you all in?

A. Very poor.

Q. Were you—what kind of time did you have making ends meet?

A. It was hard because the money that Sadie had, she did the best that she could to feed, you know, five of us. And, and that was the only way was, you know, financial, the little money that she had got. That was it.

Q. What was the neighborhood like where you were living with Sadie and Sam?

A. It wasn't safe. Gang related. Very violent. Fighting. Shooting all the time. Gun shots. So it was—it was rough.

Tr. 280-282.

Moreover, as the Circuit Court noted, Sandra Price also testified (in the Circuit Court's words) that "in 1989 she was raped and beaten by a gang of men who broke into her residence." that "Anthony was present when this was happening and that Anthony was also beaten," and that "[t]his incident is confirmed in medical records that were offered into evidence [at the evidentiary hearing] as Defendant's Exhibit 13." R.E. 2 at 7.

Sadie Doss, Anthony's mother, also testified at the evidentiary hearing. She explained that Anthony was one of her five children, each of which had a different father. Tr. 230. She, like Sandra Price, testified about the crime-ridden neighborhood in which Anthony was raised in Chicago, the lack of money, and the abuse that she and the children suffered at the hands of Sam Brown during the time she was living with him. Tr. 231-239. She testified about the history of mental illness in her family, tr. 240, which was corroborated by the Whitfield report. She explained that the trial attorney, Lee Bailey, did not ask questions about private and personal details of their life and never explained that it was important for her to tell him about these details. Tr. 243, 276. By contrast, she did tell post-conviction counsel about these things after he spent time with her and

explained that the information would be important to Anthony's case. Tr. 242.

Anthony Doss's first cousin, Q.T. Doss of Hickory, Mississippi, also testified at the evidentiary hearing. He said he first came to know Anthony when Anthony lived in Chicago and would visit Mississippi in the summers. Tr. 212-214. Later, when Anthony moved to Mississippi during his teenage years, Q.T. noticed that Anthony was hanging out with Freddie Bell, who was, as Q.T. put it, a "bully" who "stayed in trouble." Tr. 215. (As this Court noted in its direct appeal opinion, Freddie Bell was the triggerperson and the instigator of the crime for which Anthony was convicted). Anthony, by contrast, was a "follower" who "wasn't the type to influence nobody." Tr. 216. (This lay testimony of Q.T. Doss was corroborated by the testimony of the psychologist, Dr. Daniel Grant, whose extensive testing demonstrated that Mr. Doss was a follower rather than a leader, tr. 135, as well as the testing by the Whitfield experts showing that Mr. Doss suffers from subaverage intellectual functioning).

Another witness who testified at the evidentiary hearing was Sam Phillips of Calhoun City, who was Anthony's biological father. He testified that Anthony was born as the result of a "one-night stand" he had with Sadie Doss, and that he first told Anthony that he was Anthony's real father when Anthony was a teenager. Tr. 305, 308. Mr. Phillips testified that he had two children with the woman who is his wife, one of whom works at Lane, Incorporated in Pontotoc, Mississippi, and other of whom is a senior at Mississippi State. Tr. 303. While no one can be certain, this evidence suggests at least the possibility that Anthony, like his half-brother and half-sister who were Mr. Phillips's other children, might have turned out differently had he been raised in a more stable environment than the one he lived through in Chicago as documented by the testimony of Sandra Price and the Whitfield report.

All of this lay evidence about Anthony's upbringing and circumstances supplemented the Whitfield experts' report about mitigating evidence. In his testimony, one of the Whitfield experts, Dr. Lott, talked about the importance of mitigating evidence in explaining how a person ends up where they do. He did this in the context of discussing the fact that he had not diagnosed Mr. Doss as mentally retarded, but nevertheless had documented extensive mitigation in the course of his evaluation:

> Q. Now, you said that on the surface Mr. Doss's history might seem to suggest he has demonstrated limitations in some areas of adaptive skills in the community; i.e., functional academics, work, self direction, health and safety. Now, if these things were not related to mental retardation, what were they caused by?
>
> A. By growing up in an environment where one isn't supervised, one isn't monitored, one isn't nurtured, a lot of neglect and possible abuse.
>
> Q. Dr. Lott, even if a person is not mentally retarded, because in your assessment, can these things that you've talked about, very low IQ, significant subaverage intellectual functioning, abuse, prenatal—possible prenatal injuries, health problems. His mother had diabetes; right?
>
> A. Correct.
>
> Q. Abuse in the home. Can these sorts of things have an impact on where a person ends up and who they are?
>
> A. Why certainly.
>
> Q. And is the person who, who—can these sorts of things cause a person to—can these sorts of problems affect a person's judgment?
>
> A. Certainly.
>
> Q. Now, what is—what is psychology?
>
> A. The study of human behavior.
>
> Q. And do you try to—in psychology you try to study various factors that can influence a person's behavior.

A. We do.

. . .

Q. (By Mr. McDuff:) Can psychology help explain a person's behavior?

A. Yes.

Tr. 26-27.

SUMMARY OF ARGUMENT

1. In this case, the court-appointed counsel, a solo practitioner with no death penalty experience who was required to defend this case by himself, presented only one witness in mitigation, the defendant's mother, who testified for a total of eight transcript pages. He neglected to pursue leads contained in documents he had, as well as information he was given, that indicated serious intellectual and mental problems and he failed to seek the expert advice and testimony of a psychologist or psychiatrist. He spent very little time talking to family members and never asked the kinds of questions necessary to uncover sensitive and personal mitigating evidence. He did not initiate an invesigation in Chicago, where the defendant spent most of his life. Had he done these things, he would have discovered a wealth of mitigating evidence that could well have led one or more jurors to vote against the death penalty. This includes extensive evidence contained in the report of the court-appointed Whitfield experts. The totality of the mitigating evidence includes organic brain dysfunction, possible Post Traumatic Stress Disorder, serious neurological problems, very low IQ scores, head injuries, extreme substandard reading levels, a recommendation for special education classes in Mississippi as a teenager, apparent attendance at special education classes in elementary school in Chicago, deficits in attention and concentration, a history of mental illness in the family, violence in his Chicago home and the neighborhood, severe trauma, and what the

Whitfield report called a "history of neglect, abuse, and maladaptive behaviors . . . [and] the chaotic environment in which [he] was reared. . . ," as well as expert and lay evidence that Mr. Doss was a follower rather than a leader and was influenced by Freddie Bell, the instigator of this crime who was described in testimony as a "bully." Particularly given that Mr. Doss was neither the instigator nor the triggerperson in this case, this mitigating evidence should have been available to the jury and the failure to uncover and present it constitutes ineffective assistance requiring a new trial at sentencing..

2. The Circuit Court's analysis of the mental retardation issue was erroneous in several respects. The overall evidence indicates that Mr. Doss does fall under the umbrella of the *Atkins* decision and his death sentence should also be vacated on that ground.

STANDARD OF REVIEW

As indicated in the remainder of this brief, the Circuit Court made both factual and legal errors. This combination indicates that *de novo* review is required. As the Fifth Circuit explained in *Lockett v. Anderson*, 230 F.3D 695, 710 (5TH Cir. 2000), "the ultimate question of effective assistance of counsel is a mixed question of fact and law that [the Court] review[s] *de novo*." Moreover, this Court has a "commitment to heightened scrutiny on appeal in cases where the sentence of death has been imposed." *Ross v. State*, 954 So. 2d 968, 986 (Miss. 2007).

ARGUMENT

I. MR. DOSS DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL.

The two-part test for determining whether a defendant received constitutionally effective counsel was established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Under this test, a defendant must first "show that counsel's representation fell below an

objective standard of reasonableness." *Hannah v. State*, 943 So. 2d 20, 24 (Miss. 2006) (citing *Strickland*, 466 U.S. at 687-88). Then, "the defendant must show there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (citing *Strickland*, 466 U.S. at 694). A reasonable probability does not require a showing that the defendant clearly would have persuaded the jury otherwise. "[I]t is possible that the jury could have heard it all and still have decided on the death penalty, that is not the test." *Rompilla v. Beard*, 545 U.S. 374, 393 (2005) (citations omitted). Moreover, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland,* 466 U.S. at 693. Instead, the defendant need only show "a probability sufficient to undermine confidence in the outcome." *Id.* At 694. And because a "sentence of death in Mississippi requires unanimity among all jurors," *Lockett v. Anderson*, 230 F.2d 695, 716 (5th Cir. 2000), a defendant need only show that if counsel had presented discoverable mitigating evidence, "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

Mirroring the two-step test, this section proceeds in two stages. First, it establishes that representation at the sentencing stage of Anthony's trial failed to meet an objective standard of reasonableness because counsel failed to fulfill the basic function of adequately investigating and presenting mitigating evidence. Counsel's performance would have been inadequate in any trial, but was clearly inadequate given the heightened responsibilities of counsel in a death penalty trial. Second, it demonstrates the resulting prejudice — that if counsel had presented discoverable mitigating evidence, "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. at 537.

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 6th day of August, 2008.

Robert B. McDuff

The Failure to Meet an Objective Standard of Reasonableness

The United States Supreme Court has held that constitutionally effective assistance of counsel at the sentencing phase of a trial requires "efforts to discover *all reasonably available* mitigating evidence." *Wiggins*, 539 U.S. at 524 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(c) (1989)). As the lower courts have held, "[t]he imperative to cast a wide net for all relevant mitigating evidence is heightened at a capital sentencing hearing." *Frierson v. Woodford*, 463 F.3d 982, 989 (9th Cir. 2006).

Of course, the duty is not simply to discover and obtain the available mitigating evidence, but also to follow through and present it. As this Court said when holding that the defendant received ineffective assistance in *State v. Tokman*, 564 So. 2d 1339, 1342 (Miss. 1990): "It is *critical* that mitigating evidence be presented at capital sentencing proceedings." (emphasis added). And as the Sixth Circuit has explained: "The 'prospect of being put to death unless counsel obtains and presents *something* in mitigation' magnifies counsel's responsibility to investigate." *Harries v. Bell*, 417 F.3d 631, 637 (6th Cir. 2005) (citation omitted). *See also, Summerlin v. Schriro*, 427 F.3d 623, 634 (9th Cir. 2005) (*en banc*) ("a capital defense attorney not only has the duty to investigate potential mitigation defenses, but to present them."); *Haliym v. Mitchell*, 492 F.3d 680, 712 (6th Cir. 2007) ("In assessing counsel's performance, a court must . . . consider whether counsel adequately followed up on the 'leads' that were available to them.") (citing *Wiggins v. Smith*, 539 U.S. at 527).

Given the importance of the right to effective counsel, especially in death penalty cases, the United States Supreme Court and this Court have found deficient performance and ineffective assistance when attorneys, like the trial lawyer in the present case, failed thoroughly to investigate

this evidence. Had he done so, this would have led to the sort of mitigating evidence documented in the Whitfield report and the testimony of Dr. Summers and Dr. Grant and the other witnesses at the post-conviction hearing.

Neverthless, the Circuit Court held that this failure was not below an objective standard of reasonableness:

> [P]rior to the evidentiary hearing, Bailey discovered that he had in fact obtained records from Watkins [the Memphis lawyer] that included Anthony's school, mental health, and medical records. Because Bailey had possession of these records prior to Doss' trial, it cannot be said that he was ineffective for having failed to obtain or review the records
>
> . . . .
>
> Doss complains that his counsel was ineffective because he did not consult or obtain the services of a mental health expert. Bailey testified that he and Anthony had no trouble communicating with each other. Bailey also testified that Doss never appeared to be insane, and thus he never considered an insanity defense.
>
> At the time of Anthony's trial, the *Atkins* opinion had not been rendered. In fact, at the time of Anthony's trial, the view of the U.S. Supreme Court was that executing a mentally retarded individual was not cruel and unusual punishment. *Penry vs. Lynaugh*, 492 U.S. 302, 106 L.Ed. 2d. 256, 109 S.Ct. 2934 (1989). Additionally, Bailey had access to Anthony's school records, medical records, and mental health records. Nothing in those records indicated that Doss was mentally retarded, or that he had any other problems that would have suggested to Bailey that he should consult a mental health expert. For these reasons, this court find that Bailey was not deficient or derelict in failing to consult or employ a mental health expert.
>
> R.E. 2 at 14.

The record in this case and the case law precedent demonstrate that the Circuit Court committed both legal and factual error in this analysis. First, it appears that Bailey did **not** "obtain or review the records," at least not all of them. While he obtained some of them, pages were missing in Bailey's file from key records and he recalls making no effort to obtain those missing pages. The

pages that he did receive were kept in what he called "a big box that I had old criminal files stored away in," and not in his case file, which suggests that he never reviewed the documents, much less considered them in preparation for any mitigation defense. His failure to do anything about the missing pages also indicates he never reviewed the documents. Even if he did review them, his failure to obtain the missing pages demonstrates a carelessness that is far below the standards required in the defense of a death penalty case.

Moreover, the Circuit Court's decision is based on a fundamental misunderstanding of the scope of mitigating evidence under the law. According to the Circuit Court, since Bailey did not think Mr. Doss was insane, since the *Atkins* decision had yet to be rendered, and since "[n]othing in those records demonstrated Mr. Doss was mentally retarded, or that he had any other problems that would have suggested to Bailey that he should consult a mental health expert," Bailey was not ineffective. R.E. 2 at 14. Mitigating evidence is not limited to insanity or mental retardation, however, but includes a wide range of evidence of the type that existed here had only trial counsel bothered to follow through on it. This includes the possibility of organic malfunctions in the brain, a distinctly subaverage IQ, significant educational and reading deficits, and an early history of substance abuse.

This Court has long held that "[p]sychiatric and psychological evidence is crucial to the defense of a capital murder case." *State v. Tokman*, 564 So. 2d 1339, 1343 (Miss. 1990). As this Court explained, "Fifth Circuit case law makes it particularly clear that there is a critical interrelation between expert psychiatric assistance and minimally effective representation." *Id.* In keeping with this holding, the Fifth Circuit has found that, when counsel possesses "information that plainly suggested the need to investigate . . . psychological problems[,] . . . reasonably effective defense

counsel would have pursued this information." *Lockett v. Anderson*, 230 F.3d 695, 714 (5th Cir. 2000). Other courts have similarly held that counsel in death penalty cases have an obligation to consult with a mental health expert, especially when they are (or should be) on notice of possible mental disability. *See, e.g., Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995) ("where counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition as a mitigating factor in a penalty phase hearing, without a supporting strategic reason, constitutes deficient performance"); *Anderson v. Sirmons*, 476 F.3d 1131, 1143 (10th Cir. 2007), (counsel was ineffective where, even though he had retained a mitigation investigator, he did not properly direct that investigator, and moreover, did not arrange for the defendant to be "evaluated by any mental health or other expert qualified to ascertain whether [the defendant] suffered from neurological or other deficits that would mitigate his moral culpability.").

The courts have made it clear that a constitutionally adequate "penalty phase 'investigation includes examination of mental and physical health records, school records, and criminal records.'" *Correll v. Ryan*, 465 F.3d 1006, 1011 (9th Cir. 2006) (citing *Summerlin v. Schriro*, 427 F.3d 623, 630 (9th Cir. 2005) (en banc)); *Outten v. Kearney*, 464 F.3d 401, 418 (3rd Cir. 2006) (it is "standard practice . . . for a death-eligible defendant's penalty-phase investigation to include his medical history, educational history, family and social history, employment history, and adult and juvenile correctional records"); *Poindexter v. Mitchell*, 454 F.3d 564, 578-79 (6th Cir. 2006) (counsel ineffective in part because "[t]hey did not request medical, educational, or governmental records that would have given insight into [defendant's] background").

The ABA standards, to which the United States Supreme Court has "long . . . referred . . . as 'guides to determining what is reasonable'" *Wiggins*, 539 U.S. at 524 (quoting *Strickland*, 466 U.S.

at 688), also indicate that counsel has an obligation to examine these types of records during a mitigation investigation. In evaluating counsel's performance in *Outten*, the Third Circuit Court of Appeals cited 1989 American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases which state that "[c]ounsel should explore, *inter alia*, 'medical history,' 'family and social history,' 'educational history,' 'special educational needs,' 'employment and training history,' 'prior adult and juvenile records,' and 'prior correctional experience.' ABA Guideline 11.4.1(D)(2)(C)." 464 F.3d at 417-18. In *Outten,* the Court held that an examination of easily obtained records would have disclosed childhood head trauma, special education, low I.Q. and substance abuse. *Id.* at 411-12. Because counsel in *Outten* did not investigate these sources or introduce this evidence, the court found his "effort fell *well short* of the national prevailing professional standards articulated by the American Bar Association and was, therefore, unreasonable." *Id.* at 418 (emphasis added).

Likewise, in *Glenn v. Tate*, the Sixth Circuit Court of Appeals found counsel conducted a constitutionally inadequate investigation when, as in this case, "[t]he lawyers made no systematic effort to acquaint themselves with their client's social history[,]...never examined his school records...never examined his medical records...or records of mental health counseling." 71 F.3d 1204, 1208 (6th Cir. 1995). Review of the records in that case would have provided counsel with evidence of, among other things, low IQ, possible brain damage and special education. *Id.* at 1208. Even where counsel obtains the records, he or she must review them thoroughly, make use of them by following up on leads, and presenting the mitigating evidence that is contained within them and that results from the follow-up. *Summerlin*, 427 F.3d at 634 ("a capital defense attorney not only has the duty to investigate potential mitigation defenses, but to present them"); *Hamblin*, 354 F. 3d at

482, 491 (6th Cir. 2003) (counsel ineffective in part because they "did not review the earlier reports concerning [defendant's] mental status, which were prepared for a previous criminal case"); *Turpin v. Christenson*, 497 S.E.2d 216, 225 (Ga. 1998) (counsel ineffective in part because they "never obtained the complete [psychiatric] files nor did they read the entirety of the file portions that they did have"); *Turpin v. Lipham*, 510 S.E.2d 32, 40 (Ga. 1998) (vacating death sentence in part because "trial counsel totally failed to read, review or interpret the [defendant's] institutional records" in his possession); *Haliym v. Mitchell*, 492 F.3d at 712 ("In assessing counsel's performance, a court must . . . consider whether counsel adequately followed up on the 'leads' that were available to them.") (citing *Wiggins v. Smith*, 539 U.S. at 527). And as mentioned earlier, this Court has held that "there is a critical interrelation between expert psychiatric assistance and minimally effective representation." *State v. Tokman*, 564 So. 2d at 1343.

Trial counsel here actually obtained jury instructions on mitigating factors including "Grew up in a poverty environment," "Lack of significant father figure," "Suffered head injuries which changed personality" and "Lack of Education," thus indicating that he had some inkling of these aspects of Anthony's history. (State's Exhibit 1, which contains the jury instructions proposed by trial counsel and given by the trial judge.)[4] Given the wealth of available evidence related to these and other issues, counsel clearly had the obligation to dig deeper and do more than have the defendant's mother testify very briefly about them. As this Court said in *Leatherwood v. State*, 473 So.2d 964, 970 (Miss. 1985), "[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

[4] Furthermore, the fact that counsel questioned his lone mitigation witness – Anthony's mother - about the family's income (Evid. Hearing Ex. D-5. at p.142), Anthony's failure to graduate (at 143) and his head injuries (at 143-44) indicates that he considered these important mitigating factors.

does not follow through on his chosen strategy." And as this Court further emphasized in *Tokman*, 564 So. 2d at 1344, where trial counsel "presented evidence that Tokman was immature, dependent and easily led," they "were unreasonable in not pursuing psychological evidence in support of the defense that Tokman was under [his co-defendant's] domination."

Even though trial counsel here had some vague idea of potential mitigating evidence, he did not conduct an adequate investigation to uncover and present it. Clearly, trial counsel here should have obtained all of the pages in the mental health records that had been sent by the lawyer from Memphis rather than ignoring the fact that many were missing. Once he got them, he should have read them all and acted on them by obtaining what this Court called in *Tokman* called "expert psychiatric [or psychological] assistance" to gather further mitigating information and present it to the jury faced with the awesome task of deciding whether the defendant should be put to death. As illustrated by the Whitfield court-appointed experts' report, as well as the testimony of the other mental health experts at the post-conviction hearing, this would have uncovered important mitigating evidence.

In addition, the trial attorney should have gone beyond the meager investigation that he conducted for lay witness testimony, an investigation that led him to present to the jury only one witness in mitigation, Sadie Doss, who testified for only six pages on direct and two on cross. Had he done an adequate investigation, he would have obtained significant evidence that supplemented the mental health mitigation documented by the Whitfield report and the other experts, including the testimony from Sandra Price about the conditions in which Anthony was raised in Chicago and the trauma they endured, the testimony of Sadie Doss that also discussed those conditions, the testimony of Q.T. Doss about the influence of Freddie Bell over Anthony, who was a follower, and the

testimony from Anthony's biological father, Sam Phillips, which indicated the possibility of a different outcome if Anthony had been raised under different circumstances.

However, the Circuit Court held that the failure to obtain mitigating information from lay witnesses was excused because Bailey was relying on the defendant and his mother for the names of witnesses:

> Anthony Doss and Sadie, his mother, were the two people that Bailey relied on in giving him the names of potential witnesses who could testify for Anthony during the sentencing phase of the trial. . . . Bailey made an effort to locate any witnesses that Anthony believed could offer testimony that would be favorable to him.

R.E. 2 at 9. The Circuit Court never addressed trial counsel's failure to conduct an investigation and look for witnesses from Anthony's childhood in Chicago.

This Court has long held that "[a]t a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Tokman*, 564 So.2d at 1342. Given this dictate, it is clear that adequate investigation at the sentencing phase includes thoroughly interviewing witnesses to a defendant's past. As this Court explained in *Tokman*, counsel was ineffective in part because "earlier and more persistent contact with [defendant's] family and acquaintances may have led to the discovery of some of the testimony produced by counsel in the post-conviction petition." *See also Poindexter*, 454 F.3d at 579 (investigation inadequate in part because counsel "failed to interview key family members and friends who could have described his upbringing"); *Harries v. Bell*, 417 F.3d 631, 638 (6th Cir. 2005) (counsel ineffective in part due to failure to "adequately investigate [defendant's] family background, despite indications of [a] troubled childhood").

The trial court committed legal error when it excused counsel's failure on the fact that counsel relied on Anthony and his mother to give him the names of witnesses. However, the law requires counsel to conduct a thorough *independent* investigation. Indeed, the United States Supreme Court has suggested that counsel may have an obligation to conduct further investigation "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. 374, 377 (2005) (emphasis added). In *Wiggins v. Smith*, 539 U.S. 510 (2003), the Supreme Court pointed out that trial counsel had not known that the defendant had been sexually abused when he was growing up. *Id.* at 532-33. Obviously, the defendant could have told the lawyer this. But the Supreme Court never suggested that any omission by the defendant somehow excused the lawyer's failure to investigate this and present the evidence to the jury.

Likewise, this Court has found ineffective counsel although the defendant "did not provide any useful information which might be converted into, or lead to mitigating evidence [despite] repeated questioning." *Tokman*, 564 So. 2d at 1344. Similarly, many of the witnesses that defense counsel failed to call in *Leatherwood, Davis,* and *Burns* were people known to the defendants and their families in those cases. *See 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 (Miss. 2001). Even though the defendants could easily have told the lawyers of these witnesses, this Court never suggested that counsel's failure to interview the witnesses and call them to the stand could be blamed on the defendants or their families. *See, e.g., Burns v. State* at 678 (holding there was possible ineffectiveness even though defendant himself said at trial he wanted no mitigation witnesses presented). *See also, Goodin v. State*, 856 So. 2d 267 (Miss. 2003), *cert. denied* 541 U.S. 947 (2004)

(leave granted to proceed on the question of ineffective assistance regarding failure to present evidence of mental illness diagnosis even though the trial attorney's affidavit said the defendant did not mention this until he was on the stand at trial).

Other courts agree. *See, e.g., Carter v. Bell*, 218 F.3d 581, 596 (6th Cir. 2000) ("sole source of mitigating factors cannot properly be that information which defendant may volunteer; counsel must make some effort at independent investigation"); *Commonwealth v. Snead*, 899 A.2d 1067, 1083 (Pa. 2006) ("[The] onus is not upon a criminal defendant to identify what types of evidence may be relevant and require development and pursuit. Counsel's duty is to discover such evidence through his own efforts.").

The reasons for this are obvious. Courts understand that defendants and their families are generally uneducated in legal matters and do not know what evidence is relevant, particularly in a highly specialized area like capital litigation. Even a defendant with experience in the criminal justice system will not know about the unusual rules regarding mitigating evidence in a death penalty case. In most criminal cases, the only relevant evidence relates to the alleged crime itself, and perhaps character evidence of nonviolence, lawfulness, and honesty. In no other area of the criminal law, and likely the civil law, is it important to investigate matters such as childhood abuse, family dysfunction, mental problems, organic brain damage, low IQ, poor school performance, and other matters that are private and personal and potentially embarrassing. It is up to the attorneys to ask the right questions and dig for the answers (and to insure that their investigators and mental health experts do the same). In the area of mitigation, much of the information involves subjects that a defendant and his family members will be reluctant to discuss. The court-appointed Whitfield expert, Dr. Lott, confirmed this and confirmed the importance of explaining to the person what is

needed and why. Tr. 30-31. As the commentary to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases explains: "Counsel should bear in mind that much of the information that must be elicited for the sentencing phase is very personal and may be extremely difficult for the client to discuss." Guideline 10.7, commentary, p. 82 (2003).[5] A lawyer's duty is to spend time building trust with the client and his family, to discuss these issues with a wide array of family members and others who have known the defendant, and to pursue documentary and expert sources that will provide information that the client and his family are unable or reluctant to disclose.

This is clear from the post-conviction testimony of the trial attorney, Mr. Bailey, who, when asked about his brief discussions with Mr. Doss's family, admitted that he knew they weren't lawyers, knew they had no experience in what is or isn't admissible or effective in a death penalty case, and that he himself had no experience in a death penalty case. Tr. 105-106. He explained that his entire contact with the family consisted of a less than 30 minute conversation with Sadie Doss and one of Anthony's aunts, some phone calls with Sadie Doss (only one of which is documented in his time records, which are Evid. Hearing Ex. D-7), a conversation with Sadie Doss right before he put her on the stand that lasted "some minutes" but was not very long, and a pretty short conversation with a group of family members outside the courtroom during the brief interim between the guilt and sentencing phases. Tr. 75-77, 105-106. This obviously was not enough time to explain the complicated and unusual nature of mitigating evidence in a capital case, much less conduct the

---

[5] The United States Supreme Court has recognized these guidelines as a benchmark by which to review the performance of counsel in death penalty cases. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) ("[c]ounsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association . . . standards to which we long have referred as 'guides to determining what is reasonable' ") (citations omitted).

very personal inquiries that are required to uncover it. As Sadie Doss explained without contradiction at the post-conviction hearing, Mr. Bailey never asked her about personal and private information and never explained to her the importance of it in trying to persuade one or more jurors not to give her son the death penalty. Tr. 243, 276.

Similarly, although Mr. Bailey retained a mitigation investigator, Kelvin Winbush, Bailey knew that Winbush, like himself, had never conducted a death penalty mitigation investigation before. Bailey could not remember at the post-conviction hearing what he told Winbush to look for. Moreover, the description of the information that Mr. Bailey says he was provided by Mr. Winbush, which were very brief one-paragraph summaries regarding a few people (contained in evidentiary hearing exhibit D-6), focused on the alleged crime itself – whether the witnesses believed the petitioner was the kind of person who would do this, and which of his friends might have gotten him into it — and did not go to the sort of mitigating background evidence that is crucial in the sentencing phase of a capital case. Moreover, it is clear that at least two of those people would have been witnesses for the other person accused of this crime, Freddie Bell, and did not know Mr. Doss — a confusion generated by the fact that Winbush was also conducting the investigation for Bell, tr. 72, even though each defendant had an interest in portraying the other as the dominant figure. Moreover, neither Bailey nor Winbush did any investigation in Chicago, where Anthony had spent most of his life.

Thus, this is not a situation where an attorney and the investigator he supervised were familiar with the scope and importance of a thorough capital mitigation investigation and actually conducted such an investigation, but were stymied by factors totally beyond their control. The attorney here did not do a thorough investigation, he did not make sure that his investigator did such

an investigation, he did not utilize and follow up on what little his investigator did uncover, and he did not fulfill the basic functions required of an attorney in a death penalty case. When his failure to make the proper inquiries of family members and friends is combined with his failure to obtain all of the relevant background records, consult with a psychologist or psychiatrist, and uncover further mitigating evidence related to mental health, it is clear that this is one of the rare cases where a lawyer's overall actions fell below the standard required for cases like this.

The Resulting Prejudice

The Circuit Court said that "if the trial jury had heard the additional or expanded testimony that was heard at the evidentiary hearing, it would have had no impact on the jury [which] still would have sentenced him to death." R.E. 2 at 12. But the Circuit Court committed both legal and factual error here. The United States Supreme Court has held that when evaluating prejudice for purposes of an ineffective assistance claim, the new mitigating evidence must be examined as a whole for its cumulative effect. *See, (Terry) Williams v. Taylor*, 529 U.S. 362, 397-398 (2000) (state supreme court acted unreasonably when "it failed to evaluate *the totality* of the available mitigating evidence") (emphasis added). *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) ("In assessing prejudice, we reweigh the evidence in aggravation against the *totality of available mitigating evidence.*") (emphasis added). Here, the Circuit Court failed in its prejudice analysis to consider the most important mitigating evidence — that which was generated in the court-appointed Whitfield expert evaluation and the various mental health reports to which it referred, as well as the testimony regarding mitigation presented by Dr. Lott, Dr. Grant, and Dr. Summers. Instead, the Circuit Court limited its prejudice review to Sadie Doss, Q.T. Doss, Sandra Price, and Sam Phillips. R.E. 2 at 11-13. Even there, the Circuit Court committed legal error by analyzing the impact of each by itself

rather than considering what the United States Supreme Court in called "the totality of the available mitigating evidence." *(Terry) Williams v. Taylor*, 529 U.S. at 397-398.

Because the Circuit Court failed to analyze the impact of the mental health mitigation evidence, there is no finding on fact on that issue for this Court to consider. This Court's prejudice review is clearly *de novo*. As detailed in the statement of the case, the court-appointed expert Whitfield report sets out a wealth of mitigating evidence that, as Dr. Lott testified, helps explain the influences that affected Anthony Doss's judgment and caused him to get to the place where the jury convicted him of murder. This includes, for example, the fact that one psychological report said there could well be an "organic basis for Anthony's difficulties," and that another diagnosed him "with Organic Brain Dysfunction" and said "[t]he possibility of a traumatically induced anxiety order such as PTSD clearly exists." R.E. 5 at 15, 18-19. These things were corroborated at the evidentiary hearing by Dr. Summers, who said Mr. Doss has long suffered from serious neurological problems, tr. 183-190, and Dr. Grant, who testified that his testing shows Mr. Doss has organic brain syndrome and demonstrate that he is a follower rather than a leader. Tr. 135. The mitigating evidence from the court-appointed Whitfield experts also includes the very low IQ scores, the head injuries, the extreme substandard reading levels, the recommendation for special education classes in Mississippi as a teenager, the apparent attendance at special education classes in elementary school in Chicago, the deficits in attention and concentration, the history of mental illness in the family, the violence in the home and the neighborhood, the trauma, and what the Whitfield report called a "history of neglect, abuse, and maladaptive behaviors . . . [and] the chaotic environment in which [he] was reared. . . ." R.E. 5 at 6-11, 14-15, 18-19, 32.

Moreover, the lay testimony supplements the expert analysis. For example, Q.T. Doss testified about how Anthony, upon moving to Mississippi as a teenager, fell in with Freddie Bell, a "bully" who was always "in trouble," but that Anthony himself was a follower. This is corroborated by the low scores on Anthony's IQ tests and Dr. Grant's testimony that the psychological testing shows Anthony to be a follower. In a case where, as this Court noted on direct appeal, Freddie Bell was the instigator and shooter, this sort of evidence of Freddie Bell's ability to dominate Anthony was crucial in attempting to mitigate Anthony's actions at the sentencing phase. Sandra Price testified about the horrors of growing up in Sam Brown's house in Chicago, and the abuse and trauma inflicted on Anthony. Sadie Doss spoke of the same thing. And the testimony by Anthony's biological father, Sam Phillips, about the success of the children he raised highlighted the common-sense observation that Anthony could well have turned out different if he had been raised in a stable home instead of by a mother who had five different children by five different men and her then boyfriend (who Anthony long thought was his father until he learned otherwise in his teenage years) who was a violent and abusive drug dealer. The Circuit Court not only committed legal error by considering these witnesses separately, R.E. 2 at 11-13, but committed both legal and factual error by failing to address the points just mentioned with respect to the importance of their testimony and the extent to which it supplemented the mental health mitigation.

The Circuit Court suggested that Sadie Doss's evidence was cumulative of what was presented in her testimony at the original trial. R.E. 2 at 12. However, in doing so, that Court failed to account for a point that made in the previous paragraph of the opinion — that her testimony about what the Circuit Court called the "violent home environment and the violent neighborhood that

Anthony was exposed to when growing up" — had not been presented at the original trial. *Id.* This is because, as stated earlier in this brief, Bailey never asked her about those sorts of personal matters.

The Circuit Court (R.E. 2 at 10) also said that Sadie's testimony about Anthony's upbringing in Chicago differed from the information she provided the psychologists at the University of Mississippi in 1988. But that is not completely accurate. The University of Mississippi report says that Ms. Doss referred to "the gang-infested area where they lived." Evid. Hearing Ex. D-4 at p. 2[6]. (This is one of the pages that Mr. Bailey did not have and did not seek. Tr. 62-63). Moreover, the differences that do exist are not surprising. The court-appointed Whitfield expert, Dr. Lott, explained that it is quite possible that the University of Mississippi evaluator in 1988 did a fairly cursory interview that would not cause someone to reveal these sorts of private and embarrassing details. Tr. 31-32.[7] Further, the testimony Sadie Doss gave at the evidentiary hearing about life for Anthony growing up in Chicago was corroborated by that of Sandra Price, and the Circuit Court never suggested that she was not telling the truth.

Independent of Sadie Doss's testimony, of course, is the mitigating evidence provided by the mental health experts, including the Whitfield court-appointed experts. Those reports and testimony, including the evidence of organic brain dysfunction and damage, constitute powerful evidence that

---

[6] This brief will designate exhibits introduced at the post-conviction evidentiary hearing as "Evid. Hearing Ex. D-___" for exhibits introduced by the Appellant at the hearing and "Evid. Hearing Ex. S-___" for exhibits introduced by the State at the hearing.

[7] The Circuit Court said Sadie Doss "either perjured herself in Anthony's trial or at the evidentiary hearing" because "[a]t trial, she testified that Sam Brown was Anthony's father," and "[n]ow she claims his father is Sam Phillips." R.E. 2 at 11 n. 4. But that is not quite the case. In truth, Sam Brown acted, albeit dysfunctionally, as the father-figure in Mr. Doss's life since his birth. When Ms. Doss responded to Mr. Bailey's question at trial, "[w]ho is [Anthony's] father?" by saying "Sam Brown" Evid. Hearing Ex. D-5, p. 284, she was referring to the man who had stood in the place of a father for Anthony's entire life. She was not asked the name of the biological father and never said Mr. Brown was the biological father. This is not proof of perjury.

is likely to impact at least one juror and probably several more as they decide whether the defendant should be put to death. *See Glenn v. Tate*, 71 F.3d 1204, 1211 (6th Cir. 1995) (jurors are more likely to react sympathetically when their attention is drawn to organic brain problems); *Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1990) (failure to investigate and present evidence of petitioner's brain damage constituted ineffective assistance of counsel); *Wallace v. Stewart*, 184 F.3d 1112, 1116 (9th Cir. 1999) (petitioner prejudiced by counsel's failure to present evidence of "major depressive disorder" and most probably organic brain damage); *Bean v. Calderon*, 163 F.3d 1073 (9th Cir. 1998) (petitioner prejudiced by trial counsel's failure to present evidence of PTSD, brain damage, functional mental retardation, and drug use).

As the Supreme Court stated in *Strickland*, the question of prejudice must be assessed in terms of particular facts of the case and prejudice is more likely if the case for the death penalty was a close one. 466 U.S. at 696. Given that the jury in this case, when making the so-called *Enmund* findings, did not find Anthony Doss to have killed or attempted to kill, 709 So. 2d at 373, and given that co-defendant Frederick Bell was the one who killed the defendant, the wealth of mitigating evidence, had it been presented, could have led at least one juror to refrain from imposing the death penalty.

> [A] sentence of death in Mississippi requires unanimity among all jurors. See Miss. Code Ann. § 99-19-103. If we can conclude that a [single] juror could have reasonably concluded that the death penalty was not an appropriate penalty in this case based on the mitigating evidence, prejudice will have been established.

Lockett v. Anderson, 230 F.3d 695, 716 (5th Cir. 2000). Indeed, the reason this Court was closely divided in affirming the death sentence on direct appeal is because, as stated by the main dissenting opinion, Mr. Doss was not the triggerperson and the instigator. 709 So. 2d at 403 (dissenting

opinion). Certainly, if justices of this Court could reach that conclusion without hearing all of the mitigating evidence later produced in post-conviction, at least one juror could have done so if the evidence had been presented.

Finally, while the Circuit Court occasionally pointed to items that could be harmful to the defense in a sentencing hearing where the mitigating evidence was presented, many of the harmful things mentioned would not be relevant or admissible. But even with respect to those that are, the important point is that the defendant, and also the jurors and the court system, are entitled to a verdict where the jury knows all of the relevant evidence when making a decision of this magnitude. When a jury that has just convicted a defendant murder hears only eight pages worth of testimony from his mother, the death penalty is almost a foregone conclusion. By contrast, if the full range of mitigation available here would have been available, one or more jurors could well have come to the opposition conclusion. As Justice Waller said for the majority in *Brown v. State*, 749 So. 2d 82 (Miss. 1999):

> It is entirely possible that favorable mitigating evidence of Brown's mental state might not have outweighed the aggravating circumstances in the jurors' minds, but such an opportunity was never afforded them. The very purpose of mitigation is to reveal evidence that the defendant is not as bad a person as might be believed from the evidence introduced at the guilt phase of the trial. *Eddmonds v. Peters*, 93 F.3d 1307, 1321 (7th Cir. 1996). . . . It has been held that consideration of all relevant mitigating evidence is required at the sentencing phase because the imposition of the death sentence should reflect a reasoned, moral response to the defendant's background and character and the crime. *Russell v. Collins*, 998 F.2d 1287, 1291 (5th Cir. 1993).

Id. at 90-91. Prejudice clearly has been established here.[8]

---

[8] Adding to the prejudice is the fact that during his brief questioning of her, Bailey asked Sadie Doss: "You realize if the jury should sentence him — give him life that **it will be a long time before he comes back.**" D-Ex. D-5. 289, emphasis added). Thus, even though the prosecution is not allowed to comment on the possibility of parole in order to protect the rights of the defendant, *see Williams v. State*,

II. THE DECISION IN *ATKINS V. VIRGINIA* REQUIRES THAT THE DEATH SENTENCE IN THIS CASE BE SET ASIDE.

As noted by the Circuit Court, all of the expert witnesses agreed that the intellectual deficit prong of *Atkins* was met. R.E. 2 at 36. The only disagreement related to deficits in adaptive functioning. *Id.* at 31. The Circuit Court held that the *Atkins* test was not met. However, the Court was wrong in several respects.

First, the Circuit Judge rejected the claim of mental retardation on the ground that "none of the experts that were called by Anthony Doss were qualified as experts in the field of mental retardation, or as experts in the administration or interpretation of tests or in the evaluation of persons for the purpose of determining mental retardation." R.E. 2 at 28. However, Dr. Summers was tendered and accepted as an expert in psychiatry and the State waived the opportunity to voir dire on his credentials. Tr. 175. His resume summarizes his experience. Ex. D-10. Moreover, as the Circuit Court noted, "Dr. Grant was tendered as an 'expert in psychology so that he may respond to questions asking for an opinion in this case.'" *Id.* As everyone knew, Dr. Grant was going to be asked his opinion on whether Mr. Doss met the *Atkins* criteria as a result of tests he administered and the evaluation he conducted. The record shows that he answered these questions at the hearing and gave his opinion without objection. Tr. 123-135. He was accepted as an expert qualified to answer

---

445 So. 2d 798, 812 (Miss. 1984), **the defense lawyer did so here,** suggesting that at some point, the defendant would "come back" home. As in all cases where parole is raised, this injects an arbitrary factor and is prejudicial to the defense. This is another example of ineffectiveness at the sentencing phase that adds to the ineffectiveness already documented. Bailey testified at the evidentiary hearing that he was referring to the possibility of parole and was unaware of the case law holding that this is an arbitrary factor that can cause a jury to lean *towards* a death sentence. Tr. 77-78. This particular example, while not the most extreme example of ineffectiveness in this case, highlights the problems that stem from the placing the burden of capital defense solely on a solo lawyer with a busy private practice and no death penalty experience.

those questions. Moreover, the record demonstrated his experience and expertise in the field of mental retardation, the evaluation of mental retardation, and the administration and interpretation of tests for the purpose of determining mental retardation. Dr. Grant's extensive experience with testing for mental retardation is detailed in his resume and testimony, Ex. D-8 and Tr. 111-112. At one point during the hearing, the Circuit Judge specifically said, "he would qualify under the rules of evidence as an expert." Tr. 121. The Circuit Court subsequently held in its written opinion that different words should have been uttered at the time the witness was tendered. But this Court has held that when tendering an expert, counsel need not use the "magic words" as long as the opposing side is "on notice of her qualifications, credentials and the nature of her testimony." *Hobgood v. State,* 926 So. 2d 847, 851 n3 (Miss. 2006). The Circuit Court's ruling exalts form over substance and is at odds with this Court's practical application of Miss. R. Evid. 702.

Second, the Circuit Court rejected the *Atkins* claim by saying that no acceptable testing had been done for malingering. R.E. 2 at 30. But this is wrong. Dr. Grant did analyze the issue of malingering and concluded that the consistency of scores demonstrated that malingering did not exist. As Dr. Grant explained, he "used an approach which is widely used by neuropsychologists." Tr. 130. This method does not include a discrete test for malingering. Dr. Grant "give[s] multiple measure[s] of the same variable" and looks to see to if the tests have "fairly consistent" results. *Id.* at 131. It would be very difficult for a malingerer to fabricate consistency across these tests, as Dr. MacVaugh acknowledged. *Id.* at 379.

Indeed, this Court specifically has held that there is no single prescribed method for detecting malingering. *Lynch v. State*, 951 So.2d 549, 556 (Miss. 2007), and prior decisions suggesting there is "are expressly overruled." *Id.*

Moreover, everyone — the court-appointed experts and the defense experts — agreed that Mr. Doss did not malinger during the tests the each conducted and the test results demonstrated that he met the intellectual deficit prong of *Atkins*. Given that he did not malinger on the IQ tests, it is completely illogical to suspect the he malingered on the adaptive functioning tests conducted by Dr. Grant. Indeed, Dr. Lott testified that Mr. Doss did not want to appear mentally retarded, which is a strong indication that he was not malingering.

Third, the Circuit Court accepted the opinions of Dr. MacVaugh and Dr. Lott on adaptive functioning over that of Dr. Grant even though Dr. Grant was the only one to administer adaptive functioning tests. However, the 10th edition of the standard authority, *Mental Retardation: Definition, Classification, Assistance, and Support*, by the American Association of Mental Retardation, specifically requires such testing in order to analyze adaptive functioning. While the previous editions of the AAMR includes a test for adaptive skills, the revised edition goes further: "[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).

The Circuit Court noted that none of the mental health experts other than Dr. Grant "has ever administered tests to Doss to see whether he has adaptive functioning deficits." R.E. 2 at 30. Both Dr. Grant and Dr. Summers (who relied on Dr. Grant's test results) agreed that Mr. Doss suffered from adaptive functioning deficits in communication or language skills, tr. at 141 and 178, and in learning or academic skills, tr. at 141 and 179, and that these brought him under the definition of

mental retardation. Dr. Summers also noted Mr. Doss' difficulty with social interactions. Tr. at 180. Dr. Grant's opinion was based in large part on Mr. Doss's low scores on a number of standardized tests of adaptive functioning, as required by the AAMR. Tr. 132 and Evid Hearing Ex. D-9. Both of them also relied on medical history and school records in their evaluations. Tr. at 133-135, 187-189.

As noted by Dr. MacVaugh, the primary Whitfield expert called by the State, the AAMR 10th Edition represents the most up to date thinking on the diagnosis of mental retardation and should be used when conducting psychological evaluations. Tr. at 387-88. In fact, the goal of this most recent edition is "...state, describe, organize and extend the thinking in the field of mental retardation that has occurred over the past 10 years since the publication of the AAMR's 1992 manual...The present manual contains and describes the logical continuation in conceptualizing mental retardation as functional and contextual." The American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (10th ed. 2002).

Dr. MacVaugh acknowledged that he is ethically "bound to stay up to date with the most recent definition" in a clinical setting. Tr. at 388. However, he claims that for analysis in court cases, he believes himself required to use the older 9th edition because that is the one cited in *Atkins* and *Chase v. State*, 873 So. 2d 1013 (Miss. 2004). He asserted, without citing any legal or scientific authority, that "to use the newer edition without the knowledge that the court actually relied on the former edition would not be appropriate." Tr. at 350.

Yet, in *Chase v. State,* 873 So. 2d at 1021 n. 7, the court pointed out that "we do not endorse or require that experts use any particular test for determination of IQ." This strongly suggests that the Court does not intend to prescribe methods to mental health professional to assess mental

the AAMR "contains a more concise definition" of mental retardation). Other courts have acknowledged the fluidity of the definition of mental retardation. *See, Ex Parte Briseno,* 135 S.W.3d 1 (Tex. Crim. App. 2004).

As Dr. MacVaugh stated, "we [psychologists] are still learning how to do this." Tr. at 361. Yet Dr. MacVaugh did not use the most current and acceptable methods. Dr. Grant did. As he testified, he relied in large part on the standardized tests because the AAMR "says that...you should always try to use – anchor your decision in come type of measures of adaptive behavior if you can." Tr. at 134. Dr. MacVaugh acknowledged that this measure, which reflects the most recent methodology in the authoritative texts in the field, "could possibly change the diagnosis because the assessment of adaptive skills deficits would, would look different because the definition for them is different conceptually." Tr. at 350.

The Circuit Court did not criticize Dr. Grant's testimony on mitigation. But with respect to the mental retardation issue, it inserted in its opinion a gratuitous and completely unwarranted attack on Dr. Grant and his methodology. More specifically, the Circuit Court said:

> Dr. Grant seems to be the type of expert whose testimony is based on who is paying his fee. Perhaps at some point in his career he was a respected and esteemed member of his profession. However, it appears that the lure of easy fees has overridden his objectivity and the ability to render a professional opinion. He seems all to willing to prostitute his opinion for personal gain. One has to look no further than the three (3) page report that he presented to this Court explaining why he thought Doss was mentally retarded. His report would almost be laughable if the subject matter was not so serious. Dr. Grant concluded that Doss had limitations in adaptive functioning that would render him mentally retarded based almost exclusively on a test that he administered to Doss. A test that has not been normed for death row inmates. A test that is designed to test the present ability of an individual, not what an individual was able to do in the past. A test that has no safeguards in place to insure that malingering has not occurred. Dr. Grant did not even bother to interview anyone to

> find out what Doss was doing and how he was functioning in the real world prior to age 18. This court finds the methodology used by Dr. Grant, and the conclusions that he reached to be highly suspect if not scientifically dishonest.

R.E. 2 at 34-35. The undersigned counsel filed a lengthy motion to alter or amend explaining in detail why the Circuit Court's extreme language was baseless and unfair. R.E. 3. Rather than address the matter and explain itself or modify the intemperate remarks it had made, the Circuit Court denied the motion in a one page order. R.E. 4. We raise it here not only because the merits support Dr. Grant and his methodology and conclusions, but this sort of harsh language in inappropriate in a judicial opinion when, as here, there is no foundation for it.

Dr. Grant's resume, which was introduced as exhibit D-8 at the hearing, shows that he is a dedicated professional who works in difficult surroundings seeking to help those who need it. He is a psychologist at the Savannah Regional Youth Detention Center, working with disturbed children who have been in serious trouble with the law. As explained in his testimony, he has worked with both prosecutors and defense lawyers in his career. Contrary to the Circuit Court's uninformed speculation about "the lure of easy fees," the undersigned counsel represents to the Court, as he did to the Circuit Court, that Dr. Grant has never been concerned with money or being paid in this case. While the undersigned has sought funds to compensate him for his time and expense, as is appropriate and as is authorized by statute, Dr. Grant did not insist on payment in advance and has never inquired about the status of his payment or even if he would be paid. This is in contrast to other experts with whom the undersigned has worked on indigent cases — experts who have asked, quite reasonably, for counsel to pay them in advance rather than awaiting payment from state funds under the statute after court approval. In fact, another defense expert, Dr. Summers, did require advance payment, which is quite understandable. But Dr. Grant did not. Although the Circuit Court

disagrees in its opinion with Dr. Grant's conclusions and methodology, that is not a basis for questioning his motives or his integrity.

Moreover, while the Circuit Court disagreed with Dr. Grant's conclusion on adaptive functioning, there is no basis for suggesting that his "testimony is based on who is paying his fee." The Circuit Court has never seen him testify in another case. There is no evidence of contrary opinions that he has given in similar factual situations where he was being paid. While there are experts against whom this accusation could be made — medical experts who may testify one way for a plaintiff in a paid case and then, in an indistinguishable factual situation, testify another way for a physician defendant who is paying the expert's fee in another case; or a pathologist who does the same for the prosecution one day and the defense the next day in paid cases on nearly identical relevant facts — there is no basis for saying that here. These sorts of accusations against experts are generally not made unless there is a track record over a span of many cases where their divergent opinions cannot be explained except by looking at who is paying the bill. If Dr. Grant had administered the same tests and conducted the same analysis and received the same results on a multitude of different defendants, and then testified for the defense in paid cases that some of them were mentally retarded and for the prosecution in other paid cases that others were not, there might be a basis for making this accusation. But that is not the situation here.[9]

Similarly, the suggestion that cases like this involve "the lure of easy fees" is wrong. Most psychologists and psychiatrists are paid in advance for their work. In litigation, experts in civil cases generally are paid up front, as are experts for the prosecution and for non-indigent defendants in

---

[9] Counsel is also aware that Dr. Grant is not an expert who always finds mental retardation. Counsel has learned from other attorneys who have hired him that on a number of occasions, he has concluded from his evaluation and testing that defendants in capital cases were not retarded.

criminal cases. Some experts for the defense in indigent cases insist on payment in advance from the attorney, with the attorney hoping to be reimbursed if and when the court approves the fee, or a portion thereof, and the payment is processed and delivered. Those like Dr. Grant who are willing to testify without advance payment cannot be accused of chasing "easy fees." However, these experts perform a necessary service in a system that relies on people who are willing to spend time and do work for indigent defendants without any certainty as to whether, when, and how much they will be paid. The Court could just as easily accuse the undersigned counsel of pursuing "easy fees." But as with counsel in indigent death row cases, the compensation for experts in these cases who, like Dr. Grant, do not insist on advance payment, is not an avenue for easy fees.

Dr. Grant could make more money in full-time private practice. That would be more of a path to easy money. Instead, he has chosen to work for the public, helping the State of Georgia with the very difficult job of managing and trying to rehabilitate a large number of delinquent juveniles in the state facility for troubled children. Because of his experience working with mental retardation in that setting and others over the span of his career, he also occasionally has conducted evaluations in court cases, often without advance payment and with only the possibility of compensation for his time after court review and approval or some or all of the fee.

Pursuant to statute, the Circuit Court previously approved payment in the amount of $2000 for Dr. Grant's pretrial evaluation of Mr. Doss. Dr. Grant testified at the evidentiary hearing that his on-site evaluation, conducted at Parchman, spanned 12 hours over a two day period. That does not include significant additional time spent reading prior reports and preparing for the evaluation, and then reviewing and scoring the tests afterwards. In addition, Dr. Grant spent money on his hotel room and gas to drive his own car to and from his home near Savannah, Georgia, a drive which takes

approximately 11 hours each way, or 22 hours round trip. For all of this time, he charged only $2000. If his pre-evaluation preparation time is estimated at three hours and his post-evaluation time scoring and analyzing the tests at three hours (which are conservative estimates), the total time spent on the evaluation process plus the drive was 40 hours (if not more), which amounts to approximately $50 per hour. Also, he did not seek reimbursement for his expenses. Most experts charge more, and an expert with Dr. Grant's experience certainly could have charged much more. (By contrast, Dr. Timothy Summers charged $6,000, which is a reasonable fee, but is much more than was charged by Dr. Grant, who probably had to spend more time attending and conducting his pretrial evaluation than Dr. Summers had to spend for his evaluation and trial attendance).[10]

Lawyers like the undersigned, who occasionally represent indigents in capital cases, must rely on people like Dr. Grant who are willing to lend their expertise in cases like this. The undersigned represents to the court that based on the undersigned's own experience and the opinion of other lawyers whom the undersigned respects, Dr. Grant is a good and decent person, a man of integrity, and an honorable psychologist who is very professional and very courteous. Dr. Grant spent a lot of time on this case and a lot of time trying to help the undersigned learn the issues in a complex field. (If the undersigned failed to learn them, that is his own fault). That is one reason the undersigned counsel believes the paragraph at pages 34-35 is unfair, and that is why counsel is spending so much time on this part of the appeal. If people like Dr. Grant run the risk of being so harshly criticized when a judge disagrees with their opinion and methodology in an appointed indigent case, it will be difficult for lawyers to ask experts to run that same risk in future cases.

---

[10] The affidavit submitted by Dr. Grant that accompanied the motion for approval of the $2000 payment said that his standard rate is $125 per hours plus expenses. In charging $2000 for the evaluation process, he obviously did this for less than the standard rate.

For all of these reasons, the charges that Dr. Grant seems to tailor his testimony "based on who is paying his fee," that "it appears the lure of easy fees has overridden his objectivity," and that he "seems all too willing to prostitute his professional opinion for personal gain," are inaccurate and unsupported on the record of this case.

The Court also criticized Dr. Grant's report in a harsh manner and raised the unjustified spectre of "scientific[] dishonesty." This is a very grave charge. It is similar to someone implying that a judge may be judicially dishonest. The fact that the Court may disagree with an expert's approach does not mean it might be scientifically dishonest (just as the fact that a lawyer's vigorous disagreement with a judge's opinion does not give the lawyer a basis to suggest the judge might be judicially dishonest). It also does not mean the report is almost laughable.

Even though the Court may disagree with Dr. Grant's methodology, there is some basis for that methodology as noted in our earlier discussion about the propriety of using the current analysis called for in the 10th edition of the American Association of Mental Retardation's leading publication, *Mental Retardation: Definition, Classification, and Systems of Support.* While the Circuit Court noted Dr. MacVaugh's testimony that the 10th edition should not be used since it was the 9th edition that was cited in the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 204 (2002), Dr. MacVaugh also testified that, as a clinician, he would be ethically bound to use the 10th edition rather than the 9th. Tr. 388. Dr. Lott relies on the 10th edition as well in his practice. Tr. 21. It makes no sense to accuse Dr. Grant of scientific dishonesty simply because he used a more modern methodology that the court-appointed expert deems ethically binding in clinical practice.

Thus, even if this Court accepts Dr. MacVaugh's position that the 9th edition is the only one that can be considered as part of an expert's opinion in a court case, there is at least an argument that

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 5th day of November, 2007.

Robert B. McDuff