IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-00429-SCT

ANTHONY DOSS

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	12/12/2006
TRIAL JUDGE:	HON. JOSEPH H. LOPER, JR.
COURT FROM WHICH APPEALED:	GRENADA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ROBERT B. McDUFF
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: MARVIN L. WHITE, JR
DISTRICT ATTORNEY:	DOUG EVANS
NATURE OF THE CASE:	CIVIL - DEATH PENALTY - POST CONVICTION
DISPOSITION:	AFFIRMED - 12/11/2008
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

LAMAR, JUSTICE, FOR THE COURT:

¶1. Anthony Joe Doss was convicted of capital murder and sentenced to death for the murder of Robert C. Bell in the Circuit Court of Grenada County. Doss's conviction and sentence were affirmed by this Court on direct appeal. In ***Doss v. State***, 882 So. 2d 176 (Miss. 2004), this Court granted Doss's Application for Leave to file a Motion to Vacate Judgment and Sentence, finding that Anthony Doss was entitled to an evidentiary hearing in the Grenada County Circuit Court on the issues of whether he received ineffective

assistance of counsel at the penalty phase and whether he was mentally retarded. The circuit court considered the evidence and found against Doss on both issues. Doss appeals, and after consideration of the record and legal arguments presented by the parties, this Court affirms the circuit court's judgment.

PROCEDURAL HISTORY

¶2. Anthony Doss was convicted of capital murder and sentenced to death for the murder of Robert C. Bell. Doss's conviction and sentence were affirmed by this Court on direct appeal. ***Doss v. State***, 709 So. 2d 369 (Miss. 1996), *cert. denied* 523 U.S. 1111, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998). Doss filed his Application for Leave to File Motion to Vacate Judgment and Sentence in this Court in May 2003. This Court granted Doss leave to proceed in the circuit court on the following issues: (1) whether he was mentally retarded; (2) whether his trial counsel had been ineffective at the penalty phase. ***Doss v. State***, 882 So. 2d 176 (Miss. 2004).

¶3. The Grenada County Circuit Court held an evidentiary hearing on this matter on September 6-7, 2006. Doss presented as witnesses Dr. Criss Lott, a psychologist; Lee Bailey, Doss's trial attorney; Dr. Daniel Grant, a psychologist; Dr. Timothy Summers, a psychiatrist; Q.T. Doss, Doss's cousin; Sadie Doss, Doss's mother; Sandra Price, a daughter of Sam "Joe" Brown, with whom Sadie Doss had lived in Chicago; and Sam Henry Phillips, Doss's biological father. The State presented Dr. Gilbert MacVaugh, III, a psychologist, and Dr. Reb McMichael, a psychiatrist, as witnesses. On December 12, 2006, the circuit court entered an Order and an Opinion, finding that Doss was not mentally retarded under ***Atkins***

v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), and this Court's ensuing decisions. The circuit court further found that Doss had failed to meet either prong of the applicable test for ineffective assistance of counsel as provided in ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Doss subsequently filed a Motion to Alter or Amend Opinion and Judgment, which was denied. Doss has appealed and raises two issues.

ANALYSIS

¶4. The standard of review after an evidentiary hearing in post-conviction relief cases is well-settled.

> When reviewing a lower court's decision to deny a petition for post conviction relief this Court will not disturb the trial court's factual findings unless they are found to be *clearly erroneous*." ***Brown v. State***, 731 So. 2d 595, 598 (Miss. 1999) (citing ***Bank of Mississippi v. Southern Mem'l Park, Inc.***, 677 So. 2d 186, 191 (Miss. 1996)) (emphasis added). In making that determination, "[t]his Court must examine the entire record and accept 'that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's findings of fact . . . .'" ***Mullins v. Ratcliff***, 515 So. 2d 1183, 1189 (Miss. 1987) (quoting ***Cotton v. McConnell***, 435 So. 2d 683, 685 (Miss. 1983)). That includes deference to the circuit judge as the "sole authority for determining credibility of the witnesses." ***Mullins***, 515 So. 2d at 1189 (citing ***Hall v. State ex rel. Waller***, 247 Miss. 896, 903, 157 So. 2d 781, 784 (1963)).

Loden v. State, 971 So.2d 548, 572-73 (Miss. 2007). However, "where questions of law are raised, the applicable standard of review is de novo." ***Brown v. State***, 731 So. 2d 595, 598 (Miss. 1999). Anthony Doss's burden of proof in the circuit court was "by a preponderance of the evidence." Miss. Code Ann. § 99-39-23(7) (2007).

I. WHETHER DOSS RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL.

¶5. In his request for post-conviction relief filed in 2003 with this Court, Doss relied on the affidavits of his trial attorney, Lee Bailey; Bailey's investigator, Kelvin Winbush; Carolyn Watkins, the public defender who handled a separate murder charge involving Doss in Shelby County, Tennessee; Sadie Doss, his mother; Verlene Forest Williams, a friend; Carolyn Phillips, an aunt; Lucretia Monger; Randy Doss; Roselyn Monette Jackson, Doss's aunt; John Westmoreland, who had been married to Doss's aunt; Annette James, a girlfriend; Marvin Doss, Doss's half-brother; Q.T. Doss, Doss's cousin; Lillie Moore; Sandra Price, a daughter of Sam "Joe" Brown, with whom Sadie Doss had lived in Chicago during Doss's childhood; Chantay Price, Sandra Price's daughter; Varnado McDonald; Carrie Cole, Doss's aunt; Rosie Caldwell; and Sam Phillips, Doss's biological father. This Court summarized Lee Bailey's affidavit as follows:

> 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; and he did not obtain any records resulting from the investigation of criminal charges against Doss in Shelby County, but he did obtain the indictment and judgment in that case. Bailey also obtained the appointment of an investigator, Kelvin Winbush, who was also the investigator for Doss's co-defendant, Frederick Bell. Bailey stated that Winbush told him he had interviewed: Doss's aunt, Lillie Moore; Doss's sisters, Lucretia Monger and Mavis McCaster; Doss's brothers, Marvin Doss and Randy Doss; and John Westmoreland and that all stated that Doss was a good and/or quiet person who got involved with the wrong crowd. Bailey did not follow up with these witnesses or ask them to testify at the sentencing phase. Bailey stated that Winbush told him he had contacted two teachers in Bruce, a Mrs. Parker and a Coach Smith, but it was

> questionable as to whether these people actually knew Doss, or whether they had mistaken him for Frederick Bell. Bailey did not realize that a conflict might result from using Winbush, where one of Bailey's potential defense strategies was to blame Bell as the instigator of the shooting. Bailey states that he interviewed only Doss's mother and an aunt for a few minutes. 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.

Doss, 882 So. 2d at 186.

¶6. Kelvin Winbush identified several persons as possible mitigation witnesses and provided this information to Bailey. Winbush was never asked to follow up with these potential witnesses or to do anything further. ***Doss***, 882 So. 2d at 186.

¶7. Carolyn Watkins stated in her affidavit "that she obtained school records for Doss from Chicago; Doss's medical records from Chicago, including records involving a 1986 head injury; and the 1988 psychological report done at the University of Mississippi. She stated that Bailey never requested these records." ***Doss***, 882 So. 2d at 186.

¶8. This Court summarized the remaining affidavits as follows:

> The affiants say that Doss was shy and quiet, not a violent person; that there were times when Doss seemed to go into a seizure or trance of some kind, when he did not respond to people; that he had mental or medical problems that began with his mother's drinking and drug use during her pregnancy with him, followed by lead poisoning and head injuries during Doss's childhood; that mental illness seemed to run in the Doss family; that Doss was easily led by Frederick Bell, who was a bad, violent person and came from a violent family; that Doss began to run with a bad crowd when he moved from Chicago to Mississippi; that Doss's birth and upbringing in Chicago were riddled with crime, drug abuse and poverty. Specifically mentioned and blamed for much of the misfortune suffered by Doss and his family in Chicago was Sam Brown, who lived with Doss's mother. Doss apparently believed for much of his early life that Sam Brown was his biological father. According to various affidavits, Sam Brown was violent and abusive toward Doss, his mother and the rest of

> the family; he took what little money the family had to buy drugs and gamble; and he sold drugs and introduced the children in the family to drugs.

Doss, 882 So. 2d at 187.

¶9. After consideration of this material this Court

> conclude[d] 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 made 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***, 635 So.2d at 813. (Smith, J., concurring in part).

Doss, 882 So. 2d at 189.

¶10. The circuit court held an evidentiary hearing in September 2006 and issued a very thorough thirty-seven-page opinion in December 2006, finding that Doss had not received ineffective assistance of counsel. The court found that Lee Bailey's testimony at the hearing in 2006 "was in sharp contrast with the information that was contained in his affidavit that was submitted to the Mississippi Supreme Court." The court found that Bailey had not tried to mislead in his affidavit, but when he had signed the affidavit he didn't have access to his case file, and he was relying on his memory of events taking place eight years before. Bailey also had discovered that he had obtained some school, mental health, and medical records for Doss from Carolyn Watkins. Included in these records was a consultation with a doctor and psychiatrist at the North Mississippi Medical Center in 1988; medical records from Chicago from 1983, 1986 and 1987; an incomplete copy of an undated and unsigned

discharge summary ("Discharge Summary") from a hospital, where Doss was evaluated by recommendation of the Calhoun County Youth Court; a psychological report done at the University of Mississippi in 1988 ("1988 Psychological Report"), related to Doss's probation in the Calhoun County Youth Court; some school records from Chicago, special education classes, second through eighth grades; and additional school records from Chicago, 1987-88.

¶11. Bailey testified that he didn't have any trouble communicating with Doss while he was representing him and therefore discounted the possibility of Doss having mental problems. Bailey said he relied on Doss and his mother Sadie to give him names of potential mitigation witnesses. They provided the name of Mark Hendricks, the Chief of Police in Derma, Mississippi. Doss worked for Hendricks as a confidential informant on drug cases. Bailey wanted to introduce this testimony, but if Hendricks had testified, the State was prepared to cross-examine Hendricks on several criminal violations involving Doss. Bailey filed a motion in limine to attempt to exclude this testimony, but it was denied. As for the potential witnesses identified by Kelvin Winbush, and much of the documentary evidence, Bailey likewise felt that damaging effect of this testimony would have outweighed any benefits.

¶12. Bailey stated that Doss had been his only death-penalty case. At the time of Doss's trial Bailey was in contact with the Capital Defense Resource Group, a Jackson organization which supported capital defendants and their attorneys, and Bailey had received materials and information from the Group. Bailey testified in 2006 that he thought he did an adequate

job at sentencing, but he generally qualified that opinion with his lack of experience in capital litigation.

¶13. Q.T. Doss, Doss's cousin, testified that they spent time together and did yard work together when Doss visited Mississippi, and later when Doss moved back from Chicago as a teenager. Q.T. stated that Doss was a quiet person and a follower, not a leader. Q.T. testified that Doss eventually began to hang around with Frederick Bell, and Q.T. felt that Bell was a bully and troublemaker. Q.T. was not interviewed by Lee Bailey, but he said he remembered Bailey talking to family members outside the courtroom during the trial. Q.T. testified that Doss knew how to defend himself, but he didn't know anything about Doss having a gun.

¶14. Sadie Doss was the only witness presented by Lee Bailey at Doss's sentencing hearing. Her direct examination covered six pages. She testified that Doss was born in Chicago and his father was Sam Brown. She testified that Doss had finished the ninth or tenth grade, and that he had tried to find work but could not. Sadie testified that they had a "beautiful home." Sadie testified that Doss was a "warm, beautiful person" who prepared food for her and helped her when she was sick. She testified that Doss had suffered two head injuries, one when he was eleven and one when he was seventeen. When questioning Sadie before the jury about possible sentencing alternatives, Bailey asked: "You realize if the jury should sentence him – give him life that will be a long time before he comes back. You realize that?" On cross-examination Sadie admitted that Doss had been convicted of second-degree murder in Tennessee.

¶15. At the 2006 hearing, Sadie's testimony mirrored her affidavit filed in 2003 with this Court. Sadie testified that she drank alcohol regularly when she was pregnant with Doss, that she contracted gonorrhea at around that time, and Sam Brown beat her to the point that she almost miscarried. She testified that other members of her family had suffered from mental problems. Sadie testified that she didn't tell strangers about these problems, and that Lee Bailey didn't ask anything about the private details of her life. The circuit court found that this testimony on alcohol abuse and mental problems contradicted information Sadie had provided for the 1988 Psychological Report.

¶16. Sandra Price was the daughter of Sam Brown. Sandra lived with Brown, Sadie and Doss in Chicago. Sandra confirmed at the 2006 hearing the brutal treatment the family had received from Sam Brown, who was also drug user. Sandra stated that Doss was a quiet person who generally stayed to himself. Sandra testified that the family had lived in a rough neighborhood, where gang activity and violence was common. Sandra denied that she had seen Sadie Doss abuse alcohol or drugs. Sandra testified that in 1989, she was raped and beaten by a gang of men who broke into their residence. Doss was also beaten by these intruders. The State suggested that the attack was in retaliation for Doss's selling drugs. Price was not contacted by Lee Bailey about testifying at Doss's murder trial.

¶17. Sam Phillips testified at the 2006 hearing that he was the biological father of Anthony Doss and that he and Sadie Doss had never married. Phillips did not attend Doss's trial and was not contacted by Lee Bailey. Phillips had raised two children with his wife who had never been in trouble with the law.

¶18. The circuit court found that the failure of Lee Bailey to learn about Doss's childhood in Chicago did not indicate that he was ineffective, because Doss and Sadie Doss did not tell him about this. The court found that what Sadie Doss told Bailey at the time of Doss's trial was consistent with what appeared in the 1988 psychological report. The court summarized the testimony of Sadie Doss, Q.T. Doss, Sandra Price, and Sam Phillips, and found that the jury still would have sentenced Doss to death even if they had testified at trial.

¶19. The circuit court found that because Bailey had possession of some of Doss's school, mental health, and medical records at the time of trial, he was not ineffective for failure to obtain or review the records. The circuit court found that Lee Bailey had no trouble communicating with Doss, and Doss did not appear to be insane. At the time of Doss's trial, execution of the mentally retarded was not prohibited. The circuit court found that nothing in the records indicated that Doss was mentally retarded, or that Bailey should have consulted a mental-health expert.

¶20. The circuit court found no problem with the investigator in Doss's case having also been the investigator for Frederick Bell, who was a co-defendant in the murder of Robert C. Bell. Doss and Bell were tried separately. Finally, the circuit court found no harm in Lee Bailey, when questioning Sadie Doss at the sentencing hearing, suggesting that Doss might someday be released from prison. The circuit court found that this Court did not mention this specific issue when it granted Doss's application for leave to file a motion to vacate judgment and sentence in 2004, so this Court must have determined that the issue was without merit. The circuit court also considered the issue on its merits and found none.

¶21. The familiar standard of review for a claim of ineffective assistance of counsel is found in ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). ***Strickland*** recently was discussed by this Court in ***Ross v. State***, 954 So. 2d 968, 1003-04 (Miss. 2007):

> The touchstone for testing a claim of ineffectiveness of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. ***Irby v. State***, 893 So. 2d 1042, 1049 (Miss. 2004) (citing ***Strickland v. Washington***, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984)).
>
> The standard of review for a claim of ineffective assistance involves a two-pronged inquiry: the defendant must demonstrate that his counsel's performance was deficient and that the deficiency prejudiced the defense of the case. ***Id***. To establish deficient performance, a defendant must show that his attorney's representation fell below an objective standard of reasonableness. ***Davis v. State***, 897 So. 2d 960, 967 (Miss. 2004) (citing ***Williams v. Taylor***, 529 U.S. 362, 390-91, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. ***Id.*** A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.***
>
> The focus of the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. ***Id.*** at 967 (citing ***Strickland***, 466 U.S. at 688). We will not find ineffective assistance where a defendant's underlying claim is without merit. ***Id***. Similarly, multiple defaults that do not independently constitute error will not be aggregated to find reversible error. ***Walker v. State***, 863 So. 2d 1, 22 (Miss. 2003). Our review is highly deferential to the attorney, with a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. ***Howard v. State***, 853 So. 2d 781, 796 (Miss. 2003) (citing ***Hiter v. State***, 660 So. 2d 961, 965 (Miss. 1995)). However, an attorney's lapse must be viewed in light of the nature and seriousness of the charges and the potential penalty. ***State v. Tokman***, 564 So. 2d 1339, 1343 (Miss. 1990) (citing ***Washington v. Watkins***, 655 F.2d 1346, 1356-57 (5th Cir. 1981)).

¶22. The Supreme Court further stated in ***Strickland,*** 466 U.S. at 696, that "in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules." The Court elaborated on this as follows:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Strickland, 466 U.S. at 697. After review of the record and pertinent authorities we find that we need only consider the element of prejudice to resolve the question of ineffective assistance of counsel in this case.

¶23. Lee Bailey received incomplete copies of the Discharge Summary and a 1988 Psychological Report and never obtained complete copies. The Discharge Summary mentioned that Doss's "legal problems stem from robberies," that he drank alcohol regularly and had tried other drugs, and that he had an estimated IQ of 80. The Discharge Summary further stated that Doss had done "relatively well" in the program and he had a favorable prognosis.

¶24. The 1988 Psychological Report stated that Doss had been placed on probation with the Calhoun County Youth Court as a result of guilty pleas to breaking and entering, possession of marijuana, and causing a family disturbance. It also mentioned that Doss had

robbed an elderly man in Chicago. It mentioned that Doss had primarily attended special-education classes in Chicago, but had been mainstreamed into some regular classes in junior high school, where he had achieved some success. It stated that Doss wanted to go back to Chicago. It stated that Doss had an IQ of 71 after testing. It further provided that Doss's mental difficulties might have an organic basis. The report recommended more special-education classes for Doss. The report did not mention Sadie Doss's drinking problems and the terrible existence she described living with Sam Brown in Chicago.

¶25. Doss's school records from Chicago indicated that he had attended some special-education classes, and that he had failed all courses but one in 1987-88. Doss's medical records from Chicago indicate that he had been hit in the ear or head with a pipe in 1986.

¶26. In ***Ross***, 954 So. 2d at 1006, counsel failed to investigate Ross's record as an inmate, which led to the admission of highly prejudicial evidence concerning Ross's behavior while an inmate. Ross also allegedly suffered from severe psychological problems. ***Id.*** *See also* ***State v. Tokman,*** 564 So. 2d 1339 (Miss. 1990) (trial counsel failed to have psychological tests done despite court order providing for such; counsel further called no witnesses during sentencing phase and did no investigation for mitigating evidence); ***Rompilla v. Beard***, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (trial counsel failed to find evidence of past alcohol and physical abuse, and failed to examine court file on Rompilla's previous conviction despite notice from prosecutors that it would be used as aggravator and character evidence); ***Lockett v. Anderson***, 230 F.3d 695 (5th Cir. 2000) (trial counsel failed to investigate and find substantial evidence of brain damage and delusional behavior); ***Wiggins***

v. Smith*,* 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (history of homelessness and repeated sexual assault or abuse, along with counsel's failure to use forensic social worker provided by state).

¶27. Counsel could have put on evidence of Doss's mental and educational problems, history of substance abuse, and troubled childhood. If he had, the details of Doss's criminal activity and drug use also would have been admitted. We find that the mitigation evidence potentially available to Doss, taken as a whole, is not as compelling as that seen in ***Wiggins***, ***Ross***, ***Rompilla*** or ***Lockett***. We find no reasonable probability that, but for Lee Bailey's failure to produce for the jury all potentially available mitigating evidence, the result of Doss's sentencing hearing would have been different. The circuit court's finding that Doss did not suffer prejudice was not clearly erroneous. The circuit court's ultimate finding that Doss did not receive ineffective assistance of counsel is affirmed.

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

¶28. In his request for post-conviction relief filed in 2003 with this Court, Doss relied on the neuropsychological examination performed by Dr. Michael Gelbort and the affidavits of Dr. James Merikangas, a psychiatrist, and Jeffrey Eno, a social worker. Dr. Gelbort tested Doss in May 2003 and found "that he qualified, in terms of intellectual impairment, for a diagnosis of Mental Retardation." ***Doss***, 882 So. 2d at 192. Merikangas found that the 1988 Psychological Report on Doss "suggests organic brain damage and mental retardation." ***Id***. Eno provided a life history of Doss, filled with many violent and traumatic episodes.

¶29. In consideration of Doss's allegation of mental retardation this Court relied on its decision in ***Chase v. State***, 873 So. 2d 1013 (Miss. 2004). This Court in ***Chase*** attempted to clarify the application of ***Atkins v. Virginia*** in the trial courts as follows:

> The ***Atkins*** majority cited, with approval, two specific, almost identical, definitions of "mental retardation." The first was provided by the American Association on Mental Retardation (AAMR):
>
> > *Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.
>
> ***Atkins***, 536 U.S. at 308 n.3, *citing* Mental Retardation: Definition, Classification, and Systems of Support 5 (9th ed. 1992). The second was provided by The American Psychiatric Association:
>
> > "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." Diagnostic and Statistical Manual of Mental Disorders 39 (4th ed. 2000).
>
> *Id.*
>
> The Diagnostic and Statistical Manual of Mental Disorders, from which the American Psychiatric Association definition is quoted, further states that "mild" mental retardation is typically used to describe persons with an IQ level of 50-55 to approximately 70. *Id.* at 42-43. The Manual further provides,

> however, that mental retardation may, under certain conditions, be present in an individual with an IQ of up to 75. *Id.* at 40. Additionally, according to the ***Atkins*** majority, "it is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, *which is typically considered the cutoff IQ score* for the intellectual function prong of the mental retardation definition." *Id. citing* 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 2952 (B. Sadock & V. Sadock eds 7th ed. 2000) (emphasis added).
>
> These definitions were previously adopted and approved by this Court in ***Foster v. State***, 848 So. 2d 172 (Miss. 2003). This Court further held in ***Foster*** that
>
> > the Minnesota Multiphasic Personality Inventory-II (MMPI-II) is to be administered since its associated validity scales make the test best suited to detect malingering. . . . Foster must prove that he meets the applicable standard by a preponderance of the evidence. . . . This issue will be considered and decided by the circuit court without a jury.
>
> ***Id.*** at 175.
>
> These definitions, approved in ***Atkins***, and adopted in ***Foster***, together with the MMPI-II, provide a clear standard to be used in this State by our trial courts in determining whether, for Eighth Amendment purposes, a criminal defendant is mentally retarded. The trial judge will make such determination, by a preponderance of the evidence, after receiving evidence presented by the defendant and the State.

Chase, 873 So. 2d at 1027-1028. The Court added that an expert should use "any other tests and procedures permitted under the Mississippi Rules of Evidence and deemed necessary to assist the expert and the trial court in forming an opinion as to whether the defendant is malingering." ***Chase***, 873 So. 2d at 1028 n.19.

¶30. This Court then provided the procedures to be used as follows:

> We hold that no defendant may be adjudged mentally retarded for purposes of the Eighth Amendment, unless such defendant produces, at a minimum, an expert who expresses an opinion, to a reasonable degree of certainty, that:

> 1. The defendant is mentally retarded, as that term is defined by the American Association on Mental Retardation and/or The American Psychiatric Association;
>
> 2. The defendant has completed the Minnesota Multi phasic Personality Inventory-II (MMPI-II) and/or other similar tests, and the defendant is not malingering.
>
> Such expert must be a licensed psychologist or psychiatrist, qualified as an expert in the field of assessing mental retardation, and further qualified as an expert in the administration and interpretation of tests, and in the evaluation of persons, for purposes of determining mental retardation.
>
> Upon meeting this initial requirement to go forward, the defendant may present such other opinions and evidence as the trial court may allow pursuant to the Mississippi Rules of Evidence.
>
> Thereafter, the State may offer evidence, and the matter should proceed as other evidentiary hearings on motions.
>
> At the conclusion of the hearing, the trial court must determine whether the defendant has established, by a preponderance of the evidence, that the defendant is mentally retarded. The factors to be considered by the trial court are the expert opinions offered by the parties, and other evidence of limitations, or lack thereof, in the adaptive skill areas listed in the definitions of mental retardation approved in ***Atkins***, and discussed above. Upon making such determination, the trial court shall place in the record its finding and the factual basis therefor.

Chase, 873 So. 2d at 1029.

¶31. This Court considered the evidence of mental retardation presented by Doss in his request for post-conviction relief, and also noted that the State had raised "numerous legitimate questions concerning Doss's claim, including his supporting expert testimony, the alleged facts of his upbringing, and the timing of his claim of retardation." ***Doss***, 882 So. 2d

at 193. This Court found that Doss should be granted leave to present this claim in the trial court, and the State would be allowed to impeach Doss on the questions it had raised.

¶32. In July 2004, the Grenada County Circuit Court ordered that Doss be sent to the Mississippi State Hospital for a forensic mental health evaluation to assist the circuit court in determining whether Doss was mentally retarded as defined in ***Atkins*** and ***Chase***.

¶33. Doss was examined at Whitfield by Drs. Gilbert MacVaugh, III, Criss Lott, John Montgomery, and Reb McMichael ("Whitfield doctors") in November 2005. They found, to a reasonable degree of psychological and psychiatric certainty, that Doss was not mentally retarded as set forth in ***Atkins*** and ***Chase***. The examination found that Doss had an overall IQ score of 71 and was in the borderline range of intellectual functioning. The evaluation stated that Doss's true IQ score may have been higher, but malingering or fatigue may have factored in the scoring.

¶34. The evaluation further stated that Doss did not have a history of significant deficits in adaptive functioning due to intellectual limitations. The evaluation noted that Doss had worked, cared for himself, and met his own basic needs, and had shown no signs of significant deficits as far as social/interpersonal skills, communication, use of community resources or leisure activities. The evaluation stated that Doss's suggested problems in areas such as functional academics, work, self-direction, health, and safety were better explained by his chaotic upbringing than by intellectual deficits. The evaluation found that Doss was "fairly adept in coping with the life demands for someone his age in that environment."

¶35. Finally, the evaluation stated that, despite the presence of several risk factors for mental retardation, Doss had at least two prior psychological evaluations at the age of fifteen, neither of which resulted in a diagnosis of mental retardation. The evaluations found that Doss did not demonstrate deficits consistent with mental retardation prior to reaching the age of eighteen.

¶36. Doss also was examined by Dr. Daniel Grant in May 2005. Grant found that Doss's test results were similar to test results obtained by other psychologists, which indicated consistent effort and a lack of malingering. Grant found that as the complexity of a task increased, Doss's level of performance decreased. Grant agreed with earlier findings of Dr. Gelbort that Doss's test results and past history were consistent with "neuropsychological impairments and probable organic brain dysfunction" and were "likely both congenital and acquired at an early age." Grant found that Doss's IQ score of 71, recorded when he was fifteen, would actually be in the 66-to-67 score range when corrected. Grant found that the tests he administered clearly placed Doss's level of functioning within the mild mental retardation range of intelligence, and also showed significant impairments in adaptive behavior skills. Grant found that Doss's test results were "consistent with the diagnosis of Mild Mental Retardation as defined in the Diagnostic and Statistical Manual of Mental Disorders Fourth Edition - Text Revision, Mental Retardation Definitions, Classification, and Supports, Tenth Edition published by the American Association on Mental Retardation and as described by the United States Supreme Court in the Atkins decision."

¶37. Doss also was examined by Dr. Timothy Summers in July 2006. Summers did not perform any testing on Doss but relied on prior tests and reports by others. Summers found that Doss was mentally retarded "as defined in Atkins v. Virginia as manifested by an IQ of 71 and limitations in adaptive functioning in at least two areas of functioning significantly lower than his peers of equal age prior to the time that he was 18." Summers further found that Doss "meets the mental retardation criteria(s) as defined by the American Association of Mental Retardation, which defines mental retardation as an IQ between 70-75 as well as adaptional functional limitations described above along with identification of sub average intellectual functioning prior to age 18." Summers found that Doss "experienced significant limitations in his effectiveness in meeting the day to day challenges in learning, personal independence and social responsibility." Summers found that Doss was easily influenced and had poor social judgment regarding association with negative peer groups. Summers concluded that Doss would likely be the least smart person in any peer group and had problems with logic, foresight, strategic thinking, and understanding consequences.

¶38. The circuit court considered the expert testimony and lay witnesses presented by the parties and found that Doss was not mentally retarded. The circuit court found the Whitfield doctors, who had determined that Doss was not retarded, were more credible than Drs. Summers and Grant, who had found that Doss was retarded. The record revealed that Dr. Grant had not administered any tests to show lack of malingering, as required by ***Chase***. The court noted that Dr. Grant had determined that Doss's consistent test scores over a period

of time were proof of absence of malingering. The court also found that Dr. Summers did not test for malingering.

¶39. The circuit court noted that all of the examiners opined that Doss met the first requirement of mental retardation, that he displayed subaverage intellectual functioning, and as a result the court analyzed only the issue of deficits in adaptive functioning. The court noted that Drs. Grant and Summers both had made the required findings in this area to determine that Doss was retarded. It further found that Dr. Grant had relied strictly on tests he had administered to Doss and had spoken to no family members or other persons besides Doss. The court found that the tests used by Grant had not been normed for prison populations. Dr. Summers made his finding based on his interview with Doss, affidavits from family members and prior testing.

¶40. The circuit court noted that Drs. MacVaugh and Lott had interviewed Doss, numerous family members, and others who had observed him in the past. Doss was given two tests by the examiners at the Mississippi State Hospital to assess malingering, one of which indicted possible malingering. The court noted that Drs. MacVaugh and Lott had determined that Doss did not have deficits in adaptive functioning, and that Doss had held legal jobs and had obtained money illegally, saved and spent his money, bought his clothes and prepared his food, played sports, and engaged in personal relationships. The court found the Whitfield doctors' "approach and the methodology that they used is much more compelling than the approach used by experts offered by Doss." The circuit court adopted the findings of Drs.

MacVaugh, Lott and McMichael, and found that Doss had failed to prove, by a preponderance of the evidence, that he was mentally retarded.

¶41. Doss argues that the circuit court erroneously rejected Dr. Grant's finding of mental retardation because Dr. Grant failed to test for malingering as required by ***Chase***. According to Dr. Grant, he determined that Doss was not malingering by the consistency of the scores of tests taken in the past. While the circuit court certainly noted this action or inaction by Dr. Grant, this was not the only factor in its decision to reject Dr. Grant's findings. Further, it was an appropriate consideration for the court when reviewing the totality of the evidence presented.

¶42. Doss next argues that the circuit court erred in accepting the opinions of Drs. MacVaugh and Lott over that of Dr. Grant on the issue of adaptive functioning, even though Dr. Grant was the only one to administer adaptive-functioning tests. The circuit court found that the tests administered by Dr. Grant were used to test the independent living skills of elderly individuals and retarded individuals with a mean age of thirty-four, but the tests had not been normed for persons in prison populations. Dr. Grant did not speak to any family members or other persons for information on Doss. Drs. MacVaugh and Lott used interviews with Doss's relatives and others who had observed Doss's past behavior to determine that he did not have deficits in adaptive behavior.

¶43. Doss next argues that the tenth edition of Mental Retardation: Definition, Classification, Assistance, and Support, by the AAMR, specifically requires adaptive-functioning testing in order to determine mental retardation, and Dr. Grant's opinion, which

was based on the tenth edition of Mental Retardation, and included such testing, is the only credible opinion given at Doss's hearing.

¶44. In ***Lynch v. State***, 951 So. 2d 549 (Miss. 2007), this Court clarified its position on ***Chase*** and the evolving nature of testing for and defining mental retardation:

> Accordingly, in Mississippi it is acceptable to utilize the MMPI-II and/or other similar tests. ***Id.*** at 1029. This Court did not intend by its holding to declare the MMPI-II or any one test as exclusively sufficient. Having a variety of tests at their disposal, courts are provided with a safeguard from possible manipulation of results and diminished accuracy which might result if courts are limited to one test. The United States Supreme Court mentioned the Wechsler Adult Intelligence Scales Test. ***See Atkins***, 536 U.S. at 309 n.5. Other tests, as suggested by mental health experts, include the Structured Interview of Reported Symptoms (SIRS), the Validity Indicator Profile (VIP), and the Test of Memory Malingering (TOMM). *See* Douglass Mossman, *Atkins v. Virginia: A Psychiatric Can of Worms* 33 N.M.L. Rev. 255, 277-78 (Spring 2003).
>
> The Court's interpretation in this case as to the proper test to be administered with regard to an ***Atkins*** hearing supercedes any contrary decisions. This Court neither endorses the MMPI-II as the best test nor declares that it is a required test, and decisions that state otherwise are expressly overruled. *See, e.g.* ***Scott v. State***, 938 So. 2d 1233, 1238 (Miss. 2006) (holding that despite the doctor's use of a battery of other tests, administration of the MMPI-II is required prior to an adjudication of a claim of mental retardation); ***Goodin v. State***, 856 So. 2d 267, 277 (Miss. 2003) (declaring that the MMPI-II is to be administered for a determination of mental retardation since it is the best test to detect malingering). *Our trial courts are free to use any of the above listed and approved tests or other approved tests not listed to determine mental retardation and/or malingering by a defendant.* (Emphasis added).

Lynch, 951 So. 2d at 556-57. The trial court did not have the benefit of ***Lynch,*** as it was decided after the circuit court issued its opinion on Doss's mental retardation. The Whitfield doctors followed ***Chase*** as this Court directed in ***Doss***, 882 So. 2d at 190-91, 192 n.1, and based their opinion on the ninth edition of Mental Retardation. According to ***Lynch***, the

experts who examined Doss and the circuit court would have been free to use or consider any approved test "to determine mental retardation and/or malingering by a defendant." *See* ***Lynch,*** 951 So. 2d at 557.

¶45. This Court recently noted the ***Lynch*** decision in ***Ross v. State,*** 954 So. 2d 968 (Miss. 2007), and ***King v. State***, 960 So. 2d 413 (Miss. 2007). Both Ross's and King's evidentiary hearings were held before this Court's decision in ***Chase,*** and this Court upheld, in both Ross's and King's appeals, findings that neither was retarded. After weighing the evidence presented by each of the expert witness, the circuit court found the Whitfield doctors to be more credible and found that Doss was not mentally retarded. A review of the record reveals that considerable evidence was presented which supported the trial court's determination. The circuit court's finding that Doss had failed to prove, to a preponderance of the evidence, that he was mentally retarded, is not clearly erroneous.

¶46. Finally, Doss argues that the circuit court unfairly maligned Dr. Grant in its opinion. Doss asks that this Court vacate that portion of the circuit court's opinion. The Court denies this particular request for relief.

CONCLUSION

¶47. The circuit court found that Anthony Doss did not receive ineffective assistance of counsel. The circuit court found no deficient conduct by trial counsel, and that even if counsel was deficient, Doss was not prejudiced by such conduct within the meaning of ***Strickland v. Washington***. We agree that there is not a reasonable probability that, but for trial counsel's conduct, the result of the sentencing hearing would have been different. The

circuit court further found that Anthony Doss was not mentally retarded. Doss and the State submitted expert testimony on this issue, and the circuit court found the expert testimony provided by the State to be more credible. This Court affirms judgment of the Circuit Court of Grenada County.

¶48. **AFFIRMED**.

SMITH, C.J., EASLEY, CARLSON AND RANDOLPH, JJ., CONCUR. DIAZ, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY GRAVES, J.; DICKINSON, J., JOINS IN PART. WALLER, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY DICKINSON, J.; DIAZ, P.J., AND GRAVES, J., JOIN IN PART.

DIAZ, PRESIDING JUSTICE, DISSENTING:

¶49. Although I agree wholeheartedly with Presiding Justice Waller's opinion, insofar as he would hold that Doss' counsel was constitutionally ineffective, I write separately to address Doss' mental retardation and what I view as this case's most fundamental flaw.

I.

¶50. The majority's analysis on Doss' claim of mental retardation is grossly inadequate. First, the majority opinion misrepresents the facts by suggesting that the State's experts administered tests that found possible malingering as to Doss' adaptive functioning. In fact, not one expert found that Doss was malingering regarding the adaptive-functioning prong of ***Chase***. As the report clearly states, the tests given by the state examiners were used to assess malingering of *cognitive* deficits. In other words, the tests impacted only the examiners' assessment of Doss' IQ. Because all of the experts agreed that Doss displayed

below-average intellectual functioning, these tests do not impact the issue of Doss' adaptive functioning.

¶51. Second, the majority endorses the trial court's holding that ***Chase*** requires separate tests for malingering. Nothing in our previous opinions suggests that such a separate psychological test is required. By accepting the trial court's rationale, today's opinion makes a significant change in our ***Atkins*** jurisprudence and reaches beyond the realm of this Court's competence.

¶52. Finally, the majority finds that the experts "would have been free to consider any approved test." However, it is clear from the record that the State's experts were under the erroneous assumption that they were *required* to use the older definition of adaptive functioning. While I would not tie the hands of medical experts by requiring specific testing, I am troubled that the State's experts believed that they could not utilize the most current medical testing standards. Even more troubling is Dr. MacVaugh's assertion that using the latest definition "could possibly change the diagnosis."

¶53. Because of the serious nature of death-penalty cases, and our heightened review associated therewith, *see* ***Ross v. State***, 954 So. 2d 968, 986 (Miss. 2007), I would remand for an additional evidentiary hearing to allow the State's experts the opportunity to reconsider implementing the latest definition of adaptive functioning.

II.

¶54. However, today's decision compels me to make a closer examination of the application of the death penalty in Mississippi.

¶55. Earlier this year, in a case that presented to the United States Supreme Court the constitutionality of a three-drug formula commonly used in lethal injections, Justice Stevens suggested that the time had come for a national reexamination of the propriety of capital punishment. ***Baze v. Rees***, 128 S. Ct. 1520, 1548-49, ___ U.S. ___, 170 L. Ed. 420 (2008) (Stevens, J., concurring in the judgment). After more than 37 years of service to the federal judiciary, including more than 32 years at the nation's high court, Justice Stevens concluded that the imposition of death is "[a] penalty with such negligible returns to the State" that it necessarily is "patently excessive and cruel and unusual punishment violative of the Eighth Amendment." ***Baze***, 128 S. Ct. at 1551 (Stevens, J., concurring in the judgment).

¶56. For my part, I join that conversation today. My own experience on the bench is neither so seasoned nor, humility commands, so learned as that of Justice Stevens. I have served the judiciary of this state for nearly 14 years, almost nine of which have been spent at this honorable Court. During that tenure, I have considered challenges to capital sentences dozens of times, each as soberly as I know how. I have voted many times to affirm sentences of death, *see, e.g.*, ***Eskridge v. State***, 765 So. 2d 508 (Miss. 2000), and frequently I have held against the argument that the imposition of capital punishment constitutes cruel and unusual punishment. *See, e.g.*, ***Snow v. State***, 800 So. 2d 472 (Miss. 2001).

¶57. But my unique life experiences have shown me – to a greater degree, I submit respectfully, than any other justice voting today – the potentially oppressive power of government prosecution. For nearly two years, *see* ***Turner v. State***, 953 So. 2d 1063 (Miss. 2007), I have chosen to advocate for stricter adherence to the guidelines that we have

established to limit arbitrary or disproportionate sentences. *See, e.g.*, ***King v. State***, 960 So. 2d 413, 447 (Diaz, P.J., dissenting) (arguing for remand to trial court for evidentiary hearing on defendant's mental retardation).

¶58. I have concluded, though, that even this may not be enough to satisfy the demands of our state and federal constitutions that death not be meted out arbitrarily. *See* ***Furman v. Georgia***, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

III.

¶59. The Eighth Amendment's prohibition against cruel and unusual punishment requires that "capital punishment be imposed fairly, and with reasonable consistency, or not at all." ***Eddings v. Oklahoma***, 455 U.S. 104, 112, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). The U.S. Supreme Court fully confronted this demand for the first time in the landmark case ***Furman v. Georgia***, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 356 (1972). Since then, the courts of our nation have struggled without ceasing to create a system that engenders consistency while preserving the availability of capital punishment. Four years after ***Furman***, the Court found that Georgia's bifurcated capital-sentencing scheme sufficiently limited the risk of arbitrary application, ***Gregg v. Georgia***, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), but held that same day that a state could not seek to eliminate arbitrariness altogether by applying the death penalty across the board in all first-degree murder cases. ***Woodson v. North Carolina***, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

¶60. The high court based its ***Woodson*** holding on, *inter alia*, an altogether different concern – that the Eighth Amendment recognizes our society's "fundamental respect for

humanity," and that this concern requires individualized attention to "the character and record of the individual offender and the circumstances of the particular offense . . . ." ***Id.*** at 304. This charge necessarily serves to "circumscribe the class of persons eligible for the death penalty." ***Zant v. Stephens***, 462 U.S. 862, 878, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

¶61. Mississippi has addressed these concerns by requiring that capital-murder defendants be afforded separate hearings on the issues of guilt and punishment and that jurors limit their consideration of death-qualifying aggravators to those enumerated by statute. Miss. Code Ann. § 99-19-101 (Rev. 2007). But this scheme, like every similar system set up across the nation, does not answer Eighth Amendment concerns – it exacerbates them. By creating objective standards for jurors to follow during their deliberations upon capital defendants' fates, we sacrifice jury discretion for uniformity; by allowing jurors greater discretion to reach their decisions, we sacrifice consistency for arbitrariness. The perverse result is that our society's most important question is left to the criminal justice system's most unworkable feature.[1] *See* ***Penry v. Lynaugh***, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

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[1] In fairness, it must be noted that the unworkability of our capital punishment system is due in no small part to the State's utter inattention to publicly funded defense. The Mississippi indigent defense system is wholly inadequate to provide meaningful representation to the poorest criminal defendants. As Justice Graves has stated, "the State of Mississippi has failed to establish or fund a system of indigent defense that is equipped to provide all defendants with the tools of an adequate defense, and has therefore fallen short of its constitutional obligation." ***Quitman County v. State***, 910 So. 2d 1032, 1052 (Miss. 2005) (Graves, J., dissenting). Amazingly, in all criminal cases, court-appointed attorneys are entitled to no more than $1,000 compensation. Miss. Code Ann. § 99-15-17 (Rev. 2007). This problem is hardly a new one; in 1994, Justice Blackmun noted that

¶62. This quandary is not a new one, and its paradox has led to results so bizarre as the open endorsement of settling this tension by cutting one of the ropes. *See* ***Walton v. Arizona***, 497 U.S. 639, 656, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990) (Scalia, J., concurring in part and concurring in the judgment) (announcing that he would ignore forthwith the concerns enunciated in ***Woodson***, 428 U.S. 280, and permit across-the-board capital punishment). But pretending that this paradox has disappeared conveniently is no more a solution than is the unaddressed continuation of this life-and-death juggling act. "In my view, the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them," ***Callins v. Collins***, 510 U.S. 1141, 1157, 114 S. Ct. 1127, 127 L. Ed. 2d 435 (1994) (Blackmun, J., dissenting from denial of certiorari), even if this requires us to "accept[ ] the fact that the death penalty cannot be administered in accord with our Constitution." ***Id.***

¶63. The arbitrariness inherent to our capital sentencing system is no mere academic concern without real-world consequences. Every Mississippian is acutely aware of this state's history of abhorrent human-rights violations. Though we take great pride in each step taken away from that dark past, we do so under the heavy burden of a dishonorable legacy passed down to us by shortsighted forefathers. The names Roy Bryant, Byron de la Beckwith, and Edgar Killen are but a sample of those that litter the pages of history books marking the

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Mississippi's capital defense attorneys were compensated at an average rate of $11.75 per hour. ***McFarland v. Scott***, 512 U.S. 1256, 1258, 114 S. Ct. 2785, 129 L. Ed. 2d 896 (1994) (Blackmun, J., dissenting from denial of certiorari).

days when the courts of this state too often served as an ignoble vehicle for that legacy's perseverance. Certainly, no reasonable person can argue that the Mississippi of the Twenty-First Century bears any resemblance to the state whose purported system of justice turned a blind eye to the sins of these men and wrongly deprived due process to others on the basis of skin color.

¶64. But our courts are subject to fallibility no less than any of man's institutions, and racial discrimination in the courtroom is no mere bit of ancient history. Only a generation ago, the U.S. Supreme Court addressed a case in which the defendant, a black man sentenced to death for murder, produced the most comprehensive, scientific study of its kind ever compiled to date and showed that the race of his white victim made his Georgia trial court 22 times more likely to impose a death sentence. ***McCleskey v. Kemp***, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). A five-justice majority at the high court nevertheless found no constitutional violation, apparently for fear that any other outcome would endanger the continued existence of American capital punishment. *See* Edward Lazarus, *Mortal Combat: How the Death Penalty Polarized the Supreme Court, 1985-1986*, Washington Monthly (June 1988). The ***McCleskey*** Court's ultimate holding notwithstanding, the study's findings speak for themselves and echo even today; in a state where roughly one-third of citizens are African Americans, more than half of Mississippi's death row inmates are black. Death Row Inmates, Mississippi Department of Corrections, http://www.mdoc.state.ms.us/death_row_inmates.htm (last visited Nov. 26, 2008).

¶65. But even the specter of racially motivated executions pales in comparison to the most terrifying possibility in a system where the death penalty is dealt arbitrarily: innocent men can be, and have been, sentenced to die for crimes they did not commit. In 2008 alone, two men – both black – convicted of murders in Mississippi in the mid-1990s have been exonerated fully by a non-profit group that investigates such injustices. *See* Know the Cases, The Innocence Project, http://www.innocenceproject.org/know/Browse-Profiles.php (last visited Nov. 25, 2008). One of these men, Kennedy Brewer, spent an astonishing six years on death row. ***Id.*** Just as a cockroach scurrying across a kitchen floor at night invariably proves the presence of thousands unseen, these cases leave little room for doubt that innocent men, at unknown and terrible moments in our history, have gone unexonerated and been sent baselessly to their deaths.

IV.

¶66. When our founding fathers ratified the federal and state constitutions in 1788 and 1890, respectively, they did not consider all forms of the death penalty to be violative of our bans on cruel and unusual punishment. *See, e.g.*, ***Baze v. Rees***, 128 S. Ct. 1520, 1556-60, ___ U.S. ___, 170 L. Ed. 2d 420 (2008) (Thomas, J., concurring in the judgment). But just as we would disagree with our framers that, for example, the execution of a child necessarily amounts to a violation of the Eighth Amendment, ***Roper v. Simmons***, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), our society's notions of what is "cruel and unusual" change with time. This recognition has led the high court to return time and again to the Eighth Amendment's central axiom – "that the words of the Amendment are not precise, and that

their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." ***Trop v. Dulles***, 356 U.S. 86, 100-01, 78 S. Ct. 590, 2 L. Ed. 630 (1958). This determination cannot be rendered responsibly simply by lifting a wetted judicial finger into the air to gauge the current direction and speed of the popular winds, but instead rests heavily on a review of objective indicia of societal progress. ***Roper***, 543 U.S. at 564.

¶67. National polls reveal a clear trend of disfavor toward the death penalty. Nearly 15 years ago, some 80 percent of Americans favored imposition of capital punishment against convicted murderers; since then, that number has fallen consistently and today is closer to 60 percent. *See* Gallup Poll for Oct. 3-5, 2008, PollingReport.com, http://pollingreport.com/crime.htm (last visited Nov. 25, 2008). A bare minimum of 54 percent believes that the punishment is meted out fairly, ***id.***, and when given a choice between the death penalty and life in prison, fewer than half of respondents support capital punishment. Quinnipiac University Poll for July 8-13, 2008, PollingReport.com, http://pollingreport.com/crime.htm (last visited Nov. 25, 2008).

¶68. No such scientific data is available to measure Mississippians' views of the death penalty, but a review of the state's capital murder convictions demonstrates a growing reluctance to impose society's ultimate punishment. Statistics provided by the Mississippi Department of Corrections show that in 2003, juries leveled death sentences against three of the state's 21 capital murder convicts, or in 14.3 percent of cases. Since then, the percentage of capital murder convictions garnering death sentences has fallen in four of five years. And

since 2007, juries have returned capital sentences at just two of 49 opportunities, or for just over 4 percent of capital murder convictions. This year, although juries have convicted 27 defendants for capital murder, a single death sentence has yet to be handed down.

¶69. But this trend is not limited merely to the past half-decade. The past century of Mississippi's history is replete with attempt after attempt to reconcile the death penalty with our citizens' concerns over the gruesomeness of the practice. In 1940, Mississippi abandoned the often-public spectacle of hanging in favor of the more private electric chair. The state cast aside that barbaric method in the mid-1950s in favor of the supposedly more humane gas chamber, but the Legislature phased out the chamber after 1989 and instituted the current system of lethal injection. *See* Mississippi and the Death Penalty, Mississippi Department of Corrections, http://www.mdoc.state.ms.us/mississippi_and_the_death_penalt.htm (last visited Nov. 25, 2008). Each time, the people of Mississippi, by and through their elected and appointed officials, expressed a repulsion toward the death mechanism *du jour* and demanded a more "humane" system. And in doing so, Mississippians collectively and implicitly have recognized over the last century the same conclusion being reached by more and more Americans – that no manner of execution, be it publicly or privately administered, physically or chemically induced, comports with the sensibilities of Mississippians' maturing society.

V.

¶70. We have held that the death penalty uniquely serves the goals of incapacitation, deterrence, and retribution against capital-murder defendants. ***Leatherwood v. State***, 435 So. 2d 645, 661 (Miss. 1983). Our Court is hardly the only bench to enunciate such bases for this

ultimate punishment, but as Justice Stevens ably illustrated in ***Baze***, this argument rings hollow upon even the most superficial inspection. ***Baze v. Rees***, 128 S. Ct. 1520, 1547, ___ U.S. ___, 170 L. Ed. 420 (2008) (Stevens, J., concurring in the judgment). Mississippi law explicitly limits trial courts to two penalties for capital murder – death or life in prison. Miss. Code Ann. § 97-3-21 (Rev. 2007). Incapacitation, therefore, is no longer a rational basis for Mississippi's adherence to capital punishment. Likewise, the death penalty has not been shown to deter would-be murderers. Scholarship on the issue is mixed, at best, *see* ***Baze***, 128 S. Ct. at 1547 (Stevens, J., concurring in the judgment), and a review of recent Mississippi history suggests not even a hint of deterrence. Of the 310 capital murder convictions handed down since 1979, 232 of them – just under 75 percent – have been reached since 2000. Since 2006, a full 70 capital murder defendants have been convicted, accounting for more than 22 percent of such convictions over the past 30 years. No more than a glance at this Court's docket is needed to snuff out any contention that the availability of the death penalty has discouraged murder in this state. *See, e.g.*, ***Ruffin v. State***, 2008 Miss. LEXIS 518 (Miss. Oct. 23, 2008) (affirming conviction of capital murder); ***Page v. State***, 990 So. 2d 760 (Miss. 2008) (affirming conviction of murder); ***Bennett v. State***, 2008 Miss. LEXIS 417 (Miss. Aug. 28, 2008) (granting, in part, petition for leave to seek post-conviction relief); ***Howell v. State***, 989 So. 2d 372 (Miss. 2008) (granting, in part, petition for post-conviction relief); ***McCune v. State***, 989 So. 2d 310 (Miss. 2008) (affirming conviction of murder); ***Chamberlin v. State***, 989 So. 2d 320 (Miss. 2008) (affirming conviction of capital murder); ***Smith v. State***, 986

So. 2d 290 (Miss. 2008) (affirming conviction of capital murder); ***Ousley v. State***, 984 So. 2d 985 (Miss. 2008) (affirming conviction of murder).[2]

¶71. With notions of incapacitation and deterrence debunked, all that remains to justify our system of capital punishment is the quest for revenge, and I cannot find, as a matter of law, that the thirst for vengeance is a legitimate state interest. *See* ***Tison v. Arizona***, 481 U.S. 137, 181 n.19, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987) (Brennan, J., dissenting). Even if it is, capital punishment's benefit over life imprisonment in society's quest for revenge is so minimal that it cannot possibly justify the burden that it imposes in outright heinousness.

¶72. The death penalty is, therefore, reduced to "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment." ***Furman v. Georgia***, 408 U.S. 238, 312, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (White, J., concurring and casting decisive vote). In these 36 years since the high court ruled in ***Furman***, American and Mississippian experience have served only to underscore this constitutional truism, and history proffers no reason to believe that the next 36 will not follow accordingly. I cast no illusions for myself that my conclusion will persuade a majority of this Court's members, whose sober judgments in capital cases I deeply respect, even as I disagree just as deeply. Neither do I doubt that, for the time being, Justice Stevens' decision to "no longer . . . tinker with the machinery of

[2] This sample represents only decisions that we have rendered since June in murder and capital murder cases. I could go on, but surely the point has been made.

death," ***Callins v. Collins***, 510 U.S. 1141, 1145, 114 S. Ct. 1127, 127 L. Ed. 2d 435 (1994) (Blackmun, J., dissenting from denial of certiorari), will fall upon unconvinced colleagues at the high court. But I am convinced that the progress of our maturing society is pointed toward a day when our nation and state recognize that, even as murderers commit the most cruel and unusual crime, so too do executioners render cruel and unusual punishment.

¶73. But because I would make today that day, I dissent.

GRAVES, J., JOINS THIS OPINION. DICKINSON, J., JOINS THIS OPINION IN PART.

WALLER, PRESIDING JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:

¶74. I concur with the majority insofar as it finds that Doss was not mentally retarded under ***Atkins v. Virginia***, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). But because I would find that Doss received ineffective assistance of counsel at the sentencing phase of trial, I would reverse and remand for a new trial on sentencing.

¶75. The facts of this case are analogous to those in ***Rompilla v. Beard***, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 360 (2005). In ***Rompilla***, the defendant's mitigation evidence consisted of brief testimony from five family members who argued only for residual doubt and asked the jury for mercy. ***Rompilla***, 545 U.S. at 378. Despite knowing that the prosecution intended to introduce a prior conviction as aggravating evidence, defense counsel failed to make reasonable efforts to review Rompilla's prior conviction file. ***Id***. at 389. This file contained "a range of mitigation leads." ***Id***. at 390. It showed that Rompilla was reared in a slum environment; quit school at age sixteen and began a series of incarcerations; was

often assaultive; abused alcohol; suffered from schizophrenia and other disorders; and had a third-grade level of cognition. ***Id***. at 390-91. The Supreme Court found that this information would have led counsel to build a more extensive mitigation case and caused skepticism about the impressions communicated by family members. ***Id***. at 391. With further investigation, postconviction counsel learned that both of Rompilla's parents were severe alcoholics; that his mother drank during her pregnancy with him; that his father was extremely abusive; and that he had been subjected to deplorable, unsanitary living conditions. ***Id***. at 391-92. This undiscovered mitigation evidence, taken as a whole, might have led to a lesser sentence than death. ***Id***. at 393.

¶76. In the case before us, Doss's mother, Sadie Doss, was the only witness who testified at his sentencing hearing. Doss's attorney had psychological, medical, and school records which showed that Doss began drinking at age eleven; had used other drugs, including amphetamines and marijuana; had possibly suffered from psychoactive substance-abuse disorder, adjustment disorder, conduct disorder, impulse-control disorder, and/or personality disorder; had prior offenses, including robberies; had a history of school truancy; attended special-education classes; and had below-average intellectual abilities with an IQ ranging from 71 to 80. A 1988 psychological report from the University of Mississippi noted that "there may be some organic basis to [Doss's] difficulties." It is unclear how much consideration was given to these records, given that certain pages were missing and no apparent effort was made to obtain these pages. One of these missing pages indicated "[f]amily dysfunction" and revealed that Doss had been involved in gang-related activity at

an early age. Counsel instead chose to rely heavily upon his own conversations with Doss[3] and his mother. He did not investigate any potential relatives or prior acquaintances in Chicago, and did not follow up with the witnesses interviewed by the investigator.

¶77. Counsel testified that he strategically chose to withhold the information contained in Doss's records in order to prevent the jury from hearing about Doss's prior offenses. Such decision may very well be within the ambit of prudent trial strategy. But the strategic withholding of this evidence does not take away from the fact that it should have raised red flags that further investigation was warranted. Presumably, additional efforts would have uncovered the impoverished, violent, and abusive environment of Doss's childhood as described by Sandra Price, who lived with Doss during this period.

¶78. No reprieve is offered by the fact that none of the records nor any interviewed witnesses referenced Sadie Doss's drinking problems or the abusive home environment. *See* ***id.*** at 377 ("[E]ven when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial."). Counsel failed to make reasonable efforts to review all the available materials and pursue mitigation leads that were critical to the sentencing phase. *See* ***id***. at 389-93.

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[3] The 1988 psychological report from the North Mississippi Medical Center described Doss as a "poor historian."

¶79. Having never heard all the potentially available mitigating evidence, the jury was not made fully aware of the bleak circumstances surrounding Doss's childhood. Additionally, while not mentally retarded under ***Atkins***, evidence of Doss's diminished mental capabilities would have lent greater weight to the argument that he was susceptible to influence of his co-defendant in carrying out the crime. ***Atkins v. Virginia***, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). I find a reasonable probability that the sentencing hearing might have turned out differently had all the potentially available mitigation evidence been presented. *See* ***id***. at 393.

¶80. For the aforementioned reasons, I respectfully concur in part and dissent in part.

DICKINSON, J., JOINS THIS OPINION. DIAZ, P.J., AND GRAVES, J., JOIN THIS OPINION IN PART.