IN THE SUPREME COURT OF MISSISSIPPI

NO. 2022-DR-00829-SCT

TONY TERRELL CLARK

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	05/12/2022
TRIAL JUDGE:	HON. DEWEY KEY ARTHUR
TRIAL COURT ATTORNEYS:	BENTLEY E. CONNER WILLIAM R. LABARRE WESLEY THOMAS EVANS JOHN K. BRAMLETT, JR. BRYAN P. BUCKLEY MICHAEL GUEST GREGORY VINSON MILES ASHLEY RIDDLE ALLEN
COURT FROM WHICH APPEALED:	MADISON COUNTY CIRCUIT COURT
ATTORNEYS FOR PETITIONER:	OFFICE OF CAPITAL POST CONVICTION COUNSEL BY: KRISSY CASEY NOBILE SARAH BETH WINDHAM BRANDI DENTON GATEWOOD
ATTORNEYS FOR RESPONDENT:	OFFICE OF THE ATTORNEY GENERAL BY: LADONNA C. HOLLAND
NATURE OF THE CASE:	CIVIL - DEATH PENALTY - POST CONVICTION
DISPOSITION:	POST-CONVICTION RELIEF GRANTED IN PART AND DENIED IN PART - 06/19/2025
MOTION FOR REHEARING FILED:	

EN BANC.

SULLIVAN, JUSTICE, FOR THE COURT:

¶1. In 2022, the Court affirmed Tony Clark's convictions of capital murder, attempted murder, and possession of a firearm by a previously convicted felon. ***Clark v. State***, 343 So.

3d 943, 952 (Miss. 2022). The Court, likewise, affirmed Clark's sentence of death by lethal injection. ***Id.*** The United States Supreme Court denied Clark's Petition for Writ of Certiorari in 2023. ***Clark v. Mississippi***, 143 S. Ct. 2406, 216 L. Ed. 2d 1279 (2023). Clark has now filed his first Motion for Post-Conviction Relief, and the State responded. We find the motion should be granted in part and that Clark's case should be remanded to the Madison County Circuit Court for an ***Atkins***[1] hearing. All remaining claims are denied.

DISCUSSION

> Leave [to proceed in the trial court] is granted only if the application, motion, exhibits, and prior record show that the claims are not procedurally barred and that they "present a substantial showing of the denial of a state or federal right." Well-pleaded allegations are accepted as true.
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> In capital cases, non-procedurally barred claims are reviewed using "'heightened scrutiny' under which all bona fide doubts are resolved in favor of the accused." "[W]hat may be harmless error in a case with less at stake becomes reversible error when the penalty is death."

Powers v. State, 371 So. 3d 629, 642 (Miss. 2023) (alterations in original) (quoting ***Evans v. State***, 294 So. 3d 1152, 1157 (Miss. 2020)).

1. *Atkins v. Virginia*

¶2. In 2002, the United Stated Supreme Court held that it is unconstitutional to execute the intellectually disabled. ***Atkins***, 536 U.S. 304. The Supreme Court reasoned that "in the light of our 'evolving standards of decency,' . . . such punishment is excessive" and, therefore, violates the Eighth Amendment. ***Id.*** at 321. In turn, the Court held "***Atkins***

[1] ***Atkins v. Virginia***, 536 U.S. 304, 122 S. Ct. 2242, 1583 L. Ed. 2d 335 (2002).

exempts all intellectually disabled people from execution, even those people who are minimally intellectually disabled." ***Carr v. State***, 283 So. 3d 18, 24 (Miss. 2019)) (citing ***Chase v. State (Chase III)***, 873 So. 2d 1013, 1026 (Miss. 2004)).

¶3. Here, Clark presents two ***Atkins***-based claims: first, his death sentence is unconstitutional because he is intellectually disabled; and second, his trial counsel was ineffective for failing to raise an ***Atkins*** claim. The State maintains Clark has waived his ***Atkins*** claim because it was capable of being raised at trial. Alternatively, the State submits Clark has failed to meet his burden of proving he is entitled to a hearing.

¶4. To establish an intellectual disability for Eighth Amendment purposes, a petitioner must show "significantly subaverage intellectual functioning, significant deficits in adaptive behavior, and manifestation before age eighteen." ***Chase v. State (Chase V)***, 171 So. 3d 463, 470 (Miss. 2015). Along with his motion, Clark produced affidavits from three doctors: (1) Dr. Bhushan Agharker, a medical doctor and forensic psychiatrist; (2) Dr. Robert Ouaou, Ph.D., a forensic neuropsychologist; and (3) Dr. Robert Shaffer, a psychologist (an updated affidavit from Dr. Shaffer was attached to Clark's reply). These affidavits support Clark's claim that he is intellectually disabled. First, he has "significantly subaverage intellectual functioning" as shown by Dr. Ouaou's assessment that Clark has a full scale I.Q. of 65 and Dr. Shaffer's testing that demonstrated an I.Q. of 64. Additional testing showed that Clark is not malingering. As to the second element, "significant deficits in adaptive behavior," Dr. Shaffer concluded Clark has deficiencies in conceptual, executive functioning, and practical

adaptive behaviors. Likewise, he concluded Clark developed these deficiencies "prior to age 18."

¶5. We disagree with the State's assertion that Clark's claim is waived. Applying the waiver bar to such a claim carries with it the risk that an intellectually disabled individual will be executed, which the Eighth Amendment prohibits. "[T]he Constitution 'restrict[s] . . . the State's power to take the life of' *any* intellectually disabled individual." ***Moore v. Texas***, 581 U.S. 1, 12, 137 S. Ct. 1039, 1048, 197 L. Ed. 2d 416 (2017) (second and third alterations in original) (quoting ***Atkins***, 536 U.S. at 321).

¶6. In the post-conviction phase, it is not the Court's "function to determine whether [a petitioner] is [intellectually disabled]." ***Chase III***, 873 So. 2d at 1023. Instead, if the Court decides a petitioner has met the criteria for intellectual disability, the case should be remanded to the trial court for a factual determination. ***Id.***; *see also* ***Batiste v. State***, 184 So. 3d 290, 294 (Miss. 2016) ("'[A] petitioner is entitled to an in-court opportunity to prove his claims if the claims are "procedurally alive 'substantially showing denial of a state or federal right.'" (quoting ***Washington v. State***, 620 So. 2d 966, 968 (Miss. 1993))). We, therefore, find Clark's case should be remanded to the Madison County Circuit Court for an ***Atkins*** hearing.

¶7. Clark also claims his trial counsel was ineffective for failing to raise ***Atkins*** at trial. Because we are remanding the case for an ***Atkins*** hearing, we decline to address this claim.

2. Mitigation Evidence

¶8. Clark claims his trial counsel should have used an independent mental health expert, should have better prepared the court-appointed neutral expert, and should have presented more and/or different mitigation evidence. The Court applies ***Strickland***'s[2] two-prong analysis to ineffective assistance of counsel claims based on counsel's failure to properly present mitigation evidence. ***Ambrose v. State***, 323 So. 3d 482, 487 (Miss. 2021).

¶9. After carefully reviewing the mitigation evidence presented at trial and the additional evidence attached to Clark's motion, we find Clark cannot show his counsel's assistance was ineffective. Trial counsel called the following mitigation witnesses: Dr. Robert Storer; Eddie Clark (Clark's father); Levokas Clark (Clark's brother); Cederic Woodberry (Clark's friend); and Teresa Wilson (Clark's ex-girlfriend). A video of Minnie Clark (Clark's mother) was also played for the jury. These witnesses testified about Clark's difficult childhood and early adulthood, including a stabbing Clark suffered while defending his girlfriend from a sexual assault. Although Dr. Storer had difficulty contacting and interviewing Clark's family and friends, he testified that Clark's drug and alcohol abuse may have impaired both his ability to appreciate the criminality of his acts and conform his behavior to the requirements of law. Dr. Storer also testified that Clark likely has posttraumatic stress disorder and a mood disorder.

¶10. Attached to his motion, Clark provides affidavits from additional witnesses and points

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[2] ***Strickland v. Washington***, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

to the affidavits he provided to support his ***Atkins*** claim. In general, the evidence Clark provides is cumulative of the mitigation evidence presented at trial. "No prejudice exists if 'the new mitigating evidence "would barely have altered the sentencing profile presented" to the decision maker . . . .'" ***Ronk v. State***, 267 So. 3d 1239, 1258 (Miss. 2019) (alteration in original) (quoting ***Chamberlin v. State***, 55 So. 3d 1046, 1054 (Miss. 2010)). And counsel is "not required to exhaust every conceivable avenue of investigation[.]" ***Dickerson v. State***, 357 So. 3d 1010, 1026 (Miss. 2021) (internal quotation mark omitted) (quoting ***Ross v. State***, 954 So. 2d 968, 1005 (Miss. 2007)). Because Clark failed to show his counsel was ineffective, we deny his claim as to this issue.

3. *Batson v. Kentucky*[3]

¶11. Clark next claims his counsel should have better supported his ***Batson*** challenges and should have been better prepared to rebut the State's race neutral reasons.[4] Or, in other words, Clark asserts his counsel's performance prevented the circuit court and this Court (on direct appeal) from considering fully developed rebuttal arguments.

¶12. Clark must "make a sufficient showing" under ***Strickland*** to prevail. ***Powers***, 371 So. 3d at 682. "Under ***Strickland***, counsel are ineffective when their 'conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having

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[3] ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

[4] The Court denied Clark's ***Batson*** claim on direct appeal. ***Clark***, 343 So. 3d at 954-971.

produced a just result.'" ***Id.*** at 658 (quoting ***Brown v. State***, 306 So. 3d 719, 749 (Miss. 2020)). To show deficient performance, Clark must show his "counsel made errors so serious that [he or she was] not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 658 (alteration in original) (internal quotation marks omitted) (quoting ***Brown v. State***, 306 So. 3d 719, (Miss. 2020)). After reviewing counsel's ***Batson*** challenges and rebuttals, we find counsel's performance did not deprive Clark of the assistance guaranteed by the Sixth Amendment. Counsel's arguments are set forth in detail in our opinion on direct appeal. ***Clark***, 343 So. 3d at 954-71. Here, Clark presents additional or alternative arguments counsel could have made. But these new or alternative arguments do not show that counsel's performance before the trial court was deficient. Likewise, Clark has not shown that counsel's performance deprived him of a fair trial with a reliable result. ***Powers***, 371 So. 3d at 658 (quoting ***Brown***, 306 So. 3d at 749). For these reasons, we deny Clark's ineffective assistance of counsel claim.

4. Jury Wheel

¶13. Clark claims the jury wheel was unconstitutional because it did not include last names that began with the letters V through Z. Clark challenged the jury wheel on direct appeal, and the Court held his argument lacked merit. ***Clark***, 343 So. 3d at 986. "Rephrasing direct appeal issues for post-conviction purposes will not defeat the procedural bar of *res judicata*." ***Havard v. State***, 988 So. 2d 322, 333 (Miss. 2008) (quoting ***Lockett v. State***, 614 So. 2d 888, 893 (Miss. 1992)). We, therefore, deny Clark's claim as to this issue.

5. Avoiding Arrest Aggravator

¶14. Clark claims the avoiding arrest aggravator is unconstitutionally overbroad, impermissible duplicative of another aggravating factor, and improperly shifted the burden of proof to him. Clark challenged the avoiding arrest aggravator's application to his case on direct appeal. ***Clark***, 343 So. 3d at 993. Again, *res judicata* prohibits a petitioner from rephrasing direct appeal issues in post-conviction proceedings. ***Havard***, 988 So. 2d at 333. Therefore, Clark's claim as to this issue is denied.

6. Jurors' Racial Bias

¶15. Clark submits his counsel failed to question jurors on their racial biases or to request the circuit court to do so. "A strong presumption exists 'that counsel's conduct falls within a wide range of reasonable professional assistance, and the challenged act or omission might be considered sound trial strategy.'" ***Powers***, 371 So. 3d at 659 (quoting ***Brown***, 306 So. 3d at 749). Jury questioning and voir dire related to racial bais carries with it some risk. Many prospective jurors would not admit racial bias. Others may see the questions as patronizing and/or offensive. Even more, today's case did not involve racially sensitive issues. For these reasons, we find Clark has not shown his counsel was ineffective for failing to question the jury on possible racial bias or request the same from the circuit court.

7. Culpability Phase Instruction S-10

¶16. Clark claims his counsel was ineffective for failing to object to the following jury instruction:

> The Court instructs you that this phase of the trial deals only with the question of the guilt or innocence of the defendant, Tony Terrell Clark. In the event you find him guilty of Capital Murder you will then and only then consider the appropriate sentence to be imposed.

Clark claims the instruction shifted or eroded the burden of proof, invaded the province of the jury, and required him to disprove guilt. We find the instruction was not objectionable and that the jury was properly instructed on the burden of proof, especially when all instructions are read as a whole. Therefore, Clark cannot show his counsel was ineffective for failing to object to the instruction.

8. Mitigation Instructions

¶17. Clark claims his counsel was ineffective for failing to ensure the jury was instructed on the traumatic effect Clark's brother's death had on him. Clark's counsel submitted a proposed instruction that included the following mitigating factor: "Mr. Clark's brother died by drowning and that had a traumatic effect on Mr. Clark." The State, in turn, submitted an alternative instruction that did not include the "traumatic effect" language. The State said the language, which emphasized a specific factor, was surplusage. The trial court agreed with the State and ruled the instruction should read: "Mr. Clark's brother died by drowning."

¶18. In his motion, Clark claims his counsel "withdrew" the instruction. And the withdrawal resulted in the jury's not knowing how to give the proper effect to Clark's mitigation evidence. We disagree with Clark's argument. Counsel did not withdraw the instruction; rather, he defended it. Further, when reading the mitigation phase instructions as a whole, the jury was properly instructed for the penalty phase. Therefore, Clark cannot

show his counsel was ineffective.

9. Cumulative Error

¶19. Last, Clark asks the Court to find reversal is warranted under the cumulative error doctrine. We find Clark is not entitled to relief on this basis.

CONCLUSION

¶20. Clark's motion is granted in part, and the case is remanded to the Circuit Court of Madison County for an ***Atkins*** hearing. All other issues raised in Clark's motion are denied.

¶21. **POST- CONVICTION RELIEF GRANTED IN PART AND DENIED IN PART.**

COLEMAN, P.J., MAXWELL, CHAMBERLIN AND ISHEE, JJ., CONCUR. RANDOLPH, C.J., CONCURS IN PART AND IN THE RESULT WITH SEPARATE WRITTEN OPINION JOINED BY GRIFFIS AND BRANNING, JJ.; MAXWELL, J., JOINS IN PART. KING, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION.

RANDOLPH, CHIEF JUSTICE, CONCURRING IN PART AND IN RESULT:

¶22. The evidence presented is conflicting and reveals witness credibility concerns that must be resolved by the trial judge as to whether Tony Clark possesses an intellectual disability that would preclude his execution under the Eighth Amendment. "The ultimate decision of whether an individual is intellectually disabled for purposes of the Eighth Amendment rests with the trial judge." ***Carr v. State***, 196 So. 3d 926, 941-42 (Miss. 2016) (citing ***Doss v. State***, 19 So. 3d 690, 714 (Miss. 2009)). "The trial judge 'sits as the trier of fact and assesses the totality of the evidence as well as the credibility of witnesses.'" ***Id.*** (quoting ***Doss***, 19 So. 3d at 714). As the trier of fact, the trial judge's findings will be

entitled to great deference. ***Loden v. State***, 971 So. 2d 548, 572-73 (Miss. 2007).

¶23. In 2014, Fahd Saeed and his thirteen-year-old son Muhammed were working together at the family convenience store in Canton, Mississippi. ***Clark v. State***, 343 So. 3d 943, 952-53 (Miss. 2022). Muhammed was working the cash register while FaceTiming with his mother, who lived in Yemen at the time, when Clark shot and killed Muhammed at point blank range upon entering the store. ***Id.*** 952-53. Clark also shot Fahd in the stomach while he attempted to wrestle the gun from Clark, but thankfully Fahd survived. ***Id.*** at 953. A Madison County jury found Clark guilty of capital murder, attempted murder, and possession of a firearm by a previously convicted felon. ***Id.*** at 952. The jury sentenced Clark to death. ***Id.***

¶24. The Court has held that ***Atkins***[5] exempts all intellectually disabled persons from execution. ***Chase v. State***, 873 So. 2d 1013, 1016 (Miss. 2004). To establish a sufficient intellectual disability, "the defendant must prove by a preponderance of the evidence that '(1) he has significantly subaverage intellectual functioning; (2) he has deficits in two or more adaptive skills; (3) he was eighteen or younger when the retardation manifested itself; and (4) he is not malingering[.]'" ***Chase v. State***, 171 So. 3d 463, 468 (Miss. 2015) (quoting ***Thorson v. State***, 76 So. 3d 667, 676-77 (Miss. 2011)).

¶25. "Individuals with intellectual disability have [IQ] scores of approximately two standard deviations or more below the population mean, including a margin for measurement

[5] ***Atkins v. Virginia***, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

error (generally +/- 5 points)." ***Hall v. Florida***, 572 U.S. 701, 713, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014) (internal quotation mark omitted) (quoting APA, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013)). An IQ score of 70 is two standard deviations below the average score of 100. ***Lynch v. State***, 951 So. 2d 549, 559 (Miss. 2007) (Randolph, J., specially concurring) (quoting Douglas Mossman, M.D., *Atkins v. Virginia: A Psychiatric Can of Worms*, 33 N.M. L. Rev. 255, 268 (Spring 2003)). For example,

> [The results generated from IQ tests are] far from being perfectly reliable measurements of a person's cognitive ability. Under the best conditions, IQ tests have a 'measurement error' of about five points. An individual who scores say, 68 on one administration has a ninety-five percent chance of scoring between 63 and 73 on subsequent administrations. More than half of those persons whose IQ results fall in the mildly retarded range receive scores of 65 to 70, that is, there scores' margin of error will include 70.

Id. (quoting Mossman, 33 N.M. L. Rev. at 269-70).

¶26. There is conflicting evidence as to whether Clark has significantly subaverage intellectual functioning. Robert Ouaou, Ph.D., Clinical Psychology, evaluated Clark on July 13, 2023, and determined that his full scale IQ was 65. In 2004, however, when Clark was twenty four years old, he was evaluated and received an IQ score of 83. Accordingly, the five point margin of error includes an IQ score of 88, which is not even one standard deviation lower than average.

¶27. This nearly twenty point disparity certainly threatens the validity of Clark's most recent testing. Courts across the country have found that a person's IQ score remains

constant until old age. *See* ***Ramos v. Ramos***, 232 S.W.2d 188, 193 (Mo. Ct. App. 1950); ***Rios v. State***, 846 S.W.2d 310, 315 (Tex. Crim. App. 1992). Clark is currently forty-four years old, which is hardly considered to be old age; however, the trial judge in today's case, not this Court, must resolve this glaring disparity of Clark's IQ scores.

¶28. Moreover, the record reveals conflicting evidence and witness credibility concerns as to whether Clark's answers during his 2023 evaluations evinced signs of malingering, i.e., faking. Obviously, "[p]ost-crime testing increases the likelihood of attempts to manipulate, feign or through malingering, distort the diagnosis." ***Lynch***, 951 So. 2d at 561 (Randolph, J., specially concurring).

¶29. The record reveals a pattern of Clark providing suspicious answers during mental evaluations. In 2016, following Clark's indictment but prior to his trial, R.M. Storer, Ph.D., also evaluated Clark. As to Clark's high ratings on the "inconsistency scale," Storer suggested that "[r]egardless of the reason, an ICN score this high invalidates the profile and no interpretation of clinical scales should be made." As to Clark's answers regarding the "infrequency scale," Storer opined that "suggests some unusual responses to items" and that "[a] score in this range means that clinical scales should be interpreted with caution." Moreover, on the negative impression management scale, Storer revealed that "Mr. Clark attempted to portray himself in an especially negative manner." As to the positive impression management scale, Storer further opined that Clark "was in fact quick to be critical of himself while failing to endorse positive aspects of his functioning."

¶30. During Clark's evaluations in 2023, he scored below the first percentile in nearly every test that was administered. One would question the mathematical probabilities of an individual consistently receiving the lowest of the low scores in each of the different categories examined, especially when considering Clark's prominent position in his community. In 2015, a year after the crimes and prior to his trial, the record reveals that while Clark was detained, he was not only a member of the Vice Lords gang, but he was their professed leader. After an altercation with a rival gang, Lieutenant Strait wrote the following in his report:

> I talked to Inmate Ivey and he told me that they were all in [a gang] and that *the leader was inmate Clark*. . . . Inmate . . . Clark . . . are all Vice lords. . . . All inmates were working together to do the things they did to inmate Ivey. Inmate Ivey is a Latin King. In conclusion all the inmates involved are currently in a gang *and the one with the most rank in the cell was inmate Clark*.

(Emphasis added.) The trial judge in today's case must determine whether an individual who possesses the adaptive behavior qualities to be elevated to high rank over his peers in matters pertaining to life and death is consistent, according to good common sense, with the very same individual consistently providing answers below the first percentile in nearly every category of testing.

¶31. Additionally, Clark must prove by a preponderance of the evidence presented that his intellectual disability manifested itself at the age of eighteen or younger. ***Chase***, 171 So. 3d at 468. In 2023, Robert Shaffer, Ph.D., was retained by Clark's counsel to make that determination. The methodology of Shaffer's testing presents credibility concerns over the

validity of the conclusions reached. Shaffer admitted that "[i]n available records from his youth, there is no previous indication that Mr. Clark has significantly subaverage intellectual ability (Intellectual Disability)." To gain insight into Clark's intellectual ability during his youth, Shaffer entered information into his testing garnered solely from Nikki Clark, Clark's sister. According to Shaffer, "Nikki Clark . . . was close in age to Mr. Clark and able to provide observations of specific behavior during his developmental period as well as during his young adult life." According to Nikki's 2023 affidavit, "Tone and I had a really tight bond. We were like two peas in a pod. He's the baby boy and I'm the baby girl, so we were best friends."

¶32. Based on the information garnered solely from Nikki, Shaffer concluded that "all three domains resulted in an Adaptive Behavior Composite Score of 59, which is below the first (1st) percentile." The information garnered solely from Nikki further resulted in Shaffer's implausible conclusion that "[t]he specific behaviors that [Clark] demonstrated at age 18 was poorer than 999 out of 1000 individuals (0.1 percentile), indicating a severe deficit in these communication functions."[6] Further, "consistent with Nikki Clark's observations," Shaffer concluded that "[s]o few independent actions were shown by Mr. Clark at age 18 that this score total was exceeded by the activities of most six-year-olds." Accordingly, the record reveals concerns over whether Nikki had a particular interest in providing the answers to

[6]This conclusion is seemingly implausible because the odds of the testing subject producing the single lowest score of a random sample of the average population is akin to being struck by lightning and winning the lottery on the same day.

Shaffer that she did, and whether, therefore, Shaffer's entry of Nikki's answers into his testing resulted in biased or skewed conclusions.

¶33. Shaffer attempts to explain away the conflict in the evidence by suggesting that Clark may have outwardly displayed his intellectual gifts while masking any inferior ability. Such subjective justifications can be viewed as the product of Shaffer's own personal opinions and moral judgments rather than any verifiable science. Notwithstanding, the trial court will certainly retain "its fundamental role in evaluating the credibility of the conclusions the expert draws from the interviews." ***Chase***, 171 So. 3d at 483. If the trial judge determines that the scientific validity and credibility of the presented expert opinions are lacking, he will be acting within his sound discretion to reject those conclusions. ***Id.***

GRIFFIS AND BRANNING, JJ., JOIN THIS OPINION. MAXWELL, J., JOINS THIS OPINION IN PART.

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

¶34. I agree with the majority's decision to remand this case for an ***Atkins***[7] hearing. I continue, however, to disagree with this Court's jurisprudence that renders it essentially impossible to enforce ***Batson***[8] with regard to strikes of Black jurors. *See* ***Smith v. State***, 387 So. 3d 994, 1000-01, 1001 n.3 (Miss. 2024) (King, P.J., dissenting).

¶35. In Clark's direct appeal, this Court argued that Clark failed to present a comparative

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[7] ***Atkins v. Virginia***, 536 U.S. 304, 122 S. Ct. 2242, 1583 L. Ed. 2d 335 (2002).

[8] ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

juror analysis or sufficient rebuttal evidence to the trial court, ultimately finding no ***Batson*** violation. ***Clark v. State***, 343 So. 3d 943, 954-971 (Miss. 2022). Yet, the record made clear that the trial court did not permit Clark's counsel to fully present such evidence. ***Id.*** at 1014 n.11 (King, P.J., dissenting). And now, this Court forecloses any remedy via post-conviction relief for the failure to present rebuttal evidence during a ***Batson*** hearing. So the trial courts prevent defense counsel from presenting sufficient rebuttal evidence, this Court blames defense counsel (and not the trial court) for failure to present adequate rebuttal evidence, and yet this Court deems counsel's behavior as not deficient, leaving defendants with no remedy for the failure (regardless of whether the failure is due to counsel's actions or the trial court's actions) to present sufficient rebuttal evidence. Accordingly, I respectfully dissent in part.