NO. 2010-CA-01010-SCT

IN THE SUPREME COURT OF MISSISSIPPI

ROGER ERIC THORSON, *Appellant*

versus

STATE OF MISSISSIPPI, *Appellee*

BRIEF OF APPELLEE

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IN THE SUPREME COURT OF MISSISSIPPI

STATE OF MISSISSIPPI *Appellant*

versus **No. 2010-CA-01010**

ROGER ERIC THORSON *Appellee*

BRIEF IN OPPOSITION

This matter is before the Court following the defendant's January 7-8, 2010, *Atkins* hearing pursuant to the Court's remand in *Thorson v. State*, 994 So.2d 707 (Miss. 2007). The circuit court in an Order issued on June 4, 2010, found Thorson to not be retarded pursuant to *Aktins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); *Chase v. State*, 873 So.2d 1013 (Miss.2004) and *Lynch v. State*, 951 So.2d 549 (Miss.2007).

STATEMENT OF THE CASE

Appellant was indicted during the February 1987 Term of the Circuit Court, Second Judicial District, of Harrison County, Mississippi, for the crime of capital murder of Gloria McKinney while engaged in the commission of the crime of kidnapping. The indictment was returned pursuant to Miss. Code Ann. § 97-3-19(2)(e) (1972, as amended).

On May 16, 1988, this cause went to trial in the Second Circuit Court District of Harrison county. Two days into the trial, a break-in occurred in two of the sequestered jurors motel room. On motion of defendant, a mistrial was declared.

The cause was subsequently transferred to Walthall County, Mississippi, on Thorson's

motion for change of venue. Trial began September 18, 1988, when the jury was impaneled. Thorson was tried on the indictment and found guilty. After the finding of guilt, the jury heard evidence in aggravation and mitigation of sentence. They retired to consider whether appellant would be sentenced to death or life imprisonment. After due consideration the jury returned a sentence of death in proper form.

Thorson then took his automatic appeal to this Court. In his appeal he raised thirty-three claims of error. On December 8, 1994, this Court affirmed in part and remanded in part. A petition for rehearing was filed and subsequently denied on April 20, 1995. *Thorson v. State*, 653 So.2d 876 (Miss. 1994). The essence of the Court's decision was to affirm on all issues except for the claim under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and remand the case for an evidentiary hearing on the *Batson* question.

The Circuit Court of Harrison County held the *Batson* hearing on October 23, 1995. After having the State give its reasons and Thorson being given opportunity to challenge and rebut these reasons, the trial took the matter under advisement. On November 2, 1995, the trial court entered a written finding of facts and conclusion of law holding that there was not violation of *Batson*. Being dissatisfied with this ruling Thorson appealed the decision to this Court.

On direct appeal from the evidentiary hearing this Court noted that the trial court found that Thorson had failed to make out a *prima facie* case on the *Batson* issue. However, the Court declined to address the *Batson* claim finding that it was not dispositive of the

appeal. The Court found that the striking of a potential juror "solely on a potential jurors' religious affiliation" violated MISS. CONT. OF 1890, Art. 3, § 18 and Miss. Code Ann. § 13-5-2. The Court reversed and remanded for a new trial.

On remand, Thorson was again put to trial on the capital murder indictment on June 4, 2002. Tr. 607. After hearing evidence during the guilt/innocence phase of the trial the jury retired to consider its verdict. Tr. 1577. After deliberation the jury returned a verdict finding Thorson guilty of capital murder. Tr. 1585. Thereafter, the jury was presented evidence in aggravation and mitigation of the sentence of death. The jury then retired to consider the punishment to be imposed in this case. After deliberation the jury returned a sentence of death in proper form. Tr. 1688-89. The sentencing verdict was read by the Clerk and reads:

> We, the jury find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder:
>
> That the Defendant actually killed Gloria McKinney.
>
> Next we, the Jury, unanimously find beyond a reasonable doubt that the following aggravating circumstances exist:
>
> Committed while engaged in the commission of a kidnapping; the offense was heinous, cruel and torturous; the offense was committed with the purpose of covering up and hiding evidence.
>
> Finally, we, the jury, unanimously find beyond a reasonable doubt that the mitigating circumstances found by each juror in Section 3 of the sentencing instruction are insufficient to outweigh the aggravating circumstances.
>
> We, the jury, find unanimously that Roger Eric Thorson should suffer death.

Tr. 1691-92.[1]

Thorson filed a Motion for Judgment of Acquittal Notwithstanding the Verdict of Guilty or, in the alternative, Motion for New Trial. C.P. 695. After hearing arguments on the motion for new trial the trial court entered an order denying the motion. Tr. 1707; C.P. 685.

Thorson then took his automatic appeal to this Court. In that appeal Thorson raised thirty-three claims of error. These claims were:

I. THE WRITTEN FINDING OF THE JURY THAT "THE OFFENSE WAS COMMITTED WITH THE PURPOSE OF COVERING UP AND HIDING EVIDENCE" IS A PRESUMED DISASSOCIATED ARTICULATION OF THE MISS. CODE ANN. 99-19(5)(e) AGGRAVATOR AND MUST BE REPUDIATED.

II. THE WRITTEN FINDING OF THE JURY THAT "THE OFFENSE WAS HEINOUS, CRUEL AND TORTUROUS" IS AN ILLEGITIMATE ANALOGUE TO THE MISS. CODE ANN. 99-19-101(5)(h) AGGRAVATOR AND MUST BE REPUDIATED.

III. IN LIGHT OF CLAIM I AND CLAIM II, AND AS THE MAXIMUS PUNISHMENT FOR A CONVICTION OF MISS. CODE ANN. 97-3-19(2)(e), THE FEDERAL AND STATE CONSTITUTIONS REQUIRE VACATUR OF THE DEATH SENTENCE AS *RING v. ARIZONA* PROHIBITS THE DUPLICATIVE UTILIZATION OF A KIDNAPPING AGGRAVATOR AS THE SOLE SELECTION FACTOR AT THE PENALTY PHASE WHEN THE JURY FOUND MR. THORSON COMMITTED THE KIDNAPPING AT THE CULPABILITY PHASE.

IV. MR. THORSON CANNOT BE EXECUTED AS HIS DEATH SENTENCE CONTRAVENES THE RULE OF INDEPENDENT SUFFICIENCY ANNOUNCED

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[1]The verdict of the jury set forth in the document entitled Final Judgment, C.P. 626, is not an accurate reflection of the actual verdict rendered by the jury. The correct version in the one read in open court when the verdict was returned by the jury. Tr. 1691-92. The actual written verdict was not written on a separate sheet of paper but directly on Instruction DS-21, which was the Jury Verdict Form instruction. C.P. 602-03.

IN *STROMBERG v. CALIFORNIA*.

V. THE TRIAL COURT ERRED IN REFUSING TO GIVE JURY INSTRUCTION DS-5 AT THE PENALTY PHASE.

VI. THE TRIAL COURT ERRED IN REFUSING TO GIVE JURY INSTRUCTION DS-10 AT THE PENALTY PHASE.

VII. THE OMISSION OF CRUCIAL LANGUAGE FROM JURY INSTRUCTION DS-4 WHEN THE TRIAL COURT CHARGED MR. THORSON'S JURY AT THE PENALTY PHASE WAS ERROR. FURTHERMORE, BECAUSE OF THIS ERROR IN THE JURY CHARGE, THE FAILURE TO GIVE JURY INSTRUCTION DS-14 AT THE PENALTY PHASE ALSO CONSTITUTED ERROR.

VIII. THE TRIAL COURT ERRED IN REFUSING TO GIVE JURY INSTRUCTION DS-6 IN THE PENALTY PHASE.

IX. THE TRIAL COURT ERRED IN REFUSING JURY INSTRUCTION DS-15, ESPECIALLY IN LIGHT OF THE TRIAL COURT'S REFUSAL OF JURY INSTRUCTION DS-8. INSOFAR AS THE TRIAL COURT DENIED DS-15 AND DS-8, MR. THORSON'S RIGHT TO A CONSTITUTIONALLY VALID SENTENCE WAS VIOLATED.

X. THE TRIAL COURT ERRED IN REFUSING TO GIVE EITHER JURY INSTRUCTIONS DS-16 OR DS-17 AT THE PENALTY PHASE.

XI. NUMEROUS INSTANCES OF RELATING FACTS NOT IN EVIDENCE AMOUNTED TO PROSECUTORIAL MISCONDUCT.

XII. IN LIGHT OF ALL PREVIOUS CLAIMS, MR. THORSON'S DEATH SENTENCE IS THE PRODUCT OF AN INVALID PENALTY PHASE. AS THE STATE HAS FAILED TO DEMONSTRATE THAT DEATH IS THE APPROPRIATE SENTENCE, THE EXECUTION OF MR. THORSON SHALL VIOLATE HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

XIII. PURSUANT TO MISS. CODE ANN. 99-19-105(3)(a) AND THE CONSTITUTIONAL PROHIBITION AGAINST THE ARBITRARY INFLICTION OF THE DEATH SENTENCE, THE SENTENCE MUST BE VACATED.

XIV. PURSUANT TO MISS. CODE ANN. 99-19-105(3)(c), MR. THORSON'S DEATH SENTENCE IS EXCESSIVE AND DISPROPORTIONATE.

XV. THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS MR. THORSON'S SUCTODIAL STATEMENT UNDER THE SIXTH AND FOURTHEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND ARTICLE THREE, SECTIONS FOURTEEN AND TWENTY-SIX OF THE MISSISSIPPI CONSTITUTION.

XVI. AS THE STATE WAS NOT REQUIRED TO TENDER TWELVE MEMBERS OF THE VENIRE WHO SURVIVED CHALLENGES FOR CAUSE, MR. THORSON WAS DENIED HIS RIGHTS UNDER MISS. CODE ANN. 99-17-3 AND URCCC 4.05(A)(1) AND 4.05(A)(2).

XVII. THE TRIAL COURT DID NOT PERMIT MR. THORSON AN OPPORTUNITY TO RESPOND TO THE STATE'S REBUTTAL TO MR. THROSON'S BATSON CHALLENGE OF A BLACK VENIREMAN IN VIOLATION OF MR. THORSON'S CONSTITUTIONAL RIGHTS AND THE VENIREMAN'S CONSTITUTIONAL RIGHTS.

XVIII. UNDER MISSISSIPPI RULE OF EVIDENCE 403, THE TRIAL COURT ERRED IN ADMITTING STATE'S EXHIBIT 1.

XIX. THE TRIAL COURT ERRED WHEN IT DENIED MR. THORSON'S MOTION FOR THE EXPERT FUNDS FOR A SOCIAL PSYCHOLOGIST AS MR. THORSON SUFFICIENTLY DEMONSTRATED THE EXPERT TESTIMONY WOULD SUPPORT A CRITICAL ELEMENT OF MR. THORSON'S DEFENSE.

XX. THE TRIAL COURT VIOLATED MR. THORSON'S SIXTH AMENDMENT TO COUNSEL, HIS FIFTH AMENDMENT RIGHT TO COUNSEL AND TO REMAIN SILENT, HIS ARTICLE THREE, SECTION TWENTY-SIX RIGHT TO COUNSEL, HIS ARTICLE THREE, SECTION TWENTY-SIX RIGHT AGAINST SELF-INCRIMINATION AND FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS WHEN THE TRIAL COURT FORBAD MR. THORSON'S COUNSEL FROM BEING PRESENT DURING MENTAL HEALTH EVALUATION CONDUCTED BY A STATE EXPERT.

XXI. UNDER MISS. R. EVID. 801(a), THE TRIAL COURT ABUSED ITS DISCRETION IN SUSTAINING THE STATE'S HEARSAY OBJECTION TO ASSERTIONS THAT HAD NOT BEEN DETERMINED TO BE STATEMENTS.

XXII. UNDER MISS R. EVID. 801(c), THE TRIAL COURT ABUSED ITS DISCRETION IN SUSTAINING THE STATE'S HEARSAY OBJECTION TO A WITNESS RECITING STATEMENTS SHE WROTE IN A POLICE REPORT.

XXXIII. THE TRIAL COURT ABUSED ITS DISCRETION IN SUSTAINING THE STATE'S OBJECTION TO MR. THORSON'S TESTIMONY REVEALING A STATEMENT MADE BY A POLICE OFFICER DURING MR. THORSON'S INTERROGATION.

XXIV. THE TRIAL COURT ERRED IN PROHIBITING DEFENSE COUNSEL FROM INPEACHING A WITNESS UNDER MISS. R. EVID. 609.

XXV. THE TRIAL COURT ERRED IN REFUSING TO PERMIT A WITNESS HOSTILE TO MR. THORSON TO ANSWER WHETHER THE WITNESS THREATENED EITHER MR. THORSON'S OR THE CHILDREN OF GLORIA McKINNEY WHEN HE SPOKE TO MR. THORSON JUST PRIOR TO MR. THORSON'S CUSTODIAL STATEMENT.

XXVI. THE TRIAL COURT ERRED IN REFUSING TO GIVE JURY INSTRUCTION D-2 DURING THE CULPABILITY PHASE.

XXVII. THE TRIAL COURT ERRED IN REFUSING TO GIVE JURY INSTRUCITON D-16 DURING THE CULPABILITY PHASE.

XXVIII. THE TRIAL COURT ERRED IN REFUSING TO GIVE JURY INSTRUCITON D-15 AT THE CULPABILITY PHASE.

XXIX. PROSECUTORIAL MISCONDUCT OCCURRING DURING THE CROSS-EXAMINATINO OF MR. THORSON AT THE CULPABILITY PHASE AND DURING THE CROSS-EXAMINATION OF JUANITA THORSON AT THE PENALTY PHASE REQUIRES APPELLATE RELIEF.

XXX. THE AGGREGATE ERROR THIS CASE REQUIRES REVERSAL OF THE CONVICTION AND DEATH SENTENCE AS A MATTER OF FEDERAL CONSTITUTIONAL LAW.

XXXI. THE AGGREGATE ERROR IN THIS CASE REQUIRES REVERSAL OF THE CONVICTION AND DEATH SENTENCE AS A MATTER OF STATE LAW.

XXXII. MISS. CODE ANN. 99-19-101 IS FACIALLY UNCONSTITUTIONAL.

XXXIII. MR. THORSON'S CONVICTION IS UNSUPPORTED BY THE EVIDENCE ADDUCED AT TRIAL AND IS AGAINST THE OVERWHELMING WEIGHT OF EVIDENCE.

Brief of Appellant

On November 4, 2004, this Court affirmed Thorson's conviction of capital murder and the sentence of death. Thorson filed a motion for rehearing which was later denied on February 3, 2005. *See Thorson v. State*, 895 So.2d 85 (Miss. 2004).

Thorson then filed a petition for writ of certiorari with the United States Supreme Court raising the following questions:

1. In affirming the conviction for capital murder, did the state court contravene *Satterwhite v. Texas*, 486 U.S. 249 (1988) an violate Thorson's Sixth and Fourteenth Amendment right to counsel in barring defense counsel from a court-ordered, psychiatric examination conducted by a State agent?

2. In affirming Thorson's death sentence, did the state court violated Thorson's Eighth and Fourteenth Amendment rights by allowing Thorson's jury to reject lawful aggravating factors, consider unlawful aggravating factors fabricated by the jury and then weigh the unlawful fabricated aggravating factors against mitigating factors?

3. In affirming Thorson's death sentence, did the state court violate Thorson's Sixth and Fourteenth Amendment right to a jury finding on every fact required to sentence him to death where the only lawful aggravating circumstance found was entirely consumer in the element so an offense for which the maximum punishment is life imprisonment?

4. In affirming Thorson's death sentence, did the state court violate Thorson's Eighth and Fourteenth Amendment rights to due process and ro remain free of cruel and unusual punishment in permitting the jury to consider and weigh an unlawful, fabricated aggravating factor which encompasses constitutionally protected conduct?

5. In affirming thorson's conviction for capital murder, did the state court violate Thorson's Eighth and Fourteenth Amendment rights to due process and to remain free of cruel and unusual punishment by foreclosing any consideration of Thorson's constitutional challenges to the admissibility of a custodial statement?

Petition for Writ of Certiorari at I.

On October 3, 2005, the United States Supreme Court denied the petition for writ of certiorari. *See Thorson v. Mississippi*, 546 U.S. 831, 126 S.Ct. 53, 163 L.Ed.2d 83 (2005). No petition for rehearing was filed. Thorson then filed an application for post-conviction relief on January 24, 2006 raising five claims. The Court remanded the matter to the circuit court for the "sole purpose of conducting a hearing pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); *Lynch v. State*, 951 So.2d 549 (Miss.2007); and, *Chase v. State*, 873 So.2d 1013 (Miss.2004)." *See Thorson v. State*, 994 So.2d 707 (Miss. 2007). The hearing was conducted on January 7-8, 2010. The trial court, in a June 4, 2010, Order held that Thorson was not mentally retarded pursuant to *Atkins*. From that decision, the Appellant now appeals.

STATEMENT OF FACTS

By now, the Court is intimately familiar with the facts of this case and the Appellee will respectfully dispense with a detailed rendering of same and will instead cite to the Court's opinion on direct appeal in *Thorson v. State*, 895 So.2d 85 (Miss. 2004), as follows:

> ¶ 2. On March 4, 1987, Roger Eric Thorson visited Edgewater Mall in Biloxi in order to talk to his former fiancee, Gloria McKinney. He was worried that his neighbor and girlfriend Patricia Cook might have said some things to Gloria, so he wanted to apologize to her in person. When Thorson

arrived at the mall, he learned from his friend, Reggie Brazeal, that McKinney would not get off work from Morrison's until 4:00 p.m. However, Thorson remained at the mall until McKinney left at 4:45 p.m. When McKinney exited the mall, Thorson approached her car, told her that he had come to apologize and asked her for a ride to the Cedar Lake exit. When they arrived at the exit, Thorson asked McKinney to keep driving towards his house because he still needed to talk to her. At this time, Thorson pulled a knife on McKinney. McKinney continued to drive at knife point until Thorson directed her to a dirt road. Thorson then ordered McKinney to remove all of her clothes and turn with her back facing him. He then placed a .22 revolver pistol on the dashboard which he had recently purchased from his neighbor, Paul Quinn. After McKinney removed her clothes, Thorson removed a piece of rope from his jacket pocket and tied her hands behind her back. He then placed her brassiere in her mouth and tied it around her neck. Thorson then raped Gloria McKinney. After he raped her, Thorson took a towel that he had found in McKinney's car and wiped down everything that he thought he might have touched because he did not want any of his fingerprints in her car. Thorson asked McKinney if she would tell anyone what had just happened, and she shook her head indicating that she would not. Thorson told her that he did not believe her. He then took the knife and slit her throat. Thorson got out of her car and removed a blue jacket which he had given to Gloria, a plastic power steering fluid bottle and Gloria's wallet. He removed Gloria's driver's license from the wallet because he wanted a picture of her. He threw the bottle and wallet into the woods so it would appear that someone else had hurt Gloria. At this time Gloria was sitting in the car, bleeding from the wound to her neck. She was able to get out of her car and work the brassiere from her mouth. When she screamed for help, Thorson walked back to the car and shot her in the head with the .22 revolver. He then ran home and hung Gloria's coat in his closet. Thorson walked to Patricia Cook's trailer, which was directly behind his, and cleaned his hands and the knife with bleach to remove any traces of blood or gunpowder residue. He then went back to his trailer and wrapped the knife, gun, shells and Gloria's watch in Gloria's jacket and buried it in a vacant lot near his trailer.

895 So.2d at 94-5.

Because the historical facts of this case are not in dispute in the case before the Court the State would adopt the Court's rendition of the facts as its own in this appeal.

SUMMARY OF THE ARGUMENT

The trial court properly held that Thorson is not mentally retarded after conducting an *Atkins* hearing which was in no way violative of the mandates of this Court as detailed in *Chase* and its progeny. Further, the State produced evidence and testimony through licensed forensic psychologist, Dr. Gilbert Macvaugh and licensed forensic psychiatrist, Dr. Reb McMichael which the trial court deemed more credible. The trial court rendered a decision after conforming in every respect to the dictates of this Court as announced in *Chase*, *Lynch*, and *Doss*. There was no error.

PRELIMINARY MATTER

This matter was remanded solely for the purpose of conducting a hearing to determine if Thorson was indeed mentally retarded pursuant to *Atkins*. *See Thorson, supra*. As the Court held in *Doss v. State*, 19 So.3d 690 (Miss. 2009):

> ¶ 5. The standard of review after an evidentiary hearing in post-conviction-relief (PCR) cases is well settled. This Court has said:
>
> > "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)).

19 So.3d at 694.

In regards to *Atkins* hearings, the Court in *Chase v. State*, 873 So.2d 1013 (2004), established the definition of mental retardation and the procedures to be used in an *Atkins* hearing holding:

> ¶ 69. The *Atkins* majority cited, with approval, two specific, almost identical, definitions of "mental retardation." The first was provided by the American Association on Mental Retardation (AAMR):
>
> > Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, community use, self-direction, health and safety, functional academics, leisure, and work, Mental retardation manifests before age 18.
>
> *Atkins*, 536 U.S. at 308 n. 3, 122 S.Ct. 2242, citing Mental Retardation: Definition, Classification, and Systems of Support 5 (9th ed.1992). The second was provided by The American Psychiatric Association:
>
> > "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." Diagnostic and Statistical Manual of Mental Disorders 39 (4th ed.2000).
>
> Id.

¶ 70. The Diagnostic and Statistical Manual of Mental Disorders, from which the American Psychiatric Association definition is quoted, further states that "mild" mental retardation is typically used to describe persons with an IQ level of 50-55 to approximately 70. Id. at 42-43. The Manual further provides, however, that mental retardation may, under certain conditions, be present in an individual with an IQ of up to 75.[18] Id. at 40. Additionally, According to the *Atkins* majority, "[i]t is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." Id. citing 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 2952 (B. Sadock & V. Sadock eds 7th ed.2000) (emphasis added).

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

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

Id. at 175.

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

Procedure to be used.

¶ 73. Having established the definition of mental retardation to be used for purposes of Eighth Amendment protection to mentally retarded defendants, we now turn to the procedure to be used in reaching a determination of mental retardation.

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

1. The defendant is mentally retarded, as that term is defined by the American Association on Mental Retardation and/or The American Psychiatric Association;

2. The defendant has completed the Minnesota Multi phasic Personality Inventory-II (MMPI-II) and/or other similar tests, and the defendant is not malingering.

¶ 75. Such expert must be a licensed psychologist or psychiatrist, qualified as an expert in the field of assessing mental retardation, and further qualified as an expert in the administration and interpretation of tests, and in the evaluation of persons, for purposes of determining mental retardation.

¶ 76. Upon meeting this initial requirement to go forward, the defendant may present such other opinions and evidence as the trial court may allow pursuant to the Mississippi Rules of Evidence.

¶ 77. Thereafter, the State may offer evidence, and the matter should proceed as other evidentiary hearings on motions.

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

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18. This point is conceded by the State. However, IQ, alone, does not determine mental retardation. According to the DSM-IV, "it is possible to diagnose Mental Retardation in individuals with IQ's between 70 and 75 who exhibit significant deficits in adaptive behavior." Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70

if there are no significant deficits or impairments in adaptive functioning.

19. Although this Court has identified the MMPI-II as a test that should be given, we now clarify our position by stating that the expert should use the MMPI-II, and/or 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.

873 So.2d at 1027-9.

Recently, in *Doss v. State*, 19 So.3d 690 (Miss. 2009), the Court clarified the standards for conducting such a hearing holding that:

> ¶ 45. This Court clarified the nature of testing for and defining mental retardation in *Lynch v. State*:
>
> Accordingly, in Mississippi it is acceptable to utilize the MMPI-II and/or other similar tests. Id. at 1029. This Court did not intend by its holding to declare the MMPI-II or any one test as exclusively sufficient. Having a variety of tests at their disposal, courts are provided with a safeguard from possible manipulation of results and diminished accuracy which might result if courts are limited to one test. The United States Supreme Court mentioned the Wechsler Adult Intelligence Scales Test. *See Atkins*, 536 U.S. at 309 n. 5, 122 S.Ct. 2242, 153 L.Ed.2d 335. 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.

Lynch, 951 So.2d at 556-57 (emphasis in original).

The Appellee submits that the trial court conducted the hearing in a manner commensurate with the dictates of this Court in *Chase, Lynch* and as outlined in *Doss* and that the trial court's holding was not clearly erroneous. Thorson is therefore entitled to no relief on his assignments error.

ARGUMENTS

I. THE ARGUMENT REGARDING THE QUALIFICATIONS AND TESTIMONY OF DR. MACVAUGH AND DR. MCMICHAEL IS BARRED FROM CONSIDERATION AND IS ALTERNATIVELY DEVOID OF MERIT

The Appellant's first claim is that the trial court abused its discretion in allowing the testimony of Dr. Macvaugh and Dr. McMichael. App. at 12-4. This claim is barred from consideration as the Appellant did not object to the qualifications of Dr. Macvaugh and Dr. McMichael. Failure to do so constitutes waiver of that claim resulting in a bar to their consideration with this Court pursuant to *Ross v. State*, 954 So.2d 968 (Miss. 2007), in which the Court, citing to *Scott v. State*, 878 So.2d 933, 953 (Miss.2004), held that:

> "Heightened appellate scrutiny in death penalty cases does not require abandonment of our contemporaneous objection rule which applies with equal force to death cases. For many years this Court has held that trial errors cannot be raised in this Court for the first time on appeal." Williams v. State, 684 So.2d 1179, 1203 (Miss.1996). "If no contemporaneous objection is made, the

> error, if any, is waived. This rule's applicability is not diminished in a capital case." Cole v. State, 525 So.2d 365, 368 (Miss.1988) (citations omitted).
>
> See also *Rubenstein*, 941 So.2d at 755 ("*The contemporaneous objection rule applies in death penalty cases*. Therefore, any issue to which Rubenstein failed to object is procedurally barred").
>
> 954 So.2d at 1027-8. [emphasis added]

Alternatively, and without waiving the applicable procedural bar, the Appellant's arguments are entirely devoid of merit.

A. Dr. Gilbert S. Macvaugh

Dr. Macvaugh was tendered and accepted as an expert in forensic psychology with a particular emphasis in *Atkins* determinations. Tr. 172. The Appellant failed to object to these qualifications and has therefore waived the right to do so at this juncture. *Id.* Alternatively, and without waiving the procedural bar, the Appellee submits that the Appellant's argument that Dr. Macvaugh was not qualified to assess Thorson for mental retardation is without merit.

The Appellant makes much of the fact that Dr. Macvaugh is a "forensic psychologist" claiming he is not qualified to assess mental retardation. The Appellant misapprehends what a forensic psychologist actually is, much as his expert, Dr. Swanson, did by her testimony, in which she clearly stated that, "I am not a forensic psychologist."[2] Tr. 15. A forensic psychologist "specializes in the area of forensic psychology, which means assisting the legal system in answering a question regarding mental health issues. . . ." Tr. 170.

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[2]Dr. Swanson also admitted that she has no formal training in working with the prison population in "determining mental retardation or specialized work in that setting." Tr. 15.

Dr. Macvaugh has been recognized by this Court as an expert in assessing mental retardation, most recently in *Doss*, in which the Court affirmed the trial court's determination that *Doss* was not mentally retarded. The best argument that the Appellant can muster is that his expert, Dr. Swanson, has allegedly assessed "thousands" of individuals for mental retardation as opposed to a smaller number by Dr. Macvaugh. This argument is specious and is without legal merit. Dr. Macvaugh is uniquely qualified to assess individuals for mental retardation, specifically in the context of *Atkins*. This is borne out by Dr. Macvaugh's research and involvement in numerous cases concerning the issue of mental retardation and death row inmates. *See Doss, supra*; *Wiley v. Epps*, 668 F.Supp.2d 848 (N.D. Miss.,2009); *Hughes v. Epps*, 694 F.Supp.2d 533 (N.D.Miss.,2010). Not only is Dr. Macvaugh more than qualified to assess mental retardation in a clinical context, he is uniquely qualified to assess mental retardation in individuals on death row. Furthermore, Dr. Macvaugh is an experienced forensic and clinical psychologist and therefore, by definition, more qualified to offer testimony on matters such as an *Atkins* determination than a psychologist unfamiliar with *Atkins* hearings, as was the case with Dr. Swanson, who admitted that she was not even aware of the standards and/or procedures involved in an *Aktins* determination. Dr. Macvaugh was properly qualified and tendered as an expert in forensic psychology with a particular emphasis on *Atkins* determinations, without objection. Tr. 172. For that reason, the claim is now barred from consideration. Additionally, Dr. Macvaugh is a forensic and clinical psychologist with particularized experience in assessing individuals on death row for mental retardation, whose

testimony has been previously affirmed by this Court. *See Doss, supra.* This claim, while barred, is alternatively devoid of merit. Thorson is entitled to no relief on this assignment of error.

B. Dr. Reb McMichael

Dr. Reb McMichael, Service Chief of the Forensic Services Unit at the Mississippi State Hospital, was tendered as an expert in forensic psychiatry without objection. Tr. 244. Accordingly, this claim is now barred from consideration. *See Ross, supra.* Alternatively, the claim that Dr. McMichael was unqualified is also without merit. Dr. McMichael has been tendered as an expert in psychiatry in and his testimony has been affirmed in many cases, most recently in *Doss*. Much as Thorson did in his first claim regarding Dr. Macvaugh, the Appellant assails the qualifications of Dr. McMichael claiming he is not a licensed psychiatrist. See App. at 14. The State Hospital, however, is not in the habit of putting unlicensed pscyhiatrists in charge of their forensic unit. Dr. McMichael is indeed a licensed psychiatrist. Tr. 242-3. Moreover, Dr. McMichael is a forensic psychiatrist making him more qualified to give testimony in an *Atkins* hearing. Id. This claim is barred as the Appellant failed to object to the qualifications of Dr. McMichael at any point during the hearing on this issue. *See Ross, supra.* Alternatively, the claim is without merit. Thorson is entitled to no relief on this assignment of error.

II. THE TRIAL COURT'S HOLDING THAT THORSON IS NOT MENTALLY RETARDED PURSUANT TO *ATKINS* WAS NOT

CLEARLY ERRONEOUS[3]

Under this claim, the Appellee will address the Appellant's next three assignments of error as they are all essentially the same argument. In Claim II.[4], the Appellant argues that Drs. Swanson and Zimmerman were more qualified than the State's experts. In Claim III.[5], the Appellant continues this argument, stating that the court erred in not listening to his experts. In Claim IV.[6], the Appellant argues that because of the vast experience of his experts the court was in error in holding that Thorson was not mentally retarded. The State submits that each of these arguments is without merit and that the decision of the trial court on these claims was not clearly erroneous.

A. Appellant's Claim II.

In this claim the Appellant does nothing more than aver that because of his experts' experience they were more qualified than Dr. Macvaugh and Dr. McMichael. The State is unsure as to the true nature of this claim, however, to the extent the Appellant is arguing again that Drs. Macvaugh and McMichael were not qualified to render opinions at the hearing, the Appellee submits that such claims are barred from consideration by this Court, as there was no contemporaneous objection made by Thorson regarding their testimony. *See Ross, supra.*

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[3]See App. Claims II. - IV.

[4]Appellant's Brief at 14.

[5]Appellant's Brief at 16.

[6]Appellant's Brief at 17.

Alternatively, and without waiving the bar, the State submits this claim is without merit for the reasons previously stated in Claim I.[7]

The only discernible claim made here is that Dr. McMichael is not a licensed psychiatrist[8] which is incorrect as he is indeed a licensed psychiatrist with particularized training in the realm of forensic psychiatry. Tr. 242-3. Both Dr. Macvaugh and Dr. McMichael were tendered and accepted without objection as experts in the fields of forensic psychology and forensic psychiatry respectively. Tr. 172, 244. At no time did the Appellant object to their testimony. Therefore, any claim challenging their qualifications is barred from consideration. See Ross, supra. At any rate, the trial court did not rule that Thorson's experts were not qualified nor did the court hold them to be less qualified. Indeed, the trial court heard the expert testimony of all of the experts and took that testimony into account in rendering a decision. This claim, while barred, is alternatively without merit. Thorson is entitled to no relief on this assignment of error.

B. Appellant's Claim III.

In this claim the Appellant continues to aver that the trial court committed error by "accepting" the testimony of Drs. Macvaugh and McMichael that Thorson is not mentally retarded. See App. at 16. Specifically, the Appellant attempts to discredit Dr. Macvaugh's

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[7]The testimony of both Dr. Macvaugh and Dr. McMichael is addressed to a greater extent in Claims II.(B). - VI., and is compared to that of both Dr. Swanson and Dr. Zimmerman. This comparison makes it readily apparent that both Macvaugh and McMichael were more than qualified to give testimony on this issue and were more credible.

[8]App. at 14.

testimony claiming that he did not administer any IQ tests.[9] Id. The State submits that at no time was there an objection made regarding the manner in which the Whitfield doctors administered tests to Thorson, neither during his testing in which counsel was present for, nor during the hearing on this matter.[10] Accordingly, such a claim is barred from consideration at this juncture. *See Ross, supra.* Alternatively, and without waiving the procedural bar, the State would submit that the manner in which testing was administered stands in concert with the mandate of *Chase* and its progeny and has been the practice of the experts at the State Hospital for assessing death row inmates for mental retardation since that decision and is therefore, in no way violative of the mandates of this Court or *Atkins*.

Dr. Macvaugh evaluated Thorson on August 25, 2008, and found him to be not mentally retarded.[11] See Exhibit A.,(Whitfield Report admitted as S-3 at Tr. 182). The forensic clinicians at Whitfield conducted the assessment of Thorson as a team. That assessment consisted of a review of Thorson's available records, psychological testing and a clinical interview. Tr. 179. In Thorson's case there "were six doctoral level forensic clinicians involved in determining whether or not he suffer[ed] from mental retardation." Tr. 180. The data reviewed and considered involved some three hundred and nine (309) sources

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[9]Curiously, the Appellant's expert, Dr. Swanson, admitted that she administered no I.Q. test, and instead relied on the testing of others. Tr. 83-4.

[10]See Exhibit A. at 1.

[11]Dr. Macvaugh testified that "the prevalence of mental retardation is approximately 1 percent of the general population." Tr. 238.

of information. Id. In addition, Dr. Macvaugh reviewed two reports submitted by Dr. Swanson as well as her raw data. Id. In reviewing all of Thorson's records as well as the previously referenced assessments of other professionals, Dr. Macvaugh testified that Thorson had never been previously diagnosed as being mentally retarded. Tr. 185.[12]

Specifically, Dr. Macvaugh testified that Thorson:

1. "scored a 29 out of 30" on a cognitive screening instrument which "suggests normal range of cognitive functioning." Tr. 186.
2. was not malingering. Id.
3. achieved a full scale I.Q. of 79 on the WAIS-III. Tr. 187.

Thorson's full scale I.Q. of 79 was well above the range for someone who suffered from mental retardation therefore, obviating the need for adaptive deficit measures. Moreover, Dr. Macvaugh noted in his report that "[b]ased on observations of Mr. Thorson's test behavior, his scores on the WAIS-III are considered to be an underestimate of his true intellectual ability." See Exhibit A. at 65. While there may be a possibility of an individual being diagnosed as mentally retarded with an I.Q. of 75, if there are significant deficits in adaptive functioning, an individual is not going to be found to be mentally retarded with an I.Q. of 79.

Dr. Macvaugh further testified, in regards to the defendant's claim that his I.Q. scores should be lowered pursuant to the so called Flynn Effect, that the "scientific community has [not] generally accepted that we should be individually adjusting scores in cases like this."

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[12]Except, of course for Dr. Zimmerman's questionable 2005 post-conviction evaluation. Id.

Tr. 197. Further, Dr. Macvaugh noted that this effect is a "statistical phenomenon" and there exists considerable controversy over its application in this context. Id. Specifically, Dr. Macvaugh testified that the publishers of the WAIS-III "do[] not endorse the recommendation to modify WAIS-III scores to correct for the Flynn Effect."[13] Tr. 239. Even Dr. Swanson testified that she had not applied Flynn when evaluating individuals for disability benefits. Tr. 100. Dr. Macvaugh testified further that even if he were to adjust for Flynn, Thorson would still not be mentally retarded. Tr. 214. Further, the claim that Thorson's scores should be adjusted pursuant to the so called "tree stump effect" is misplaced as such practice is "not generally accepted in the scientific community. . . ." Tr. 223.

Dr. Macvaugh also reviewed Thorson's report cards "received from Ocean Springs City Schools from grades one through six" as well as for "grades seven and eight at Ocean Springs High School" and grades nine and ten. See Exhibit A. at 24. The comments on a number of these cards suggest that Thorson's problems were related not to his I.Q. or lack thereof but rather to a lack of focus in the classroom beginning with the comments on his first grade report. His first grade teacher noted that Thorson "like[d] to talk too much." *Id.* On that same progress report, the teacher noted that, "Roger worked well for a few days then would not apply himself for a while." *Id.* Likewise, his second grade progress report contains a note by his teacher who stated that Thorson "can do the work if he only will put forth the

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[13]Nor does this Court or the Fifth Circuit recognize Flynn. *See Maldonado v. Thaler*, 625 F.3d 229 (5th Cir. 2010)(quoting *In re Mathis*, 483 F.3d 395, 398 n. 1 (5th Cir.2007)(holding that circuit has not recognized the Flynn effect as scientifically valid); *see also Berry v. Epps*, No. 1:04-CV328-D, 2006 WL 2865064, at *35 (N.D.Miss. Oct.5, 2006) (refusing to consider Flynn)

effort." *Id.* Thorson was retained in the third grade, yet a review of the comments on his third grade progress report offers an explanation for this retention. On that progress report the teacher stated that, "Roger needs to pay attention in class and do less talking and playing." Id at 25. That same teacher states further that "Roger needs to apply himself more." Id. Interestingly, that following year Thorson achieved mainly B's and C's with only one D and no F's. Id. Even so, his teacher for that year, who was different than his first stint in the same grade, noted that Roger was "not trying to learn as he should." Id. There was no report card provided for Thorson's fourth grade year. Instead, the records skip to the fifth grade in which Thorson achieved all C's. Id. at 26. Thorson's sixth grade progress has no comments by the teacher. The only notation is that his advancement to the next grade was the apparent result of a social promotion. Id.

Taken as a whole, these school records clearly show that Roger Thorson did not apply himself in school and his grades reflect that. That certainly does not mean he is retarded. It means, quite simply, that he did not put forth the effort necessary to do better than he did, as his teachers virtually unanimously indicated. He did however put forth the effort to get his GED[14] which he acknowledged to Dr. Macvaugh and which was verified at the hearing on this matter. Id. at 27; Tr. 92. Dr. Swanson conceded that "it would be very difficult for mentally retarded person to get a GED because he would have to academically achieve at - - on standardized testing at the 11th and 12th grade level before he would be allowed to sit for the

[14]See Exhibit B. (Copy of Thorson's General Educational Development Test or High School Equivalency Diploma).

GED." Id. at 94.

Dr. Macvaugh also reviewed evidence of previous testing Dr. Macvaugh's full scale I.Q. of 79 was within two points of Dr. Gasparrini's 1988 score of 77[15] which was significant because "the scores were almost identical on all of the indices, the full scale I.Q. score, the verbal I.Q. score, and the performance I.Q. score." Tr. 200. Moreover, these scores were achieved on "two separate editions of a test" some twenty or so years apart making the validity of the 79 achieved at Whitfield readily apparent. Id. It is also readily apparent that Thorson would not have been able to obtain his GED if he were retarded, a fact which Dr. Swanson acknowledged. Tr. 94.

Dr. McMichael testified that Thorson did not meet the first prong of *Atkins* in that he did not have an I.Q. of 70 or below. Tr. 246-7. Dr. McMichael further testified that Dr. Swanson's administration of a "standard measure of adaptive behavior to a girlfriend of Mr. Thorson's who was involved with him for between four and eight months when she was between 16 and 18, and then . . . some other formal standard measure to somebody who had a learning disability or was in special education who knew Mr. Thorson thirty years ago" should be viewed with a "great deal of scepticism." Id. at 247-8. Such retrospective application, in the context of capital litigation was not how the Vineland was to be used. Id. Dr. McMichael further testified that he has never seen Flynn or the tree-stump effect "applied in anything other than capital litigation" nor was Flynn endorsed by the publishers of the

[15]Dr. Gasparrini's Report was admitted as State's Exhibit S-2. See Tr. 198-9.

WAIS-III. Tr. 248.

Testifying further, Dr. McMichael stated that Thorson's word usage in his video taped statement[16] was not consistent with someone who was mentally retarded. Dr. Swanson testified that Thorson had a score of 52 in the oral communication category of the Woodcock-Johnson which translated to a kindergarten or first grade level. Tr. 250. This, according to McMichael was inconsistent based on the "language usage that I heard from Mr. Thorson both in that video tape and when I interviewed him. . . ." Id.

Dr. Macvaugh is a licensed forensic psychologist and Dr. McMichael is a licensed forensic psychiatrist. Both have offered testimony in numerous cases throughout the state on such matters and are clearly qualified to do so. Any claim to the contrary is without merit. Thorson is entitled to no relief on this assignment of error.

C. Appellant's Claim IV.

Here, the Appellant argues that the trial court abused its discretion by not holding in his favor based on the testimony of his experts, which is merely a continuation of his preceding arguments. App. at 18. The Appellant, offers no real argument regarding how the trial court abused its discretion. Instead, he does nothing more than reargue points previously made. Apparently, the gist of the argument is that since his experts have "over sixty years of combined experience" he should have prevailed. App. at 20. That is not the case. The Appellants are unaware of any authority which stands for the proposition that simply because

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[16]See State's Exhibit S-1. (Confession Video).

an expert may have more years of practice that they are to be given more credence. The trial court took into account the testimony of both Thorson's experts as well as those of the State and rendered its decision accordingly, without regard for the length of practice of the respective experts, as that is not the standard. The State submits that for the reasons previously stated, this argument is without legal merit, and the Appellant is therefore entitled to no relief on this assignment of error.

III. THE TRIAL COURT'S HOLDING THAT THORSON IS NOT MENTALLY RETARDED BASED ON THE EVIDENCE AND TESTIMONY OF THE WHITFIELD DOCTORS IS NOT CLEARLY ERRONEOUS[17]

In this claim, the Appellant avers that the trial court was in error by accepting Dr. Macvaugh and Dr. McMichael's testimony and "rejecting Dr. Zimmerman and Dr. Swanson's testimony that Mr. Thorson exhibits significantly sub-average intellectual functioning as set forth by *Atkins*." App. at 20. This claim is simply a continuation of the Appellant's prior claims regarding the qualifications of the Whitfield doctors, claims which are barred from consideration. *See Ross, supra*; See Claim I. The Appellant argues further that the methods employed by the experts at Whitfield in administering tests were suspect because Dr. Macvaugh did not administer them. App. at 16. The Appellee submits that any such claim is barred as the Appellant failed to object at any time to the methods and/or

[17]See App. Claim V.

practices employed by the experts at Whitfield in evaluating Thorson.[18] *See Ross, supra.* Alternatively, and without waiving the applicable procedural bar the Appellee submits this claim is devoid of merit.

The specious nature of this claim is evidenced by the fact the Thorson's own expert, Dr. Swanson, failed to administer an I.Q. test at any time nor did she administer a test for malingering in the collection of her original information, as required by the Court. *See Chase, supra; Lynch, supra.* This failure is substantial considering Dr. Swanson re-evaluated Thorson, meaning there was no way to tell "whether or not for sure [Thorson] may have been putting forth suboptimum effort or attempting to malinger when she collected her data as part of her [first] evaluation." Tr. 205. Dr. Swanson also admitted that she had no expertise in administering tests for malingering and was unsure as to the actual test she claimed to have administered. Tr. 269. Indeed, the test utilized by her, during her second evaluation of Thorson to test for malingering was not even recognized by the State's experts. See Tr. 206, 288. In short, Dr. Swanson did not follow the mandate of the Court in assessing Thorson. *See Chase, supra; Lynch, supra.* Moreover, Dr. Swanson confessed that she was not familiar with the Specialty Guidelines for Forensic Psychologists because she was not a forensic psychologist. Tr. 103. This statement, however, does not insulate her from the requirements

[18]This claim is particularly disingenuous considering counsel for Thorson was present at such testing and made no objections at that time to the manner in which Thorson was being tested. See Exhibit A. at 1.

of those guidelines.[19] Dr. Swanson, reassessed Thorson and failed to comply not only with the mandates of the Court but also those of her own profession.

The Appellant's second expert, Dr. Zimmerman, was anything but credible in his testimony. Thorson was evaluated following his arrest in 1988, prior to his re-trial in 2000, again in 2002, and yet again in 2008. See Exhibit A. Four different mental health professionals found Thorson was not mentally retarded. The three earlier evaluations, found Thorson to have an I.Q. of 77, while Dr. Zimmerman administered the same tests and found Thorson to have an I.Q. of 70. Id. Dr. Zimmerman asked the trial court to simply accept the seven to nine point drop in Thorson's I.Q. as fact, yet those results were clearly suspect[20] as Zimmerman's full scale I.Q. score of 70 represents a seven point disparity when compared to the test results achieved by Dr. Gasparrini and a nine point difference in the score obtained by Dr. Macvaugh and the clinicians at the State Hospital.[21] The only support Dr. Zimmerman offered to explain away this disparity was his reliance on the so called "Flynn Effect." However, this reliance was highly suspect considering his testimony in a Georgia case, referenced at the hearing, in which Dr. Zimmerman acknowledged that the only application of Flynn occurs in the death penalty context and that it was not accepted in cases in which

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[19]In fact, Dr. Swanson admitted that she was required to review these guidelines after stating she was not a forensic psychologist. Tr. 106-7.

[20]Zimmerman didn't even prepare his own affidavit. Tr. 131-2.

[21]Dr. Macvaugh testified that this ten point differential "didn't make any sense. . . ." Tr. 211. Macvaugh further testified that the difference was "not attributable to practice." Id. at 212.

he had testified previously.[22] Tr. 152-6.

Most telling of all, however, is that Dr. Zimmerman did not even diagnose Thorson as being mentally retarded.[23] Tr. 153-6, 162. In fact, Dr. Zimmerman testified that Thorson was not retarded based on his diagnostic criteria. Tr. 156. Therefore, for the purposes of this *Atkins* determination, the State submits that Zimmerman's testimony, apart from being unreliable, was completely unsupportive of the claim that Thorson suffers from mental retardation. That testimony, combined with Dr. Swanson's failure to administer an I.Q. test means that Thorson failed to demonstrate that he is mentally retarded pursuant to the requirements of *Chase* and its progeny

The Whitfield doctors testing of Thorson was proper in every respect and was never the subject of any challenge by the Appellant.[24] The Appellant cannot now claim such practices were improper nor does he cite to any authority which stands for the proposition that such practices are not accepted. Thorson was tested in the same manner as every other individual that has come before this Court on such a challenge. The "approach and the methodology" employed by Dr. Macvaugh and Dr. McMichael is certainly "more compelling

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[22]*See Ledford v. Head*, 2008 WL 754486 (N.D. Ga. 2008).

[23]In Zimmerman's affidavit however, he did offer a diagnosis of mental retardation which further impugns his character and credibility.

[24]Thorson's I.Q. tests were administered by Dr. Robert Storer, a licensed psychologist and at the time of the Appellant's evaluation a member of the Whitfield staff. Dr. Storer was not called as a witness and his administration of these tests to Thorson was never challenged. Dr. Thorson was however, present at the hearing and ready to testify, however, there was no challenge raised in regards to his testing of the Appellant.

than the approach used by experts offered by [Thorson]." *See Doss*, 19 So.3d at 712. There was no error. This claim is barred and is alternatively devoid of merit. Thorson is entitled to no relief on this assignment of error.

IV. THE ARGUMENTS CONCERNING THE FLYNN AND "TREE STUMP" EFFECTS AS WELL AS THOSE CONCERNING STANDARD ERRORS OF MEASURE ARE WITHOUT LEGAL MERIT[25]

Next, the Appellant avers that the trial court abused its discretion by "ignoring" standard errors of measure. App. at 20. Specifically, the Appellant contends that the trial court failed to take into account the Flynn effect and the "tree stump" effect. Id. at 21. For the reasons stated previously, as well as herein, the State submits this argument is without merit.

Dr. Macvaugh specifically addressed the Flynn effect in both his evaluation and in his testimony, contrary to the claims of the Appellant.[26] Dr. Macvaugh testified, in regards to the defendant's claim that his I.Q. scores should be lowered pursuant to the so called Flynn Effect, that the "scientific community has [not] generally accepted that we should be individually adjusting scores in cases like this." Tr. 197. Further, Dr. Macvaugh noted that

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[25]See App. Claim V.

[26]Dr. Macvaugh specifically addressed standard errors of measure including the Flynn effect in his evaluation. See Exhbit A. at 65, 73. The evaluation speaks for itself in that clearly shows that standard errors of measure were addressed and taken into consideration, contrary to the claims of the Appellant. If anything, Thorson's full scale I.Q. is probably higher than 79 due to the circumstances of his testing in that he grew weary during testing due to his having been awakened in the pre-dawn hours on the day of testing in order to be transported from Parchman to Whitfield. Id. at 65.

this effect is a "statistical phenomenon" and there exists considerable controversy over its application in this context. Id. Specifically, Dr. Macvaugh testified that the publishers of the WAIS-III "do[] not endorse the recommendation to modify WAIS-III scores to correct for the Flynn Effect." Tr. 248-9. Even Dr. Swanson testified that she had not applied Flynn when evaluating individuals for disability benefits. Tr. 116. As stated previously, Dr. Macvaugh testified that even if he were to adjust for Flynn, Thorson would still not be mentally retarded. Tr. 247-8. Further, the Appellant's claim that his scores should be adjusted pursuant to the so called "tree stump effect" is misplaced as such practice is "not generally accepted in the scientific community. . . ." Tr. 259. Dr. Macvaugh specifically and repeatedly addressed standard errors of measure in both his testimony and in his report. See Exhibit A. at 65, 73. This claim is further discounted by the fact that the trial court specifically held that both sides presented evidence and testimony regarding standard errors of measure. See Trial Court Order (Appellee's Record Excerpts at58).

The trial court was presented with a plethora of testimony and reports all of which took into account the standard errors of measure. Any claim to the contrary is devoid of merit. Thorson is therefore entitled to no relief on this assignment of error.

V. THE TRIAL COURT COMMITTED NO ERROR IN DETERMINING THAT THORSON HAS NO ADAPTIVE FUNCTIONING DEFICITS[27]

In his next three assignments of error, all of which the Appellees have addressed under this heading as they are all essentially the same argument, the Appellant avers that the trial

[27]See App. Claims VI. - VIII.

court was in error in holding him to not be mentally retarded because of his alleged adaptive deficits. Specifically, the Appellant avers that the trial court abused its discretion by "accepting Dr. Macvaugh and Dr. McMichael's determination that Mr. Thorson does not have concurrent deficits or impairments in at least two areas of adaptive functioning"[28], by rejecting his expert's opinion that Thorson suffered from adaptive deficits[29] and by rejecting his expert's retrospective assessment of adaptive functioning.[30] There is a reason for that. Thorson is not mentally retarded.

I.Q., of course, is but one aspect of the determination of mental retardation. According to *Atkins* and pursuant to *Chase* v. State, 873 So.2d 1013 (2004), significant adaptive functioning deficits must be present as well as well as onset prior to age eighteen. In *Chase* the Court held:

> Thus, it is possible to diagnose Mental Retardation in individuals with IQ's between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, *Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning.*
>
> 873 So.2d at 1021 ¶ 33. [emphasis added]

Thorson's I.Q. score of 79[31] meant he did not meet the initial criteria for adaptive

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[28]See Appellant's Claim VI. at 23.

[29]See Appellant's Claim VII. at 26.

[30]See Appellant's Claim VIII. at 30.

[31]See Exhibit A. at 65.

testing pursuant to *Aktins*, *Chase* and its progeny. Therefore, the trial court did not abuse its discretion. Rather, the court considered all testimony and evidence offered by all experts. The State presented evidence and testimony which categorically showed that Thorson's IQ did not meet the threshold level for mental retardation. Accordingly, there was no need to test for adaptive deficits.

The Appellant misapprehends *Atkins* and the mandate of *Chase* and its progeny as there is no need to advance to the adaptive prong of testing if the individual does not demonstrate a deficit in his I.Q. which would place him in the range of those who could be considered to be mentally retarded since "[a]ll three factors, (1) significant subaverage intellectual functioning, (2) related or significant limitations in adaptive skills, and (3) manifestation before age 18, must be met in order for the offender to be classified as mentally retarded and eligible for *Atkins* protection from execution. *See Doss*, 19 So.3d at 709. Such is the case here. The experts at Whitfield tested Thorson and found him to have an I.Q. of 79. See Exhibit A. Thorson's I.Q., therefore, did not warrant additional testing for adaptive deficits because his score was simply too high.[32] Accordingly, this claim is without merit. However, even if the Appellant were able to somehow advance to the adaptive prong, the State submits there was a plenitude of evidence which clearly showed that Thorson had no significant deficits in adaptive functioning as the trial court specified in its order. See Trial Court Order (Appellant's Record Excerpts at 58.).

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[32]The Whitfield doctors did however address Thorson's adaptive functioning at length. See Exhibit A. at 60-3.

In *Doss*, the Court held in regards to testing for adaptive deficits that:

¶ 46. . . the conceptualization of "adaptive behavior" or "adaptive skills" has proven elusive. Note, Implementing Atkins, 116 Harv. L.Rev. 2565, 2573 (2003); Lois A. Weithorn, Symposium: Conceptual Hurdles to the Application of *Atkins v. Virginia*, 59 Hastings L.J. 1203, 1219 (2008) ("there is no single, commonly-accepted conceptualization of 'adaptive behavior' "); see also Dora W. Klein, Categorical Exclusions from Capital Punishment: How Many Wrongs Make a Right?, 72 Brooklyn L.Rev. 1211, 1234 n. 3 (2007) (noting that scholars and courts alike find that determinations regarding adaptive functioning are often subjective). There has been confusion not only about the concept itself, but also disagreement as to its value. Note, Implementing *Atkins*, 116 Harv. L.Rev. at 2575. Some studies have suggested that IQ remains the best way of measuring intelligence in some contexts. Id.; see also James W. Ellis and Ruth A. Luckasson, Symposium on the ABA Criminal Justice Mental Health Standards: Mentally Retarded Criminal Defendants, 53 Geo. Wash. L.Rev. 414, 422 n. 46 (citing Zigler, Balla & Hodapp, On the Definition and Classification of Mental Retardation, 89 Am. J. Mental Deficiency 215, 227 (1984)) (noting that three scholars have proposed that adaptive functioning be omitted from the definition of mental retardation because " 'the essence of mental retardation involves inefficient cognitive functioning' ").

¶ 47. Adaptive functioning historically has been assessed "on the inherently subjective bases of interviews, observations, and professional judgment." Klein, 72 Brooklyn L.Rev. at 1235. In recent decades, researchers have developed an increasing number of test instruments for quantifying adaptive functioning, only a few of which have gained acceptance in the field. Id.; Weithorn, 59 Hastings L.J. at 1220. These tests provide a necessary objective measurement but offer no panacea. There are "no generally accepted psychometric instruments for measuring adaptive skill levels that are commensurate in reliability with IQ tests." Note, Implementing Atkins, 116 Harv. L.Rev. at 2575 n. 72 (citing AAMR, Mental Retardation: Definition, Classification, and Systems of Supports, 24, 87-90 (10th ed.2002)) (noting that the AAMR concedes that there is no consensus regarding tests for adaptive behavior, but states there are a number of tests with "excellent psychometric properties"). One commentator suggests that existing measurement instruments are inadequate and have very little utility in the *Atkins* context. Weithorn, 59 Hastings L.J. at 1222.

¶ 48. By citing these controversies, we in no way suggest that this Court

abandon the adaptive-behavior prong, or intimate that the tests for measuring adaptive functioning are inherently unreliable. Our point is to illustrate that there is considerable, sincere disagreement among professionals and scholars in the field as to the best method for measuring adaptive functioning. The concept and measurement of adaptive functioning is an unsettled area without consensus among experts and therefore, we cannot find that the Whitfield doctors' opinions are baseless, or that the trial judge clearly erred in accepting their opinions.

¶ 49. We also find evidence which reasonably supports the trial judge's conclusion that the opinions of the Whitfield doctors were more compelling. Although Dr. Grant tested Doss for impairments in adaptive-skill behaviors, he spoke to no family members or other persons besides Doss. Interviews with family members, and others familiar with an individual's typical behavior over an extended period of time in various settings, can supplement or aid in the interpretation of test results. Peggy M. Tobolowsky, Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them From Execution, 30 J. Legis. 77, 98 (2003) (using different sources of data is recommended rather than placing sole reliance on the adaptive-skill assessment instrument); Linda Knauss & Joshua Kutinsky, Into the Briar Patch: Ethical Dilemmas Facing Psychologists Following Atkins v. Virginia, 11 Widener L.Rev. 121, 130-31 (2004). Additionally, testing instruments for assessing adaptive-functioning impairments can, for a variety of reasons, "be less than ideal for assessing adult criminal defendants who might be mentally retarded." Klein, 72 Brooklyn L.Rev. at 1235 (citing certain problems such as the unavailability of caregivers or other reliable independent sources, the use of inappropriate norms, and the atypical environment of a prison); Knauss & Kutinsky, 11 Widener L.Rev. at 131 ("Few (if any) measures of adaptive functioning have been designed or normed for use with a correctional population. Thus, adaptive functioning prior to incarceration should be the target for assessment."); Note, Implementing *Atkins*, 116 Harv. L.Rev. at 2576 (noting that an individual's environment may add a layer of uncertainty to diagnosing adaptive-skill deficits). Indeed, Dr. Lott stated that he knew of no studies that have normed an adaptive-functioning test for those on death row, and Dr. Grant admitted that the adaptive-functioning tests he administered were not normed for a prison population.

¶ 50. In sum, we have in this case experts who take opposite positions as to whether Doss is mentally retarded. Neither side's methodology, approach, or understanding of the issue is infallible. The ultimate issue of whether Doss

> is, in fact, mentally retarded for purposes of the Eighth Amendment, is one for the trial judge, who sits as the trier of fact and assesses the totality of the evidence as well as the credibility of witnesses. While expert opinions are helpful and insightful, the ultimate decision of mental retardation is not committed to the experts, but to the trier of fact. As the United States Supreme Court has noted, "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law." *Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002).

19 So.3d at 713-4.

The Appellant presented evidence and testimony to the trial court purporting to show that he suffered from adaptive deficits. Even though the Whitfield doctors, having determined that Thorson did not meet the I.Q prong for mental retardation did not have to assess him for adaptive deficits, they nonetheless addressed their specific reasons for not administering the Vineland Adaptive Behavior Scales but also examined evidence of his adaptive functioning. See Exhbit A. at 60-3, 74.[33] Both Dr. Macvaugh and Dr. McMichael testified regarding Thorson's alleged adaptive deficits and stated not only their objections to Dr. Swanson's retrospective assessment of the Vineland but also provided the trial court with precise examples of Thorson's lack of such deficits.

Dr. Swanson relied on a number of affidavits in arriving at the conclusion that Thorson suffered from adaptive deficits however a number of them clearly show Thorson clearly has

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[33]They did however review a wealth of information regarding Thorson's adaptive functioning and determined he had no significant deficits except for the area of functional academics. Id.

no significant adaptive deficits.[34] For example, the affidavit of Fred Cody, Jr. states that Thorson had a car as a teenager and actually drove his friends around. See Exhibit A. at 62. Thorson's mother, in her affidavit, spoke of Thorson participating and helping in various church programs, making furniture for her and doing construction work. Id. at 61. These instances show that Thorson did not suffer from adaptive deficits.

Further, Dr. Swanson administered the Vineland, an adaptive measure, retrospectively to Joann Griggs who was Thorson's girlfriend for a four to eight month period when she was around sixteen years of age. Dr. Macvaugh testified as to the inherent problems of such a retrospective analysis, stating that such an administration is not scientifically valid and that the test was not developed for that purpose. Tr. 202. Macvaugh further testified that such an assessment "relies on the memory of someone" from "approximately 29 years ago" and that psychological research suggests that "memory is not reliable over time." Id. Further, in regards to an adaptive measure administered by Dr. Swanson, Dr. Macvaugh testified that the "norms that were created to standardize that instrument consisted of only 19 people with mental retardation." Tr. 203. Moreover, Dr. Swanson failed to re-administer all of the same instruments to Thorson during her second evaluation of him making that data irrelevant because she had failed to give him a test for malingering on her first evaluation. Tr. 206. Dr. Swanson also did not include in her report pertinent data points, as she was ethically required to do, which indicated that Thorson was not mentally retarded such as the fact:

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[34]See Tr. 41.

1. That Thorson reported to Dr. Sidney Smith in 1987 [] very detailed information about his medical history. Tr. 101.

2. That on numerous reports submitted by Thorson to the Mississippi Department of Corrections that he complained of numerous health problems and sought treatment for all these asking for specific medications such as Robaxin antibiotic cream, as well as other medications. Id.

3. That in Dr. Tate's October 2000 evaluation he found every opportunity to skip school. Tr. 102.

4. That in the fifth grade Thorson had a yearly average of C for all courses. Id.

5. That his social habits in the fifth and sixth grade were all marked satisfactory in all areas that year. Tr. 102-3.

6. That under the Department of Corrections records Judy Brasher in 1984 noted that Thorson obtained a GED and had vocational experience in refrigeration and air conditioning and electrical wiring. Tr. 119.

7. That Dr. Gasparrini, in his 1988 report, noted that Thorson had obtained his GED from Jackson County Junior College and took vocational courses. Tr. 103.

8. That in Dr. Maggio's 2002 report Thorson admitted to abusing

marijuana and that he admitted to using it every day. Tr. 104.

9. That at times Thorson asserted his right not to incriminate himself during interviews. Id.

10. That in the Mississippi Department of Corrections records there was no history of Thorson having received disability benefits. Tr. 104-5.

Dr. Swanson included none of these data points in her report but acknowledged that she was ethically required to do so. Tr. 106. Dr. Swanson also failed to include in her report additional data that argued against adaptive deficits such as the fact that, Thorson saved a boy from drowning and received an award for that, washed dishes at a summer camp and made his adoptive mother a coffee table, end table and cutting board in his shop class. See Exhibit A. at 60. This type of data, which argues against adaptive deficits, was conveniently left out of Dr. Swanson's report while the Whitfield doctors took great pains to examine all relevant data in their report and including a review of all data, affidavits of "people who described his functioning in the past" as well as "his prison records." Tr. 188. Dr. Macvaugh testified that in reviewing all the data[35] as well as in questioning Thorson determined that his only adaptive deficit was in the area of "functional academics." Tr. 188-9. This deficiency alone however, was not symptomatic of mental retardation. Again, as Dr. Macvaugh testified, there was a considerable amount of data compiled throughout this decades long case that was considered

[35]Again, Dr. Macvaugh reviewed over "300 different pieces of information, reports, video tapes, criminal histories, prison histories, prior evaluations" as well as his evaluation in determining that Thorson is not mentally retarded. Tr. 191-2.

in evaluating for adaptive deficits and yet there was "no data to suggest to us that he suffered from mental retardation during the developmental period", that being prior to age eighteen (18). Tr. 191.

The State submits there was no credible evidence presented that showed any significant limitations in Thorson's adaptive functioning nor was there any evidence of manifestation prior to age eighteen. *Chase, supra.* Thus, the trial court's holding was not clearly erroneous.

As was the case in *Doss*, the trial court in the case sub judice considered "all the evidence and the expert opinions offered, and found the Whitfield doctors to be more credible." *Id.* at 714-5. The trial court followed the procedures outlined in *Chase* and properly concluded by a preponderance of the evidence that Thorson is not mentally retarded. *Id.* Thorson is therefore entitled to no relief on this assignment of error.

VI. THE ARGUMENT SUGGESTING THE TRIAL COURT WAS IN ERROR FOR REJECTING DR. SWANSON'S CLINICAL JUDGMENT IS WITHOUT MERIT[36]

This argument is nothing more than a continuation of the preceding arguments and lacks any legal merit whatsoever. Essentially, the Appellant claims that because Dr. Swanson has "37 years of direct experience" that the trial court should have sided with her and that Dr. Macvaugh's clinical judgment was somehow defective. App. at 32-3. The Appellee submits that, for the reasons previously stated in Claims I. - IV., the arguments of which the Appellee respectfully incorporates herein, this argument is completely devoid of merit. Dr. Macvaugh's

[36]See App. Claim IX.

evaluation and testimony clearly demonstrate, or rather exemplify the very highest level of clinical judgment and stand in stark contrast to the reports and testimony of Appellant's experts. This claim is specious and is without legal merit. Thorson is entitled to no relief on this assignment of error.

VII. THE STANDARD APPLIED BY THE TRIAL COURT WAS NOT CLEARLY ERRONEOUS[37]

The Appellant's final argument is that the trial court somehow applied the wrong standard in rendering a decision in this case, claiming that the court's order was incorrect. App. at 33. The State submits that trial court conducted a hearing pursuant to the authority of this Court and rendered a decision which was in no way contrary to those mandates. Indeed, the trial court's Order is exemplary in that the court addressed not only the correct legal standard but detailed the specific instances which categorically show that Thorson is not mentally retarded. See Trial Court Order (Appellant's Record Excerpts at 58).

In short, "[t]he trial judge heard all the evidence and the expert opinions offered, and found the Whitfield doctors to be more credible. The trial judge followed the procedures. . . set forth in *Chase* and concluded that [Thorson] had failed to prove by a preponderance of evidence that he is mentally retarded." *See Doss* at 714-5. The trial court, therefore, committed no error in concluding that Roger Thorson is not mentally retarded nor was the Order clearly erroneous. This claim is without legal merit. Thorson is entitled to no relief on

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[37]See App. Claim X.

this assignment of error.

CONCLUSION

For the above and foregoing reasons the State would assert that the decision of the circuit court finding Thorson to not be mentally retarded should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jason L. Davis, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, first-class postage prepaid, a true and correct copy of the foregoing **BRIEF OF APPELLEE** to the following:

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