2010-CA-01010-SCTRT

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I. THE STANDARD FOR ASSESSING MENTAL RETARDATION APPLIED BY THE TRIAL COURT CONSTITUTES AN ABUSE OF DISCRETION – A CONTENTION THAT THE STATE DOES NOT AND CANNOT REFUTE.

Seemingly recognizing the gravity of the mistake, the State, in its Response brief, has made **absolutely no effort** to refute Thorson's contention that the trial court abused its discretion by applying an erroneous standard in rendering its mental retardation determination. This is because even a cursory review of the trial court's Order reveals that the trial court turned the mental retardation inquiry inside out. Putting the proverbial cart before the horse, the trial court hinged its ultimate determination - that Thorson is not mentally retarded - on an incorrect formulation of the criteria for mental retardation. As such, the trial court's ruling was an abuse of discretion and should be reversed.

In its Order, the trial court stated that Thorson's functional academic deficit "has not been shown by a preponderance of the evidence to be **as a result of** mental retardation." (*See* June 4, 2010 Order issued by Judge Roger T. Clark ("Order"), p. 6) (emphasis added). Aside from being impossible to satisfy, this is simply not Thorson's burden to overcome. Thorson has absolutely no obligation to show – by a preponderance of evidence or otherwise – that any of his adaptive functioning deficits were **caused by** mental retardation. The trial court emphasized that it was "not convinced that Thorson's functional academic deficit **was proven to be a result** of mental retardation...". *Id.* Again, this is not only an insurmountable burden, it is not the standard for assessing mental retardation imposed by the field of psychology or applicable law.

The trial court, as is clear from the language of its Order, premised its ruling on

Thorson's failure to prove a causal relationship between his adaptive deficits and his mental retardation. However, the diagnostic criteria outlined in the DSM-IV-TR, and cited in *Atkins* and *Chase*, **do not require the substantiation of such a relationship**. *See Atkins v. Virginia*, 536 U.S. 304 (2002); *Chase v. State*, 873 So. 2d 1013 (Miss. 2004). In fact, as shown below, the proper standard for assessing mental retardation requires:

> (a) significantly subaverage intellectual functioning (IQ of approximately 70 or below on an individually administered IQ test); **and**
>
> (b) concurrent deficits or impairments in present adaptive functioning (. . . effectiveness in meeting the standards expected for his age by his cultural group) in at least two of the following areas: communication, self-care, home living, social /interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety; and
>
> (c) onset before the age of 18.

(Def. Ex. 2 at 1). This standard **does not** require proof that this ultimate condition of mental retardation causes the very factors upon which mental retardation is based. This topsy turvy logic shows that the trial court fundamentally misunderstands the applicable law and science on diagnosing mental retardation. The concept of causation – which the trial court hinged its ruling on – is neither referenced nor required by the applicable standard for the assessment of mental retardation. However, as the plain language of the Order shows, the trial court's analysis was premised on its rejection of Thorson's adaptive functioning deficits based on their theoretical cause – rather than an analysis using the standard articulated above. Therefore, the trial court abused its discretion and its findings should be reversed.

The trial court's application of this improper standard is only highlighted by the context in which it was most directly applied. Tellingly, both the State and Thorson's witnesses agreed that Thorson displayed adaptive functioning deficits in the academic realm. (Order, p. 6). This finding was not in dispute. However, despite the consensus of the experts who testified at the hearing that Thorson displayed impairments in academic functioning, the trial court categorically dismissed this deficit **solely because it was not proven to be "a result" of mental retardation** – a standard of proof that is neither relevant nor applicable to a mental retardation assessment. The trial court's dismissal of this agreed upon deficit based on its supposed causation exposes the trial court's egregious error in assessing Thorson's mental retardation. As such, the trial court abused its discretion and its determination that Thorson is not mentally retarded should be reversed.

The significance of the trial court's application of the incorrect standard is further emphasized by the State's Response brief. Rather than refute the arguments set forth by Thorson, the State categorically ignores the trial court's error offering little more than the "trial judge heard all the evidence and the expert opinions offered, and found the Whitfield doctors to be more credible." (Response, p. 43). But this is simply not the case. Instead, the trial court, as is evident from the unambiguous language of the Order, improperly mandated that Thorson overcome the impossible (and inapplicable) burden of demonstrating some causal nexus between his adaptive functioning deficits and mental retardation – a burden that is **not** articulated in either *Atkins* or *Chase*. The State's blatant disregard of the application of an erroneous standard in assessing mental retardation is alarming and draws even more attention to the trial court's error. As the trial court abused

its discretion by applying an improper standard to the assessment of mental retardation, reversal of the trial court's findings is warranted.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY IGNORING THE UNDISPUTED FACT THAT THE CONFIDENCE INTERVAL OF THORSON'S INTELLECTUAL FUNCTIONING PLACED HIM WITHIN THE MENTALLY RETARDED RANGE.

As a threshold matter, the State, and ultimately the trial court, made a glaring error in evaluating Thorson's intellectual functioning. Both the State and the trial court recognized the applicability of the DSM-IV-TR, AAMR, *Atkins* and *Chase* - each of which expressly acknowledgethat a person with mental retardation may have an IQ score **as high as 75** (Tr. a 224; State Ex. 3 at 73; Order p. 4). The trial court also adopted Dr. Macvaugh's testimony that an individual's IQ score **"should be reported with a "confidence interval."** (Order, p. 4) (emphasis added). Then, the trial court went on to ultimately adopt Dr. Macvaugh's finding that Thorson's confidence interval **"would be between 75 and 83"** - the bottom end of which is considered mentally retarded under *Atkins* or *Chase*. (Order, p. 4) (emphasis added). However, in an unexplained and unsupported leap, the trial court, without reason and in contradiction of all of the applicable authority and each expert, categorically **ignored the overlap** and found that Thorson did not meet the intellectual functioning prong of a mental retardation assessment. The trial court's disregard for the fact that Thorson's confidence interval – as reported by each of the experts – falls within the mentally retarded range was a clear abuse of discretion and warrants reversal of the trial court's findings.

The trial court's abuse of discretion is highlighted by the fact that the State and

Thorson's experts agreed that reporting an individual's intellectual functioning in the context of a confidence interval is paramount. Specifically, Dr. Macvaugh, opined that the testing of intellectual functioning is:

> ...not a very precise measurement. It's not like taking a temperature. This is an assessment of intelligence, which is complicated, and there are lots of ways that the score can be affected by various sources of error.

(Tr. at 193-194). Thorson's expert Dr. Swanson elaborated on Dr. Macvaugh's characterizations and placed particular attention on the sources of error:

> ...I would stress [that] all the AMR editions that we've discussed and the DSM pay particular attention to the standard error of measurement, and it's an approximate score. They ask you to look at the standard error of measurement or the confidence interval around that score. So it's not a set cut-off score. It's more like a confidence interval that you look at.

(Tr. at 25). The experts agree – intellectual functioning is not precise – it is approximate. The experts also agree that it is imperative to account for standard statistical concepts of measurement error and report intellectual functioning scores within a confidence interval.

However, while the experts both articulated the very same concerns and highlighted the very same factors that must be considered in the assessment of intellectual functioning, the trial court abused its discretion by acknowledging the confidence interval of "between 75 and 83" – which places Thorson within the mentally retarded range – and then systematically ignoring it by finding him not mentally retarded. The trial court's disregard for the standard error of measurement and Thorson's applicable and unrefuted confidence interval was an abuse of discretion and warrants reversal of the trial court's findings.

In addition, the trial court abused its discretion by failing to apply the Flynn effect

to Thorson's IQ score. Instead of factoring in this effect – widely recognized in the field – the trial court improperly adopted the State's disingenuous argument that the "Flynn" effect should not be applied to adjust an individual IQ score. (Order, p. 4). However, Dr. Macvaugh's testimony should not have been relied as demonstrated by Dr. Macvaugh's prior sworn testimony and academic writing on the topic. Specifically, Dr. Macvaugh was one of three experts who stated that "the Flynn effect is generally accepted in the psychological community and must be taken into consideration in interpreting Petitioner's full-scale IQ". *See Wiley v. Epps*, 668 F. Supp. 848, 894 (N.D. Miss. 2009). Even more, in his academic writing, Dr. Macvaugh states that "the Flynn effect has gained sufficient scientific acceptance that this factor should be described in Atkins assessments and that Flynn-corrected IQ scores (including the 2.34 adjustment of WAIS-III Full Scale IQ score) should be reported in addition to the observed scores." (State Ex. 6 at 24, Dr. Macvaugh & Cunningham, Atkins v. Virginia: Implications and Recommendations for Forensic Practice, JOURNAL OF PSYCHIATRY & LAW (in press 2008)). Thus, contrary to his stance at the trial court hearing, Dr. Macvaugh has recognized application of the Flynn effect when reporting an individual IQ score. (Contra Tr. at 195). The trial court's improper reliance on the State's self-serving testimony and its refusal to apply to Flynn effect to Thorson's IQ score was an abuse of discretion and should be reversed.

III. THE TRIAL COURT'S RELIANCE ON AN ABRIDGED ADAPTIVE FUNCTIONING ANALYSIS WAS AN ABUSE OF DISCRETION.

The State, in an effort to distract from the fact that it conducted a bare bones adaptive functioning assessment, now steadfastly argues that "there was no need to test for adaptive deficits." (Response, p. 35). However, not only is this contention entirely

incorrect, it is directly contradicted by the State's own expert, Dr. Macvaugh. During his testimony, Dr. Macvaugh framed and answered the following question:

> Are you asking if somebody has an IQ that is as high as 75, that would require further assessment of adaptive functioning?

(Tr. at 218-219). To which he responded without qualification:

> **Yeah, I would agree with that.**

Id. (emphasis added). As discussed above, because the State concedes that Thorson's confidence interval placed his IQ at between 75 and 83 it would thus **require** a full and complete adaptive functioning assessment. However, though he acknowledged that it was **required**, Dr. Macvaugh failed to properly conduct an assessment of adaptive functioning. The trial court's acceptance of Dr. Macvaugh's inadequate assessment was an abuse of discretion.

Though Dr. Macvaugh noted the absolute necessity for a full adaptive functioning assessment, he failed to conduct one. Instead, Dr. Macvaugh performed a truncated adaptive functioning assessment that did not include the use of a single standardized test instrument. (Tr. at 190). In addition, he conducted no personal interviews of any witnesses, other than Thorson, to support his opinions. (Tr. at 232). Dr. Macvaugh's inadequate analysis should have been summarily rejected by the trial court. In fact, Dr. Macvaugh himself recognizes the inadequacy of his effort in that he does not usually conduct such a severely limited adaptive functioning assessment. *See Doss v. State*, 19 So. 3d 690, 712 (2009) (The circuit court noted that Dr. Macvaugh, at the very least, interviewed Doss, numerous family members, and others who had observed him in the past for his adaptive functioning assessment). Therefore, Dr. Macvaugh's abridged assessment

– and the trial court's reliance on this inadequate assessment – was an abuse of discretion and should be reversed.

Thorson's expert, Dr. Swanson, not only recognized the necessity of an adaptive functioning assessment – she actually conducted one. Namely, as detailed in her testimony and report, Dr. Swanson interviewed not just Mr. Thorson but **ten** other individuals to perform her assessment in this case. (Tr. 36-62). The individuals she interviewed, either in person or over the telephone, included Mr. Thorson's biological mother, sister, former girlfriend, uncles and aunts, cousins, co-workers, a schoolteacher and school special education administrator. (Tr. 36-62; Def. Ex. 2). In addition to the interviews, Dr. Swanson reviewed medical history, affidavits submitted in post-conviction papers, report cards, social security work history, previous assessments of Mr. Thorson's mental condition, previous intellectual assessments, other mental health assessments, including those from Dr. Zimmermann, and Dr. Swanson also administered what is widely recognized as the "gold standard" test for academic functioning, the Woodcock-Johnson test (Tr. at 75-76; Def. Ex. 2 at 28). As Dr. Swanson not only acknowledged the necessity of an adaptive functioning analysis – she actually conducted it and based her findings on the same, the trial court abused its discretion in failing to adopt her findings.

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING DR. MACVAUGH AND DR. MCMICHAEL TO TESTIFY AS EXPERTS IN THE *ATKINS* CONTEXT.

Despite the clear language of the *Atkins* standard, the State in its Response brief and the trial court at the hearing placed an unjustified emphasis on the fact that Dr. Macvaugh and Dr. McMichael are trained in the field of forensic psychology and Dr. Swanson is not.

During the *Atkins* hearing, the State systematically exaggerated the significance of Dr. Macvaugh and Dr. McMichael's forensics background, and similarly highlighted Swanson's alleged lack of forensic experience. (Tr. at 103, 106, 170-172, and 177). However, this distinction is unimportant in an *Atkins* setting, as the standard itself does not require, much less make mention of, forensics training. Ultimately, this unjustifiable contention was toxic to the trial court's interpretation and credibility assessment of the respective expert witnesses.

Without a shred of legal support, the State attempts to wage a turf war – claiming *Atkins* determinations belong in the territory of forensic experts. In fact, there are numerous *Atkins* cases in which both the prosecution and defense have proffered non-forensic experts who are otherwise qualified to assess mental retardation, and the court recognized them as such. *See Chase v. State*, 873 So.2d 1013 (Miss. 2004); *Spicer v. State*, 973 So.2d 184 (Miss. 2008); *Wiley v. State*, 890 So.2d 892 (Miss. 2004); and *Branch v. State*, 961 So.2d 659 (Miss. 2007). Therefore, the trial court abused its discretion by placing too much emphasis on the title "forensic". The trial court erroneously ignored Dr. Macvaugh and Dr. McMichael's lack of experience and qualifications regarding the assessment of mental retardation simply because they possess forensics training.

As fuel for its turf war, the State engages in *ad hominem* attacks against Dr. Swanson for not being a forensic psychologist. However, as this Court made clear in *Chase*, the expert opinions offered on the *Atkins* determination must be from someone who is:

> 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.

Chase, 873 So.2d at 1029. There simply is no requirement that the expert be a forensic psychologist – or have any training in forensics whatsoever. Instead, the focus is training in the field of assessing mental retardation – the field in which Dr. Swanson has the most training, expertise, and experience of anyone who testified in this matter. In fact, Dr. Swanson's **entire** professional career has focused on and continues to focus on testing, reviewing tests, interpreting tests, and diagnosing individuals for mental retardation. With over thirty years of training, experience, and expertise in the area of mental retardation her qualifications are unmatched by her State counterparts. Dr. Swanson's sophisticated knowledge and intimate understanding of mental retardation and its accurate assessment make her expert opinion paramount among the experts who testified at the hearing before the trial court. Given Dr. Swanson's extensive training, experience and expertise in the field of assessing mental retardation – and the fact that forensic training is not included in the criteria for assessing experts in an *Atkins* context – the trial court abused its discretion by rejecting Dr. Swanson diagnosis of Thorson as an individual with mental retardation and adopting the diagnosis set forth by Dr. Macvaugh and Dr. McMichael.

V. THORSON'S EXTENSIVE *VOIR DIRE* OF MAVAUGH AND MCMICHAEL PROVIDED THE COURT WITH AMPLE INFORMATION TO FULFILL ITS "GATEKEEPER" FUNCTION.

Through extensive *voir dire*, Thorson, by and through his counsel, adamantly opposed the acceptance of Dr. Macvaugh and Dr. McMichael as experts in the assessment of mental retardation and provided the trial court with more than enough information to properly fulfill its "gatekeeper" function. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,

509 U.S. 579, 589 (1993) ("the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."); *Smith v. Clement,* 983 So. 2d 285, 289 (Miss. 2008) (under the rule of evidence governing the admissibility of expert opinion, trial judges are "gate keepers" with the responsibility of determining, in the first instance, whether an expert's proferred opinion is both relevant and reliable.) In *Smith,* the trial court struck an affidavit proferred by plaintiff's expert, Dr. Forbes, after the defendant assisted the court in fulfilling its "gate keeper" responsibility by alerting the court that the expert's methodology was neither reliable nor relevant. *Smith,* 938 So. 2d at 289. As is it is the trial court's responsibility to determine the reliability and relevance of the proferred testimony, Thorson's counsel assisted the trial court by consistently and repeatedly challenging Dr. Macvaugh and Dr. McMichael's experience and training in assessing mental retardation and specifically highlighting their respective lack thereof.

Through pointed cross-examination prior to his acceptance as an expert, Thorson's counsel elicited that Dr. Macvaugh is admittedly "self-educated" on *Atkins* (Tr. at 171), has only personally examined "probably a hundred" individuals to determine whether they are mentally retarded, much of which was done in his doctorate and post-doctorate training (Tr. at 169) and that Dr. Macvaugh does not even maintain a clinical practice. In response to direct questioning from Thorson's counsel, Dr. Macvaugh alerted the trial court that, in his own words: "[a]ll I do is forensic work." (Tr. at 174). Even more, after questioned by Thorson's counsel, Dr. Macvaugh admitted that only 10% of his work involves individuals who are suspected of being mentally retarded. (Tr. at 176). Through Thorson's efforts, the trial court was made aware that Dr. Macvaugh was simply not qualified to evaluate

individuals for the purposes of diagnosing them as being mentally retarded and, as such, Dr. Macvaugh lacked the experience and qualifications to render a competent opinion on whether Thorson is mentally retarded. As such, the trial court failed to properly fulfill its "gate keeper" function and abused its discretion in accepting Dr. Macvaugh as an expert in the field of mental retardation and relying on Dr. Macvaugh's assessment or diagnosis with regard to same. Similarly, when questioned by Thorson's counsel during *voire dire,* Dr. McMichael admits that he neither administers tests nor interprets test results for the purposes of diagnosing patients as mentally retarded (Tr. at 244) and has not done many evaluations for the sole purpose of determining mental retardation (Tr. at 244). Accordingly, Thorson put the trial court on direct notice that Dr. McMichael was not "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," and that he should not have been recognized as an expert in the *Atkins* context. *Chase,* 873 So.2d at 1029. Based on the elicited testimony regarding Dr. McMichael's clear lack of qualifications, it is evident that the trial court failed to properly fulfill its "gate keeper" function and abused its discretion in accepting Dr. Macvaugh as an expert in the field of mental retardation and relying on Dr. Macvaugh's assessment or diagnosis with regard to same.

The extensive examination conducted by Thorson's counsel thoroughly challenged the sufficiency of both doctor's experience in assessing mental retardation, administration and interpretation of tests, and evaluation of persons for purposes of determining mental

retardation. This calculated and ardent examination of the State's experts was a clear and unmistakable manifestation of an objection to Dr. Macvaugh and Dr. McMichael's credentials and suitability to be tendered as experts in an *Atkins* context as they did not employ the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. The trial court abused its discretion by failing to properly fulfill its "gate keeper" function and further abused its discretion by permitting the expert testimony of Dr. Macvaugh and Dr. McMichael despite having been alerted to the unreliability and relevance of such testimony by Thorson's counsel.

CONCLUSION

Based on the foregoing and the arguments set forth in his opening brief, Mr. Roger Thorson has demonstrated that the trial court abused its discretion in determining that he is not an individual with mental retardation and requests that the trial court's ruling be reversed in its entirety and this Court enter an order finding that Mr. Thorson is mentally retarded and thus ineligible for the death penalty under *Atkins*. In the alternative, Mr. Thorson requests that his cause be remanded to the trial court for a new hearing on *Atkins* related matters conducted pursuant to the appropriate standard.

RESPECTFULLY SUBMITTED this 17th day of February, 2011.

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CERTIFICATE OF SERVICE

I, James L. Davis, III, do hereby certify that I have this day served the original and three (3) copies of the above and foregoing REPLY BRIEF OF APPELLANT. along with an electronic version of same on CD, via United States mail, postage prepaid, to the following, to-wit:

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I further certify that one (1) copy of said BRIEF OF THE APPELLANT has this day been forwarded, via United States mail, postage prepaid, to the following, to-wit:

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