IN THE MISSISSIPPI SUPREME COURT

Supreme Court No. 2010-CA-01010-SCT

Appeal from Cause No. 5190
In the Circuit Court of Harrison County, Mississippi
Second Judicial District

ROGER ERIC THORSON, Appellant,

v.

STATE OF MISSISSIPPI, Appellee.

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

In order that the Justices of this Court may evaluate possible disqualification or recusal, the undersigned certifies that the following persons have an interest in the outcome of this case:

A. Appelllant: Roger Eric Thorson

B. Appellee: State of Mississippi

C. Aligned with Appellee: Mississippi Attorney General's Office, District Attorney of Harrison County

D. Appellant's Counsel: Jim Davis, Gulfport, Mississippi; Daniel S. Brennan and Erin E. Krejci, Chicago, Illinois (with the firm Laurie & Brennan, LLP); Richard Klawiter and Michael Kasdin, Chicago, Illinois (with the firm DLA Piper LLP(US))

E. Appellee's Counsel: Marvin Davis (Mississippi Attorney General's Office), Jason Davis, (Mississippi Attorney General's Office), Mark Ward (Assistant District Attorney for Harrison County, Mississippi)

F. Crime Victim: Gloria McKinney and her family members, relatives and surviving heirs

G. Trial Judges: Judge Jerry O. Terry (original trial judge); Judge Roger T. Clark

SO CERTIFIED THIS 6th day of October, 2010

Jim Davis

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STATEMENT OF THE CASE

Course of Proceedings

Thorson was indicted on June 3, 1987 and charged with the capital murder of his ex-girlfriend, Gloria McKinney, during the commission of kidnapping on March 4, 1987. Thorson entered a plea of not guilty.

Thorson was tried and convicted as charged in 1988. Thorson appealed to the Mississippi Supreme Court on a variety of grounds. The Mississippi Supreme Court found merit to the contention that there was a possible violation of *Batson v. Kentucky,* 476 U.S. 79 (1986) and remanded for a *Batson* hearing to determine if the prosecution violated the *Batson* criteria in exercising its peremptory challenges. *Thorson v. State,* 653 So.2d 876 (Miss. 1995). Upon remand, the trial court found no *Batson* violation. Thorson then appealed to the Mississippi Supreme Court, which reversed his conviction and remanded the matter for a new trial, having found that a juror was improperly challenged based solely on her religious affiliation. *Thorson v. State*, 721 So.2d 590 (Miss. 1998).

A new trial began on June 3, 2002 in the Harrison County Circuit Court, Judge Jerry O. Terry, presiding. On June 7, 2002, Thorson was convicted as charged. The following day, on June 8, 2002, Thorson was sentenced to death.

The Mississippi Supreme Court affirmed Thorson's conviction on November 4, 2004 and denied his petition for rehearing on February 3, 2005. *Thorson v. State*, 895 So.2d 85 (Miss. 2004). The mandate issued on February 10, 2005.

On April 27, 2005, Thorson filed a petition for writ of certiorari with the Supreme Court of the United States. That petition was denied on October 3, 2005. *Thorson v. Mississippi*, 126 S.Ct. 53 (2005).

Thorson timely filed with a petition for post-conviction relief with the Mississippi Supreme Court on January 24, 2006. The Mississippi Supreme Court rejected all of Thorson's grounds for post-conviction relief except for Thorson's claim that he was mentally retarded under *Atkins v. Virginia*, 536 U.S. 304 (2002). The case was remanded to the Circuit Court of the Second Judicial District of Harrison County for an *Atkins* hearing. *Thorson v. State*, 994 So. 2d 707 (Miss. 2007).

The Circuit Court held an evidentiary hearing on January 7 and 8, 2010 on the *Atkins* issue. Thereafter, the Circuit Court requested post-hearing briefs from Thorson and the State. On June 4, 2010, the circuit court, by Judge Roger T. Clark, issued an order finding that Thorson did not meet the standard for mental retardation under *Atkins* and *Chase v. State*, 873 So. 2d 1013 (Miss. 2004). It is that order that is the subject of this appeal.

Statement of Facts

Thorson has previously submitted to this Court extensive factual information on his mental retardation claim in connection with his petition for post-conviction relief and that information is incorporated by reference.[1]

Many of the relevant facts regarding Thorson's mental retardation claim are discussed in detail in the Argument portion of this brief. A summary of certain pertinent information is set forth below.

Thorson's Early Years and Indicia of Mental Retardation

Thorson was adopted by Juanita and Roger R. Thorson when he was two days old. His biological mother, Bertha Brooks, was a 15 year old girl who came from an impoverished and

[1] The experts who testified at the *Atkins* hearing reviewed most if not all of these materials as well. (Def. Ex. 2 *generally* and Appendix A to Def. Ex. 2 listing documents reviewed; State's Ex. 3).

troubled home. Thorson's biological father, Kenneth Woodard, did not have much schooling and may have been mentally retarded. (Def. Ex. 2 at 8).

Thorson suffered from a difficult life at home and at school. As a child, Thorson's father, Roger R. Thorson, was rarely home because he worked in the South Pacific. During this time, Thorson lived with his mother and his grandmother, who suffered from bouts of depression and would stay in bed all day. Thorson's mother worked as a registered nurse and spent many hours at the hospital, leaving Thorson at home with his depressed grandmother. (Def. Ex. 2 at 8).[2]

Thorson's family never had much money. Thorson's father was an alcoholic who drank all day long and as a result was mean and physically abusive to Thorson. As an example, on one particularly abusive occasion, while the children were at home, Thorson's father beat his mother, dragged his mother around the house by her hair and threatened her with a gun. (Def. Ex. 2 at 9).

In addition to his broken home life, Thorson suffered from physical and mental health afflictions throughout his childhood. Specifically, Thorson was often sick with a variety of ailments, including pneumonia, red measles, tonsillitis and mononucleosis. He also suffered from high fevers causing his body to become rigid and causing him to stop breathing. In addition, he suffered from convulsions as a result of these fevers. At a very young age, Thorson began taking medication for stress due to problems he suffered at home and school that caused him to have stomach cramps. Thorson continued to require anti-anxiety medication well into adulthood. (Def. Ex. 2 at 14).

School presented difficult challenges for Thorson. In the second and third grade, Thorson was put on medication to counter anxiety experienced with school. The medication did

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[2] Much of this information on Thorson's childhood was also contained in the affidavits of Juanita Thorson, Mr. Thorson's now-deceased adoptive mother. That affidavit was received by all experts and was submitted to this Court with Thorson's petition for post-conviction relief.

not help and Thorson's teachers reported that he was having trouble advancing grades. He repeated third grade. In sixth grade, Thorson's teacher gave him a "social promotion" to seventh grade, but noted his poor performance. In seventh grade, he failed all of his classes and Thorson's mother learned that he had taken a test that showed he had an IQ of 70. Unfortunately, special education classes for the mildly mentally retarded did not exist at this time and Thorson did not receive any academic attention for his mental disabilities. (Def. Ex. 2 at 12-13). Following the tenth grade, after enduring an endless array of physical, mental, social and familial problems, Thorson dropped out of school in the early 1970's. (Def. Ex. 2. at 15).

After dropping out of school, Thorson attempted to hold a job, but never seemed to keep any one position for very long. Most of his jobs were of short duration and involved very basic, repetitive work such as his work at Morrison's Cafeteria, one of the last positions he had before the crime that led to his conviction. (Def. Ex. 2 at 15).

Throughout his life, Thorson depended on other people for anything and everything. Thorson never had a bank account or maintained a phone or other utility in his name. Thorson did not shop alone nor could Thorson budget money. (Def. Ex. 2 at 27).

Defense Assessment of Mental Retardation

Thorson was first evaluated for mental retardation in 2005 in connection with his post-conviction proceedings. While Thorson had undergone IQ testing before that time, he was never fully assessed for mental retardation. In 2005, Thorson was evaluated by Dr. Marc Zimmermann. (Tr. at 122). Dr. Zimmermann has extensive education, training and experience in administering and interpreting psychological tests and evaluating persons for mental retardation – an evaluation he has done "[h]undreds if not thousands of times". (Tr. at 117; Def. Ex. 3). Dr. Zimmermann administered a battery of psychological tests to Thorson including the

Wechsler Adult Intelligence Scale Three, the Rey 15 Item Test, the Test of Memory Malingering, the Short Category Test, the Wisconsin Card Sort, the Screening Test for the Luria-Nebraska Neuropsychological Battery, the full Luria Neuropsychological Battery, the Wide Range Achievement, and the Benton Visual Retention Test and malingering tests. (Tr. at 122-123, 130; Def. Ex. 5).

The details of these tests are discussed in greater detail in the Argument section of this brief but it is important to note the results of the Wechsler Adult Intelligence Scale Three test – one of the "gold standards" for measuring IQ. Dr. Zimmermann personally administered this test and concluded that, based on that test, Thorson had a full-scale IQ of 70. (Tr. at 129). Dr. Zimmermann further opined that Thorson was not malingering when he took the IQ test (Tr. at 129-30).

In 2008 and 2009, Dr. Victoria Swanson undertook an extensive assessment to determine whether Thorson is mentally retarded. Dr. Swanson has over 30 years of experience in working with the mentally retarded, including testing and evaluation for the purpose of diagnosing mental retardation. (Tr. at 10-14; Def. Ex. 1). She has assessed "thousands" of people for mental retardation. (Tr. at 11).

Among other things, Dr. Swanson's assessment included a review of at least three (3) sets of IQ scores on standardized, individually administered tests (Dr. Zimmermann's testing, the State's 2008 testing, and Dr. Gasparrini's testing in 1988), personal interviews of Thorson and ten other people to explore the adaptive functioning levels of Thorson at the relevant time, administering a variety of academic and testing instruments and the use of standardized tests to measure adaptive functioning. (Def. Ex. 2, *generally*; Tr. at 40-41). Based on her extensive investigation and assessment, Dr. Swanson concluded that:

> [t]hus, there is evidence that he met the DSM-IV-TR and AAMR, 10th Edition diagnostic criteria for a diagnosis of Mental Retardation prior to the age of 18, and there is evidence that he continues to exhibit concurrent, significant intellectual and adaptive deficits at the present time.
>
> In accordance with Mississippi law, it is the opinion of this licensed psychologist that, to a reasonable degree of certainty, (a) Mr. Thorson meets the criteria for a diagnosis of Mental Retardation by both the DSM-IV-TR and the AAMR definitions and (b) appropriate malingering tests were administered that determined Mr. Thorson was not malingering.

(Def. Ex. 2 at 30-31).

State's Assessment of Mental Retardation

In August, 2008, a team of State employees convened at Whitfield State Hospital to review information relating to whether Thorson was mentally retarded. The team was led by Dr. Gilbert Macvaugh III, forensic psychologist, and Dr. Reb McMichael, a forensic psychiatrist, neither of whom have nearly the experience of Dr. Swanson, or Dr. Zimmermann for that matter, in connection with evaluation for mental retardation. Dr. Macvaugh has only recently burnished his credentials on assessing mental retardation as a result of the *Atkins* decision. (Tr. at 171). Dr. McMichael admitted that he neither administers tests nor interprets test results for the purposes of diagnosing patients as mentally retarded. (Tr. at 244). He further admits that he has not done many evaluations for the sole purpose of determining mental retardation (Tr. at 244).

The State's assessment of Mr. Thorson consisted of essentially the following: (1) review of numerous documents (many of which were Mississippi Department of Corrections records generated since Thorson was imprisoned for the crime in question); (2) administration of an IQ test – by neither Dr. Macvaugh nor Dr. McMichael; and (3) a truncated adaptive functioning assessment that included an interview of only Thorson. (State Ex. 3; Tr. at 186-87, 232).

Based on the partial assessment done at Whitfield and flawed application of recognized methodologies, both Dr. Macvaugh and Dr. McMichael erroneously concluded that Thorson was not mentally retarded. (Tr. at 240, 246).

STATEMENT CONCERNING REFERENCES TO THE RECORD

All references to the transcript of the proceedings in the trial court shall be "Tr. at ____." All references to exhibits offered by Thorson at the hearing below and admitted into evidence shall be "Def. Ex. ____." All references to exhibits offered by the State at the hearing below and admitted into evidence shall be "State Ex. ____." All references to the June 4, 2010 Order from the Harrison County Circuit Court issued by Judge Roger T. Class shall be "Order at ___."

SUMMARY OF ARGUMENT

In this direct appeal, Mr. Thorson presents ten claims for review by this Court. These errors, both individually and taken together, deprived Mr. Thorson of his rights under Mississippi statutory and case law, Article Three, Sections 14, 26 and 28 of the Mississippi Constitution, the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and other authorities cited herein.

At Mr. Thorson's hearing, he presented the testimony of two supremely qualified experts in the field of mental retardation and in the field of testing for mental retardation. Specifically, each of these experts has over thirty years of experience directly assessing and diagnosing mental retardation. Both of these experts testified that they collectively administered an extensive battery of tests, reviewed the results of previous testing, conducted a thorough investigation of all available biopsychosocial history materials with respect to Mr. Thorson, and relied on their respective clinical judgment and determined to a reasonable degree of medical

certainty that Roger Thorson is mentally retarded as that term is defined by both the America Psychological Association ("APA") and American Association or Mental Retardation (now known as the American Association on Intellectual Developmental Disabilities ("AAMR" or "AAID")) within the meaning of *Atkins v Virginia.*

Mr. Thorson's experts were essentially unrebutted by the State. Neither of the witnesses proffered by the State were qualified to testify with respect to testing for or diagnosing mental retardation. Rather, by their own admission, the State's experts were unqualified to interpret the only data available. Further, the State witnesses conducted no testing of their own, failed to conduct interviews and have neglible experience upon which to provide meaningful clinical judgment with respect to the diagnosis of mental retardation. Despite the overwhelming weight of the testimony, the trial court nonetheless found that Mr. Thorson was not mentally retarded. This finding constituted an abuse of discretion, and it should be reversed.

The Standard of Review

As indicated in the remainder of this brief, the trial court made both factual and legal errors. Challenges to a trial court's findings when sitting as finder of fact are reviewed for manifest error, clear error, or to determine whether an erroneous legal standard was applied. *Martin v. Fly Timber Company, Inc.*, 825 So.2d 691, 695 (Miss. 2002). The standard of review for the admission or suppression of evidence, including expert testimony, is an abuse of discretion. *Utz v. Running & Rolling Trucking, Inc.*, 32 Se.2d 450 (Miss. 2010). Moreover, this Court has a commitment to heightened scrutiny on appeal where the sentence of death has been imposed. *Ross v. State,* 954 So. 2d 968, 986 (Miss. 2007).

The Standard for Determining Mental Retardation

The United States Supreme Court established the prohibition against executing the mentally retarded in *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Chase v. State,* 873 So.2d 1013 (Miss. 2004), this Court set forth the standard that Mississippi courts must apply when determining whether a defendant is mentally retarded. As this Court explained, a petitioner must be granted an evidentiary hearing to determine whether he is mentally retarded where a petitioner presents:

> an affidavit from at least one expert . . . who opines, to a reasonable degree of certainty, that: **(1) the defendant has a combined Intelligence Quotient ("IQ") of 75 or below,** and (2) in the opinion of the expert, there is a reasonable basis to believe that, upon further testing, the defendant will be found to be mentally retarded, as defined [by the Court].

Chase, 873 So.2d at 1029. (emphasis added) 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.

Id. (emphasis added). These factors are stated conjunctively meaning that an expert offering opinions on *Atkins* must meet all three criteria. Upon receipt of this affidavit, an evidentiary hearing should be set. *Id.*

At an evidentiary hearing, a petitioner must show by a preponderance of the evidence that he is mentally retarded. *Chase,* 873 So. 2d at 1029. "The burden of showing something by a preponderance of the evidence simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence." *Metro. Stevedore Co. v. Rambo,* 521 U.S. 121, 137 (1997) (citations omitted). In this case, this burden only required that Mr. Thorson present evidence that preponderates in his favor, thus producing a rational belief that his claims are true.

See Hickman v. State, 592 So. 2d 44, 46 (Miss. 1991). As set forth below, Mr. Thorson has met and indeed exceeded this burden.

The applicable standards for a diagnosis of mental retardation are set forth in the APA's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision ("DSM-IV-TR") and in the AAMR's "Mental Retardation - Definition, Classification and Systems of Support (10th Ed.), both of which are cited in *Atkins* and *Chase*. DSM-IV-TR lists the diagnostic criteria for mental retardation as follows:

> (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).

Likewise, AAMR defines mental retardation as significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills with the disability originating before age 18. (Def. Ex. 2 at 2). Both the DSM-IV-TR and AAMR definitions allow for a diagnosis of mental retardation based on an IQ score of 75 or below as long as there is evidence of concurrent, related deficits in adaptive behavior prior to the age of 18. (Def. Ex. 2 at 4).

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING DR. MACVAUGH AND DR. MCMICHAEL TO OFFER EXPERT TESTIMONY ON BEHALF OF THE STATE RELATED TO THE ASSESSMENT OR DIAGNOSIS OF MENTAL RETARDATION IN THE *ATKINS* CONTEXT.

The protection of the *Atkins* decision will be illusory if the evaluations and testimony of experts who do not have adequate training and experience in mental retardation become the rationale for judicial decisions concerning the presence or absence of mental retardation. In the instant case, the State relies primarily on the testimony of Doctor Gilbert Macvaugh, an employee of the State of Mississippi with minimal direct experience in the assessment and diagnoses of mental retardation.[3] Dr. Macvaugh's background, training and experience do not qualify him as an expert in accordance with *Chase* and his methods in this case did not comport with the standard of the AAMR and APA – the very standards that Macvaugh acknowledged should apply.

In stark contrast to the mental retardation expert proffered by Mr. Thorson, Dr. Macvaugh, was recognized by this court only as an expert in forensic psychology. (Tr. at 205).[4] He is admittedly "self-educated" on *Atkins* (Tr. at 171). In his career, Dr. Macvaugh 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).

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[3] It is worth stating that Dr. Macvaugh is very much a party witness in this case. The State elicited testimony to suggest that Dr. Macvaugh was somehow an "independent" expert appointed by the Court. That is patently untrue. The State specifically requested that this Court have Mr. Thorson examined by Dr. Macvaugh at Whitfield. (See Order for Mental Examinations, dated March 4, 2008). Dr. Macvaugh is the State's chosen witness and employee, and he very much has a "dog in the hunt." (*Contra* Tr. at 247)

[4] The State's other expert, Dr. McMichael admitted that he neither administers nor interprets tests – and he also admitted that he has not done many evaluations for sole purpose of determining mental retardation. (Tr. at 244). Dr. McMichael's testimony was essentially useless.

Perhaps most telling with respect to his paucity of credentials to evaluate patients for mental retardation is Dr. Macvaugh's admission that he doesn't even maintain a clinical practice. In his own words: "[a]ll I do is forensic work." (Tr. at 174).

Notwithstanding that he focuses his practice solely on forensic work, Dr. Macvaugh is not board certified as a forensic psychologist – despite such certification being available. (Tr. at 216-217). Indeed, he is not board certified in any subject. (Tr. at 217). This Court routinely considers board-certification as a relevant factor when evaluating credibility of expert testimony. *See University of Mississippi Medical Center v. Gore*, 40 So. 3d 545 (Miss. 2010); *Figueroa v. Orelans*, 42 So.3d 49 (Miss. App. 2010); *see also Jones v. Rallos*, 384 Ill. App. 3d 73, 90 (1st Dist. 2008) (board certification, or failure to attain board certification, can be relevant to credibility of expert); *Gianos v. Baum*, 941 So.2d 581, 585 (Fla. App. 4th Dist. 2006).

It is not surprising, given the fact that his practice does not involve clinical work coupled with his lack of board certification, that, in the last four years, Dr. Macvaugh has only assessed individuals for mental retardation approximately 25 times. (Tr. at 175). In fact, only 10% of his work involves individuals who are suspected of being mentally retarded. (Tr. at 176). Dr. Macvaugh is simply not qualified to evaluate individuals for the purposes of diagnosing them as being mentally retarded and, as such, Dr. Macvaugh lacks the experience and qualifications to render a competent opinion on whether Mr. Thorson is mentally retarded. The trial court abused its discretion in certifying Dr. Macvaugh as an expert in the field of mental retardation and relying on Dr. Macvaugh's assessment or diagnosis with regard to same. Alternatively, even if Dr. Macvaugh was qualified to offer opinions on mental retardation, the credibility of his opinions based on his poor methods and relative lack of experience cannot overcome the evidence from Mr. Thorson's two mental retardation experts.

The State also offers the testimony of Dr. Reb McMichael. Dr. McMichael admits that he neither administers tests nor interprets test results for the purposes of diagnosing patients as mentally retarded. (Tr. at 244). He further admits that he has not done many evaluations for the sole purpose of determining mental retardation (Tr. at 244). Accordingly, because Dr. McMichael is 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," he should not have been recognized as an expert in the *Atkins* context and court abused its discretion in permitting his expert testimony and relying on the same. *Chase*, 873 So.2d at 1029.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT RELYING ON DR. SWANSON AND DR. ZIMMERMANN'S EXPERT ASSESSMENT AND DIAGNOSIS OF MENTAL RETARDATION IN AN *ATKINS* CONTEXT.

Pursuant to *Chase*, an *Atkins* 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." *Chase*, 873 So.2d at 1029. Unlike the experts for the State, Mr. Thorson's primary expert, Dr. Victoria Swanson, not only meets this threshold standard, she far exceeds it. Dr. Swanson has assessed and tested "thousands and thousands" of people for mental retardation. (Tr. at 11). Since she began her practice in 1973, Dr. Swanson has used nearly every test available to test and assess individuals for mental retardation. (Tr. at 11). The primary focus of Dr. Swanson's work experience over the past 37 years has been directly assessing people for and diagnosing mental retardation. (Tr. at 10-12). In addition to conducting hands-on assessments in the field of mental retardation, Dr. Swanson has extensive

experience in interpreting psychological testing for the express purpose of assessing and diagnosing mental retardation. (Tr. at 18-20).

Dr. Swanson has been involved in the Association for Individuals with Mental Retardation for the State of Louisiana and served on the Board for many years. (Tr. at 11). She also served on the Board for the national chapter of the Association for Individuals with Mental Retardation in a leadership capacity. (Tr. at 11). Dr. Swanson's research and services in the field of mental retardation have earned her a number of awards and accolades from the AAMR and the State of Louisiana. (Tr. at 11-12). Dr. Swanson currently serves on the eligibility committee for the Office of Citizens with Developmental Disabilities, often referred to as the Office of Mental Retardation, for the State of Louisiana. (Tr. at 13). Her credentials have qualified her to determine, on behalf of the State of Louisiana, whether an individual is mentally retarded. (Tr. at 20). Dr. Swanson's vast training and experience in mental retardation have previously been recognized in this State as she has been deemed qualified to offer expert testimony on the subject in a Mississippi federal court on *Atkins* specific issues. (Tr. at 12).

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.

Dr. Marc Zimmermann, Mr. Thorson's other expert, also has extensive experience testing individuals for mental retardation as part of his clinical practice. (Tr. at 116-117). In particular, Dr. Zimmermann worked for the Deep East Texas Mental Health and Mental Retardation

Services in Lumpkin, Texas assessing individuals for mental retardation. (Tr. at 117). Specifically, he was responsible for testing and assessing individuals to determine whether they qualified for admission into the Lufkin State School in Texas. (Tr. at 117). Dr. Zimmermann also has experience testing individuals for the Office of Disability Determinations and performed and continues to perform social security evaluations and performs special education testing for 13 separate counties. (Tr. at 117). Over the span of thirty years, he has tested hundreds, if not thousands, of individuals for mental retardation. (Tr. at 117). Dr. Zimmermann has been qualified as an expert in Mississippi, Louisiana, Texas, Florida, Georgia, and New Jersey courts. (Tr. at 118). Like Dr. Swanson, Dr. Zimmermann is a highly skilled mental health professional with direct experience in the testing and diagnosis of mental retardation.

Given Dr. Swanson and Dr. Zimmermann's extensive training, experience and expertise in the field of assessing mental retardation, the trial Court abused its discretion by rejecting Dr. Swanson and Dr. Zimmermann's diagnosis of Mr. Thorson as an individual with mental retardation.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY ACCEPTING DR. MACVAUGH AND DR. MCMICHAEL'S DETERMINATION THAT MR. THORSON DOES NOT EXHIBIT SIGNIFICANTLY SUBAVERAGE INTELLECTUAL FUNCTIONING.

Dr. Macvaugh administered no tests to determine Mr. Thorson's level of intellectual functioning. As explained at the hearing in this case, six doctoral level students performed most of the substantive work that Dr. Macvaugh relied upon in forming his "expert" opinion that Mr. Thorson is not mentally retarded. (Tr. at 179-183) The IQ tests that Dr. Macvaugh relied upon were administered by a post-doctoral psychologist Dr. Robert Storer. (Tr. at 183). Of course, Dr. Storer was not called by the State as a witness, and his qualifications and experience remain unknown. The State should not be allowed to bootstrap potentially unscientific or improper

testing performed by a potentially unqualified, and absent, witness by allowing another witness to "rely" on the work of the absent witness. The State has essentially stamped Dr. Macvaugh's name on someone else's work.

Dr. McMichael did even less. As he candidly admitted in his 9 pages of testimony, "I don't administer or interpret tests." (Tr. at 244). With that admission, the State can rely only on Dr. Macvaugh's opinions on whether Mr. Thorson demonstrated significantly subaverage intellectual functioning.

If Dr. Macvaugh justifiably relied on others' IQ testing – when viewed through the prism of the required reporting under the APA and AAMR – then by his own admission, the FSIQ that resulted from the State's IQ testing of Mr. Thorson should be reported with a confidence interval of between 75 and 83 – even without applying the Flynn Effect and the tree-stump effect.[5] (Tr. at 224; State Ex. 3 at 73). Dr. Macvaugh further admitted that both DSM-IV-TR and AAMR recognize that a person with mild mental retardation can have a FSIQ as high as 75. (Tr. at 218). Thus, accounting for the confidence interval, which is required by the AAMR and DSM-IV-TR, even the State's testing demonstrates that Mr. Thorson meets the first criterion under *Atkins* – significantly subaverage intellectual functioning.

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY REJECTING DR. SWANSON AND DR. ZIMMERMANN'S DETERMINATION THAT MR. THORSON EXHIBITS SIGNIFICANTLY SUBAVERAGE INTELLECTUAL FUNCTIONING.

Based on over thirty years of direct experience, Dr. Zimmermann conducted IQ tests and a battery of related psychological tests on Mr. Thorson. (Tr. at 122). Specifically, Dr. Zimmermann personally conducted Mr. Thorson's Wechsler Adult Intelligence Scale Three, the Rey 15 Item Test, the Test of Memory Malingering, the Short Category Test, the Wisconsin

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[5] The Flynn effect and the tree stump effect are discussed further at pages 19-20 of this brief.

Card Sort, the Screening Test for the Luria-Nebraska Neuropsychological Battery, the full Luria Neuropsychological Battery, the Wide Range Achievement, and the Benton Visual Retention Test and malingering tests. (Tr. at 122-123, 130).

Dr. Zimmermann found that Mr. Thorson's results on the Short Category Test were consistent with a person who suffers from mental retardation. (Tr. at 124). Dr. Zimmermann also determined that Mr. Thorson's results on the Wide Range Achievement Test, Revision Three were consistent with a person with mental retardation. (Tr. at 124-125). After conducting the Wisconsin Short Card Test on Mr. Thorson, Dr. Zimmermann determined that the results were consistent with someone who is mentally retarded. (Tr. at 126). Dr. Zimmermann further found that Mr. Thorson's results on the Stroop Color and Word Test and the Luria-Nebraska Neuropsychological Battery were also consistent with mental retardation. (Tr. 126-128). In addition to finding that Mr. Thorson's scores with respect to each of the above tests were consistent with an individual with mental retardation, Dr. Zimmermann found that Mr. Thorson has a high deficit in his thinking processes and significant deficits in executive functioning. (Tr. 124-128).

Dr. Zimmermann also personally conducted the Wechsler Adult Intelligence Test, an IQ test, on Mr. Thorson. After directly conducting and personally interpreting the results, Dr. Zimmermann placed Mr. Thorson's IQ at 70 – in the mentally retarded range. (Tr. at 129). Dr. Zimmermann also found with a reasonable degree of clinical certainty, after direct testing, that Mr. Thorson was not malingering. (Tr. at 130). Based on over thirty years of experience, after personally conducting and interpreting this large battery of tests, Dr. Zimmermann determined that in his expert opinion that Mr. Thorson's results are consistent with mental retardation. (Tr. at 131).

Dr. Swanson, also with over thirty years of direct experience also received all available information on Thorson's IQ testing. Based on that review, Dr. Swanson determined that Mr. Thorson's full scale IQ is approximately 71 – placing him within the range of mentally retarded. Dr. Swanson testified that the intellectual test scores for Mr. Thorson fell within the range of finding a person mentally retarded. (Tr. at 68). This opinion accounts for all available valid IQ testing on Mr. Thorson – that is standardized, individually administered IQ tests. In particular, Dr. Swanson reviewed IQ tests from Dr. Gasparrini (in 1988), Dr. Zimmermann (in 2005), and at Whitfield (in 2008). (Def. Ex. 2 at 17; Tr. at 68). Dr. Swanson's professional opinion, given the range of scores, and applying all applicable adjustments, is that Mr. Thorson's true IQ is probably around 71 or 72. (Def. Ex. 2 at 17). In addition to finding that Mr. Thorson's IQ places him within the mentally retarded range, Dr. Swanson confirmed Dr. Zimmermann's conclusion that the testing of Mr. Thorson did not indicate malingering. (Tr. at 68).

During the *Atkins* hearing, the following facts related to Mr. Thorson were adduced:

- Mr. Thorson has had extensive IQ testing performed by various professionals. According to Dr. Swanson, Mr. Thorson's test results are consistent with a person with mental retardation. (Tr. at 74);
- Dr. Swanson confirmed that the intellectual test scores for Mr. Thorson fell within the range of finding a person mentally retarded. (Tr. at 68);
- **Dr. Swanson's professional opinion, given the range of scores, and applying all applicable adjustments, is that Mr. Thorson's true IQ is probably around 71 or 72. (Def. Ex. 2 at 17), which falls within the intellectual functioning criteria under DSM-IV-TR and AAMR.;**
- The testing of Mr. Thorson did not indicate any malingering at all. (Tr. at 68);
- An informal mental status exam on Mr. Thorson was consistent with mental retardation. (Tr. at 70);
- Mr. Thorson's intellectual development "topped off" somewhere around the sixth grade which is consistent for an individual with mild mental retardation. (Tr. at 59);

- All the academic testing was indicative of mental retardation. (Tr. at 59);

- No expert who has examined Mr. Thorson has found him to be malingering. (Tr. at 68, 129-130, 229);

- During the hearing, the State attempted to hang its entire case on a GED which was supposedly awarded to Mr. Thorson in 1976. However, as Dr. Swanson testified, the GED is a red herring. It does not change her opinion that Mr. Thorson is mentally retarded as the requirements for a GED in 1976 were not explained by the State and as such cannot be relied upon in the face of proper interpretation of IQ testing. (Tr. at 127);

- Dr. Zimmermann estimates Mr. Thorson's full scale IQ to be 70. (Tr. at 149) Dr. Zimmermann confirms that this score is consistent with the first prong of mental retardation. (Tr. at 131);

- It is the consensus of experts in the field that full-scale IQ scores must account the "Flynn effect," which recognizes that IQ tests increase by approximately 0.3 points per year from the date the IQ test is normed and thus rest results should be reported and adjusted downward based on this effect. Likewise, the tree stump effect – a lowering of scores on the WAIS-III, used by Dr. Zimmermann and the State, to account for a norming error n the WAIS-III – by 2.34 points is recommended and would further reduce those scores for Mr. Thorson (Def. Ex. 2 at 5); and

- Applying all appropriate confidence intervals and adjustments to the various IQ scores obtained for Mr. Thorson, - - including the State's his IQ is most likely 71 or 72. (See Chart, Def. Ex. 2 at 17).

Dr. Zimmermann and Dr. Swanson's interpretation of Mr. Thorson's intellectual functioning are based on over sixty years of combined experience in the assessment of mental retardation. As such, the Court's abused its discretion by rejecting Dr. Zimmermann and Dr. Swanson's determination that Mr. Thorson exhibits significantly subaverage intellectual functioning as set forth by *Atkins.*

V. THE TRIAL COURT ABUSED ITS DISCRETION BY IGNORING SCIENTIFICALLY ESTABLISHED ERRORS OF MEASUREMENT FOR THE ASSESSMENT OF SIGNIFICANTLY SUBAVERAGE INTELLECTUAL FUNCTIONING.

Dr. Swanson, in keeping with AAMR best practices, recognized her duty to inform the trial court of any factors that may introduce unreliability into the mental health assessment

procedure and render Mr. Thorson's test scores erroneously high. (Tr. at 28). As she testified, not all IQ tests are equal, and in order to accurately score an IQ test, professionals must account for standard statistical concepts of measurement error, practice effect, the Flynn effect and the tree stump effect. (Tr. at 66-68).

As testified to by Dr. Swanson, failure to take the Flynn effect into account results in an artificially high IQ score. (Tr. at 28). When looking at any IQ score, therefore, it is imperative to know when the test was issued and when it was renormed. The AAMR recognizes the Flynn effect and the practice effect as necessary for reliability, particularly when conducting retrospective diagnoses, those "when the individual with mental retardation did not receive an official diagnosis of mental retardation during the developmental period." (Def. Ex. 2 at 6-7). In addition to many courts holding that the Flynn effect must be accounted for, it is the consensus of experts in the field that full-scale IQ scores must take both the Flynn effect and the tree stump effect into consideration (Def. Ex. 2 at 5). Applying all appropriate confidence intervals and adjustments to the various IQ scores obtained for Mr. Thorson, -- including the State's -- his IQ is most likely 71 or 72. (See Chart, Def. Ex. 2 at 17).[6] As Dr. Swanson noted in her report:

> [a]dditionally, taking into account the Flynn Effect and the confidence interval for the three tests, Dr. Swason determined that Mr. Thorson's three Flynn-adjusted Full Scale IQ (FSIQ) scores – including the test conducted by the State -- fall somewhere between 64 and 72 (FSIQ, 67; 2005) and 71 and 80 (FSIQ, 75; 2008) at the 95% confidence interval. As noted above, the confidence interval is the probability the obtained score (FSIQ) reflects his true score. The 95% confidence interval, is the range in which the true score will be found 95% of the time. Within this interval, the examiner can be fairly confident the person's IQ is in that range. The chart below represents the three Flynn-adjusted scores and the confidence intervals for those scores. A comparison across the three confidence intervals indicates there is an obvious overlap at 71 to 72.

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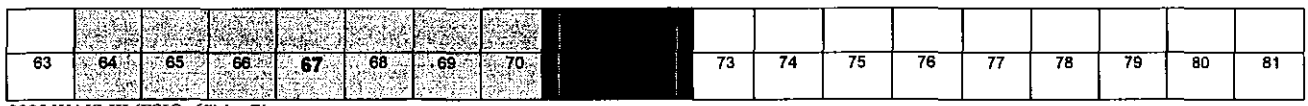
[6] This chart is reproduced later in this brief.

(Def. Ex. 2 at 17).

The conveyance of Thorson's IQ test scores at 71 or 72 was illustrated by Dr. Swanson in the following chart in her report:

1988 WAIS-R (FSIQ, 74) by Gasparini



2005 WAIS-III (FSIQ, 67) by Zimmermann

2008 WAIS-III (FSIQ, 75) by MSH

(Def. Ex. 2 at 17) (emphasis added).

Though the State meekly challenged the application of the "Flynn" effect and the "tree stump" effect to individual IQ scores at Mr. Thorson's hearing, it should be noted that in another Atkins case in a Mississippi federal court 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). 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, 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 both the Flynn effect and the tree stump effect when reporting an individual IQ score. (*Contra* Tr. at 195). Accordingly,

the Court abused its discretion in not applying the appropriate errors of measurement when it concluded, incorrectly, that, Mr. Thorson's IQ was not 75 or below.

VI. 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.

By their own admission, Dr. Macvaugh's team performed a truncated adaptive functioning assessment that did not include the use of standardized test instruments – both of which deviate from the AAMR standard for assessing mental retardation. (Tr. at 190). Mr. Thorson's expert Dr. Swanson provided many examples of adaptive functioning deficits. Dr. Swanson testified, and cited in her report, recognized authorities for the use of these instruments in a retrospective setting. Dr. Macvaugh's only response was to try and discredit Dr. Swanson's investigation without actually going through the trouble of conducting his own.

Dr. Macvaugh conducted no personal interviews of any witnesses, other than Mr. Thorson, to support his opinions. (Tr. at 232). In fact, Dr. Macvaugh didn't even bother to pass this task off to his "team" as it is conceded that the "team" conducted no personal interviews either. (Tr. at 232). While the State trumpets "300" sources of information listed in Dr. Macvaugh's report (Tr. at 194), even a cursory review of the so-called sources reveals that nearly 70% are prison administrative records, fingerprint cards, pleadings from old cases and other irrelevant, and second-hand, data. (State Ex. 3 at 2-14). This data is useful for little more than substantially lengthening Dr. Macvaugh's report.

Dr. Macvaugh's methodology – or lack thereof - with respect to adaptive functioning tests violates the strict mandates regarding the admissibility of expert testimony. *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 39 (Miss. 2003) (recognizing that current version of Miss. R. Evid. 702 embodies a modified framework based upon the *Daubert* rule). In order to be

admissible, testimony must be both (1) relevant, and (2) reliable. *Daubert*, 509 U.S. at 589. In this case, the testimony offered by the State's witnesses, Dr. Macvaugh and Dr. McMichael, is unreliable, and should not be considered. At the very least, the unreliable nature of Dr. Macvaugh's and Dr. McMichael's assessment cannot defeat the evidence that Thorson produced.

In evaluating reliability, the court's "focus ... must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595. Accordingly, expert testimony must be based upon scientific methods and procedures, not on unsupported speculation or subjective belief. *Miss. Dep't of Mental Health v. Hall*, 936 So.2d 917, 928 (Miss. 2006). To assist with making this determination, the *Daubert* court developed a non-exclusive list of factors to consider when assessing the reliability of expert testimony. *McLemore*, 863 So.2d at 37 (citing *Daubert*, 509 U.S. at 592-94). Mississippi Rule of Evidence 702 adds three additional requirements: (1) the expert testimony must be based on sufficient facts or data, (2) it must be the product of reliable principles and methods, and (3) the expert must have reliably applied the principles and methods to the facts of the case. Miss. R. Evid. 702 (emphasis added). As set forth below, the State completely failed to satisfy two of these elements.

In the instant matter, Dr. Macvaugh's admission that he conducted no standardized tests and did not interview anyone other than Mr. Thorson does not comply with AAMR standards, nor does it satisfy the *Daubert* standard for assessing adaptive functioning deficits. While the previous editions of the AAMR include a reference to testing for adaptive skills, the revised edition goes further:

> [s]ignificant limitations in adaptive behavior should be established throughtout the use of standardized test measures normed on the general population including people with disabilities and people without disabilities.

See The American Association on Mental Retardation, *Mental Retardation: Definition Classification, and Systems of Supports* 13 (10th ed. 2002).[7]

Adhering to well-accepted methodologies for assessing adaptive functioning deficits was particularly important in light of Mr. Thorson's IQ score. Dr. Macvaugh reported the following in his report on Mr. Thorson:

> Given test error (standard error of the measurement at a .05 confidence interval), Mr. Thorson's true IQ score would likely fall somewhere between 75 and 83. However, because IQ scores become artificially inflated as the test becomes outdated (i.e., "Flynn Effect"), Mr. Thorson's IQ score should be modified to account for the obsolescence. After adjusting for the Flynn Effect (.3 points per year between the date in which the test was standardized (1995) and the date of testing (2008)), Mr. Thorson's Full Scale IQ score of 79 should be reduced by four points, which places his Full Scale IQ score at 75. **When his IQ score is interpreted with test error, the confidence interval changes from 71-80. Nevertheless, Mr. Thorson's IQ is still above the cutoff for mental retardation (i.e., approximately 70 or below).**[8]

(State Ex. 3 at 73) (emphasis added). With the lower end of Mr. Thorson's IQ score falling anywhere between 71 and 75, as reported by Dr. Macvaugh, Mr. Thorson's IQ score falls within the threshold of 75 established by *Chase.* That range of scores puts Mr. Thorson in the mildly mentally retarded range which is exactly the range that absolutely demands a full adaptive functioning assessment. The AAMR notes that differentiating between Mild Mental Retardation (50-55 to approximately 70) from Borderline Intellectual Functioning (generally 71 to 84) requires careful consideration of all available evidence. (Def. Ex. 2 at 1). In fact, Dr. Macvaugh expressly admitted that if an individual had an IQ as high as 75, that individual would require further assessment of adaptive functioning. (Tr. 218-219). As such, the Court's reliance

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[7] Both Dr. Macvaugh and Dr. Swanson acknowledge the applicability of the 10th Edition of the AAMR.
[8] Dr. Macvaugh's assertion about 70 being the cutoff for an IQ score to satisfy the intellectual functioning prong of mental retardation directly contradicts *Chase* which used 75 as the cutoff score and AAMR and DSM-IV-TR.

on Dr. Macvaugh's so-called assessment of Mr. Thorson's adaptive functioning – which did not include "careful consideration of all available evidence" is an abuse of discretion.

VII. THE TRIAL COURT ABUSED ITS DISCRETION BY REJECTING DR. SWANSON'S DETERMINATION THAT MR. THORSON EXHIBITS CONCURRENT DEFICITS OR IMPAIRMENTS IN AT LEAST TWO AREAS OF ADAPTIVE FUNCTIONING.

The second criterion for a diagnosis of mental retardation is concurrent deficits in adaptive functioning. More specifically, DSM-IV-TR requires that the person have concurrent deficits or impairments in adaptive functioning 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. (Def. Ex. 2 at 1). AAMR requires significant limitations in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. (Def. Ex. 2 at 2).

Recognizing that a proper mental retardation assessment requires evaluating all three criteria, Dr. Swanson conducted a comprehensive adaptive functioning assessment. (Tr. at 36-62). Her assessment was based on, and consistent with, the guidance provided by the DSM-IV-TR and AAMR and bolstered by her thirty years of experience in evaluating and assessing mental retardation. Dr. Swanson recognized:

> [t]he DSM-IV-TR notes that there are standardized measures that "provide a clinical cutoff score that is a composite of performance in a number of adaptive skill domains" but bases its adaptive criteria on the AAMR 1992 classification system that extended the concept of adaptive behavior from a global description to the specification of the specific adaptive skills noted in the DSM-IV-TR adaptive criteria. The AAMR 2002 classification system requires standardized scores in one of three domain areas or an overall standard score of greater than two standard deviations below the mean for the measure used.

(Def. Ex. 2 at 2).

It is recommended in the field that when assessing adaptive functioning, standardized tests be used. (Tr. at 32). In adherence to this recommendation, the standardized test instruments that Dr. Swanson used in assessing Roger Thorson and his adaptive functioning deficits were the Vineland-II Adaptive Behavior Scales ("VABS-II") and the Adaptive Behavior Assessment System-II ("ABAS-II"). (Def. Ex. 2 at 7; Tr. at 40). The VABS-II is considered a "gold standard" test for adaptive functioning. (Tr. at 252-253). The manual for VABS-II was updated after *Atkins* was decided and the manual's authors issued instructions on how to use these instruments for a retrospective diagnosis. (Tr. at 35,40, 305). The very authors of these widely-accepted test instruments recognized the application of these instruments in a retrospective fashion. Likewise, various articles that Dr. Swanson referenced in her testimony have been published regarding the use of the ABAS-II in a retrospective manner. (Tr. at 35).

In accordance with the guidelines for the use of the VABS-II, Dr. Swanson located an informant (the term used for a source of information for the instrument) who knew Mr. Thorson as close to the age of 18 as possible. That informant was Mr. Thorson's former girlfriend, Joanne Griggs. Relying on her years of training, Dr. Swanson personally conducted the VABS-II interview of Ms. Griggs. Based on her personal administration of this test and her evaluation of its results, Dr. Swason determined that Mr. Thorson had a deficit in eight of the eleven categories of adaptive functioning. (Tr. at 41).

Dr. Swanson administered a subtest of the VABS-II and the ABAS-II to Reggie Brazeal, a co-worker of Mr. Thorson at Morrison's Cafeteria in the mid-to-late 1980's. (Tr. at 44-47). Given Mr. Brazeal's familiarity with Mr. Thorson's work history, the subtest administered was for work functioning. (Tr. at 44-47). The results on both the VABS-II and ABAS-II test indicated that Mr. Thorson was functioning at least two standard deviations below the mean in

work functioning, which is the criteria for finding a deficit in adaptive functioning under VABS-II. (Tr. at 73-74).

Use of the recommended standardized test instruments was not the sole basis for Dr. Swanson's opinion on adaptive functioning. As is customary in assessing adaptive functioning, Dr. Swanson reviewed voluminous other sources of information and conducted many personal interviews. (Tr. 36-62). The broad-based inquiry followed the guidelines promulgated by leading authorities in the field. As Dr. Swanson noted in her report:

> [a]uthorities in the field of mental retardation also recommend certain strategies recommended by both AAIDD and APA Division 33 to deal with the complex task of assessing adaptive functioning. These strategies include (a) use multiple sources of information (school, work, social, medical, etc.), (b) choose robust standardized instruments broadly recognized in the field, (c) use multiple informants, (d) conduct an examination of adaptive behavior in two or more environments, (e) conduct a longitudinal study of adaptive behavior that begins in childhood, (f) understand that adaptive and problem/maladaptive behaviors are independent constructs and not opposite poles of a continuum, (g) realize adaptive behavior refers to typical and actual functioning and not to capacity or maximum functioning, (h) recognize the appropriate respondents and instruments in prison settings, and (i) be aware of the cautions against using self-report and directly administered standardized adaptive tests in prison settings.
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> * * *
>
> In Atkins hearings, it is necessary to access as many sources as possible because the examiner is assessing functioning retrospectively to the crime Olley (2006b). To overcome this obstacle, experts in the field of mental retardation recommend that the examiner seek adaptive behavior information **from several sources** and to look for the convergence of findings. Standardized measures, direct observations, collaborative interviews with the offender and others who knew him well prior to the age of 18, and reviews of relevant information in school, medical, psychiatric, work, military, Social Security, and prison records are recommended.

(Def. Ex. 2 at 4, 6)(emphasis added).

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 summarized, one of the areas where Mr. Thorson demonstrated a deficit in adaptive functioning was in work. (Tr. at 74). Mr. Thorson's spotty work history, as evidenced by his Social Security earnings statement, demonstrates an inability to obtain meaningful employment and hold that employment for a long period of time. Over the 14 years for which Social Security earnings history was available, the most Mr. Thorson ever earned was just over $5,000 a year. (Def. Ex. 2 at 15). The interview of Reggie Brazeal and the ABAS-II work subtest indicated that Mr. Thorson's work at Morrison's Cafeteria never rose past the level of dishwashing. (Tr. at 46-47). In addition, at Morrison's Cafeteria he was trained by using picture cue cards to show him even the most simple and rudimentary steps for cleaning dishes, cutting vegetables and other food. (Tr. at 45).

The report and testimony of Dr. Swanson are replete with references from friends, relatives and co-workers demonstrating other pervasive adaptive functioning deficits that Mr. Thorson suffered before the age of 18. (Tr. at 36-62). Dr. Swanson summarized this in her report as follows:

> [a] standardized adaptive assessment with the VABS-II indicated that about the age of 18 to 22, Mr. Thorson met the AAMR 10th edition adaptive criteria (overall

adaptive score greater than 2 standard deviations below the mean and/or adaptive skills greater than 2 standard deviations below the mean in the areas of conceptual, practical, and social skills), and the DSM-IV-TR adaptive behavior criteria (deficits or impairments in adaptive functioning in at least 2 of 11 designated areas). The subdomain standard scores indicate that, at about the age of 18 to 22, deficits (2 or more standard deviations below the mean) existed in the areas of (1) communication, (2) functional academic skills, (3) self-care, (4) use of community resources, (5) social/interpersonal relationships, (6) leisure, (7) self-direction, (8) health, and (9) work.

(Def. Ex. 2 at 30).

Mr. Thorson's deficits persist today as Dr. Swanson further noted in her report:

[s]tandardized academic, neuropsychological, and adaptive assessments completed after the age of 18, adaptive probes with Mr. Thorson completed by this examiner, and interviews with Ms Griggs, Mr. Brazeal, relatives, and friends who knew him as an adult in the community as well as reviewed affidavits indicate Mr. Thorson, as an adult, continues to have adaptive deficits and, at the very least, has significant limitations in the areas of (1) communication (standard scores in oral language, oral expression, listening comprehension, following directions; interviews with work supervisor, and Ms Griggs; interviews with Mr. Thorson), (2) functional academic skills (as noted in academic testing given by Dr. Zimmermann and this examiner; academic probes made directly by this examiner), (3) self-direction (as noted in legal records and neuropsychological testing completed by Dr. Zimmermann), and (4) work (as evidenced by Social Security records, an interview with a former supervisor, a standard score on the ABAS-II Work subtest that was greater than 2 standard deviations below the mean, adaptive probes made by this examiner). Thus, there is evidence that he met the DSM-IV-TR and AAMR, 10th Edition diagnostic criteria for a diagnosis of Mental Retardation prior to the age of 18, and there is evidence that he continues to exhibit concurrent, significant intellectual and adaptive deficits at the present time.

(Def. Ex. 2 at 30).

VIII. THE TRIAL COURT ABUSED ITS DISCRETION BY REJECTING DR. SWANSON'S USE OF RETROSPECTIVE TESTING FOR ADAPTIVE FUNCTIONING.

The best that the State can muster to challenge Dr. Swanson's use of standardized tests for adaptive functioning is testimony from Dr. Macvaugh, a relative newcomer to the testing and assessment for mental retardation, that he does not accept Dr. Swanson's use of the ABAS and

Vineland as scientifically valid. (Tr. at 201-202). In contrast, Dr. Swanson, an expert with vastly more experience than Dr. Macvaugh in assessing mental retardation, testified that the Vineland is the "gold standard" testing for adaptive functioning deficits. (Tr. at 293). Against Dr. Swanson's robust experience with mental retardation diagnosis and the guidance of the AAMR, Dr. Macvaugh's "criticism" is frankly, not credible. The results from the standardized instruments are probative and compelling evidence on the existence of adaptive functioning deficits.

Dr. Swanson testified, and cited in her report, recognized authorities for the use of these instruments in a retrospective setting. (Tr. at 35). Specifically, Dr. Swanson noted that retrospective diagnoses are required when a person with mental retardation did not receive an official diagnosis of mental retardation during the developmental period but is now being considered for eligibility determination, guardianship petitions, competence determinations, or *Atkins*-related sentencing eligibility questions. (Def. Ex. 2 at. 6). Further, Dr. Swanson informed the trial Court that the APA and AAMR have opined on the use of retrospective assessment and even put forth specific guidelines to ensure that retrospective diagnoses are conducted properly. (Def. Ex. 2 at. 6). Dr. Swanson specifically testified that making her retrospective diagnosis she carefully followed the guidelines promulgated by the AAMR. Thus, it was an abuse of discretion for the trial court to ignore Dr. Swanson's use of standardized tests when it found "the application of the retrospective Vineland test [and other tests] unreliable and unpersuasive." (Order at. 5).

IX. THE TRIAL COURT ABUSED ITS DISCRETION BY REJECTING DR. SWANSON'S CLINICAL JUDGMENT.

The trial Court abused its discretion by effectively rejecting Dr. Swanson's clinical judgment and relying on Dr. Macvaugh. According to the AAMR, clinical judgment is a special

type of judgment rooted in a high level of clinical expertise and experience, which only Dr. Swanson has. Clinical judgment is based on the clinician's explicit training and emerges directly from extensive data. As such clinicians who have not gathered extensive relevant assessment data should not claim clinical judgment.

Dr. Macvaugh's team did not gather extensive, relevant assessment data. Instead, Dr. Macvaugh performed a truncated adaptive functioning assessment that did not include the use of standardized test instruments (Tr. at 190) and conducted no personal interviews of any witnesses, other than Mr. Thorson, to support his opinions. (Tr. at 232). Dr. Macvaugh's abbreviated evaluation is not an appropriate exercise of clinical judgment pursuant to the AAMR and should have been summarily rejected by the trial Court.

The AAMR explains clinical judgment and warns against donning the cloak of clinical judgment to cover shortfalls in the proper assessment of mental retardation:

> [c]linical judgment is a special type of judgment that emerges directly from extensive data and is rooted in a high level of clinical expertise and experience [citation omitted]. Its three characteristics are that it is (a) systematic (i.e., organized, sequential, logical), (b) formal (i.e., explicit and reasoned), and (c) transparent (i.e., apparent and communicated clearly). The result of competent clinical judgment is that its use enhances the precision, accuracy, and integrity of the clinician's decisions and recommendations. It is important to point out that clinical judgment is not (a) a justification for abbreviated evaluations, (b) a vehicle for stereotypes or prejudices, (c) a substitute for insufficiently explained questions, (d) an excuse for incomplete or missing data, (e) or a way to solve political problems.

See AAIDD, User's Guide: Mental Retardation – Definition, Classification and Systems of Supports – 10th Ed. (2007) at 23.[9]

In the instant matter, it is clear based on Dr. Swanson's extensive experience and expertise that Dr. Swanson is the only expert qualified to provide her reliable clinical judgment.

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[9] This publication was cited in Dr. Swanson's report. (Def. Ex. 2 at 33).

In addition, Dr. Swanson, as detailed above, is the only expert who conducted a thorough social history and applied broad based assessment strategies. To the extent Dr. Macvaugh testified about his use of clinical judgment, he did not adhere to the AAMR guidance set forth above and, if anything, claimed to use clinical judgment as an excuse for an abbreviated evaluation – which is expressly prohibited by the AAMR. As Dr. Swanson's clinical judgment stems from 37 years of direct experience and her personal collection and review of extensive data, the trial Court abused its discretion in rejecting Dr. Swanson's diagnosis of mental retardation in Mr. Thorson.

X. THE TRIAL COURT APPLIED AN ERRONEOUS STANDARD TO THE ADAPTIVE FUNCTIONING PRONG OF A MENTAL RETARDATION ASSESSMENT AND IGNORED CLEAR EVIDENCE OF ONSET PRIOR TO AGE 18.

The trial court abused its discretion in that it applied the wrong standard to the assessment of adaptive functioning. Specifically, the Court indicated in its Order that Mr. Thorson's functional academic deficit "has not been shown by a preponderance of the evidence to be **as a result of mental retardation."** Order, p. 6 (emphasis added). In addition, the trial court stated that it was "not convinced that Thorson's functional academic deficit was proven **to be a result of mental retardation...".** *Id.* (emphasis added). These statements show that the trial court turned the inquiry inside out. Mental retardation does not cause adaptive functioning deficits. To the contrary, the presence of adaptive functioning deficits indicates the presence of mental retardation. Experts in mental retardation have noted that the very misconception that the trial court showed is widespread and completely at odds with the science of diagnosing mental retardation.

> Many arguments in court appear to be based on the assumption that diagnostic categories are explanatory concepts or causal factors. The discussion is sometimes framed as "Was the observed adaptive behavior deficit caused by mental retardation or something else." The reply is that mental retardation is not a cause at all, but a result. Mental retardation is a label given to a constellation of observed behaviors. It doesn't cause anything, but any one of several hundreds of

> known factors (genetic, environmental, infection, trauma, etc.) can cause the condition that we call mental retardation. Although the cause of mental retardation is often not known, it is clear that mental retardation is a term for the result; it is not a cause. To reason otherwise would be to argue that mental retardation causes mental retardation.

Olley, J-G (2007), *The Assessment of Adaptive Behavior in Adult Forensic Cases: Part 3: Sources of Adaptive Behavior Information.* Psychology in Mental Retardation and Developmental Disabilities, 33(1) 3-6.[10]

The adaptive functioning prong of an *Atkins* assessment requires that the Court find "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. (Def. Ex. 2 at 1). The finding of a concurrent deficit is not required to be a "result of mental retardation" as the trial court expressly indicated – instead the mere existence of the deficit itself is one of the factors to be considered in the proper diagnosis and assessment of mental retardation. Given that the trial court incorrectly premised it's rejection of Mr. Thorson's functional academic deficit – a deficit that both the State and Mr. Thorson's experts agreed existed - on its theoretical cause, it abused its discretion in assessing Mr. Thorson's adaptive functioning in an *Atkins'* context. As such, the trial court's finding with respect to adaptive functioning should be reversed.

The trial Court further erred in prematurely concluding its mental retardation assessment of Mr. Thorson. Though a complete mental retardation assessment clearly requires the examination of whether the disability originated before the age of 18, (Def. Ex. 2 at 2) the trial Court did not address this issue at all. Instead, the trial Court erred by not conducting a thorough

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[10] This article is cited by Dr. Swanson in her report. (Def. Ex. 2 at 33).

analysis and by not accepting Dr. Swanson's opinion, within a reasonable degree of certainty that Roger Thorson was mentally retarded prior to the age of 18. (Tr. at 91). Thorson clearly submitted evidence to satisfy the age of onset criterion for a diagnosis of mental retardation.

CONCLUSION

Based on the foregoing, Mr. Roger Thorson has demonstrated that the trial court erred 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 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.

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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 *BRIEF OF THE 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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