# NO. 15-7073

# IN THE UNITED STATES SUPREME COURT

OCTOBER 2015 TERM

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***RICKY CHASE,*** *Petitioner*

*versus*

***STATE OF MISSISSIPPI,*** *Respondent*

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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## BRIEF IN OPPOSITION

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## CAPITAL CASE

### QUESTIONS PRESENTED

I. NEITHER THE COURT BELOW NOR THE TRIAL COURT REFUSED TO CONSIDER TESTIMONY REGARDING PETITIONER'S ADAPTIVE FUNCTIONING AND NO NEW REQUIREMENT WAS ADDED TO SHOWING ADAPTIVE FUNCTIONING.

II. WHILE THE COURT BELOW POINTED OUT THAT NO "NORMED DATA" REGARDING ADAPTIVE FUNCTIONING WAS PRESENTED BY EITHER SIDE DURING THE EVIDENTIARY NO NEW REQUIREMENT WAS CREATED REGARDING PRESENTATION OF PROOF REGARDING ADAPTIVE FUNCTIONING, THE ULTIMATE DECISION OF THE COURT BELOW DID NOT REST ON THIS FACT.

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

## BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

## OPINION BELOW

The opinion of the Mississippi Supreme Court is reported as *Chase v. State*,171 So.3d 463 (Miss. 2015). A copy of this opinion is before this Court as Appendix A to the petition for certiorari.

## JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C.A. § 1257(3). He fails to do so.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the U.S. CONST., AMEND. VIII and XIV. He fails to do so.

## STATEMENT OF THE CASE

### A. Statement of Facts

The state court set forth the facts of this case in the opinion on direct appeal and again on post-conviction review. *See Chase v. State*, 645 So.2d 839, 836-37 (Miss. 1994); *Chase v. State*, 698 So.2d 521 (Miss. 1997). *See also Chase v. Epps*, 74 Fed.Appx. 339, 340 (5th Cir. 2003). The State would adopt these recitations of the facts as its statement of the facts here.

### B. Procedural History

Chase was indicted was indicted for capital murder during the November 1989 term of the Circuit Court of Copiah County, Mississippi, in violation of Miss. Code Ann. § 97-3-19(2)(e). Petitioner was tried on the indictment and found guilty of capital murder by the jury. At the conclusion of the separate sentencing trial the jury returned a sentence of death. A motion for a new trial was denied on April 5, 1990.

Petitioner pursued his automatic direct appeal to this Court raising some twenty claims of error. On February 24, 1994, the Mississippi Supreme Court affirmed the conviction of capital murder and sentence of death, and later denied the petition for rehearing with a written opinion on December 8, 1994. *Chase v. State*, 645 So.2d 829 (Miss. 1994), *cert.*

*denied*, 515 U.S. 1123, 115 S.Ct. 2279, 132 L.Ed.2d 282, *reh. denied*, 515 U.S. 1179, 116 S.Ct. 20, 132 L.Ed.2d 903 (1995). On July 15, 1996, Chase filed a Application for Leave to File Motion to Vacate Judgment and Sentence of Death with the Mississippi Supreme Court presenting some fifteen claims. On August 7, 1997, the State Court denied the application for post-conviction relief. *Chase v. State*, 699 So.2d 521 (Miss. 1997).

On November 17, 1997, Chase filed a petition for writ of habeas corpus with the United States District Court for the Southern District of Mississippi. On January 2, 2001, the district court entered its Memorandum Opinion and Order denying the petition for writ of habeas corpus. *Chase v. Puckett*, No. 3:97-cv-744 (W). The district court denied petitioner's motion to reconsider on May 29, 2001. On June 28, 2002, petitioner filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit. On July 30, 2002, petitioner filed his Motion for Certificate of Appealability. On November 29, 2001, the district court entered an order granting a Certificate of Appealability, limited to the question of whether counsel was ineffective for failing to have petitioner evaluated for mental retardation. The United States Court of Appeals for the Fifth Circuit affirmed the denial of federal habeas relief on August 8, 2003, and denied the petition for panel rehearing and rehearing en banc on December 18, 2003. *Chase v. Epps*, 74 Fed.Appx. 339, *reh. and reh. en banc denied*, 83 Fed. Appx. 673 (5th Cir. 2003). Petitioner then file a petition for writ of certiorari with this Court which was denied on May 17, 2004. *Chase v. Epps*, 541 U.S. 1050, 124 S.Ct. 2180, 158 L.Ed.2d 746 (2004).

While his petition for rehearing was pending in the Fifth Circuit petitioner filed a motion for leave to file a successive post-conviction petition contending that he was mentally retarded withing the meaning of *Atkins v. Virginia*, 536 U.S. 304 (2002). Because *Atkins* was found to be an intervening decision, petitioner was allowed to proceed with his claim in the trial court. On May 20, 2004, the Mississippi Supreme Court remanded this case for an evidentiary hearing on the mental retardation question. *Chase v. State*, 873 So.2d 1013 (Miss. 2004).

The ordered evidentiary hearing was held on August 16-17, 2010. The trial court took the case under consideration and on November 8, 2010, issued a memorandum opinion finding that petitioner was not retarded within the meaning of *Atkins v. Virginia, supra*. Petitioner appealed the circuit court's decision to this Court.

On January 15, 2013, the Mississippi Supreme Court entered an en banc order vacating the circuit court's order and remanding the case to the circuit court to take into account its clarification of what the court could rely on in making its decision and ordering the circuit court to enter "his own Findings of Fact and Conclusions of Law and to enter a new judgment based thereon." On May 6, 2013, the circuit court entered its own Order again denying petitioner relief on his *Atkins* claim.

Petitioner timely perfected his appeal of this order. The case was again briefed and argued. On April 23, 2015, the Mississippi Supreme Court rendered an opinion affirming the denial of relief on the *Atkins* question. A petition for rehearing was denied on August 20,

2015. *See Chase v. State*, 171 So. 3d 463 (Miss. 2015).

Petitioner has now filed this petition for writ of certiorari challenging the decision of the Mississippi Supreme Court.

## REASONS FOR DENYING THE WRIT

Where the state trial court considers all of the testimony presented in regarding petitioner's adaptive functioning presented during the evidentiary hearing on his *Atkins* claim and finds that petitioner has failed to sustain his burden that he is mentally retarded there is no ground for the court below to disturb the ruling by the trial court.

The court did not create a new requirement, on appeal, regarding the proof required to show deficits in adaptive functioning. The court below did not decide this case on the basis of the failure to present any "normed data" from clinical instruments.

Petitioner presents no cognizable claim under the Constitution or statutes of the United States upon which relief can be granted, therefore certiorari should be denied.

## ARGUMENT

### I. NEITHER THE COURT BELOW NOR THE TRIAL COURT REFUSED TO CONSIDER TESTIMONY REGARDING PETITIONER'S ADAPTIVE FUNCTIONING AND NO NEW REQUIREMENT WAS ADDED TO SHOWING ADAPTIVE FUNCTIONING.

The case at bar is one in which the trial court found that petitioner met the first prong of the *Atkins* test holding that he presented with significantly subaverage intellectual functioning because his full scale IQ score was 71. The Mississippi Supreme Court affirmed this finding by the trial court. *See Chase v. State*, 171 So. 3d at 479-81. The issue

presented to this Court is whether the trial court and the court below erred in finding that petitioner failed to demonstrate that he had substantial adaptive functioning deficits.

Petitioner contends that the teachings of *Atkins, supra; Panetti v. Quarterman*, 551 U.S. 930 (2007); *Hall v. Florida*, — U.S. —, 134 S.Ct. 1986 (2014); *Brumfield v. Cain.* — U.S. —, 135 S.Ct. 2269 (2015), are violated by the decision of the Mississippi Supreme Court in the case at bar. Respondents will show how that is incorrect.

It is petitioner contention that the trial court refused to consider testimony regarding petitioner's adaptive functioning from witnesses that knew petitioner during "developmental period". Further, he contends that the court below likewise refused to consider this evidence and placed a requirement that petitioner present "normed data" in support of his adaptive functioning.

Respondent would submit, with respect to the witness interviews relied on by Dr. Reschly, that they were considered. The problem pointed out by both the trial court and the court below was not the information in the interviews, but the interpretation placed on that information by Dr. Reschly.

Petitioner argues that the court below and the trial court discounted the witness statements because they were unreliable and that they rejected Dr. Reschly's use of the "principle of conversion [sic] validity" to verify the statements of the witnesses. There he is incorrect. The Mississippi Supreme Court held:

> ¶ 64. As an initial matter, we agree with Chase that the circuit court clearly erred by finding that Dr. Reschly used no methodology to assure the credibility

of the interview sources. In fact, Dr. Reschly testified that he had used the convergent validity principle[2] to assess the credibility of the sources. However, that error was of little import to the circuit court's holding. It is manifest from the circuit court's opinion that the primary reason it found Dr. Reschly's opinions unpersuasive was that Dr. Reschly relied on his own personal opinions and moral judgments rather than on science. The trial court found Dr. Reschly's opinions to be replete with instances of attributing deficits easily and based on personal beliefs, not science."

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2. According to the testimony, that principle holds that consistency across multiple sources tends to show that the sources were telling the truth about what they observed.

3. Contrary to the dissent's position, the trial court did not find Dr. Reschly's opinions less credible due to "inherent bias" of the sources. In fact, the trial court never stated that the interview sources were "inherently biased." The trial court's primary reason for discounting Dr. Reschly's opinions was its finding that many of his conclusions were not grounded in science, but in his own personal opinions and moral judgments.

171 So. 3d at 482.

The statement found in footnote 3 of the *Chase* opinion sets forth the basis of the court below and the trial court's problems with Dr. Reschly's conclusion drawn from the interviews. It was not the rejection of the interviews but a rejection of the conclusions drawn from those interviews by Dr. Reschly. In another *Atkins* case in which Dr. Reschly testified, *United States v. Montgomery*, 2014 WL 1516147 (W.D.Tenn. January 28, 2014), the district judge found similar problems with his testimony. There the judge concluded:

> In conclusion, Dr. Reschly's testimony and conclusions are unreliable. The Court assigns little weight to them in light of the fact that they were often hasty, overstated, or simply incorrect. The Court has no doubt that Dr. Reschly is an accomplished academic and well-qualified to opine on issues of adaptive behavior and MR/ID; his methods and conclusions in this particular case, however, lack credibility.

2014 WL 1516147, *11.

It appeared to the trial court, the court below and the federal district court in Tennessee that Dr. Reschly has some problems with applying his personal opinions on what classifies as adaptive deficits rather than taking a more critical or scientific approach.

In reviewing the circuit court's findings regarding Dr. Reschly, the court below held:

> ¶ 67. The circuit court held that Dr. Reschly had relied on his personal beliefs when he found that Chase demonstrated a significant deficit in social responsibility by unknowingly fathering a child out of wedlock. This finding was fully supported by Dr. Reschly's admission at trial that this opinion was based on his own moral judgment of Chase's behavior. Dr. Reschly also assigned an adaptive deficit to Chase's statement during his interview that he washes salt off prepackaged noodles. Dr. Reschly found this demonstrated an adaptive deficit because washing salt off noodles is impossible. The circuit court found this to be "an insufficient and ungrounded basis for finding a deficiency, but an action [washing salt off noodles] that is entirely possible." The circuit court further found that Dr. Reschly used his own personal judgment in determining that Chase told made-up stories to mask his intellectual deficiency, and that Dr. Reschly "simply decided himself what was and was not possible."
>
> ¶ 68. Dr. Reschly's report indicates that, except for Chase's story of being suspended for having sex on school property, which Dr. Reschly verified was untrue after talking to his teacher, Dr. Reschly's opinions about the veracity of Chase's descriptions of past incidents were entirely subjective. The circuit court found that Dr. Reschly's finding that Chase was lying when he said he had been knocked out when he hit his head on a basketball rim at age twelve or thirteen was not credible. The circuit court found that Dr. Reschly simply assumed this event was implausible without asking followup questions. The circuit court found that Dr. Reschly's assignment of deficits to Chase due to his short work history and the fact that his mother still bought him clothes and gave him money was not credible because Dr. Reschly failed to take into consideration the fact that Chase was ages sixteen through nineteen during this time. The circuit court found that, while Dr. Reschly found that certain statements Chase had made during the interview were illogical or untrue, his

only basis for that conclusion was his own personal unfamiliarity with Chase's linguistic expressions. The circuit court also noted Dr. Reschly's conclusion that Chase's chronic lateness demonstrated an adaptive deficit in the area of time concepts. Dr. Reschly testified that Chase's chronic lateness showed he had problems telling time, but Dr. Macvaugh testified that this conclusion was erroneous. These credibility decisions are entrusted to the circuit court under our standard of review.

¶ 69. The circuit court also found unpersuasive Dr. Reschly's opinion about Chase's understanding of his liability for capital murder. Dr. Reschly stated:

> Mr. Chase's language and thinking limitations are revealed in a comment by Dr. Pate in 1989, quoted in the MS State Hospital Report: "He does not want to die but hates that he has no future because of something he didn't do." Clearly Mr. Chase failed then and now to understand his culpability as someone who admitted to assisting and encouraging a crime that caused a murder. (Ricky Chase's Trial Testimony, 1990). Culpability is an abstract idea, involving understanding the relationship among several elements. Such language and abstract thinking deficits are at the heart of the exclusion of the death penalty with persons with mental retardation.

The circuit court was unpersuaded by this opinion because Chase demonstrated an understanding of his criminal liability. The circuit court stated that "certainly accomplice liability is an area which many people, even those with legal training, often do not fully understand and certainly an argument by Chase that as the non-triggerman in a murder equals less culpability is not so easily categorized as deficient." This finding was fully supported by the law and the record. Under *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), to be sentenced to death, a person convicted of capital murder actually must have killed, attempted to kill, intended to kill, or intended that lethal force be used in a felony. Chase consistently maintained at his sentencing hearing that his participation in the robbery and murder were wrong, but that, because he did not fire the fatal shot or intend the murder, he should not receive the death penalty. He stated:

> I was wrong. I was just as much involved in it as he was. I was wrong for being there and I was wrong for taking a part in it, because I knew it was wrong, it was dead wrong. What I'm saying is, to the Judge, the DA, the Court, the Grand Jury, is that I'm not the one who shot Mr.

> Hart. I didn't kill him. I was there and I was wrong for being there, but I didn't kill him.
>
> . . .
>
> I'm not ready to pay the price for nothing, but I broke the law and I know I have to be punished for me taking my part in that murder, but I don't feel like – I don't feel like, in fact, I know that I shouldn't be punished for what I'm charged with, because I didn't commit the crime, although sometimes someone shoots a person and they're right there with him, they're just as guilty as he is.
>
> . . .
>
> I was just as guilty as he is, but I didn't pull the trigger that killed Mr. Hart. I did not fire the shot. I did not fire the shot that killed Mr. Elmer Hart.

> The circuit court reviewed the same medical history and trial transcripts as Dr. Reschly and was entitled to find that Chase's statements did not justify Dr. Reschly's conclusions about Chase's understanding of his criminal liability.

171 So. 3d at 483-85.

The trial court's conclusion on this matter is telling. The trial court held:

The trial court considered the testimony of the experts and recounted their testimony regarding adaptive functioning and the different domains to be considered. R.E. 23-33. The trial court then summarized the testimony and concluded that petitioner had failed to prove that he suffered from adaptive deficits. The Court explained why he found petitioner's experts conclusions less credible. The Court held:

> Dr. Reschly stated that it was his opinion that Chase had substantial deficits in adaptive functioning, thereby meeting the second prong of the test for mental retardation. Dr. O' Brien testified that he found substantial deficits in at least two of the three areas as described by the 2002 AAMR definition.

They both relied primarily on the interviews conducted by Dr. Reschly.

The State's primary witness, Dr. Macvaugh testified that Chase did not possess the adaptive behavior deficits as contemplated by *Atkins* and *Chase*. From a functional academic standpoint, Chase attended school until the 10th grade, never received any Special Education services, and was never diagnosed with a learning disability or mental retardation by school professionals or anyone before *Atkins*. His scores on the WRAT-R administered by Dr. Perry, the achievement test administered by Whitfield, and the sixth grade California Achievement Test revealed abilities which were incongruent with the lower level of functioning indicated by his interviews and grades. This Court finds the opinions of Dr. Macvaugh to the most credible and reliable.

This Court is not persuaded by Dr. Reschly's findings in the area of adaptive functioning, as many of his opinions did not appear to have a substantial scientific basis, but rather were personal opinions which did not necessarily show the deficit assigned to them, and could readily be interpreted differently. Dr. Reschly's report and testimony appeared lack scientific objectivity as to adaptive functioning. His report does not indicate any particular method of questioning the interviewees so as to obtain reliable, unbiased information. He appeared to have accepted anything he was told by informants, without critical analysis. In fact, he that he believed the interviewees were telling the truth and had no reason to lie to him. Both Dr. Macvaugh and Dr. O'Brien testified that blindly relying on the accounts of family, teachers, and friends should be viewed with caution. The subjects of the interviews conducted by Dr. Reschly did not testify in Court, other than the Chases' prior testimony, and for whatever reason, were not made available to the State for interview. The objectivity and credibility of Dr. Reschly's report is further drawn into question when he attributes deficiencies to areas either due to his personal lack of knowledge of a phrase, unsubstantiated belief that the statements were either untrue or impossible, or personal moral opinion. For instance, Chase stated that he hit his head on the basketball rim at 12 or 13, which Dr. Reschly assigned as a deficit because it was implausible. However, Dr. Reschly did not ask whether the goal was regulation height, or lower, or if the children were using a trampoline. Reschly's belief that dunking at that age is entirely impossible was not shown to be grounded in science, but his personal beliefs.

Dr. Reschly's findings are replete with instances of attributing deficits

easily and based on personal beliefs, not science. For instance, Dr. Reschly assigned a deficit in social responsibility to the fact that Chase may have unknowingly fathered a child out of wedlock prior to his incarceration, and that he failed civics class.

The same can be said about the adaptive deficiency assigned to Chase due to his washing salt off pre-packaged noodles. That appears to be not only an insufficient and ungrounded basis for finding a deficiency, but an action that is entirely possible. Chase's stories of his sexual exploits were not believed by Dr. Reschly and therefore were credited as adaptive deficits. He explained that mentally retarded people make up stories to blame their failures on other things not related to the thing they failed to accomplish. While potentially true, he did not appear to corroborate any of these allegedly "made up stories", but rather simply decided himself what was and was not possible. Dr. Reschly assigned deficits to Chase's fairly short work history, and that his mother still bought him clothes and gave him money. However, he did not believe it relevant to this finding that Chase was 16-19 through his work history, and was arrested for the current offense at age twenty. Additionally, Dr. Reschly assigned a deficiency to Chase due to his statements about being less culpable in the murder for which he was convicted than the shooter. Accomplice liability is an area which many people, even those with legal training, often do not fully understand and certainly an argument by Chase that as the non-triggerman in a murder equals less culpability is not so easily categorized as deficient.

This Court does not find that Chase has met his burden as to the second criteria, significant deficits in adaptive functioning as contemplated by *Atkins* and *Chase*. Despite the credibility and reliability issues expresses as to Dr. Reschly's findings, it appears that Chase does have some limitations, but not significant deficits in the required areas, shown by a preponderance of the evidence. Therefore, this Court will not address the third criteria, onset before age 18.

R.E. 33-35.

The trial court clearly set forth its reasons for making the credibility choices that it did. The case at bar is simply a case of credibility choices made by the trial judge after hearing the evidence presented at the evidentiary hearing.

While petitioner relies heavily on *Hall v. Florida*, — U.S. —, 134 S.Ct. 1986 (2014),[1] the facts of this case do not fall within the teachings of that case. The Mississippi Supreme Court has always recognized that a person with an IQ of 70-75 may fall within the definition of intellectual disability as announced by this Court. Further, the consideration of adaptive functioning as conducted by the trial court and the court below did not foreclose further exploration of petitioner's adaptive functioning. Because the choices made in the case at bar were credibility choices based on the consideration of all the evidence presented to the trial court there is no reason to grant certiorari on this point.

Petitioner also contends that the Mississippi Supreme Court added a new requirement to the consideration of adaptive functioning that petitioner had no knowledge of prior to the evidentiary hearing. Petitioner asserts that the court below added the requirement that "normed data" regarding adaptive functioning must be presented in order to show deficiency in adaptive functioning. The respondent would submit that while the court below did discuss the absence of "normed data" that was not the basis of the affirmance of the case at bar. The Mississippi Supreme Court held:

> ¶ 70. We recognize an additional deficiency in Dr. Reschly's opinions not identified by the circuit court. Citing the 2010 AAIDD manual, Dr. Reschly's report indicated that adaptive behavior is evaluated through the use of standardized measures. He quoted the manual's directive that significant adaptive functioning deficits are assessed in the following manner:

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[1]Respondent assumes his citation to the one sentence grant of certiorari and remand for consideration of the opinion in *Hall*, in *Lane v. Alabama*, — U.S. —, 136 S.Ct. 91 (2015), is also for this point.

> For the diagnosis of intellectual disability, significant limitations in adaptive behavior should be established through the use of standardized measures normed on the general population, including people with disabilities and people without disabilities. On these standardized measures, significant limitations in adaptive behavior are operationally defined as performance that is approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, or practical or (b) an overall score on a standardized measure of conceptual, social, and practical skills. The assessment instrument's standard error of measurement must be considered when interpreting the individual's obtained scores.
>
> *Intellectual Disability: Definition, Classification, and Systems of Support* 43 (11th ed.2010). Yet Dr. Reschly used no normed data to evaluate the results of the interviews he conducted. Instead, he relied on his own personal opinions and clinical judgment as to what the information he gathered meant. We find that, without reference to a standardized measure normed on the generalized population, Dr. Reschly's conclusions lacked the sound scientific basis demanded in the context of an *Atkins* evaluation. Dr. O'Brien's opinions suffered from the same deficiency. We find that the circuit court did not clearly err in rejecting the conclusions of Dr. Reschly and Dr. O'Brien.
>
> 171 So. 3d at 485.

This discussion did not only refer to the petitioner, but to the state's expert as well. The Court further held:

> ¶ 73. Nonetheless, Dr. Macvaugh's conclusions exhibited the same deficiency we identified in Dr. Reschly's testimony. Dr. Macvaugh's opinions about Chase's abilities rested solely upon his clinical judgment, with no reliance on normed data, with the exception of the WRAT-4, which measures only spelling, mathematics, and reading recognition. Certainly, reliance on clinical judgment is warranted in the area of adaptive functioning. *See Doss*, 19 So.3d at 713 (stating that "[a]daptive functioning historically has been assessed 'on the inherently subjective bases of interviews, observations, and professional judgment'"; *Hardy*, 762 F.Supp.2d at 883 (stating that "[t]he evaluation of a person's adaptive functioning involves significantly more subjective clinical judgment. That judgment is still constrained to some extent by the criteria spelled out by the APA and AAMR/AAIDD, as well as the use of standardized

tests"). But Dr. Macvaugh himself recognized the important role of normed data to evaluate intellectual disability, even in the context of a death-row inmate attempting to meet the *Atkins* standard. In a peer-reviewed article by Dr. Macvaugh that was admitted into evidence in this case, Dr. Macvaugh stated the following regarding *Atkins* evaluations of incarcerated individuals:

> [I]nformation regarding adaptive function[ing] is most reliably obtained through the descriptions of third parties who have had the opportunity to closely observe the examinee in the community. The individual under evaluation is not the most reliable source of information regarding his own adaptive functioning. *[A]ppraisal of the adaptive quality of behavior is most reliably based on comparison of described behavior with that of a normative group (e.g., standardized adaptive behavior rating scales).*

Macvaugh, G.S. & Cunningham, M.D., *Atkins v. Virginia: Implications and Recommendations for Forensic Practice*, 37 J. of Psychiatry & the Law, 131, 168 (2009) (emphasis added). Despite his article's emphasis on the importance of using normed data, Dr. Macvaugh did not follow the procedures he advocated in his assessment of Chase.[4] We find that none of the experts in this case conducted nearly the depth of investigation appropriate for assessing intellectual disability for the purposes of *Atkins*. Nonetheless, the burden of proof rested with Chase. The circuit court did not clearly err by rejecting the opinions of Dr. Reschly and Dr. O'Brien and finding that Chase had failed to prove intellectual disability by a preponderance of the evidence.

171 So. 3d at 486.

The court below did not hold that information based on "normed" testing was required to prove deficits in adaptive functioning. The Court did not hold that it was deciding the case on this basis, but on the basis of the information before the trial court.

It is clear from the court's opinion setting forth the basis on which it was reviewing this case that it was not making a requirement that "normed data" must be presented. The court stated:

> ¶ 13. The new AAIDD and APA definitions are similar and require the same three basic elements of intellectual disability as the earlier definitions: significantly subaverage intellectual functioning, significant deficits in adaptive behavior, and manifestation before age eighteen. Although the new definitions changed the terminology applicable to adaptive functioning, other courts have recognized that "the exact wording of the various standards makes little substantive difference in this *Atkins* context." *U.S. v. Williams*, 1 F.Supp.3d 1124, 1146 (D.Haw.2014) (citing *U.S. v. Hardy*, 762 F.Supp.2d 849, 879-80 (E.D.La.2010)). This is because both the earlier and later standards promulgated by the AAIDD and the APA "direct clinicians to the same standardized measures of adaptive behavior, such as the Vineland Adaptive Behavior Scales-II (VABS-II) and the [AAIDD's] Adaptive Behavior Scale." *Williams*, 1 F.Supp.3d at 1147 (quoting *Hardy*, 762 F.Supp.2d at 879-80). And "[e]ven after release of the DSM-5, *prong two still 'generally requires a more expansive investigation of a defendant's life history and skill levels than could be fully evaluated through use of a normed instrument,'" and still involves "significantly more subjective clinical judgment.*" *Id.* (quoting *U.S. v. Salad*, 959 F.Supp.2d 865, 878 (E.D.Va.2013)).
>
> 171 So. 3d at 470. [Emphasis added.]

The respondent would submit that the discussion of the normed instruments in the opinion was pointing out that other methods of showing adaptive deficits were available and not used by either the petitioner or the state. The decision rested on the credibility choices made by the trial court after hearing and considering all the testimony at the evidentiary hearing.

Respondent would assert that certiorari should be denied.

## II. WHILE THE COURT BELOW POINTED OUT THAT NO "NORMED DATA" REGARDING ADAPTIVE FUNCTIONING WAS PRESENTED BY EITHER SIDE DURING THE EVIDENTIARY NO NEW REQUIREMENT WAS CREATED REGARDING PRESENTATION OF PROOF REGARDING ADAPTIVE FUNCTIONING, THE ULTIMATE DECISION OF THE COURT BELOW DID NOT REST ON THIS FACT.

The decision of the court below did not rest on the application of a new requirement

for showing adaptive functioning in a hearing under *Atkins*. Petitioner, citing *Ford v. Georgia*, 498 U.S. 411, 423 (2011), argues that the Mississippi Supreme Court violated his due process rights by creating a new requirement that an *Atkins* petitioner must present "normed data" and applying it to his case. In *Ford, supra*, the Court found a procedural rule concerning when a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), must be raised to save it from being held untimely was applied for the first time to the case under consideration and could not be considered firmly established at the time of Ford's trial. That is not the case here.

The Mississippi Supreme Court did not announce a rule that "normed data" had to be introduced in order to prove an *Atkins* petitioner's adaptive functioning. It pointed to the deficiency in failing to introduce such evidence, but did not hold that the decision was based solely on that reason. The reason for affirming the trial court's finding was the credibility choices made by the trial court on the evidence presented. The court below merely was pointing out that this information could have presented more information to the trial court in making its decision.

It is difficult to argue that a new requirement was added in light of the Mississippi Supreme Court's decision in *Doss v. State*, 19 So. 3d 690 (Miss. 2009), which held:

> ¶ 44. Doss next argues that the circuit court erred in accepting the opinions of Drs. MacVaugh and Lott over that of Dr. Grant on the issue of adaptive functioning, even though Dr. Grant was the only one to administer adaptive-functioning tests. Doss also argues that the tenth edition of Mental Retardation: Definition, Classification, Assistance, and Support, by the AAMR, specifically requires adaptive-functioning testing in order to determine

mental retardation, and Dr. Grant's opinion, which was based on the tenth edition of Mental Retardation and included such testing, was the only credible opinion given at Doss' hearing. As we will explain *infra*, these arguments are flawed for two reasons: (1) this Court has recently held in *Lynch v. State*, 951 So.2d 549 (Miss.2007), *that there is not one test to determine mental retardation, including the adaptive functioning component; and (2) there is no agreement among scholars or professionals as to the proper testing to be used in assessing adaptive functioning.*

. . .

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

¶ 47. Adaptive functioning historically has been assessed "on the inherently subjective bases of interviews, observations, and professional judgment." Klein, 72 Brooklyn L.Rev. at 1235. *In recent decades, researchers have developed an increasing number of test instruments for quantifying adaptive functioning, only a few of which have gained acceptance in the field. Id.*; Weithorn, 59 Hastings L.J. at 1220. *These tests provide a necessary objective measurement but offer no panacea. There are "no generally accepted psychometric instruments for measuring adaptive skill levels that are*

*commensurate in reliability with IQ tests*." Note, *Implementing Atkins*, 116 Harv. L.Rev. at 2575 n. 72 (citing AAMR, Mental Retardation: Definition, Classification, and Systems of Supports, 24, 87-90 (10th ed.2002)) (noting that *the AAMR concedes that there is no consensus regarding tests for adaptive behavior, but states there are a number of tests with "excellent psychometric properties"*). One commentator suggests that *existing measurement instruments are inadequate and have very little utility in the Atkins context.* Weithorn, 59 Hastings L.J. at 1222.

¶ 48. By citing these controversies, we in no way suggest that this Court abandon the adaptive-behavior prong, or intimate that the tests for measuring adaptive functioning are inherently unreliable. *Our point is to illustrate that there is considerable, sincere disagreement among professionals and scholars in the field as to the best method for measuring adaptive functioning.* The concept and measurement of adaptive functioning is an unsettled area without consensus among experts and therefore, we cannot find that the Whitfield doctors' opinions are baseless, or that the trial judge clearly erred in accepting their opinions.

¶ 49. We also find evidence which reasonably supports the trial judge's conclusion that the opinions of the Whitfield doctors were more compelling. Although Dr. Grant tested Doss for impairments in adaptive-skill behaviors, he spoke to no family members or other persons besides Doss. Interviews with family members, and others familiar with an individual's typical behavior over an extended period of time in various settings, can supplement or aid in the interpretation of test results. Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them From Execution*, 30 J. Legis. 77, 98 (2003) (*using different sources of data is recommended rather than placing sole reliance on the adaptive-skill assessment instrument*); Linda Knauss & Joshua Kutinsky, *Into the Briar Patch: Ethical Dilemmas Facing Psychologists Following Atkins v. Virginia*, 11 Widener L.Rev. 121, 130-31 (2004). Additionally, testing instruments for assessing adaptive-functioning impairments can, for a variety of reasons, *"be less than ideal for assessing adult criminal defendants who might be mentally retarded."* Klein, 72 Brooklyn L.Rev. at 1235 (citing certain problems such as the unavailability of caregivers or other reliable independent sources, the use of inappropriate norms, and the atypical environment of a prison); Knauss & Kutinsky, 11 Widener L.Rev. at 131 (*"Few (if any) measures of adaptive functioning have been designed or normed for use with a correctional population. Thus, adaptive functioning prior to incarceration should be the*

*target for assessment.*"); Note, *Implementing Atkins*, 116 Harv. L.Rev. at 2576 (noting that an individual's environment may add a layer of uncertainty to diagnosing adaptive-skill deficits). Indeed, Dr. Lott stated that he knew of no studies that have normed an adaptive-functioning test for those on death row, and Dr. Grant admitted that the adaptive-functioning tests he administered were not normed for a prison population.[17]

¶ 50. In sum, we have in this case experts who take opposite positions as to whether Doss is mentally retarded. Neither side's methodology, approach, or understanding of the issue is infallible. The ultimate issue of whether Doss is, in fact, mentally retarded for purposes of the Eighth Amendment, is one for the trial judge, who sits as the trier of fact and assesses the totality of the evidence as well as the credibility of witnesses. While expert opinions are helpful and insightful, the ultimate decision of mental retardation is not committed to the experts, but to the trier of fact. As the United States Supreme Court has noted, "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law." *Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002).

19 So. 3d 690, 712-14. [Emphasis added.]

In light of the foregoing from the *Doss* opinion it is hard to imagine that the Mississippi Supreme Court would require the administration of normed instruments to measure adaptive functioning. Especially, without making any mention of the opinion in *Doss*.

Respondents would assert that the Mississippi Supreme Court did not create a new requirement that a petitioner must introduce in order to demonstrate deficiencies in adaptive functioning.

For this reason the respondent would submit that certiorari should be denied.

## CONCLUSION

For the above and foregoing reasons the petition for writ of certiorari should be

denied.

Respectfully submitted,
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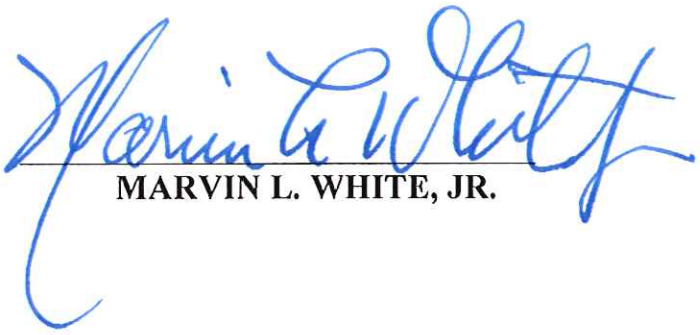
## CERTIFICATE

I, Marvin L. White, Jr., Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above **Brief in Opposition** to the following:

James W. Craig, Esquire
Roderick and Solange MacArthur
Justice Center
4400 S. Carrollton Avenue
New Orleans, Louisiana 70119

This the 22nd day of April, 2016.



**MARVIN L. WHITE, JR.**