No. _____
OCTOBER TERM 2015

IN THE
SUPREME COURT OF THE UNITED STATES

RICKY CHASE, *Petitioner,*

v.

STATE OF MISSISSIPPI, *Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

PETITION FOR A WRIT OF CERTIORARI
CAPITAL CASE

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CAPITAL CASE: NO EXECUTION DATE PENDING

QUESTIONS PRESENTED

In *Hall v. Florida*, ___ U.S. ___, 134 S.Ct. 1986 (2014), this Court held that state statutes and procedures which create an unacceptable risk that persons with intellectual disability will be executed violate the Eighth and Fourteenth Amendments. In this case, Petitioner presented substantial evidence of his adaptive functioning deficits at a Circuit Court evidentiary hearing on his post-conviction motion to vacate his death sentence under *Atkins v. Virginia*, 536 U.S. 304 (2002).

The Circuit Court rejected all adaptive functioning data from interviews conducted by a qualified psychologist, finding they lacked scientific criteria for assessing reliability. The Mississippi Supreme Court found that grounds for rejecting the data to be error, but affirmed because the trial court also found that the expert "relied on his own personal opinions and moral judgments rather than on science."

In affirming this ruling, the Mississippi Supreme Court also held that an *Atkins* petitioner must present "normed data" on adaptive functioning from clinical instruments such as the Vineland or the ABAS in order to prove the second criterion for intellectual disability. This novel requirement was imposed on Petitioner, even though he had no notice of this 2015 rule at the time of his evidentiary hearing in 2010, and even though the State's own report issued before the evidentiary hearing stated that no such clinical instruments were useful in assessing adaptive behavior retrospectively.

This presents the following questions:

1. Does it violate the Eighth and Fourteenth Amendments, as understood in *Atkins* and *Hall,* for a State court to refuse to accept data from clinical interviews with persons who knew a death-sentenced prisoner during the "developmental period" where the uncontested testimony and scientific and clinical consensus finds such data to be useful in determining the second criteria for intellectual disability, i.e., adaptive functioning deficits?

2. Does it violate the Eighth and Fourteenth Amendments, as understood in *Atkins* and *Hall*, for a State court to impose a requirement that a death-sentenced prisoner present "normed data" from clinical instruments in order to prove the second criteria for intellectual disability under *Atkins*, i.e., adaptive functioning deficits?

3. Does it violate the Fourteenth Amendment Due Process Clause for a State court to create a novel requirement that a death-sentenced prisoner present "normed data" from clinical instruments in order to prove the second criteria for intellectual disability under *Atkins*, and impose that requirement to deny relief to a prisoner who had no notice of the requirement during his evidentiary hearing?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ricky Chase, a state capital inmate, respectfully requests that the Court grant a writ of certiorari to review the decision of the Mississippi Supreme Court affirming the ruling of the Circuit Court of Copiah County, Mississippi, which denied Mr. Chase's successive petition for post-conviction relief. After conducting an evidentiary hearing, the Circuit Court held that Mr. Chase is not intellectually disabled and therefore not entitled to relief under this Court's opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002). The Mississippi Supreme Court affirmed with additional grounds for denying *Atkins* relief.

OPINIONS BELOW

The Mississippi Supreme Court opinion at issue is reported as *Chase v. State*, 171 So.3d 463 (Miss. 2015). The original opinion was issued on April 23, 2015; rehearing was denied on August 20, 2015. The opinion is reproduced as Appendix A to this petition. The order denying rehearing is reproduced as Appendix B to this Petition. The Mississippi Supreme Court had previously remanded the case due to the trial court's verbatim adoption of the State of Mississippi's Proposed Findings of Fact and Conclusions of Law. *Chase v. State*, 112 So. 3d 421 (Miss. 2013). The state supreme court's remand opinion is reproduced as Appendix C.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Mississippi Supreme Court on the basis of 28 U.S.C. § 1257. The Mississippi Supreme Court denied the motion for rehearing on August 20, 2015.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The questions presented implicate the following provisions of the United States Constitution:

AMEND. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMEND. XIV: No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY AND DECISION BELOW

A. Trial and Direct Appeal

The Circuit Court of Copiah County, Mississippi entered the judgment of conviction of capital murder and kidnapping, and the death sentence against Ricky Chase on February 28, 1990. Mr. Chase appealed the judgment and conviction to the Mississippi Supreme Court. The Mississippi Supreme Court affirmed Mr. Chase's conviction and death sentence on February 24, 1994. *Chase v. State*, 645 So. 2d 829 (Miss. 1994). Rehearing was denied on December 8, 1994. Certiorari from direct appeal was denied by the United States Supreme Court on June 5, 1995. *Chase v. Mississippi*, 515 U.S. 1123 (1995). Rehearing was denied on August 11, 1995.

B. First State Post-Conviction Proceeding

Under the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. §99-39-1 et seq., Mr. Chase filed an Application for Leave to File Motion to Vacate Judgment and Death Sentence in the Mississippi Supreme Court on July 15, 1996. The Mississippi Supreme Court denied relief on August 7, 1997. *Chase v. State*, 699 So. 2d 521 (Miss. 1997).

C. First Petition for Writ of Habeas Corpus

On October 14, 1997, Mr. Chase filed an Application for Stay of Execution and a Motion for Appointment of Counsel in the United States District Court for the Southern District of Mississippi. *Chase v. Puckett*, No. 3:97-744-HTW. On November 17, 1997, Mr. Chase's appointed counsel filed a Petition for Writ of Habeas Corpus. In an unpublished opinion entered on January 2, 2001, the District Court denied relief, and also denied Mr. Chase an evidentiary hearing on his claims. The District Court granted a Certificate of Appealability on one issue: whether trial counsel rendered ineffective assistance by failing to have Mr. Chase properly

evaluated for mental retardation. A separate final judgment was entered in the case on January 19, 2001.

Movant timely appealed the denial of habeas relief to this Court. In addition to raising the one issue as to which a Certificate of Appealability was granted, Mr. Chase also sought to expand the Certificate of Appealability to include the other claims in the petition. On August 7, 2003, this Court affirmed the District Court's denial of relief on the claim on which a Certificate of Appealability had been granted. In the same opinion, the Court denied Movant's motion to expand the COA. *Chase v. Epps*, 74 Fed.Appx. 339 (5th Cir. 2003).

A timely filed petition for panel rehearing was denied by the Court of Appeals on December 18, 2003. *Chase v. Epps*, 83 Fed.Appx. 673 (5th Cir. 2003). The Supreme Court denied certiorari on May 17, 2004. *Chase v. Epps*, 541 U.S. 1050 (2004).

D. *Atkins* Litigation

1. Successive Application for Post-Conviction Relief

A year and a half after the District Court denied habeas corpus relief to Mr. Chase, this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002). Exactly one year after the decision in *Atkins*, Mr. Chase filed his Successive Application for Leave to File Motion to Vacate Death Sentence. This application raised only one issue: whether Mr. Chase is intellectually disabled (using the terminology at the time, the Application seeks a ruling that Petitioner is "mentally retarded") and therefore barred from execution under the United States Supreme Court's ruling in *Atkins*.

In an opinion written by Justice Dickinson for the Court, the Mississippi Supreme Court ruled that the Successive Application stated a claim as to which "there has been an intervening decision of the Supreme Court of ... the United States which would have actually adversely affected

the outcome of his ... sentence." *Chase v. State*, 873 So. 2d 1013, 1017 at ¶6 (Miss. 2004), quoting Miss. Code Ann. §99-39-27(9). Because *Atkins* was such an "intervening decision," Mr. Chase's Successive Application was not prohibited by the Mississippi statute's successive petition bar.

The Mississippi Supreme Court thus remanded Mr. Chase's case for an evidentiary hearing on the merits of his *Atkins* claim. *Chase v. State*, 873 So. 2d at 1030, ¶83. The Court adopted the two definitions for intellectual disability employed in the *Atkins* opinion (originating from the American Psychological Association and the American Association on Mental Retardation). Id. at 1028, ¶¶68-72. As this Court is well aware, both those definitions require the same three criterion: (A) significantly subaverage intellectual functioning; (B) significant limitations in adaptive functioning skills; and (C) onset before age 18.

After adopting the *Atkins* definitions, the Court discussed, at length, the requirements that Mr. Chase (and other future *Atkins* petitioners in Mississippi) would be required to prove at the hearing in order to be entitled to relief:

> ¶ 74. We hold that no defendant may be adjudged mentally retarded for purposes of the Eighth Amendment, unless such defendant produces, at a minimum, an expert who expresses an opinion, to a reasonable degree of certainty, that:
>
> 1. The defendant is mentally retarded, as that term is defined by the American Association on Mental Retardation and/or The American Psychiatric Association;
>
> 2. The defendant has completed the Minnesota Multi phasic Personality Inventory-II (MMPI-II) and/or other similar tests, and the defendant is not malingering.
>
> ¶ 75. Such expert must be a licensed psychologist or psychiatrist, qualified as an expert in the field of assessing mental retardation, and further qualified as an expert in the administration and interpretation of tests, and in the evaluation of persons, for purposes of determining mental retardation.
>
> ¶ 76. Upon meeting this initial requirement to go forward, the defendant may present such other opinions and evidence as the trial court may allow pursuant to the Mississippi Rules of Evidence.
>
> ¶ 77. Thereafter, the State may offer evidence, and the matter should proceed as other evidentiary hearings on motions.

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

Chase, 873 So. 2d at 1029, ¶¶74-78.

Notably, no mention was made of the need to use a standardized instrument to produce "normed data" on the adaptive functioning criterion for intellectual disability. By contrast, the state court was quite specific about the guidelines for showing the first criterion, intellectual functioning. *Id.* at 1028 ¶70.

2. First Remand to Circuit Court; First Appeal to Supreme Court

On November 17, 2009, the Circuit Court ordered that Petitioner Chase be evaluated at the Mississippi State Hospital at Whitfield ("State Hospital" or "Whitfield"), and further ordered the State Hospital to report the results of their evaluation to the Court, the State, and Petitioner. On August 2, 2010, the Circuit Court ordered the Mississippi State Penitentiary at Parchman to allow Petitioner's mental retardation experts, Dr. Daniel Reschly and Dr. Gerald O'Brien, to have contact visits so that the Petitioner would have expert assistance in the evidentiary hearing.

The evidentiary hearing ordered by the Mississippi Supreme Court was conducted on August 16-17, 2010. On September 20, 2010, the Circuit Court received Proposed Findings of Fact and Conclusions of Law from both the Petitioner and the State. On November 8, 2010, the Circuit Court entered its ruling, finding Petitioner not intellectually disabled therefore not entitled to successive post-conviction relief. Circuit Judge Pickard used, verbatim, the State's Proposed Findings of Fact and Conclusions of Law. In fact, the Court's Order was titled, "Proposed Findings of Fact and Conclusions of Law."

The Mississippi Supreme Court vacated the Circuit Court's ruling on January 15, 2013.

Chase v. State, 112 So. 3d 421 (Miss. 2013). The main grounds for reversal was the Circuit Court's verbatim use of the State's proposed findings of fact and conclusions of law. Again, there was no mention of any requirement of "normed data" from standardized instruments to prove the second criterion of intellectual disability.

3. Second Remand and Second Appeal

On remand, the Circuit Court entered a new opinion and order on May 6, 2013. This order again denied relief to Mr. Chase on his Atkins claim. On May 16, 2013, Mr. Chase filed a motion for reconsideration of that order. The motion for reconsideration was denied by the Circuit Court on May 28, 2013.

Mr. Chase's briefing on this second appeal expressly raised due process issues related to the Circuit Court's procedure and findings, citing *Panetti v. Quarterman*, 551 U.S. 930, 127 S.Ct. 2842 (2007), *Rivera v. Quarterman*, 505 F.3d 349 (5th Cir. 2007), and *Hall v. Florida*, ___ U.S. ___, 134 S.Ct. 1986 (2014).

On April 23, 2015, the Mississippi Supreme Court affirmed the Circuit Court's denial of Atkins relief. *Chase v. State*, 171 So.3d 463 (Miss. 2015). Three Justices dissented, including Justice Dickinson, whose earlier opinion established the procedure for the evidentiary hearing.

Mr. Chase filed a timely motion for rehearing, raising the following issues:

> ISSUE ONE: The Circuit Judge's Complete Rejection of Dr. Reschly's Opinion on Adaptive Functioning Deficits Was Based on That Court's Clearly Erroneous Factual Findings.
>
> ISSUE TWO: Neither Legal Precedent, Scientific Literature or The Expert Testimony In This Case Support A Requirement That Normed Data Be Presented On The Adaptive Behavior Prong.

In the discussion of Issue Two, Mr. Chase specifically asserted that "it would violate the Due Process Clause of the Fourteenth Amendment to create a new requirement that an *Atkins* petitioner present 'normed data' in support of adaptive functioning, and apply it to a pending case,

when the petitioner had no notice of any such rule." Mot. For Rehearing at 9.

On June 18, 2015, Mr. Chase filed a Notice of Supplemental Authority directing the Mississippi Supreme Court's attention to this Court's opinion in *Brumfield v. Cain*, ___ U.S. ___, 135 S.Ct. 2269 (2015).

The motion for rehearing was denied on August 20, 2015.

II. STATEMENT OF FACTS: RICKY CHASE PRODUCED SUBSTANTIAL EVIDENCE ON ALL THREE DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

In its most recent opinion in Mr. Chase's case, the Mississippi Supreme Court noted that the diagnostic criteria recited in *Atkins* and in the 2004 Chase opinion have been superseded. The state court explicitly adopted the 2010 criteria adopted by the American Association for Intellectual and Developmental Disability (AAIDD; formerly the AAMR) and the 2013 criteria adopted by the American Psychiatric Association. *Chase v. State*, 171 So. 3d 463, 471 ¶16. The state court pointed out that "[t]he 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." *Chase (2015),* 171 So. 3d at 470 ¶13.

At the August 2010 hearing, Mr. Chase produced abundant, and in some cases uncontested, evidence on all three of these criteria. The state court's refusal to vacate Chase's death sentence was based on grounds that deviate from the well-established norms of clinical practice and scientific knowledge in the assessment of intellectual disability.

A. In every instrument administered in his lifetime, Mr. Chase has been assessed with a Full Scale IQ which meets the crierion for significantly subaverage intellectual functioning.

The first diagnostic criterion is "significantly subaverage general intellectual

functioning." This refers to a Full Scale IQ score of 75 or lower. *Chase (2004),* 873 So. 2d at 1028, ¶ 70, *citing Atkins*, 536 U.S. at 308 n.3.

Ricky Chase has been tested twice for intellectual disability, in 1989 and in 2010, and both times his score has been within the range of "significantly subaverage general intellectual functioning." In December 1989, while he was pending trial on the capital murder charge, Petitioner was tested by Dr. John W. Perry. The results of that test were: Full Scale IQ of 71; Verbal IQ of 77; Performance IQ of 64. Hearing Exhibit P-10.

In January of 2010, Dr. Amanda Gugliano of the Mississippi State Hospital at Whitfield administered the Wechsler Adult Intelligence Scale, 4th edition, which she characterized as "one of the gold standards for intelligence testing." Mr. Chase's Full Scale IQ on the State Hospital test was 71. Hearing Exhibit P-1; *Chase (2015)*, 171 So. 3d at 471-72 ¶18.

B. Mr. Chase Produced Abundant Evidence on the "Significant Deficits in Adaptive Functioning" Criterion

1. Qualifications of Mr. Chase's Experts

To provide an expert evaluation on the second diagnostic criterion, significant deficits in adaptive functioning, Mr. Chase engaged the services of two highly qualified psychologists. One of these was Dr. Gerald O'Brien, Ph.D., a Mississippi-licensed psychologist who was appointed as an *Atkins* expert by the United States District Court for the Northern District of Mississippi. *Wiley v. Epps*, 625 F.3d 199, 204 (5th Cir. 2010) (affirming Atkins relief by district court in reliance on, among other things, Dr. O'Brien's testimony).

The other expert for Mr. Chase was Dr. Daniel Reschly, chair of the Department of Special Education for Peabody College at Vanderbilt University and Professor of Education and Psychology. Dr. Reschly is licensed in Iowa, Arizona, and Oregon. He has published over 100 articles, chapters, and books on the topics of mild mental retardation, school psychology

professional practices, and the assessment of disabilities in minority children and youth. Dr. Reschly has been an active member of Division 33 of the American Psychological Association, which is devoted to intellectual and developmental disabilities. http://www.apa.org/about/division/div33.aspx.

Dr. Reschly has received a Lifetime Achievement Award and three Distinguished Service Awards from the National Association of School Psychologists, the Stroud Award, and appointment as a Fellow of the American Psychological Association and the American Psychological Society. Moreover, Dr. Reschly chaired the National Academy of Science panel on Disability Determination in Mental Retardation, and edited the resulting report, Reschly, Myers & Hartel, MENTAL RETARDATION: DETERMINING ELIGIBILITY FOR SOCIAL SECURITY BENEFITS (National Academy Press 2002).

Dr. Reschly's training, experience and leadership in school psychology is especially relevant to the diagnosis of mild mental retardation since most such diagnoses are made first during the school-age years of 5-18. Indeed, as Dr. Reschly pointed out, school psychologists make more diagnoses of mild mental retardation than any other professionals including those in various specialties of psychology, education, and medicine. This is particularly true for people, like Mr. Chase, who have mild mental retardation, since they are most likely to be referred to psychologists in their school years.

Working as a school psychologist, Dr. Reschly has personally supervised several hundred cases involving mental retardation, and has performed the Wechsler Adult Intelligence Scale test—the one in question in this case—approximately fifty times through the course of his career. Dr. Reschly discussed his findings at length in a report which was admitted into evidence by the Circuit Court in the August 2010 Atkins hearing.

2. Mr. Chase's History of Subaverage Adaptive Functioning Skills

In assessing Mr. Chase's adaptive functioning skills, these experts relied on clinical interviews with Mr. Chase, his school records, Social Security Records, drivers' license records, the prior testimony of Petitioner's mother at the 1990 trial, and Dr. Reschly's in-person interviews with family members, educators, and a former girlfriend and her mother.

Mr. Chase's school records provided abundant detail about his adaptive abilities. Dr. Reschly summarized the school records as follows:

> A clear downward trend is apparent in reviewing Mr. Chase's school grades over grades 1st through 10th. In the early years of schooling his grades were acceptable, but gradually declined to these 6th grade year averages:
>
> Arithmetic D-, Health/Safety/Physical Education D-, Language Arts/English D-, Reading D+, Spelling C-, Writing C, Science F, and Social Studies/Geography D-.
>
> The downward progression of school grades is frequently seen with persons with mental retardation due to the increasingly abstract nature of the school curriculum and academic demands.
>
> Mr. Chase's school grades continued to be largely Ds and Fs in grades 7-10. He was retained in 10th grade because he apparently earned no credits toward graduation in 1984-85 when he was in 10th grade for the first time. His grades during the Fall Semester of the 1985-86 school year continued the same failing pattern. He dropped out during the second 9 weeks of 10th grade according to the Hazlehurst School Records.

Reschly Report at 18.

In addition to records, Dr. O'Brien and Dr. Reschly also relied upon interviews Dr. Reschly conducted in Copiah County in August 2010. The interviews with school teachers give more depth to the school records. Reschly Report at

Dr. Reschly's report states:

> Mr. Chase needed to be in special education according to Mrs. Minor, his 9th grade science teacher, Foster Topp his Civics and Mississippi History teacher, and Sita Johnson (his sister in law). Ms. Johnson was married to Ricky's older half brother, Melvin, and saw Ricky daily during his middle and high school grades. All three discussed how much help he needed and how very slow he was to learn and apply

> abstract information. Ms. Johnson described attempting to help him with his homework. Mr. Chase gave good effort, but was not capable of understanding what other children could understand and do regarding school work. Mrs. Minor recalled that he was the lowest in her classes and could not understand basic science concepts. Mr. Chase received Ds and Fs in Ms. Minor's classes. Mr. Topp described him as very low and perhaps lowest in his classes where he received grades of F and D. Others also described Mr. Chase as exceptionally slow and needing assistance with homework including Mrs. Adams, Mrs. Norrells, Mrs. Chase, and Mrs. Johnson.

Reschly Report at 17.

> Mrs. Minor, Chase's science teacher, explained further:
>
> Mrs. Minor described him in the classroom as sort of fading into the background, never offering to answer questions or contribute to the discussion. Mrs. Johnson reported that Mr. Chase pretty much stayed to himself, not interacting normally with other kids his age. She also mentioned that he tended to hang around younger kids where he likely could better understand the social interactions.

Reschly Report at 23.

Moreover, several persons interviewed by Dr. Reschly mentioned that Mr. Chase could not complete his homework so other students often completed it for him (Mrs. Adams, Mrs. Johnson, Mrs. Chase). Mr. Chase often failed to remember to turn in his homework even when it was completed. Mrs. Chase and Mrs. Adams recalls that Mrs. Chase would have to go to Mr. Chase's classroom and make sure he turned in his work. Reschly Report at 23-24.

Mr. Chase's Social Security Records show that that no single employer paid him as much as $1000 in a year. Hearing Exhibit P-9. The longest he had ever held a job was three weeks. Petitioner spent 23 months in Job Corps, but only worked three weeks in the field of welding, which he had spent the last two years trying to learn.

Mr. Chase's adaptive functioning deficits explain these problems in employment. As early as high school, Chase's classmate Marshall Gordon recalls him being unable to participate in their Building Trades class. He could not understand the projects other students completed such as gun racks and cabinets. Reschly Report at 27. Mrs. Norrells, Chase's high school

girlfriend's mother, stated that he failed to be able to do simple tasks like changing a light bulb around the house. Reschly Report at 27.

Mr. Chase could not travel on his own. Although he told the State Hospital staff that he received a drivers' license while in the Job Corps in South Carolina, there is no record of any such license issued by the South Carolina authorities. Hearing Exhibit P-8. Mrs. Norrells reported that Mr. Chase had to depend on others to drive him around. Reschly Report at 28.

Mr. Chase's leisure activities were compromised by his adaptive functioning deficits. For example, Dr. Reschly reported that Mr. Chase's abilities to play football were limited by his lack of understanding:

> Jerome Cleveland played football with Mr. Chase and remarked that he could not remember plays, including very simple ideas related to the number system for plays and which numbers established whether the play went to the right or left. He mentioned that Mr. Chase was very fast and quite successful in junior high, but could not be trusted in high school to follow the plays. I am interpreting this fatal flaw as a football player to the fact that Mr. Chase was very slow and to language deficits. Mr. Cleveland mentioned that Mr. Chase could play in the defensive backfield if the team was playing man to man pass coverage, but could not play any zone coverage because the latter requires decision making depending on the other team's offensive formation and deployment of receivers.

Reschly Report at 20.

The interviews also provided information on Chase's lack of ability to care for himself, either in terms of health or daily self-care activities:

> Mrs. Norrells recalls Mr. Chase as clean and well groomed. These practical skills outcomes were, however, excessively dependent on Mrs. Chase who carefully directed and monitored Mr. Chase's dress, hygiene, and grooming. According to several persons, Mrs. Chase selected Mr. Chase's clothes even when he was in high school.
>
> Mrs. Chase recalled that her son was much more difficult to toilet train, particularly compared to his half siblings and was overall slower than other children to accomplish preschool and school age developmental milestones.

> Mrs. Chase said that he could "cook a little," but needed close directions. Mrs. Johnson was more negative, saying that he never cooked anything and likely was incapable of doing even simple dishes.
>
> Marshall Gordon recalls him trying to cut his own hair in high school resulting in him looking bad. He was, however, oblivious to how his haircut turned out resulting in still another incident of others making fun of him.
>
> Mr. Chase described how he washed his clothes in his prison cell toilet to me and to Dr. Macvaugh. Although his efforts to be clean are to be applauded, his choice of how to wash his clothes (a sink is available) seemed uninformed and ignorant. Mr. Chase rejects the prison laundry service as inadequate and dirty . . . his method seems lacking in reason and judgment.
>
> Also, Mr. Chase does not take his high blood pressure medicine, because he fears becoming dependent on it, and thinks he can wash the salt off of pre-packaged noodles.

Reschly Report at 26-28.

These interviews were substantially corroborated by both the available records, and by the 1990 trial testimony. In particular, Mrs. Chase's testimony at that trial recounts that:

> She bought Petitioner's clothes, even in his late teens and at age 20, and set them out for him to wear in the morning
>
> She gave Petitioner a small amount of money every day, on the commode where he would find it.
>
> Petitioner could not drive.
>
> Petitioner could not maintain a job.

Hearing Exhibit P-14.

C. Mr. Chase's Intellectual Disability Manifested Before Age 18

The third diagnostic criterion is onset before age 18. Petitioner Chase was 20 years old when he was arrested. All of the documentary evidence, and the opinions of Dr. O'Brien and Dr. Reschly, show that Chase's intellectual functioning and adaptive functioning difficulties manifested before age 18. There can be no doubt that Ricky Chase's mental retardation manifested before age 18.

III. THE STATE COURTS USED NON-CLINICAL CRITERIA TO ADJUDICATE MR. CHASE'S *ATKINS* CLAIM

In its most recent opinion in Mr. Chase's case, the Mississippi Supreme Court noted that the diagnostic criteria recited in *Atkins* and in the 2004 Chase opinion have been superseded. The state court explicitly adopted the 2010 criteria adopted by the American Association for Intellectual and Developmental Disability (AAIDD; formerly the AAMR) and the 2013 criteria adopted by the American Psychiatric Association. *Chase v. State*, 171 So. 3d 463, 471 ¶16. The state court pointed out that "[t]he 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." *Chase (2015),* 171 So. 3d at 470 ¶13.

The state supreme court correctly identified this Court's controlling opinion in *Hall v. Florida*, ___ U.S. ___, 134 S.Ct. 1986 (2014). And indeed, the Mississippi Supreme Court corrected parts of the Circuit Judge's new opinion which rested on non-scientific criteria and erroneous assumptions. Ultimately, however, the Mississippi Supreme Court left part of that erroneous analysis intact, and supplemented it with its own new requirement of "normed data" instruments to prove adaptive functioning deficits. While this new threshold appears "scientific," the use of normed adaptive functioning instruments is not considered appropriate or necessary in all contexts by clinicians with expertise in intellectual disability.

A. The Mississippi Supreme Court corrected the Circuit Court's obvious *Hall* error in assessing the intellectual functioning criterion.

Throughout his life, Ricky Chase has never tested above a Full Scale IQ of 75. Both in 1989 and in 2010, and both times his score has been within the range of "significantly subaverage general intellectual functioning." Exhibit P-10 (1989 Perry Report) (Full Scale IQ of

71; Verbal IQ of 77; Performance IQ of 64). Exhibit P-1 (Results of 2010 Gugliano testing) (Full Scale IQ of 71). Despite this, the State's expert would not forthrightly admit that Mr. Chase demonstrated significantly subaverage intellectual functioning. Instead, Dr. Macvaugh concluded "that Chase has borderline intellectual functioning and is not intellectually disabled within the meaning of Atkins." *Chase (2015)*, 171 So. 3d at 477 ¶42. The Circuit Court which conducted the evidentiary hearing agreed with the State:

> Relying on Dr. Macvaugh's testimony that Chase's scores on the WRAT-R and the Wechsler Memory Scale were inconsistent with intellectual disability and that Chase's suboptimal performance could have negatively affected his test scores, the circuit court "viewed [Chase's IQ score] as leaning towards the high mark on the range of standard deviation, not the lower." Therefore, the Circuit Court found that Chase had not met his burden of proof of significantly subaverage intellectual functioning.

Id. at 480 ¶54.

This is, of course, exactly the constitutional error which precipitated this Court's decision in *Hall v. Florida*, ___ U.S. ___, 134 S.Ct. 1986 (2014). The Mississippi Supreme Court vacated this part of the Circuit Court's ruling, and specifically found that Mr. Chase "proved significantly subaverage intellectual functioning." *Chase (2015)*, 171 So. 3d at 481 ¶58.

B. While acknowledging that the trial court's determination on adaptive functioning was based on that court's erroneous view that Petitioner's expert used subjective criteria for compiling adaptive functioning data from interviews, the Mississippi Supreme Court affirmed the lower court's finding that Petitioner's expert "relied on his own personal opinions and moral judgments rather than on science" – making the exact same error.

1. Unwilling to acknowledge the clinical basis for compiling data from interviews using the convergent validity principle, the trial court again refused to credit Dr. Reschly's expert testimony.

At the August 2010 evidentiary hearing, the State of Mississippi challenged Dr. Reschly's qualifications on grounds that he was not licensed to practice psychology in Mississippi and that he was a "school psychologist." R. 30-45. The Circuit Court's 2010 denial of relief in the "Proposed Findings of Fact and Conclusions of Law" endorsed by the trial judge found that Dr. Reschly's testimony was not creditable. On appeal, after vacating the Circuit Court's verbatim adoption of the State's proposed order, the Mississippi Supreme Court found it necessary to instruct the lower court that Petitioner's experts were not required to conduct their own, new testing of Petitioner's intellectual functioning, but could rely on the testing performed by the State's experts. *Chase v. State*, 112 So. 2d 421 (2013).

On remand, the Circuit Court did not conduct any further evidentiary hearing. Issuing a new order, the lower court again refused to credit the testimony of Petitioner's experts on the issue of Mr. Chase's adaptive functioning:

> The circuit court found that Dr. Reschly's opinions were unpersuasive because many of his conclusions were grounded in his own personal opinions and moral judgments and did not have a substantial scientific basis.

Chase v. State (Chase 2015), 171 So. 3d 463, 481 ¶62 (Miss. 2015).

2. While holding the trial court in error for finding that Dr. Reschly did not have a "scientific basis" for his testimony, the state supreme court substituted its own synonym for this error -- the functionally equivalent notion that Dr. Reschly "relied on his own personal opinions and moral judgments rather than on science."

In the second appeal, the state supreme court specifically found that "the circuit court

clearly erred by finding that Dr. Reschly used no methodology to assure the credibility of the interview sources." *Chase (2015)*, 171 So. 3d at 482 ¶64. But despite this significant error in the lower court's grounds for assessing the weight of the expert testimony, the Mississippi Supreme Court found that reversal was not necessary, reasoning as follows:

> 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.

Id.

All this did was substitute one phrase ("did not have a substantial scientific basis") for its functional equivalent ("relied on his own personal opinions and moral judgments rather than on science"). Both phrases stood for the exact same thing – the trial judge's refusal to accept the validity of data from interviews.

In fact, Circuit Judge Pickard's view that Dr. Reschly's expert opinion was derived from his personal moral judgment was **dependent on** the trial court's clearly erroneous finding that Petitioner's expert had no scientific criteria for evaluating witness interviews. Judge Pickard's own introduction to this part of the ruling states in no uncertain terms: "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 easily be interpreted differently." R. 801 (emphasis added).

The trial court then took each of the sides of this equation in order. The purported lack of scientific basis for Dr. Reschly's report related to the circuit court's erroneous belief that Petitioner's expert did not have "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." R. 802. As the Mississippi Supreme Court held, this

finding was clearly erroneous, as Dr. Reschly employed the convergent validity principle to determine whether to credit the interviewees' statements. *Chase (2015)*, 117 So. 3d at 482 ¶64 & n.2.

That error contributed heavily to the other side of the proverbial coin, the circuit court's finding that Dr. Reschly "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." R. 802. This must be the case, because the isolated examples of Dr. Reschly's so-called "personal moral judgments" cited by the circuit court were both taken out of context and constituted a tiny minority of Dr. Reschly's findings. Only by wholly disregarding the interviews could the circuit could conclude that Dr. Reschly imposed his own beliefs on the data before him.

Thus, the circuit judge faulted the expert for purportedly having the opinion that unknowingly fathering a child out of wedlock showed a deficit in social responsibility, one of the categories of the social skills domain. R. 799, citing P-3 (Reschly Report) at 24; R. 892. See also *Chase (2015)*, 171 So. 3d at 483 ¶67.

But Dr. Reschly's opinion had far more depth than the lower court assigned to it. At the cited location in his report, Dr. Reschly actually stated:

> [Mr. Chase] also said to me that he might have fathered a daughter, based on Mrs. Chase saying that the mother's daughter once contacted her. Mr. Chase did not know who the mother of this daughter was or anything else about this matter. The absence of social responsibility in this matter, if true, needs no further elaboration.

R. 461.

For Dr. Reschly, then, the absence of social responsibility derived as much from Mr. Chase's lack of contact with his possible child after he was told about her possible existence as it was from the mere fact of having fathered a child out of wedlock. Certainly that could be considered part of a "moral code," as Dr. Reschly freely admitted, T. 106, but what aspect of the category of "social responsibility" is not?

Another category in which Dr. Reschly's "personal views" were cited by the circuit court related to the self-care category of the Practical Skills Domain. After discussing the "child out of wedlock" example of the use of Dr. Reschly's purported reliance on his personal judgment, the circuit court went on to say that "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." R. 802; *compare Chase (2015)*, 171 So. 3d at 483 ¶67.

Of course, the high amount of sodium in prepackaged noodles is not free-standing salt which can be "washed off," but is an inherent part of the ingredients in the product as prepared by the manufacturer.[1] Mr. Chase could no more "wash off" the 800 or so milligrams of sodium from a package of Top Ramen than he could the 3.5 grams of saturated fat that are also the result

[1] See www.nissinfoods.com/Nutrition/Top Ramen NF Ingredients.pdf (last viewed November 18, 2015). The public health concerns based on the high sodium content of the prepackaged noodles are well documented. http://www.ncbi.nlm.nih.gov/pubmed/24966409 (last viewed November 18, 2015).

of the manufacturer's formula for the product.

Further, the circuit court found fault with Dr. Reschly's purported reliance on his own "personal beliefs" had to do with communication, one of the categories of the Conceptual Skills Domain. R. 797. The circuit court found, "Dr. Reschly found that certain statements made during the Whitfield interview, in his opinion, showed adaptive deficits in the area of language because they were not logical or were untrue. However, when questioned regarding his interpretation of these statements, he conceded that they were not logical to him, or that he had not heard some of the expressions before." *Id.* Whether or not phrases like "she works all the time, like a kangaroo" (R. 456) are expressions unfamiliar to Dr. Reschly (or anyone else), that is not a matter of "personal moral judgment."

Similarly, the circuit court also found that "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." R. 803; *see also Chase (2015)*, 171 So. 3d at 483-84 ¶68.

But as this Court knows, the third criterion of a clinical assessment of intellectual disability requires an assessment of the prisoner's abilities before age 18. How can this focus (which also corresponds to the only pre-incarceration history of Mr. Chase) be used as a basis for disregarding the expert's testimony and report? Moreover, the trial testimony of Mr. Chase's mother, admitted into evidence as P-14, showed that she both continued to select his clothing up until the date of his arrest, and that she left Mr. Chase two or three dollars a day by putting it on the commode, because it was the only way to be certain he would see it and pick it up. The relevance to the Practical Skills Domain is obvious.

Furthermore, these isolated examples selected by the circuit court hardly do justice to the depth of Dr. Reschly's report and testimony. Alone among the experts who testified, Dr. Reschly interviewed witnesses and thereby analyzed the Practical Skills Domain from the standpoint of Mr. Chase's abilities before he was age 18; Dr. Macvaugh analyzed these skills based on his interview of Mr. Chase in January 2010, when the Petitioner was 40 years old. R. 800-01. Alone of the experts who testified, only Dr. Reschly interviewed the principal of the school which Mr. Chase attended, and determined that (1) special education classes were not available in Mr. Chase's school at the time he was a student there and (2) Mr. Chase was not expelled from school for having sex on campus. T. 85-86, 94-95.

This is a classic case of the trial court relying on "inaccurate assumptions and select pieces of the evidence" in making its Atkins determination. *Pruitt v. Neal*, 788 F. 3d 248, 268 (7th Cir. 2015). Where the State produced no retrospective analysis at all, thus ceding this dispositive ground of evaluation to Petitioner's experts, the trial court was not free "to use its independent judgment to disregard uncontroverted expert analyses, consider factors that the experts have testified are unreliable, or declare to be dispositive a factor irrelevant to the clinical definitions employed by the experts." *Van Tran v. Colson*, 764 F.3d 594, 612 (6th Cir. 2014).

And because the rules regulating the factors involved in the ultimate determination of whether a defendant qualified as intellectually disabled under *Atkins* raise questions of law, *Clark v. Quarterman*, 457 F.3d 441, 444 (5th Cir. 2006), the trier of fact was charged to "focus on [the Petitioner's] deficits, not his abilities." *United States v. Lewis*, 2010 WL 5418901 (N.D. Ohio Dec. 23, 2010) at *30. "A full, independent review of whether [Petitioner] showed by a preponderance of the evidence that he displayed adaptive deficits by the time he was age 18 **must therefore look at his weaknesses instead of at his strengths**." *Black v. Bell*, 664 F.3d 81,

99 (6th Cir. 2011) (emphasis added).

Petitioner respectfully submits that the circuit court's disregard of Dr. Reschly's testimony and report cannot be separated from the clear error that court committed in assessing the scientific basis for Dr. Reschly's testimony. Indeed, the trial judge's unrelenting disapproval of Dr. Reschly simply continued unabated from the initial "verbatim" opinion -- which refused to accept the Full Scale IQ of 71 and discredited Petitioner's experts for relying on the State Hospital's IQ testing – to the revised opinion, which contended that the editor of the Social Security Administration's intellectual disability manual would base his assessments on "personal moral opinions."

Thus, by simply substituting a phrase it accepted ("relied on his own personal opinions and moral judgments rather than on science") for the one it rejected ("did not have a substantial scientific basis"), the Mississippi Supreme Court did not cure the Circuit Court's error. Because the validity of interview data is an accepted norm of the clinical assessment of intellectual disability, the state courts' ruling is infected with the same error as found in *Hall v. Florida* and *Lane v. Alabama.*

C. To the Circuit Court's error in refusing to accept adaptive functioning data from interviews, the Mississippi Supreme Court added the novel requirement of "normed data" in all adaptive functioning assessments under *Atkins.*

In affirming the Circuit Court's finding that Mr. Chase did not prove, to a preponderance of the evidence, that he demonstrated significant limitations or deficits in adaptive functioning, this Court relied upon "an additional deficiency in Dr. Reschly's opinions not identified by the circuit court." *Chase (2015)*, 171 So. 3d at 485 ¶70. The state court noted that "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."

Id.

The court found support for this view in the 2010 AAIDD Manual (the "Green Book"), which it quoted as follows:

> 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.

Chase (2015), 171 So. 3d at 485 ¶70, quoting INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 43 (11th ed. 2010).

A more recent publication by AAIDD, however, qualifies this statement for *Atkins* cases:

> **The current AAIDD 11th edition** (Schalock et al., 2010) and the recent User's Guide to the 11th edition (Schalock et al., 2012) have **urged the use of standardized instruments in the concurrent assessment of AB [adaptive behavior]**, but **they have not directly addressed their use in *Atkins* cases in which the assessment is retrospective by its nature.** That is, such scales were **normed and standardized by asking the respondent to rate that individual's current functioning.** In *Atkins* cases, raters are asked to rate the defendant based on the examiner's memory of the defendant's functioning in the past – usually pre-18 and often at the time of the crime. Given that defendants are incarcerated at the time of the evaluation, current adaptive community functioning cannot be measured.

Olley, *Adaptive Behavior Instruments*, in Polloway, editor, THE DEATH PENALTY AND INTELLECTUAL DISABILITY (AAIDD 2015) at 187 (emphasis added).

Thus, it is incorrect to say that AAIDD requires the use of standardized instruments in assessing the adaptive behavior prong in the Atkins environment. As Dr. Olley explains in the above quote, all current standardized instruments are normed for respondents giving current information. Interviewees ("respondents") in the *Atkins* context cannot give current assessments

(because the prisoner is incarcerated in a controlled environment). Instead, they attempt to recall the prisoner's life skills pre-incarceration, and if possible, pre-18. But the data which "norms" the responses on instruments such as the Vineland or the ABAS-II are not taken from such retrospective answers. This is important, because the data that establishes norms is exactly what makes the Vineland or ABAS-II "standardized."

Dr. Reschly explained in detail, and with reference to scientific literature, why he did not undertake a formal assessment of adaptive behavior using standardized instruments. R. 447, Reschly Report at ¶38. Contrary to the Mississippi Supreme Court's opinion, AAIDD specifically directs the examiner in the criminal justice context to rely on interviews evaluated by the examiner's clinical judgment – the exact approach employed by Dr. Reschly:

> The assessment of AB in *Atkins* cases focuses on behavior in childhood through the time of the crime and is, thus, inherently retrospective. The examiner must draw information from as many sources as possible and give each source its appropriate weight, using clinical judgment to arrive at a diagnostic conclusion. Among the most common and potentially most valuable sources are interviews with family members and others who have known the individual well in varied community settings. Multiple informants who have known the individual at different ages before the pertinent crime can provide consensual validity regarding adaptive functioning.

Id. at 193, *citing* Schalock & Luckasson, CLINICAL JUDGMENT (AAIDD 2005).

Contrary to the state court's opinion, AAIDD allows, but does not urge, let alone **require**, the use of standardized instruments in the assessment of adaptive behavior in retrospective *Atkins* evaluations. What AAIDD does urge in the Atkins context are "interviews with family members and others who have known the individual well in varied community settings." Dr. Reschly was the only expert who conducted such interviews in this case. *Compare Thomas v. Allen*, 607 F.3d 749, 754 (11th Cir. 2010) (finding prisoner intellectually disabled on the basis of interviews and records because he "had no standardized behavior assessments during his developmental period").

REASONS FOR GRANTING THE PETITION

Mr. Chase suffers from intellectual disability, a condition which substantially impaired him in a way that "do[es] not warrant an exemption from criminal sanctions, but [] do[es] diminish [his] personal culpability." *Atkins v. Virginia*, 536 U.S. 304, 318 (2002). But the Mississippi Supreme Court endorsed the trial court's refusal to accept the scientific, clinical basis for employing interviews, and culling data from them, in assessments of adaptive functioning deficits. The state supreme court then added a novel, non-clinical threshold requirement of "normed data" to prove Mr. Chase's deficient adaptive functioning skills.

Mississippi's refusal to accept the well-established clinical practice of interviewing respondents about a subject's adaptive functioning strengths and weaknesses, and requiring the use of instruments that are not normed for retrospective assessment of those strengths and weaknesses, violates the Eighth Amendment. This requirement raises a substantial risk that intellectually disabled persons in Mississippi may be executed, despite the holding in Atkins.

As applied to Mr. Chase, Mississippi's approach to *Atkins* cases also violates the Fourteenth Amendment's due process clause, because the requirement was announced on appeal of the *Atkins* hearing, but retroactively applied to Mr. Chase to affirm the denial of relief.

This Court should grant *certiorari* on either or both of these questions to address the continuing refusal of state courts to employ clinical criteria in determining whether a death-eligible defendant or death-sentenced prisoner is intellectually disabled. In the alternative, this Court should grant the writ of *certiorari*, vacate the judgment below, and remand for reconsideration in light of *Hall v. Florida*, ____ U.S. ____, 134 S.Ct. 1986 (2014) and *Lane v. Alabama*, ___ U.S. ___, 136 S.Ct. 91 (2015).

I. QUESTIONS ONE AND TWO: MISSISSIPPI'S ATKINS PROCEDURE VIOLATES THE PROHIBITION, ARISING FROM THE EIGHTH AND FOURTEENTH AMENDMENTS, AGAINST THE USE OF PROCEDURES WHICH CREATE A SUBSTANTIAL RISK THAT INTELLECTUALLY DISABLED PERSONS WILL BE EXECUTED.

The Mississippi Supreme Court's denial of post-conviction relief to Mr. Chase violates *Atkins* itself, *Panetti v. Quarterman*, 551 U.S. 930, 127 S.Ct. 2842 (2007), *Hall v. Florida*, ___ U.S. ___, 134 S.Ct. 1986 (2014), *Brumfield v. Cain*, ___ U.S. ___, 135 S.Ct. 2269 (2015), and *Lane v. Alabama*, ___ U.S. ___, 136 S.Ct. 91 (2015).

Panetti addressed the language in *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595 (1986), that the States would be allowed to construct procedures by which a death-sentenced prisoner could prove that he was incompetent to be executed. This Court held that the procedures applied by the State of Texas to Panetti's claim of incompetence did not meet the demands of fundamental due process. *Panetti*, 551 U.S. at 948, 127 S. Ct. at 2855.

Thus, while *Atkins*, like *Ford*, left to the States the discretion to develop procedures to implement the Eighth Amendment prohibitions announced in those cases, this Court did not give the States *carte blanche* to deny legitimate claims of intellectual disability by arbitrary and non-scientific criteria.

Applying *Atkins* and *Panetti*, *Hall* holds that it is unconstitutional for a State to adjudicate claims of ineligibility for capital punishment in a manner that "creates an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 134 S.Ct. at 1990. *See also Brumfield v. Cain*, ___ U.S. ___, 135 S.Ct. 2269 (2015).

A. Wholesale rejection of data from retrospective assessment interviews, confirmed with the principle of convergent validity, creates an unacceptable risk that persons with intellectual disability will be executed.

In adjudicating Petitioner's *Atkins* claim, the Mississippi Courts first used non-scientific criteria for excluding the only evidence offered on the adaptive functioning criteria for

intellectual disability – the testimony of Dr. Reschly and Dr. O'Brien and the records and interviews considered by the two psychologists.

Under *Atkins*, *Panetti*, *Hall*, *Brumfield*, and *Lane*, a state court is not free to wholly discard an expert's use of interviews in the assessment of the prisoner's adaptive functioning skills (i.e., prong two of the APA/AAMR/AAIDD standard for intellectual disability).

The state trial court, Circuit Judge Pickard of Copiah County, wholly disregarded the interviews of the only expert who conducted them – Dr. Reschly. For example, in assessing Mr. Chase for social/interpersonal skills, Dr. Reschly used interviews of former school companions, teachers, Mrs. Chase's mother, and Mrs. Shirley Norrells, whose daughter dated Chase prior to the offense. In contrast, the State's expert psychologist, Dr. Macvaugh, did not conduct any interviews with third-party informants and instead relied on "Chase's high level of interaction during the [clinical] interview, his behavior when he entered the courtroom during the hearing and his behavior in the halls outside the courtroom prior to the hearing."

As discussed at length above, the Mississippi Supreme Court purported to cure this fundamental error by a formula of words – substituting a phrase it accepted ("relied on his own personal opinions and moral judgments rather than on science") for the one it rejected ("did not have a substantial scientific basis"). In either event, Dr. Reschly's interview data were discarded, not because of any reasoned criticism, but because the Mississippi courts refused to believe that any interview data could be valid as an assessment of adaptive functioning.

That is flatly contrary to the practice of clinicians who assess intellectual disability. Dr. Reschly explained, "The way that I assessed adaptive behavior is consistent with professional standards. We have to rely on the reports of other persons who are familiar with the individual." R. 234. He continued, "The professional standard in assessing adaptive behavior, we consider a

wide variety of information, some of which involves relying on the reports of other individuals, and we have to try to assess those with veracity based on our judgment. That's the professional standard in the Division 33 [of APA] recommendations on death penalty evaluations." R. 234-35. On redirect examination Dr. Reschly further explained his method of interviewing collateral informants about adaptive functioning deficits:

> Q. What is important to you as an examiner in assessing the reliability of information given to you by an informant?
>
> A. First, they have firsthand information. Secondly, can they cite specific examples? Third, are they relatively consistent, and then more of a judgment, do they seem knowledgeable and able to describe events accurately.
>
> Q. Is there something called the principle of conversion information?
>
> A. Yes, it's called **the principle of conversion validity**, and it's very important in trying to assess and analyze information on adaptive behavior. The principle of conversion validity says, in essence, that you look for consistency or broad inconsistencies across wie varieties of information. The information that I gather concerning – that I assess are considered concerning Mr. Chase came from a variety of sources, across different time periods, and it was by and large consistent with the exceptions I noted in my report.

R. 245-46 (emphasis added). This testimony was consistent with the methodology set forth in Dr. Reschly's report. Ex. P-3 at ¶¶38-41.

Dr. Reschly's approach is also consistent with the methodology set forth in the seminal article authored by the State's expert, Dr. Macvaugh. Indeed, the Circuit Court accepted this article into evidence and Dr. Macvaugh's authorship of it was part of the lower court's determination of the State expert's credibility. But that article – the only scientific literature reviewed by the lower court – fully endorsed Dr. Reschly's approach to assessing adaptive functioning. Dr. Macvaugh's article gives an excellent outline of what an examiner must do to determine if a defendant has deficits in adaptive living skills [all quotes from Ex. S-16]:

> Information from an evaluee's records often provides one of the most valuable sources of data in an Atkins evaluation. [162]
>
> Seek and thoroughly analyze a wide range of records. [164]
>
> In cases where it is suspected that the records may not be a candid reflection of the defendant's performance in a school or employment context, school personnel, employers and other third parties should be interviewed. [164]
>
> Family members and other third parties should be interviewed individually and outside the presence of other family members or collateral sources. [165]

Ex. S-16 at 162, 164, 165 (R.E. 116, 118, 119).

A similar stance has been taken by a number of other courts that have rejected the findings of experts who have chosen to either conduct less extensive interviews of third parties or conduct no interviews at all:

> We note that Dr. Salekin conducted a far more extensive interview with Holladay than Dr. Ackerson and also interviewed many more people in her preparation than Dr. Ackerson. Additionally, we note that although the criteria for diagnosing mental retardation includes determining that deficiencies were present before the defendant turned eighteen, Dr. Ackerson did not interview anyone who knew Holladay before he became an adult. Dr. Ackerson also selected a much narrower range of subjects with whom to speak about Holladay's conduct as an adult, focusing primarily on law enforcement and an obviously hostile ex-wife who would not even speak with Dr. Salekin. By contrast, Dr. Salekin spoke to several of Holladay's siblings, a former neighbor, a former lawyer, friends and prison personnel (guards and medical).

Holladay v. Allen, 555 F.3d 1346, 1362 (11th Cir. 2009); *see also Moore v. Dretke*, 2005 WL 1606437, at *13 (E.D. Tex. July 1, 2005) ("Dr. Llorente contacted and interviewed Moore's family members to learn about Moore's childhood, while Dr. Mears did not contact or interview anyone because he thought their opinions were not useful. Instead, Dr. Mears relied exclusively on his comparatively brief interview with Moore and his review of Moore's records") *aff'd sub nom. Moore v. Quarterman*, 342 F. App'x. 65 (5th Cir. 2009); *United States v. Davis*, 611 F.Supp.2d 472, 507 (D. Md. 2009) ("By far, the defense experts used a broader and more

comprehensive basis of information in the formulation of their opinions, and did not dispense with attempts to quantify adaptive functioning simply because some of the sources may be less than ideal"); *United States v. Lewis*, 2010 WL 5418901, at *24 (N.D. Ohio Dec. 23, 2010) (criticizing the fact that "neither Dr. Ott nor Dr. Askenazi interviewed third-party respondents for their expert reports"); *Brumfield v. Cain*, *supra*.

B. The requirement that death-sentenced prisoners present "normed data" from standardized instruments creates an unacceptable risk of permitting the execution of the intellectually disabled.

By imposing, as a prerequisite to relief, the use of standardized behavioral assessments which are allowed but not required in the scientific context, Mississippi has adopted a procedure which "creates an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 134 S.Ct. at 1990.

AAIDD, has made clear that requiring standardized instruments to determine adaptive functioning deficits retrospectively could lead to inaccurate results, because the instruments are not normed for this purpose:

> The current AAIDD 11th edition (Schalock et al., 2010) and the recent User's Guide to the 11th edition (Schalock et al., 2012) have urged the use of standardized instruments in the concurrent assessment of AB [adaptive behavior], but they have not directly addressed their use in *Atkins* cases in which the assessment is retrospective by its nature. That is, **such scales were normed and standardized by asking the respondent to rate that individual's current functioning**. In *Atkins* cases, raters are asked to rate the defendant based on the examiner's memory of the defendant's functioning in the past – usually pre-18 and often at the time of the crime. Given that defendants are incarcerated at the time of the evaluation, current adaptive community functioning cannot be measured.

Olley, *Adaptive Behavior Instruments*, in Polloway, editor, THE DEATH PENALTY AND INTELLECTUAL DISABILITY (AAIDD 2015) at 187 (emphasis added).

As Dr. Olley explains in the above quote, all current standardized instruments are normed

for respondents giving current information. Interviewees ("respondents") in the *Atkins* context cannot give current assessments (because the prisoner is incarcerated in a controlled environment). Instead, they attempt to recall the prisoner's life skills pre-incarceration, and if possible, pre-18. But the data which "norms" the responses on instruments such as the Vineland or the ABAS-II are not taken from such retrospective answers. This is important, because the data that establishes norms is exactly what makes the Vineland or ABAS-II "standardized."

Dr. Reschly explained in detail, and with reference to scientific literature, why he did not undertake a formal assessment of adaptive behavior using standardized instruments. R. 447, Reschly Report at ¶38. Contrary to the Mississippi Supreme Court's opinion, AAIDD specifically directs the examiner in the criminal justice context to rely on interviews evaluated by the examiner's clinical judgment – the exact approach employed by Dr. Reschly:

> The assessment of AB in *Atkins* cases focuses on behavior in childhood through the time of the crime and is, thus, inherently retrospective. The examiner must draw information from as many sources as possible and give each source its appropriate weight, using clinical judgment to arrive at a diagnostic conclusion. Among the most common and potentially most valuable sources are interviews with family members and others who have known the individual well in varied community settings. Multiple informants who have known the individual at different ages before the pertinent crime can provide consensual validity regarding adaptive functioning.

Id. at 193, *citing* Schalock & Luckasson, CLINICAL JUDGMENT (AAIDD 2005).

Thus AAIDD allows, but does not require, the use of standardized instruments in the assessment of adaptive behavior in retrospective *Atkins* evaluations. What AAIDD does urge in the *Atkins* context are "interviews with family members and others who have known the individual well in varied community settings." Dr. Reschly was the only expert who conducted such interviews in this case. *Compare Thomas v. Allen*, 607 F.3d 749, 754 (11th Cir. 2010) (finding prisoner intellectually disabled on the basis of interviews and records because he "had no standardized behavior assessments during his developmental period").

Moreover, the State's own expert report in this case established that "normed data" instruments are not accurate when attempting to assess adaptive functioning twenty or more years after age 18: As the State Hospital Report points out, there is apparently no "test" like the IQ tests that is ideal for determining what a prisoner's adaptive functioning skills were pre-incarceration:

> Standardized adaptive behavior instruments, such as the Vineland Adaptive Behavior Scales, are intended to be used for assessments of individuals who are living in the community. Such instruments have not been standardized for use with offenders who have been incarcerated for a number of years, particularly those on death row, since the opportunities for involvement in activities measured by such instruments are limited due to the nature of the prison environment.

Ex. S-17 at 28 (R. 169).

The use of standardized instruments beyond their designed function every bit as non-scientific as the refusal to use appropriate scientific instruments. Mississippi's requirement of "normed data" for adaptive functioning assessments in Atkins cases creates the same risk as Florida's IQ score "cutoff" of 70 did in *Hall*.

II. QUESTION THREE: MISSISSIPPI'S NOVEL "NORMED DATA" REQUIREMENT FOR ADAPTIVE FUNCTIONING ASSESSMENTS UNDER *ATKINS* VIOLATES DUE PROCESS BECAUSE RICKY CHASE HAD NO NOTICE OF THIS REQUIREMENT AT THE TIME OF HIS EVIDENTIARY HEARING

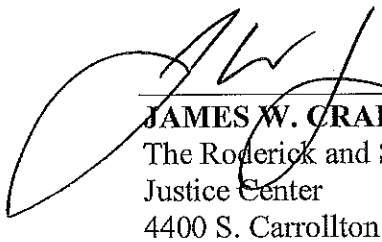
It can hardly be doubted that the retroactive application of Mississippi's novel "normed data" requirement to deny relief to Ricky Chase violates the Due Process Clause of the Fourteenth Amendment. Due process forbids Mississippi to create a new requirement that an *Atkins* petitioner present "normed data" in support of adaptive functioning, and apply it to a pending case, when the petitioner had no notice of any such rule. "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in

justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Ford v. Georgia*, 498 U.S. 411, 423, 111 S.Ct. 850, 857 (2011).

CONCLUSION

Petitioner respectfully pleads that this Court grant his writ of certiorari and permit briefing and argument on the issues set forth herein.

Respectfully submitted,



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