IN THE
Supreme Court of the United States

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ANTHONY CARR,
*Petitioner*,

vs.

STATE OF MISSISSIPPI,
*Respondent*.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSISSIPPI SUPREME COURT

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# APPENDICES

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2019 WL 2384142
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Supreme Court of Mississippi.

Anthony CARR
v.
STATE of Mississippi

NO. 2017-CA-01481-SCT
|
06/06/2019

**Synopsis**

**Background:** Following affirmance of conviction and death sentence on four counts of capital murder, 655 So.2d 824, defendant applied for leave to seek post-conviction relief. The Supreme Court, 873 So.2d 991, granted the application in part. The Circuit Court found that defendant had failed to prove his execution was prohibited on the basis of intellectual disability and denied his petition. Defendant appealed. The Supreme Court, 196 So.3d 926, reversed and remanded. On remand, the Circuit Court, Quitman County, Charles E. Webster, J., again denied petition. Defendant appealed.

**Holdings:** The Supreme Court, Chamberlin, J., held that:

[1] defendant waived issue of whether he was entitled to a new evidentiary hearing;

[2] defendant failed to establish that he was prejudiced by trial court's failure to hold a new hearing;

[3] prior remand order did not require trial court to hold a new hearing; and

[4] trial court properly determined that defendant was not intellectually disabled.

Affirmed.

King, P.J., filed dissenting opinion, in which Kitchens, P.J., and Ishee, J., joined

**Procedural Posture(s):** Appellate Review; Post-Conviction Review.

West Headnotes (7)

**[1] Criminal Law**
Review De Novo

Where questions of law are raised, the applicable standard of review is de novo.

**[2] Criminal Law**
Post-conviction relief

The Supreme Court will not reverse the factual findings of the trial court in postconviction proceedings unless they are clearly erroneous.

**[3] Criminal Law**
Subsequent Appeals

Following Supreme Court's remand with direction for the trial court in postconviction proceedings to make "new factual findings applying the correct legal standard," defendant challenging imposition of death penalty on grounds of intellectual disability waived for subsequent appeal issue of whether he was entitled to a new evidentiary hearing based on changes to the law since his prior hearing, where defendant failed to timely request a new hearing in the trial court. Miss. Code Ann. § 99-39-21(1).

**[4] Criminal Law**
Subsequent Appeals

Defendant challenging imposition of death penalty on grounds of intellectual disability was not prejudiced by trial court's failure to hold a new evidentiary hearing in postconviction proceedings following Supreme Court's remand with direction for the trial court to make "new factual findings applying the correct legal standard," and thus could not overcome waiver of the claim; although defendant contended that

there had been significant changes in the law since his prior hearing, trial court's revised order complied with changes in the law, remand instructions were properly aimed at providing clarification of prior findings, and defendant was not denied a proper evaluation. Miss. Code Ann. § 99-39-21(1).

**[5] Criminal Law**

Mandate and proceedings in lower court

Supreme Court's prior decision remanding postconviction proceedings to the trial court with direction to make "new factual findings applying the correct legal standard," did not require trial court to hold a new evidentiary hearing on remand; case was reversed and remanded to give trial judge an opportunity to make new factual findings after performing the requisite interrelated analysis of adaptive functioning, consistent with the United States Supreme Court's Eighth Amendment precedent. U.S. Const. Amend. 8.

**[6] Sentencing and Punishment**

Persons with intellectual disabilities

Trial court properly determined that defendant was not intellectually disabled as would render him ineligible for the death penalty under the Eighth Amendment; trial court conducted an interrelated analysis between defendant's IQ score and his adaptive-skill deficits and concluded that the deficits were not significant in nature, and trial court considered and weighed all of the evidence presented and made a reasoned finding that defendant had failed to meet his burden. U.S. Const. Amend. 8.

**[7] Criminal Law**

Post-conviction relief

**Sentencing and Punishment**

Hearing

In reviewing a postconviction claim of ineligibility for the death penalty on grounds of intellectual disability, the Supreme Court gives deference to the trial judge as the ultimate finder of fact, and does not reweigh the evidence on appeal.

QUITMAN COUNTY CIRCUIT COURT, CHARLES E. WEBSTER, J.

**Attorneys and Law Firms**

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EN BANC.

**Opinion**

CHAMBERLIN, JUSTICE, FOR THE COURT:

***1** ¶1. The United States Supreme Court has held that the Eighth Amendment to the United States Constitution prohibits the execution of intellectually disabled persons. On September 20, 2017, the Circuit Court of Quitman County denied Anthony Carr's petition for post-conviction relief ("PCR"), finding that Carr did not prove that he was intellectually disabled. Carr appealed the trial court's decision. We affirm.

## FACTS AND PROCEDURAL HISTORY

¶2. Anthony Carr was convicted of four counts of capital murder and sentenced to death for each. *Carr v. State*, 655 So. 2d 824, 830 (Miss. 1995) ("*Carr I*"). [1] In *Carr I*, we affirmed Carr's conviction. *Id.* at 858.

¶3. In 2004, we granted Carr leave to proceed in the circuit court on his PCR claim that he is intellectually disabled and, thus, ineligible for the death penalty under *Atkins v. Virginia*. [2] *Carr v. State*, 873 So. 2d 991 (Miss. 2004) ("*Carr II*"). The trial court later denied Carr's petition for PCR (the "original order"), and Carr appealed. *Carr v. State*, 196 So. 3d 926 (Miss. 2016) ("*Carr III*").

  

¶4. In *Carr III*, we reversed and remanded with directions for the trial court to make "new factual findings applying the correct legal standard." *Id.* at 944. Following the *Carr III* decision, the trial court entered a revised order, again denying Carr's petition for PCR (the "revised order"). The trial court entered the revised order more than a year after remand. In the interim, the trial court did not hold an additional hearing, and the parties did not request one. Carr timely appealed. [3]

## STATEMENT OF ISSUES

¶5. On appeal, Carr raises three issues. The State raises four issues. For the sake of clarity, we restate the issues as follows:

I. Whether the trial court erred by failing to hold a new evidentiary hearing.

II. Whether the trial court erred in holding that Carr did not prove by a preponderance of the evidence that he suffers from an intellectual disability that manifested prior to age eighteen.

## STANDARD OF REVIEW

**[1]** **[2]** ¶6. The standard of review in the instant appeal is mixed. "[W]here questions of law are raised the applicable standard of review is *de novo*." *Brown v. State*, 731 So. 2d 595, 598 (Miss. 1999) (citing *Bank of Miss. v. S. Mem'l Park, Inc.*, 677 So. 2d 186, 191 (Miss. 1996)). When addressing whether the trial court and the Court in *Carr III* applied the correct legal standard, a *de novo* standard is applied. On the other hand, the Court "will not reverse the factual findings of the trial court unless they are clearly erroneous." *Walker v. State*, 230 So. 3d 703, 704 (Miss. 2017) (citing *Brown v. State*, 731 So. 2d 595, 598 (Miss. 1999).

## ANALYSIS

### I. Whether the trial court erred by failing to hold a new evidentiary hearing.

***2** ¶7. Carr argues that the trial court erred by failing to hold a new evidentiary hearing. In support of his arguments, Carr presents evidence gathered from a new investigation that he would like to present in a new evidentiary hearing, including expert evidence from Dr. William Kallman. Carr maintains that the new evidence does not constitute new arguments. Carr argues that the United States Supreme Court's decision in *Moore v. Texas*, —— U.S. ——, 137 S.Ct. 1039, 197 L.Ed. 2d 416 (2017) ("*Moore I*"), and the Court's decision in *State v. Russell*, 238 So. 3d 1105 (Miss. 2017), have "wrought significant changes to *Atkins* jurisprudence," that "[t]he 2013 hearing was conducted under a different regime" and that Carr is therefore entitled to a new hearing.

¶8. In response, the State argues that Carr waived the issue by not raising it in the trial court. The State asserts that Carr's argument is an attempt to relitigate the entirety of his intellectual-disability claim. Further, the State argues that Carr is procedurally limited to the issues that were the subject of *Carr III*'s remand.

¶9. Mississippi Code Section 99-39-21 addresses waiver in PCR proceedings. It reads,

> (1) Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.
>
> (2) The litigation of a factual issue at trial and on direct appeal of a specific state or federal legal theory or theories shall constitute a waiver of all other state or federal legal theories which could have been raised under said factual issue; and any relief sought under this article upon said facts but upon different state or federal legal theories shall be procedurally barred absent a showing of cause and actual prejudice.
>
> (3) The doctrine of res judicata shall apply to all issues, both factual and legal, decided at trial and on direct appeal.
>
> (4) The term "cause" as used in this section shall be defined and limited to those cases where the legal foundation upon which the claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal.
>
> (5) The term "actual prejudice" as used in this section shall be defined and limited to those errors which would have

actually adversely affected the ultimate outcome of the conviction or sentence.

(6) The burden is upon the prisoner to allege in his motion such facts as are necessary to demonstrate that his claims are not procedurally barred under this section.

Miss. Code. Ann. § 99-39-21 (Rev. 2015).

¶10. The Court analyzes this issue in three parts.

*A. Carr did not request a new hearing and thus waived the issue on appeal.*

**[3]** ¶11. Carr failed to timely request a new hearing in a motion before the trial court after *Carr III*. Further, Carr failed to timely raise the need for a new hearing in a motion for reconsideration after the trial court entered its revised order.[4] Therefore, Carr has waived the issue on appeal under Mississippi Code Section 99-39-21(1). *See* Miss. Code Ann. § 99-39-21(1) (Rev. 2015). We next consider whether Carr has shown the requisite "cause" and "actual prejudice" necessary to overcome the waiver.

*B. Carr has not shown "cause" and "actual prejudice" to overcome the waiver.*

***3** **[4]** ¶12. Section 99-39-21(1) requires "a showing of cause *and* actual prejudice." Miss. Code Ann. § 99-39-21(1) (emphasis added). Carr claims that caselaw handed down since the 2013 hearing and original order has significantly changed the landscape of *Atkins* jurisprudence, thus requiring a new hearing. We address only the requirement of "actual prejudice," as it is dispositive.

¶13. *Hall v. Florida* was decided in May 2014. *Hall v. Florida,* 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed. 2d 1007 (2014). In *Hall*, the United States Supreme Court reevaluated its *Atkins* jurisprudence and held that Florida's bright-line IQ score cutoff "bars consideration of evidence that must be considered in determining whether a defendant in a capital case has intellectual disability." *Id.* at 723, 134 S.Ct. 1986. *Hall* made clear that an interrelated analysis was required: "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.*

¶14. Here, in its revised order, the trial court noted that Carr's IQ scores—ranging from 70 to 75 —"all fall on or within the margin of error applicable to the test." The trial court then analyzed the testimony of multiple experts and witnesses about Carr's adaptive deficits. In sum, the trial court conducted an interrelated analysis between Carr's IQ score and his adaptive-skill deficits. An interrelated analysis is what *Hall* requires. *Id.* Moreover, the trial court examined and relied on our opinion in *Carr III*, which discusses *Hall* at length. *Carr III*, 196 So. 3d at 933–35. Thus, the trial court complied with *Hall*, and Carr is not entitled to a new hearing.

¶15. *Moore I* was decided in March 2017. *Moore I*, 137 S.Ct. at 1039. *Moore I* examined the Texas Court of Criminal Appeals' use of certain factors in its *Atkins* determinations. *Id.* at 1044. The *Moore I* Court reiterated that "adjudications of intellectual disability should be 'informed by the views of medical experts' " and that the factors used by the Texas Court of Criminal Appeals " 'creat[e] an unacceptable risk that persons with intellectual disability will be executed.' " *Id.* (alterations in original) (quoting *Hall*, 572 U.S. at 721, 704, 134 S.Ct. 1986).

¶16. *Moore I* reiterated *Atkins* and did not alter the *Atkins* landscape. Carr has failed to demonstrate prejudice under *Moore I*.[5]

¶17. The Court decided *Russell* in December 2017. *Russell*, 238 So. 3d at 1105. In *Russell*, the Court reversed the trial court and held that the State's request to evaluate Russell before an *Atkins* hearing should have been granted. *Id.* at 1111. The *Russell* Court noted that "our *Atkins* procedures clearly contemplate the State responding to the petitioner's evidence with its own expert opinion." *Id.* Of particular importance in *Russell* was that the State was not denied "a second, duplicate *Atkins*

  

evaluation," but "was requesting *the* *Atkins* evaluation." *Id.* at 1110 (emphasis in original).

***4** ¶18. Here, Carr does not claim that he was denied an *Atkins* evaluation. Further, Carr was evaluated by two experts (including Carr's expert, Dr. Gerald O'Brien), and the trial court examined the testimony of each expert. Because, unlike in *Russell*, Carr was evaluated by his own expert and was able to present testimony, Carr's reliance on *Russell* fails to show actual prejudice.

¶19. On a final note, Carr analogizes the case to *Thompson v. State*, 208 So. 3d 49 (Fla. 2016). Even though *Thompson* is not binding precedent, we address it here for the sake of conclusiveness. In *Thompson*, the Supreme Court of Florida remanded the case for a new evidentiary hearing, stating that "Thompson's previous hearing on intellectual disability was tainted by the bright-line cutoff of 70 for IQ scores" that was later denounced by *Hall*. *Id.* at 58 (citing *Hall*, 572 U.S. at 724, 134 S.Ct. 1986).

¶20. In *Carr III*, we recognized the unconstitutionality of the bright-line IQ score cutoff and remanded for an interrelated analysis between the significantly subaverage intellectual function and the significant deficits in adaptive behavior. *Carr III*, 196 So. 3d at 933–34. In the original order, the trial court considered the second prong and concluded that Carr had adaptive deficits in two skill areas. However, the trial court then failed to perform an interrelated analysis between the first and second prong. *Carr III*'s remand instructions, therefore, were properly aimed at providing clarification of its findings. Further, in its revised order, the trial court explicitly noted its adherence to *Carr III* and at no point indicated it was employing a strict score cutoff. *Thompson* is not analogous to the facts at hand and does not support Carr's assertion of actual prejudice.

¶21. As stated above, Section 99-39-21(1) requires "a showing of cause *and* actual prejudice." Miss. Code Ann. § 99-39-21(1) (emphasis added). Considering the recent *Atkins* decisions, Carr is unable to establish actual prejudice. Without actual prejudice, the Court need not address cause. Carr, therefore, cannot overcome that he waived a new hearing.

*C.* **Carr III** *did not require a new evidentiary hearing on remand.*

**[5]** ¶22. *Carr III* held that "a legal standard that views a full-scale IQ score as dispositive of intellectual disability without performing and balancing an interrelated analysis of adaptive functioning, runs afoul of the Eighth Amendment." *Carr III*, 196 So. 3d at 943. *Carr III* stated that reversal and remand was necessary

> to provide the circuit judge an opportunity to consider whether Carr's adaptive functioning deficits—which the circuit judge found to exist—are so severe that Carr should be ruled intellectually disabled through an interrelated analysis with his IQ scores, which the circuit judge found to be between 70 and 75.

*Carr III*, 196 So. 3d at 944 (footnote omitted). Nothing in *Carr III* mandates a new hearing. Instead, the Court examined the law, including *Hall*, and directed the trial court to make new factual findings after performing the requisite interrelated analysis.

¶23. Carr also argues that the *Carr III* Court created a new *Atkins* standard. Carr argues that, by remanding the case in 2016 "to provide the circuit judge an opportunity to consider whether Carr's adaptive functioning deficits—which the circuit judge found to exist—are *so severe* that Carr should be ruled intellectually disabled through an interrelated analysis with his IQ scores," the Court created a new standard for determining whether a defendant has an intellectual disability. *Id.* at 943 (emphasis added).

***5** ¶24. In *Hall*, the United States Supreme Court approvingly cited DSM-5 and quoted the following language: "[A] person with an IQ score above 70 may have *such severe* adaptive behavior problems ... that the person's actual functioning is comparable to that of individuals with a lower IQ score." *Hall*, 572 U.S. at 712, 134 S.Ct. 1986 (alteration in original) (emphasis added) (quoting *Diagnostic*

  

*and Statistical Manual of Mental Disorders* 37 (5th ed. 2013)). The remand order from *Carr III* does not conflict with the language cited approvingly in *Hall*. Further, no material difference exists between *Hall*'s instruction to determine whether a defendant has "such severe" adaptive-functioning deficits as to render him or her intellectually disabled through an interrelated analysis and *Carr III*'s instruction to determine whether a defendant's adaptive-functioning deficits are "so severe" to support a finding of intellectual disability. *Hall* and *Carr III* therefore provide the same or substantially similar instruction. We see no reason for a new evidentiary hearing at this juncture.

**II. Whether the trial court erred in holding that Carr did not prove by a preponderance of the evidence that he suffers from an intellectual disability that manifested prior to age eighteen.**

¶25. The Court has recognized that *Atkins* exempts all intellectually disabled people from execution, even those people who are minimally intellectually disabled. *Chase v. State*, 873 So. 2d 1013, 1026 (Miss. 2004) ("*Chase III*") (citing *Atkins*, 536 U.S. at 321, 122 S.Ct. 2242). The Court has also recognized that mild intellectual disability "may, under certain conditions, be present in an individual with an IQ of up to 75." *Chase v. State*, 171 So. 3d 463, 471 (Miss. 2015) ("*Chase V*") (quoting *Chase III*, 873 So. 2d at 1028 n.18). Further, in 2015, following the Supreme Court's guidance in *Hall* and accounting for "the medical community's evolving understanding of intellectual disability and its diagnosis," *Chase V* adopted "the 2010 [American Association on Intellectual and Developmental Disability (AAIDD) ] and 2013 [American Psychiatric Association (APA) ] definitions of intellectual disability as appropriate for use to determine intellectual disability in the courts of this state in addition to the definitions promulgated in *Atkins* and *Chase*." *Chase V*, 171 So. 3d at 471; *see also* *Hall*, 572 U.S. at 710, 134 S.Ct. 1986 ("In determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions."). In *Chase V*, we noted that "[t]he new definitions have not materially altered the diagnosis of intellectual disability but have provided new terminology." *Id.* (citing *United States v. Williams*, 1 F. Supp. 3d 1124, 1146 (D. Haw. 2014)).

¶26. The AAIDD articulates the skills domains as follows:

> The conceptual skills domain includes "language; reading and writing; and money, time, and number concepts." The social skills domain includes "interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), follows rules/obeys laws, avoids being victimized, and social problem solving." The practical skills domain includes "activities of daily living (personal care), occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone."

*Chase V*, 171 So. 3d at 469 (citations omitted). The APA states,

> The *conceptual (academic)* domain involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problems solving, and judgment in novel situations, among others. The *social domain* involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The *practical domain* involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others.

***6** *Chase V*, 171 So. 3d at 469–70 (quoting *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013)). While some differences exist in the standards articulated by the AAIDD and APA, " 'the exact wording of the ... standards 'makes little substantive difference in the context of *Atkins*,' " since all "are similar and require the same three basic elements ... significantly subaverage intellectual functioning, significant deficits in adaptive behavior, and manifestation before age eighteen." *Chase V*, 171 So. 3d at 470 (quoting *Williams*, 1 F. Supp. 3d at 1146). Moreover, *Chase V* provided specific guidance on

Mississippi's application of "significant deficits in adaptive behavior." *Id.* We stated,

> 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 V*, 171 So. 3d at 486 (quoting *Intellectual Disability: Definition, Classification, and Systems of Support* 43 (11th ed. 2010)).

¶27. In *Carr III*, we followed *Chase V*'s guidance, reasserting Mississippi's adoption of both the definitions from the AAIDD and the APA. *Carr III*, 196 So. 3d at 933 (citing *Chase V*, 171 So. 3d at 471). Further, we recognized that "significant deficits in one of the three adaptive-functioning domains are required," which include the conceptual-skills domain, the social-skills domain, and the practical-skills domain. *Id.* at 933 (citing *Chase V*, 171 So. 3d at 469).

¶28. Here, the trial court reviewed our *Carr III* decision and restated the correct legal standard addressing the three prongs of the test. *See Carr III*, 196 So. 3d at 933. Further, the trial court correctly noted that "[t]here is some amount of interplay between two of the criteria: (a) significantly sub-average intellectual function, and (b) significant deficits in adaptive behavior." The trial court also noted that "although an individual may possess an IQ above what is normally considered appropriate for a finding of intellectual disability, the deficits in such an individual's adaptive behavior might be so severe that a finding [of] intellectual disability may still be made or even compelled." We review the trial court's analysis of each prong of the *Atkins* test separately.

*1. Significantly subaverage intellectual function*

**[6]** ¶29. The trial court analyzed the first prong as follows:

> [T]he three IQ tests administered to Carr resulted in IQ determinations of 70, 72, and 75. These scores all fall on or within the margin of error applicable to the test. They are not so dramatically low or high to be strongly suggestive either way on the issue of intellectual disability. This is significant because, "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability ...."

The trial court did not make a specific finding as to the existence of significantly subaverage intellectual functioning at this juncture in its analysis, because doing so was not necessary. The only factual finding the trial court needed to make—which it did in light of the evidence presented—was that the "scores all fall on or within the margin of error applicable to the test." Having done so, the trial court properly utilized the correct legal standard, and we cannot say that its findings amounted to clear error. *See Hall*, 572 U.S. at 723, 134 S.Ct. 1986; *see also Carr III*, 196 So. 3d at 934.

*2. Significant deficits in adaptive behavior*

***7** ¶30. The trial court correctly described each of the three domains: conceptual, social and practical and recognized that "[s]ignificant deficits in one of the domains is required." The trial court then examined the testimony of three different witnesses to determine whether Carr exhibited significant deficits in adaptive behavior. Specifically, the trial court reviewed the testimony of Dr. Gilbert Macvaugh, the State's expert witness, Dr. O'Brien, Carr's expert witness and Johnnie Chaney, a childhood associate of Carr's.

¶31. Discussing adaptive-deficit testing, the trial court stated that, "[a]ccording to Dr. Macvaugh, such tests were not designed to assess individuals who have been incarcerated in a heavily structured environment such as exists in jails/

  

prison." The trial court noted that "[u]ltimately, Macvaugh agreed that Carr exhibited deficits in the areas of functional academics, employment, and perhaps social." The trial court also considered the testimoney of Carr's expert stating, "Dr. O'Brien found deficits in all three domains and in 8 of the 10 adaptive skills" and explicitly "addressed the areas of communication, self-direction, leisure, social, community use and work and found deficits in all such areas." Further, the trial court noted Johnnie Chaney's testimony but found it to be a "mixed bag," ultimately determining that "the issue came down more to the testimony and credibility of the experts." It then found that Carr had not shown significant adaptive-skill deficits.

¶32. Carr argues that the trial court's original order held that Carr had at least two of the adaptive-functioning deficits. Carr also argues that the "so severe" language has changed the standard to require "super deficits" in adaptive functioning. We disagree.

¶33. First, as concluded above, *Carr III*'s "so severe" language does not create a new standard requiring "super deficits." *See* *Hall*, 572 U.S. at 712, 134 S.Ct. 1986 (alteration in original) ("[A] person with an IQ score above 70 may have such severe adaptive behavior problems ... that the person's actual functioning is comparable to that of individuals with a lower IQ score." (quoting *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013))).

¶34. Second, while the trial court did originally find that "Carr has demonstrated adaptive skill deficits in at least two (2) of the adaptive skill areas," the trial court did not find *significant* adaptive-skill deficits. Under *Chase V*, adaptive-skill deficits require a showing of "significant limitations in adaptive behavior" that "should be established through the use of standardized measures normed on the general population, including people with disabilities and people without disabilities." *Chase V*, 171 So. 3d at 486 (quoting *Intellectual Disability: Definition, Classification, and Systems of Support* 43 (11th ed. 2010)). Specifically, *Chase V* provided that the "significant limitations in adaptive behavior are operationally defined as performance that is approximately two standard deviations below the mean ...." *Id.* (quoting *Intellectual Disability: Definition, Classification, and Systems of Support* 43 (11th ed. 2010)). [6]

***8** ¶35. The *Chase V* Court also considered that none of the experts had performed the adaptive-deficits analysis properly, noting that Dr. Macvaugh, who was one of the experts, had written an article on the importance of using normed data. *Id.* (citing Macvaugh, G.S., & Cunningham, M.D., *Atkins v. Virginia: Implications and Recommendations for Forensic Practice,* 37 J. of Psychiatry & the Law 131, 168 (2009)). The *Chase V* Court concluded that because the burden rested on Chase, the trial court's finding that Chase had failed to prove intellectual disability did not constitute clear error. *Chase V*, 171 So. 3d at 486. *Carr III* did not review *Chase V*'s emphasis on normed data. However, in requiring the trial court "to consider whether Carr's adaptive functioning deficits—which the circuit judge found to exist—are so severe that Carr should be ruled intellectually disabled through an interrelated analysis with his IQ scores, which the circuit judge found to be between 70 and 75," *Carr III* supported *Chase V*'s requirement. *Carr III*, 196 So. 3d at 943-44 (footnote omitted).

¶36. In sum, the trial court did as *Carr III* instructed. In weighing the testimony, the trial court considered Carr's adaptive deficits in an interrelated analysis with Carr's IQ scores and concluded that the deficits were not significant in nature. Further, because no expert employed the use of normed data, we conclude, as we did in *Chase V*, that the trial court's rejecting Dr. O'Brien's testimony and finding that Carr had not proved intellectual disability by preponderance of the evidence was not clear error.

*3. Manifestation before age 18*

¶37. Carr argues that the trial court has still failed to issue a finding on the third prong. Under the trial court's revised analysis and findings on the second prong, analysis on the third prong was not required. *Hall*, 572 U.S. at 723, 134 S.Ct. 1986. However, the trial court did properly analyze the third prong. Therefore, we disagree.

¶38. In *Carr III*, we stated, "Because the circuit judge found that adaptive functioning deficits existed based on evidence which largely focused on Carr's academic performance before age eighteen, we instruct the trial court to review its findings on this prong upon remand." *Carr III*, 196 So. 3d at 943 n.10. The trial court considered the credibility of the witnesses, their testimony and the evidence regarding Carr's schooling and determined that "Carr failed to show by a preponderance of the evidence that he was suffering from an intellectual disability that had manifested itself prior to the age of 18."

  

**[7]** ¶39. Just as *Carr III* directed, the trial court considered and weighed all of the evidence presented and made a reasoned finding that Carr had failed to meet his burden. Specifically, the trial court did not ignore any of the testimony but weighed it. *See Brown v. State*, 168 So. 3d 884, 894 (Miss. 2015) (distinguishing between a trial judge's weighing testimony and his not ignoring it). Thus, because we "give deference to the trial judge as the ultimate finder of fact," we do "not reweigh the evidence on appeal," and we conclude that no clear error exists. *Id.*

## CONCLUSION

¶40. Carr's argument for a new hearing is waived on appeal and, notwithstanding the waiver, is without merit. Further, the trial court's rejecting Dr. O'Brien's testimony and finding that Carr had not proved intellectual disability by preponderance of the evidence was not clear error. Finally, the trial court properly revisited the third prong of the *Atkins* test as required by the remand order in *Carr III*. Therefore, we affirm the decision of the trial court holding that Carr is not intellectually disabled.

¶41. **AFFIRMED.**

RANDOLPH, C.J., COLEMAN, MAXWELL, BEAM AND GRIFFIS, JJ., CONCUR. KING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS, P.J., AND ISHEE, J.

KING, PRESIDING JUSTICE, DISSENTING:

***9** ¶42. Considering the totality of the evidence presented, I would hold that the trial court clearly erred in its finding that Carr failed to prove by a preponderance of the evidence that he was intellectually disabled within the parameters of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed. 2d 335 (2002). Accordingly, I dissent from the majority's affirmance of the trial court's decision and would reverse the trial court's ruling and render judgment in favor of Carr.

¶43. The United States Supreme Court, in *Atkins*, concluded that, construing the Eighth Amendment "in the light of our 'evolving standards of decency,' " the capital punishment of intellectually disabled offenders is unconstitutional and constitutes cruel and unusual punishment. *Id.* at 321, 122 S.Ct. 2242 (quoting *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed. 2d 335 (1986)). As the majority states, the *Atkins* decision exempts even those who are *minimally* intellectually disabled from execution. *Chase v. State*, 171 So. 3d 463, 467 (Miss. 2015) (*Chase V*) (emphasis added) (quoting *Chase v. State*, 873 So. 2d 1013, 1026 (Miss. 2004) (*Chase III*)). Intellectual Disability is "characterized by significant limitations in both intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills." *Chase V*, 171 So. 3d at 469 (quoting *Intellectual Disability: Definition, Classification, and Systems of Support* 1 (11th ed. 2010)).

¶44. At the conclusion of an *Atkins* hearing, the trial court must determine "whether the defendant has established, by a preponderance of the evidence, that the defendant" is intellectually disabled. *Chase III*, 873 So. 2d at 1029. "Preponderance of the evidence in Mississippi, as elsewhere, simply means that evidence which shows that the fact to be proved is more probable than not." *Gardner v. Wilkinson*, 643 F.2d 1135, 1137 (5th Cir. 1981). "This burden simply requires the greater or more convincing evidence. The burden is far less than clear and convincing evidence or beyond a reasonable doubt." *City of Meridian v. Hodge*, 632 So. 2d 1309, 1314 (Miss. 1994) (Smith, J., dissenting). Due to the irreversible nature of capital punishment, "[t]horoughness and intensity of review are heightened in cases where the death penalty has been imposed." *Irving v. State*, 361 So. 2d 1360, 1363 (Miss. 1978) (citing *Augustine v. State*, 201 Miss. 731, 29 So. 2d 454, 454 (1947)).

### I. Intellectual Functioning

¶45. Subaverage intellectual functioning is measured by intelligence quotient (IQ). *Chase III*, 873 So. 2d at 1021. "[I]ntellectual disability 'may ... be present in an individual with an IQ of up to 75.' " *Chase V*, 171 So. 3d at 468 (quoting *Chase III*, 873 So. 2d at 1028 n.18). Here, Carr established that his IQ scores fell within the range that can indicate intellectual disability. Dr. William Kallman first evaluated Carr for intellectual disability in 1990, when Carr was twenty-five years old. Dr. Kallman found that Carr had a performance IQ of 63 and a verbal IQ of 72,

for a Full Scale IQ of 70. Dr. Kallman stated that Carr's score was in the mildly intellectually disabled range on the Wechsler Adult Intelligence Scale–Revised (WAIS-R). Dr. Kallman concluded that Carr was functioning in the mildly intellectually disabled range in intelligence and that Carr's "performance on the IQ test and the neuropsychological screening instruments are all indicative of someone who is functioning at a relatively low level cognitively." He found that "there were no signs of malingering or intentional efforts to distort the data" and stated that Carr's deficits were spread across all areas and were nonspecific.

***10** ¶46. The Forensic Unit at Mississippi State Hospital (MSH) evaluated Carr in 2009, when he was forty-four years old, and administered two IQ tests. The MSH report, signed by Dr. Gilbert S. Macvaugh III, stated that Carr achieved a Full Scale IQ of 72 on the WAIS-IV. On the Stanford-Binet Intelligence Scales, Fifth Edition (SB5), Carr scored a Full Scale IQ of 75. Like Dr. Kallman, the MSH report found that Carr did not appear to be malingering cognitive deficits. Dr. Macvaugh also stated that Carr's IQ scores would have been even lower had they been adjusted downward due to the Flynn Effect. The Flynn Effect "is a phenomenon positing that, over time, standardized IQ test scores tend to increase with the age of the test without a corresponding increase in actual intelligence in the general population." *Thorson v. State*, 76 So. 3d 667, 672 (Miss. 2011) (quoting *Wiley v. Epps*, 625 F.3d 199, 203 n.1 (5th Cir. 2010)). The MSH report concluded that Carr's test scores did not rule out the possibility of a diagnosis of mild intellectual disability. In addition, Dr. Gerald O'Brien, a licensed psychologist, issued a report on April 6, 2012, in which he stated, with a reasonable degree of certainty, that Carr met the intellectual-functioning prong of intellectual disability.

¶47. Each of Carr's IQ scores fell within the range that can indicate intellectual disability. Because Carr proved by a preponderance of the evidence that his IQ was 75 or below, the trial court must address the second *Atkins* prong—significant deficits in adaptive functioning. *Thorson*, 76 So. 3d at 683.

**II. Significant Limitations in Adaptive Behavior**

¶48. The American Association on Intellectual and Developmental Disability (AAIDD)

> defines each domain of adaptive functioning. The conceptual skills domain includes "language; reading and writing; and money, time, and number concepts." The social skills domain includes "interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), follows rules/obeys laws, avoids being victimized, and social problem solving." The practical skills domain includes "activities of daily living (personal care), occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone." For a diagnosis of intellectual disability, an individual must have significant deficits in one of the three adaptive functioning domains.

*Chase V*, 171 So. 3d at 469 (citations omitted). I believe that Carr presented overwhelming evidence that he had significant deficits in several domains of adaptive functioning.

¶49. Dr. O'Brien concluded that Carr was considered to be intellectually disabled consistent with both *Atkins* and *Chase*. Dr. O'Brien found that Carr's reports indicated "significant deficits in *all three* adaptive types or domains defined by the AAIDD, and in *eight of the ten* included skill areas...." (Emphasis added.) Dr. O'Brien stated that Carr's deficits were "in the *conceptual* domain (including communication, functional academics, and self-direction), the *social* domain (including leisure and social skills), and the *practical* domain (including home living, health and safety, and self-care)." In addition, the MSH report stated that Carr may have demonstrated significant limitations in *at least* two areas of adaptive behavior before the age of eighteen, functional academics and work.

¶50. In the conceptual domain of adaptive deficits, competence in reading, writing, and math reasoning become probative. Dr. Victoria Swanson, a licensed psychologist, evaluated Carr in 2010, when Carr was forty-four years old. Even at age forty-four, Dr. Swanson found that Carr was operating on a mostly fourth-grade level. Carr scored at a fourth-grade level on Brief Achievement, Brief Reading, Brief Math, and Academic Skills. Carr's highest score was in Broad Reading and was at only a fifth-grade level.

¶51. Dr. Kallman testified that Carr's IQ and achievement testing indicated that he

  

> doesn't have very good cognitive skills, he doesn't understand a whole lot of what goes on around him, he doesn't have a lot of basic living skills, such as simply arithmetic and reading abilities, and ... Well, this person would have great difficulty functioning independently in the world unless it was a fairly simple task that did not require a lot of intellectual understanding and activity.

***11** ¶52. Carr's school records also indicate significant deficits in functional academics. Carr failed the third, seventh, and ninth grades and dropped out of school at age seventeen after his second attempt at ninth grade. In addition, his grades were poor throughout the whole of his school years. As the MSH report stated, Carr's grades as a whole ranged "from failing to barely passing in most subjects...." In the fifth grade, Carr's standardized testing scores mostly were at the second-grade academic level. On standard achievement tests administered in the eighth grade, Carr obtained national percentile rankings which ranged from the first percentile to the thirty-sixth percentile. Carr's reading standard score in the eighth grade was in the .8 percentile, meaning that more than 99 percent of students taking the test scored higher in reading than Carr. Similarly, in math over 99 percent of students ranked higher than Carr, and 99 percent of students scored higher in spelling than Carr. Thus even Carr's best standardized test score was lower than 64 percent of the students who took the test. Carr's national percentile was ten, which meant that 90 percent of students taking the test scored higher than Carr.

¶53. The MSH report concluded that Carr *probably* demonstrated adaptive-behavior deficits in the area of functional academics prior to the age of eighteen. Dr. Macvaugh found probative that Carr had failed the third, seventh, and ninth grades. In addition, it noted that Carr's grades had been "quite poor, ranging from failing to barely passing in most subjects throughout his school years." However, Dr. Macvaugh was concerned with Carr's absences from school. Although the trial court also was concerned about Carr's poor attendance, even when Carr repeated grades, he continually maintained poor marks in school. In addition, Carr's IQ scores continually have remained around the same significantly low level.

¶54. Carr also presented sufficient evidence to show significant deficits in the social-skills domain. Dr. Kallman's report stated that Carr's personalty assessment suggested that he was a "severely disturbed individual who has been in a state of extreme emotional turmoil for most of his life." He additionally reported that Carr's profile was "consistent with others who are labelled [sic] 'dangerous psychotics.' " Although the MSH report took issue with Dr. Kallman's suggestion that Carr may have been exaggerating symptoms of mental illness, Dr. Kallman repeatedly stated in his report that the evaluation was a valid indicator of Carr's current state of cognitive and emotional functioning. Dr. Kallman additionally stated that "[t]here were no signs of malingering or intentional efforts to distort the data."

¶55. Carr additionally presented testimony from Johnie Chaney, a childhood acquaintance of Carr's. Chaney testified that when Carr was approximately fifteen or sixteen, Chaney would have to help him "keep his clothes right on him." Chaney testified that he would have to tell Carr to tie his shoes and to clean up when he had "an odor." Dr. O'Brien testified that Chaney's testimony was consistent with his own opinions regarding Carr's deficits. The trial court found probative the portion of Chaney's testimony in which he stated that Carr had played softball with other young people. And Chaney did state that Carr could play softball in the outfield, however, he additionally stated that he had to tell Carr to run and catch the ball. Chaney also testified that Carr got along with everybody only when they were not trying to take advantage of him or trying to make him do crazy things. Therefore, I disagree with the trial court's contention that Chaney's testimony was not helpful and would find that Chaney's testimony showed additional deficits in Carr's social and practical skills.

¶56. Dr. Macvaugh stated that Carr also may have demonstrated significant limitations relating to work. He stated that he did not have access to information to confirm the validity of Carr's work experience and that it was unclear whether he experienced difficulty relating to work. However, Carr clearly could not hold a steady job. Before the age of twenty-five, Carr's various positions included chopping cotton, working as a janitor, working at a tire shop performing tire rotations, reading meters with the water department, working on boat motors, and working at service stations and clubs. Dr. Macvaugh's lack of access to information from

  

Carr's former employers did not cancel out Carr's broken work history, which Dr. Kallman also noted.

***12** ¶57. Considering the totality of the evidence presented, I would find that the trial court erred in its ruling that Carr failed to prove by a preponderance of the evidence that he suffered from significant adaptive deficits.

**III. Prior to Age Eighteen**

¶58. Lastly, Carr presented sufficient evidence that his adaptive deficits did in fact manifest prior to age eighteen. On remand, the trial court wrote that "there is no evidence that Carr was administered an IQ test prior to age 18." In addition, the MSH report stated that,

> [i]n summary, Mr. Carr does, in our opinion, have intellectual limitations and may very well have met the diagnostic criteria for [intellectual disability] before the age of 18. However, we cannot be certain of this because he never received intelligence testing or a standardized assessment of his adaptive functioning before age 18.

Yet Carr must not be penalized because he was not given an IQ test before his eighteenth birthday. As Dr. O'Brien stated, "there's almost never an IQ test in a case like this before the age of 18.... But we do have what you might call collateral information about his academic functioning which is strongly suggestive of an IQ score in the range we're talking about." Thus, while Carr was not given a formal IQ test before he turned eighteen, he presented clear evidence indicating his IQ and adaptive deficits prior to age eighteen—testimony from family and friends and his school grades.

¶59. Dr. O'Brien reported that he definitively found that Carr's deficits existed prior to age eighteen. Dr. O'Brien testified that, at about the third-grade level, Carr started reaching the end of his academic potential. Carr "reached the limit at which he could no longer keep up with the average student in that school...." Dr. O'Brien additionally found that Carr was not considered to have been deceptive or malingering during any ability testing. Carr's IQ scores after he turned eighteen also present evidence of his intellectual functioning prior to his turning eighteen. *See* *Rivera v. Quarterman*, 505 F.3d 349, 363 (5th Cir. 2007) ("And, although Rivera did not take the WAIS-III test prior to age 18, the district court found that the combination of his score of 68, other evidence of Rivera's intellectual functioning, and his performance in school 'establish that Rivera had significantly subaverage intellectual functioning prior to the age of 18.' "). Seven years after Carr turned eighteen, Dr. Kallman established that Carr had an IQ score of 70.

¶60. Chaney testified that when Carr was approximately fifteen to sixteen, he had to tell Carr when to tie his shoes and when he had an odor. Carr's sister, Annette Carr, stated that Carr was slow growing up and that he never lived independently. Carr's sister, Sarah Carr Jefferson, also thought that Carr was slow and had mental-health problems. Sarah stated that Carr would sometimes talk to dogs and that the dogs talked to him when he was young. Carr's former school teacher stated that she taught Carr in the fifth and sixth grades and that Carr was a slow learner and a poor student. She attributed this to his home environment and his attitude.

¶61. In addition, in its opinion remanding this case to the circuit court, this Court stated that the trial court had found "that adaptive functioning deficits existed based on evidence which *largely focused on Carr's academic performance before age eighteen* ...." *Carr III*, 196 So. 3d at 943 n.10 (emphasis added). This Court then instructed the trial court to review its findings on whether Carr's adaptive functioning deficits existed prior to age eighteen. *Id.* Thus, this Court's own language on remand strongly indicated that Carr had in fact shown adaptive-functioning deficits before he turned eighteen.

**IV. Summary**

***13** ¶62. As previously stated, *Atkins* prohibits the death penalty for those who are even *minimally* intellectually disabled. The standard in this case was the preponderance of the evidence. A preponderance of the evidence does not require proof beyond doubt nor does it require even convincing proof. *Producers Gin Ass'n v. Beck*, 215 Miss. 263, 60 So. 2d 642, 644 (1952). A preponderance of the evidence means exactly that—the greater weight of the evidence.

¶63. Carr presented a report and testimony from Dr. O'Brien, who found to a reasonable degree of psychological

  

certainty that Carr was intellectually disabled. In addition, Dr. Kallman also found that Carr was functioning in the mildly intellectually disabled range. Carr presented evidence of Dr. Swanson's testing that indicated Carr was functioning on a mostly fourth-grade level, which was corroborated by Carr's school records. And although Dr. Macvaugh concluded that overall he was "unable to form an opinion to a reasonable degree of psychological and psychiatric certainty regarding whether or not Mr. Carr is [intellectually disabled] as defined by" *Atkins* and *Chase*, even he agreed that Carr may have demonstrated significant limitations in *at least* two areas of adaptive behavior before the age of eighteen.

¶64. This is not even a case of opposing experts. The evidence showed that one expert stated Carr *could* be intellectually disabled but that he was not certain. Yet Carr presented evidence from two experts stating that he was intellectually disabled, presented school records that showed significant academic deficits, presented testimony indicating that Carr had to be told when to tie his shoes and when to bathe, and presented IQ tests showing significant intellectual deficits. Because the death penalty is final and cannot be reversed, all doubts are to be resolved in favor of the accused. *Lynch v. State*, 951 So. 2d 549, 555 (Miss. 2007). Resolving all doubts in favor of Carr, clearly the greater weight of the evidence showed that Carr was intellectually disabled within the meaning of *Atkins*. I would find that the trial court erred in its finding that Carr failed to prove his intellectual disability claim by a preponderance of the evidence.

¶65. Carr established that his IQ scores each fell within the margin of error applicable to the test, that he had significant adaptive deficits in more than one area, and that those deficits manifested before the age of eighteen. Accordingly, I would reverse the trial court's ruling on intellectual disability and would render judgment in favor of Carr.

KITCHENS, P.J., AND ISHEE, J., JOIN THIS OPINION.

**All Citations**

--- So.3d ----, 2019 WL 2384142

Footnotes

1 The facts surrounding Carr's underlying offense have been discussed at length previously by the Court and do not pertain to the issues on appeal.

2 *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed. 2d 335 (2002).

3 Carr also filed a motion for reconsideration. Although it does not appear that the motion for reconsideration was ever ruled on, we conclude that the instant appeal is proper. Under Rule 6(b) of the Mississippi Rules of Civil Procedure, the time period to file motions under Rule 52(b) cannot be extended. Miss. R. Civ. P. 6(b), 52(b). Thus, Carr's motion for reconsideration was untimely filed, and, with no arguments made by either party on appeal about it, we conclude that the motion for reconsideration has been abandoned.

4 Again, while Carr did request a new hearing in his motion for reconsideration after the trial court entered its revised order, the motion for reconsideration was not timely.

5 Following the 2017 remand to the Texas Court of Criminal Appeals, the United States Supreme Court has reviewed and clarified *Moore I*. *Moore v. Texas*, —— U.S. ——, 139 S.Ct. 666, 670-72, —— L.Ed.2d —— (2019) ("*Moore II*"). The *Moore I* Court had provided that "[c]linicians ... caution against reliance on adaptive strengths developed 'in a controlled setting.' " *Moore I*, 137 S.Ct. at 1050 (quoting *Diagnostic and Statistical Manual of Mental Disorders* 38 (5th ed. 2013)). The *Moore II* Court has reiterated its warning from *Moore I*, specifically pointing out that trial courts should rely on adaptive-skill *deficits* rather than adaptive-skill *strengths.* *Moore II*, 139 S.Ct. at 670-72. *Moore II*'s reiteration does not change the analysis here.

6 The *Moore II* decision also described the clinical approach to determining the significance of adaptive deficits: "clinicians look to whether an individual's adaptive performance falls two or more standard deviations below the mean in any of the three adaptive skill sets (conceptual, social, and practical)." *Moore II*, 139 S.Ct. at 668 (quoting *Moore I*, 137 S.Ct. at 1046).

  

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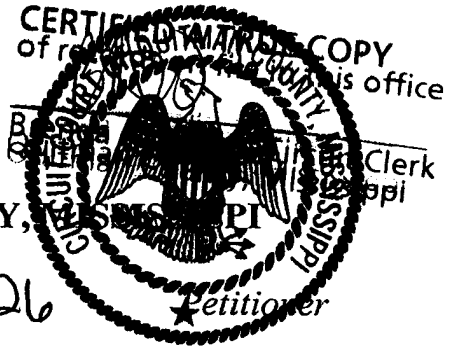


IN THE CIRCUIT COURT OF QUITMAN COUNTY, MISSISSIPPI

ANTHONY CARR, 2014-CA-726 *Petitioner*

*versus* No. 5115

STATE OF MISSISSIPPI, *Respondent*

FILED
SEP 28 2017
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

**REVISED ORDER DENYING PETITION FOR POST-CONVICTION RELIEF**

**THIS CAUSE** finds its way back before this court by virtue of that certain decision of the Mississippi Supreme Court dated August 11, 2016, reversing this court's previous ruling in this matter denying petitioner's Petition for Post-Conviction Relief. The court has carefully reviewed the decision of the Mississippi Supreme Court and meticulously reviewed and re-considered the evidence presented during the original hearing in this matter. The court is ready to enter its revised ruling in this case.

1. The facts surrounding the conviction of petitioner on four counts of capital murder and resulting death sentence are well documented in the direct appeal of such convictions as well as the previous order of this court and the most recent decision of the Mississippi Supreme Court. They do not need repeating here. The issue here is not guilt - but rather whether petitioner suffers from an intellectual disability which prohibits his execution.

2. In both this court's previous order and the Supreme Court's decision, the three factors to be considered when making such a determination may be summarized as follows:

(a) Significantly sub-average intellectual function;

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SEP 25 2017
BRENDA A. WIGGS, CIRCUIT CLERK
BY



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(b) Significant deficits in adaptive behavior; and

(c) Manifestation prior to age 18.

*See* Mississippi Supreme Court decision, No. 2014-CA-00726-SCT, pp. 9 - 10. In an effort to be clear, it is this court's understanding that, to make a finding of intellectual disability, each of the above three criteria must be met. There is some amount of interplay between two of the criteria: (a) significantly sub-average intellectual function, and (b) significant deficits in adaptive behavior. These two factors can act as a "sliding scale" or require a "balancing," *i.e.*, although an individual may possess an IQ above what is normally considered appropriate for a finding of intellectual disability, the deficits in such an individual's adaptive behavior might be so severe that a finding intellectual disability may still be made or even compelled, or an individual may possesses an IQ sufficiently low that a finding of intellectual disability would normally be considered appropriate, however such individual's adaptive behavior might be of such a high or higher order that a finding of intellectual disability might be inappropriate. This must be viewed on a case-by-case basis. The third criterion – manifestation prior to age 18 – does not seem to be as flexible. The intellectual disability either manifested itself prior to age 18 or it did not. It is the court's understanding that even if this court were to find that the petitioner possessed a significantly sub-average intellectual function and significant and/or severe deficits in adaptive behavior that would support a finding of intellectual disability, if such did not manifest itself prior to age 18, then no finding of intellectual disability can be made. The burden of proof for a finding of intellectual disability lies with the petitioner.

3. On the issue of "significantly sub-average intellectual functioning," this court previously found that Carr had failed to carry his burden of proof. However, because this court also found that petitioner suffered from deficits in "at least two (2) of the adaptive skill areas" but failed to (a) specifically identify such areas and (b) further failed to discuss how such deficits might impact the decision regarding the defendant's claim of intellectual disability, this court's earlier decision was reversed and remanded for additional consideration. *See* Carr v. State, 196 So. 3d 926, 943 (¶65) (Miss. 2016).

4. As stated earlier, those factors of significantly sub-average intellectual function and significant deficits in adaptive behavior are interrelated. Neither factor, standing alone, is conclusive of intellectual disability.

5. There is no evidence that Carr was administered an IQ test prior to age 18. The earliest IQ test administered to Carr was by a Dr. Kallman and resulted in a full scale IQ of 70. Carr was 25 years of age at the time. The next IQ test administered to Carr was the Wechsler Adult Intelligence Scale administered by personnel at the Mississippi State Hospital in 2009. Carr would have been 44 years of age. His full scale IQ was determined to be 72. State Hospital personnel also administered the 2009 Stanford-Benet 5 IQ test to Carr where he rated a full scale IQ of 75. The point being that the three IQ tests administered to Carr resulted in IQ determinations of 70, 72, and 75. These scores all fall on or within the margin of error applicable to the test. They are not so dramatically low or high to be strongly suggestive either way on the issue of intellectual disability. This is significant because, "when a defendant's IQ test score falls

within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability...". *See* Carr, 193 So. 3d at 934 (¶26). Again, what one is looking for is evidence that a particular individual possesses not just sub-average intellectual functioning, but *significantly* sub-average intellectual functioning.

6. Turning to the adaptive skills - such adaptive skills are categorized into three *domains*: conceptual, social and practical. Significant deficits in one of the domains is required. Carr, 196 So. 3d at 933 (¶22). As referenced by Justice Lamar, the conceptual skills domain includes "competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. The *social domain* involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The *practical domain* involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others." Carr, 196 So. 3d at 933 (¶23) (citing Chase v. State, 171 So. 3d 463, 469 (Miss. 2015)). At least one of the experts, Dr. Macvaugh, expressed doubt regarding the validity of assessing adaptive skills of individuals, such as Carr, who have been imprisoned for a lengthy period of time. According to Dr. Macvaugh, such tests were not designed to assess individuals who have been incarcerated in a heavily structured environment such as exists in jail/prison.

7. Dr. O'Brien found deficits in all three domains and in 8 of the 10 adaptive skills.

O'Brien specifically addressed the areas of communication, self-direction, leisure, social, community use and work and found deficits in all such areas. He did not expound on his findings but offered them in more of a conclusory manner. Neither in his report nor his testimony did O'Brien give the actual basis for his findings. Macvaugh was not as convinced as O'Brien. As noted, Macvaugh expressed concerns regarding the validity of any such testing. Ultimately, Macvaugh agreed that Carr exhibited deficits in the areas of functional academics, employment, and perhaps social.

8. The only other witness called by either side was a childhood associate of Carr, Johnnie Chaney. This court did not find Chaney's testimony to be particularly helpful. In one manner, it suggested that Carr was somewhat of a loner, an introvert. It also related that Carr played some sports, softball/baseball, with other young people in the community. Chaney's testimony was somewhat of a mixed bag – in some ways helpful to Carr's position, but in others, not helpful. As such, the issue came down more to the testimony and credibility of the experts.

9. When attempting to assess credibility, numerous factors come into play: what is being said, the manner in which it is being said, the demeanor of the witness, the body language and attitude of the witness – factors that do not necessarily relate well on the written page but must be observed first-hand. In observing the two expert witnesses, hearing and considering what they each had to say and the manner in which it was said, this court found Macvaugh to be the more credible witness. As such, this court is persuaded that Macvaugh is more credible in his conclusions – although his ultimate conclusion was that there was insufficient evidence to make

a conclusive finding regarding Carr's intellectual standing. Based upon the evidence presented, this court determines that Carr failed to show by a preponderance of the evidence that he is intellectually disabled.

10. The last factor to be considered is whether such intellectual disability manifested itself prior to age 18. The only evidence presented which can be assured was prior to Carr's 18th birthday was that evidence regarding his schooling. There is no doubt but that Carr did terribly in school. He had excessive absences. Some would argue that such excessive absences were due to the fact that he was so inferior in intellect that he became frustrated and simply avoided school to save embarrassment. Such could be true. It could also be true that it was the excessive absences that led to his doing so poorly academically. One of his family members reported that school and education were not emphasized in the Carr household, and he was not compelled to attend. In this court's previous order it cautioned that "looking back some twenty to twenty-five years into the dimly-lit past of [Carr] to determine if such mental retardation was manifested prior to age 18 was fraught with peril." Such has not changed. The task is made even more difficult with the relatively meager records available from that period of the defendant's life and when dealing with someone who, if intellectually disabled, is only minimally so.

11. Having again considered all of the evidence presented, and having again assessed the credibility of the witnesses and the testimony offered, this court determines that Carr failed to show by a preponderance of the evidence that he was suffering from any intellectual disability that had manifested itself prior to the age of 18.

**IT IS THEREFORE ORDERED and ADJUDGED** and for the reasons stated above, the Petition for Post-Conviction Relief heretofore filed on behalf of the petitioner, **ANTHONY CARR**, shall be and is hereby **DENIED**.

**IT IS FURTHER ORDERED** that the circuit clerk shall mail a copy of this order to counsel for Anthony Carr and to Anthony Carr at his last known address.

**SO ORDERED and ADJUDGED** this the 20th of September, 2017.

CIRCUIT JUDGE



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**Supreme Court of Mississippi**
**Court of Appeals of the State of Mississippi**
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September 12, 2019

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 12th day of September, 2019.

Supreme Court Case # 2017-CA-01481-SCT
Trial Court Case # 5115

Anthony Carr v. State of Mississippi

The Motion for Rehearing filed by Appellant is denied. Kitchens and King, P.JJ., and Ishee, J., would grant.

* NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS *
If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

**Please note: Pursuant to MRAP 45(c), amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found by visiting the Court's website at: https://courts.ms.gov, and selecting the appropriate date the opinion was rendered under the category "Decisions."**

196 So.3d 926
Supreme Court of Mississippi.

Anthony CARR
v.
STATE of Mississippi.

No. 2014–CA–00726–SCT.
|
Aug. 11, 2016.

**Synopsis**

**Background:** Defendant was convicted in the Circuit Court, Quitman County, Elzy Jonathan Smith, Jr., J., of four counts of capital murder, and was sentenced to death. Defendant appealed. The Supreme Court, James L. Roberts, Jr., J., 655 So.2d 824, affirmed. Defendant applied for leave to seek post-conviction relief. The Supreme Court, Cobb, P.J., 873 So.2d 991, granted the application in part and denied it in part. On remand, the Circuit Court, Quitman County, Charles E. Webster, J., found that defendant had failed to prove his execution was prohibited on the basis of intellectual disability and denied his petition for post-conviction relief on that basis. Defendant appealed.

**Holdings:** The Supreme Court, Lamar, J., held that:

[1] justice demanded that Supreme Court allow defendant's out-of-time notice of appeal;

[2] allocating burden of proof to defendant with respect to demonstrating intellectual disability that would preclude his execution did not violate defendant's substantive Eighth Amendment right against cruel and unusual punishment;

[3] allocating burden of proof to defendant with respect to demonstrating intellectual disability that would preclude his execution did not violate defendant's due process rights; and

[4] trial court was required to balance and analyze defendant's adaptive functioning deficits with his IQ score when determining whether defendant had intellectual disability precluding his execution.

Reversed and remanded.

Maxwell, J., specially concurred with separate opinion in which Coleman, J., joined and Randolph, Presiding Judge, joined in part.

Randolph, Presiding Judge, concurred in part and in result without separate written opinion.

King, J., concurred in part and in result with separate written opinion in which Kitchens, J., joined.

West Headnotes (18)

**[1] Criminal Law**
Post-conviction relief

Prosecution's failure to object or respond to petitioner's motion for reconsideration of denial of post-conviction relief precluded prosecution from challenging timeliness of such motion.

**[2] Criminal Law**
Excuse for delay; extension of time and relief from default

Justice demanded that Supreme Court allow out-of-time notice of appeal from denial of petition for post-conviction relief, even though appeal was not filed until 81 days after petitioner's motion for reconsideration was denied; stakes were significant, in that petitioner had been sentenced to death for capital murder, and issues, including whether petitioner had intellectual disability that precluded his execution, merited review. Rules of App.Proc., Rules 2, 4.

**[3] Criminal Law**
Effect of delay

The Supreme Court may suspend appellate rules when justice demands to allow an out-of-time appeal in criminal cases. Rules of App.Proc., Rules 2, 4.

**[4] Criminal Law**
Post-conviction relief

Petitioner was precluded from raising claim, on appeal from denial of post-conviction relief, that given trial court's finding that question of whether he had intellectual disability was too close to call, it was unconstitutional under Eighth or Fourteenth Amendment for him to bear burden of proof with respect to showing intellectual disability that would preclude his execution, where petitioner did not raise such issue before trial court in his motion for reconsideration. U.S.C.A. Const.Amends. 8, 14.

1 Cases that cite this headnote

**[5] Criminal Law**

Burden of proof

**Sentencing and Punishment**

Post-conviction relief

Allocating burden of proof to petitioner, a death-row inmate seeking post-conviction relief, with respect to demonstrating intellectual disability that would preclude his execution did not violate petitioner's substantive Eighth Amendment right against cruel and unusual punishment, even if case involved close call. U.S.C.A. Const.Amend. 8.

**[6] Constitutional Law**

Post-conviction relief

**Criminal Law**

Burden of proof

Allocating burden of proof to petitioner, a death-row inmate seeking post-conviction relief, with respect to demonstrating intellectual disability that would preclude his execution did not violate petitioner's due process rights, even if case involved close call. U.S.C.A. Const.Amend. 14.

**[7] Constitutional Law**

Procedural due process in general

**Constitutional Law**

Presumptions, inferences, and burden of proof

It is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental. U.S.C.A. Const.Amend. 14.

**[8] Constitutional Law**

Presumptions, inferences, and burden of proof

When analyzing whether a burden of proof offends a fundamental principle of justice, so as to be subject to proscription under the Due Process Clause, courts must consider historical practice and whether the burden violates a recognized principle of fundamental fairness in its operation. U.S.C.A. Const.Amend. 14.

**[9] Sentencing and Punishment**

Mentally retarded persons

Intellectual disability precluding death penalty under Eighth Amendment requires significantly subaverage intellectual functioning, significant deficits in adaptive behavior, and manifestation before age eighteen; an assessment of intellectual disability must be retrospective to the time of the crime and before the defendant turned eighteen. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

**[10] Sentencing and Punishment**

Mental Illness or Disorder

The ultimate decision of whether an individual is intellectually disabled and therefore ineligible for execution under the Eighth Amendment rests with the trial judge. U.S.C.A. Const.Amend. 8.

**[11] Criminal Law**

Sufficiency

The trial judge sits as the trier of fact and assesses the totality of the evidence as well as the

  

credibility of witnesses at a post-conviction relief proceeding.

**[12] Criminal Law**

Degree of proof

The burden of proof is on the petitioner seeking post-conviction relief to show by a preponderance of the evidence that he or she is entitled to relief. West's A.M.C. § 99–39–23(7).

**[13] Sentencing and Punishment**

Mentally retarded persons

All three factors, including significantly subaverage intellectual functioning, significant deficits in adaptive behavior, and manifestation before age eighteen, must be met before the petitioner seeking post-conviction relief can be classified as intellectually disabled and declared ineligible for execution under the Eighth Amendment. U.S.C.A. Const.Amend. 8.

**[14] Criminal Law**

Post-conviction relief

If the trial court denies post-conviction relief, the reviewing court will not disturb that court's factual findings unless they are clearly erroneous.

**[15] Criminal Law**

Interlocutory, Collateral, and Supplementary Proceedings and Questions

**Criminal Law**

Post-conviction relief

Factual findings at a post-conviction relief proceeding are not clearly erroneous simply because the reviewing court would have decided the case differently, but that limitation on the reviewing court's scope of review is enforced only where the factfinder applied the correct legal standard.

**[16] Criminal Law**

Interlocutory, Collateral, and Supplementary Proceedings and Questions

Where the trial judge presiding over a petition for post-conviction relief has applied an erroneous legal standard, the reviewing court should not hesitate to reverse.

**[17] Criminal Law**

Review De Novo

When reviewing denial of petition for post-conviction relief, questions of law are reviewed de novo.

**[18] Sentencing and Punishment**

Mentally retarded persons

Trial court was required, when determining whether capital defendant had intellectual disability that would preclude his execution under Eighth Amendment, to balance and analyze defendant's adaptive functioning deficits with his IQ score, and could not rely on defendant's IQ score alone in making determination. U.S.C.A. Const.Amend. 8.

**Attorneys and Law Firms**

***929** Office of Capital Post–Conviction Counsel by Alexander Kassoff, Jamila K. Alexander, Louwlynn V. Williams, attorneys for appellant.

Office of the Attorney General by Jason L. Davis, Cameron Benton, attorneys for appellee.

EN BANC.

**Opinion**

LAMAR, Justice, for the Court:

¶ 1. The Eighth Amendment to the United States Constitution prohibits execution of persons who are intellectually disabled. [1] Following a hearing, the Circuit Court of Quitman County found that death-row inmate Anthony Carr had failed to prove that he is within that category of persons. We reverse and remand for additional findings by the trial court.

  

## FACTS AND PROCEDURAL HISTORY

¶ 2. Just before midnight on February 2, 1990, the Lambert Volunteer Fire Department responded to a call at Carl and Bobbie Jo Parker's home. *Carr v. State,* 655 So.2d 824, 830 (Miss.1995) ("*Carr I* "). Firemen found Carl and the Parkers' children, twelve-year-old Gregory and nine-year-old Charlotte, dead inside. *Id.* at 830. Carl and Gregory each had been shot twice. *Id.* at 832. Their feet and ankles were bound, and their wrists were tied behind their backs. *Id.* at 830. Charlotte had been shot three times, and a piece of binding was on her wrists. *Id.* at 830, 832. She was naked from the waist down under her dress, and there was evidence of sexual battery (both vaginally and anally). *Id.* at 830. Bobbie Jo's body was not found until after the fire was extinguished early the next morning. *Id.* She was burned beyond recognition and had been shot once. *Id.* at 830, 832.

¶ 3. Anthony Carr and Robert Simon Jr. were arrested the next day. *Id.* at 831. After a nine-day trial, Carr was convicted on four counts of capital murder and sentenced to death for each. *Id.* at 832. This Court affirmed his convictions and sentences in 1995. *Id.* at 858.

¶ 4. In 2004, this Court granted Carr leave to proceed in the circuit court on his post-conviction relief claim that he is intellectually disabled and thus ineligible for the death penalty under *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). *Carr v. State,* 873 So.2d 991 (Miss.2004) ("*Carr II* "). Following a hearing, the circuit court denied Carr's petition.

¶ 5. Carr now appeals, raising two issues, which we restate as:

**I. Is it unconstitutional for Carr to bear the burden of proof here, *930 when the trial judge found that the question of his intellectual disability was "too close to call"?**

**II. Did the circuit court err in holding that Carr is not intellectually disabled?**

## DISCUSSION

**[1]** **[2]** ¶ 6. Before turning to Carr's arguments, we first address briefly the State's argument that Carr's appeal should be dismissed as untimely. The circuit court denied Carr's petition on June 19, 2013. Carr moved for reconsideration under Rules 52(b) and 59(e) of the Mississippi Rules of Civil Procedure on July 2, 2013—one day after the ten-day deadline under those rules. The court denied reconsideration on March 3, 2014, and, eighty-one days later, on May 23, 2014, Carr filed an out-of-time notice of appeal. [2]

**[3]** ¶ 7. First, there is no evidence in the record that the State objected or responded to Carr's motion for reconsideration. So the State's challenge to the timeliness of that motion is procedurally barred. Second, while we recognize that Carr's appeal was untimely filed, "[w]e may suspend Rules 2 and 4 'when justice demands' to allow an out-of-time appeal in criminal cases." *McGruder v. State,* 886 So.2d 1, 2 (Miss.2003) (citing *Fair v. State,* 571 So.2d 965, 966 (Miss.1990)). [3] We do so here, because the stakes are significant, and the issues merit review.

### I. Is it unconstitutional for Carr to bear the burden of proof here, when the trial judge found that the question of his intellectual disability was "too close to call"?

¶ 8. After hearing evidence from Carr and from the State, the trial judge found that the question of intellectual disability was "too close to call." But because "[t]here cannot be a tie," the burden of proof became the deciding factor, and the trial judge found that Carr had failed to meet his burden.

¶ 9. Carr argues that he proved by a preponderance of the evidence that he is intellectually disabled. Without conceding that position, he also insists that, even if there was an evidentiary "tie," the case still must be resolved in his favor. Otherwise, argues Carr, a miscarriage of justice will result because the State will one day execute a person who is just as likely as not intellectually disabled.

¶ 10. To be clear, Carr is not asking this Court to alter the burden of proof in all *Atkins* cases. Rather, he argues that when the evidence of intellectual disability is an "actual tie"—as the trial judge found here—the State must then bear the risk of error because the possible injury to the petitioner (i.e.,

  

death) is far greater than the possible harm, if any, to the State. According to Carr, the social harm in executing someone who could be intellectually disabled, combined with the value that society places on individual liberty, requires the State to bear the risk. Moreover, argues Carr, imposing the risk of error on the State is consistent with the "heightened scrutiny" applied in death-penalty cases.

**[4]** ¶ 11. The State argues first that this issue is procedurally barred because Carr failed to raise it before the circuit ***931** court. We agree. *See, e.g., Evans v. State,* 725 So.2d 613, 632 (Miss.1997) (collecting authorities). Carr claims it was impossible for him to do so "until the circuit court issued its order declaring the outcome of the hearing a tie." But while that may be true, Carr could have raised the issue in his motion for reconsideration.

¶ 12. Procedural bar notwithstanding, we find also that this claim lacks merit. As the State points out, the burden of proof in *Atkins* cases is well-settled. [4] And simply put, neither the Eighth Amendment nor the Due Process Clause requires that the State bear the burden here.

**[5]** ¶ 13. Carr's argument could be interpreted two ways. On one hand, he seems to argue that allocating the burden of proof to him under these facts violates his substantive Eighth Amendment right against cruel and unusual punishment. But the United States Supreme Court has never held nor even implied that a burden of proof alone can "so wholly burden an Eighth Amendment right as to eviscerate or deny the right." *Hill v. Humphrey,* 662 F.3d 1335, 1351 (11th Cir.2011) (emphasis omitted); *see also Hall v. Florida,* ——U.S. ——, 134 S.Ct. 1986, 2011, 188 L.Ed.2d 1007 (2014) (Alito, J., dissenting) ("As [the petitioner] concedes, the Eighth Amendment permits States to assign to a defendant the burden of establishing intellectual disability by at least a preponderance of the evidence.").

**[6]** ¶ 14. A second interpretation of Carr's argument implicates due process rather than the Eighth Amendment. In effect, he argues that it is simply unfair to require petitioners to bear the burden of proof when the question of intellectual disability is "too close to call." We note first that this argument is completely unsupported by any authority. A party either bears the burden of proof or it does not. Stated differently, the burden of proof is not somehow allocated once the evidence has been presented.

¶ 15. And importantly, *Atkins* did not establish a burden of proof. Nor did it provide definitive procedural or substantive guides for determining who is intellectually disabled. *Bobby v. Bies,* 556 U.S. 825, 831, 129 S.Ct. 2145, 2150, 173 L.Ed.2d 1173 (2009). Instead, consistent with its approach to insanity in *Ford v. Wainwright,* 477 U.S. 399, 405, 416–17, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), the United States Supreme Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins,* 536 U.S. at 317, 122 S.Ct. 2242.

**[7]** **[8]** ¶ 16. States generally reserve the power to set burdens of proof unless their standard offends some fundamental principle of justice:

> [I]t is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

*Medina v. California,* 505 U.S. 437, 445, 112 S.Ct. 2572, 2577, 120 L.Ed.2d 353 (1992) (quoting *Patterson v. New York,* 432 U.S. 197, 201–02, 97 S.Ct. 2319, 2322, 53 L.Ed.2d 281 (1977)). So when analyzing ***932** whether a burden of proof offends a "fundamental principle of justice," courts must consider historical practice and whether the burden violates a recognized principle of "fundamental fairness" in its operation. *Medina,* 505 U.S. at 446–48, 112 S.Ct. 2572. But there is no historical prohibition on executing the intellectually disabled. *Atkins* was based on society's "evolving standards of decency," not historical tradition. *Atkins,* 536 U.S. at 321, 122 S.Ct. 2242; *Hill,* 662 F.3d at 1350.

¶ 17. And while some states have not expressly assigned a burden of proof in intellectual disability cases, "[a]ll of the states that have expressly assigned a burden of proof regarding mental retardation have assigned this burden to the defendant." Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution,* 30 J. Legis. 77, 118 (2003); *see also Hill,*

  

662 F.3d at 1355; *State v. Jimenez,* 188 N.J. 390, 402, 908 A.2d 181, 188 (2006); *opinion clarified,* 191 N.J. 453, 924 A.2d 513 (2007). Simply put, the Constitution does not require that the State bear the burden of proof in intellectual disability cases. *United States v. Webster,* 421 F.3d 308, 311 (5th Cir.2005).

¶ 18. Finally, Carr has cited no authority to support his assertion that the burden of proof should shift to the State when a case is close. It is telling that Carr cites a veteran's-disability case to support the standard he advances. As the Eleventh Circuit Court of Appeals said in *Hill:*

> A third critical flaw in Hill's argument is that *a risk of error exists with any burden of proof.* Every standard of proof allocates some risk of an erroneous factual determination to the defendant and therefore presents some risk that mentally retarded offenders will be executed in violation of *Atkins* ....
>
> *The necessary result of Hill's reasoning is that the burden of proof must be placed on the state and that the state must prove beyond any doubt that an offender is not mentally retarded. No state uses that standard. The effective result of Hill's argument, then, is that every state's death penalty statute or case law procedure is unconstitutional* because none of them requires the state to prove the absence of mental retardation beyond a reasonable doubt. Or, to take Hill's argument to its logical conclusion, beyond all doubt....

*Hill,* 662 F.3d 1335, 1355–56 (emphasis added).

¶ 19. In sum, we find that Carr's burden-of-proof argument lacks merit. The difficulty in ascertaining where the truth lies may be a reason *for* placing the burden of proof on the proponent of an issue. *Cooper v. Oklahoma,* 517 U.S. 348, 366, 116 S.Ct. 1373, 1384, 134 L.Ed.2d 498 (1996). The effect of Carr's proposal would be to prohibit the execution of anyone who is even arguably intellectually disabled. Neither the Eighth Amendment nor the Due Process Clause require such a rule.

¶ 20. So having determined that Carr's burden of proof is not unconstitutional, we turn now to his second issue on appeal and the evidence presented to the circuit judge.

**II. Did the circuit court err in holding that Carr is not intellectually disabled?**

A. Intellectual disability requires significantly subaverage intellectual functioning, significant deficits in adaptive behavior, and manifestation of both before age eighteen.

¶ 21. In *Chase v. State,* this Court "recognize[d] developments in the field of assessing intellectual disability that have ***933** manifested since *Atkins* and *Chase.*" *Chase v. State,* 171 So.3d 463, 469 (Miss.2015) ( "*Chase V* "). This Court noted that, in 2004, it had adopted the American Association on Mental Retardation's (AAMR) and the American Psychiatric Association's (APA) definitions of intellectual disability cited in *Atkins. Id.* at 471. This Court then took the opportunity to "adopt the 2010 AAIDD and 2013 APA definitions of intellectual disability as appropriate for use to determine intellectual disability in the courts of this state in addition to the definitions promulgated in *Atkins* and *Chase.*" *Id.*

¶ 22. The American Association on Intellectual and Developmental Disability (formerly the AAMR) defines intellectual disability as a condition originating before age eighteen "characterized by significant limitations in both intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills." *Id.* at 469 (citations omitted). Significant deficits in one of the three adaptive-functioning domains are required:

> The conceptual skills domain includes "language; reading and writing; and money, time, and number concepts." The social skills domain includes "interpersonal skills, social responsibility, self-esteem, gullibility, naivete (i.e., wariness), follows rules/obeys laws, avoids being victimized, and social problem solving." The practical skills domain includes "activities of daily living (personal care), occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone."

*Chase V,* 171 So.3d at 469 (internal citations omitted).

¶ 23. And the APA defines intellectual disability as "a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains." *Id.* (citations omitted). Individuals must have significant deficits in one of the three domains:

  

> The *conceptual (academic) domain* involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problems solving, and judgment in novel situations, among others. The *social domain* involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The *practical domain* involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others.

*Id.* at 469–70.

**[9]** ¶ 24. Ultimately though, the exact wording of the above standards "makes little substantive difference." *Id.* at 470. All are similar and require the same three basic elements: "significantly subaverage intellectual functioning, significant deficits in adaptive behavior, and manifestation before age eighteen." *Id.* An assessment of intellectual disability must be retrospective to the time of the crime and before the petitioner turned eighteen. *Id.* at 468 (citing *Goodin,* 102 So.3d at 1115).

¶ 25. Recently, in *Hall v. Florida,* the United States Supreme Court analyzed Florida's capital sentencing scheme as it pertains to intellectually disabled persons. *Hall v. Florida,* —— U.S. ——, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014). Florida's Supreme Court had interpreted Florida's statute very strictly, such that a person whose IQ test score is above 70—including ***934** a score within the margin of error[5]—"does not have an intellectual disability and is *barred* from presenting other evidence that would show his faculties are limited." *Id.* at 1994 (emphasis added).

¶ 26. In finding that interpretation unconstitutional, the United States Supreme Court said

> Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.
>
> ....
>
> Intellectual disability is a condition, not a number. Courts must recognize, as does the medical community, that the IQ test is imprecise. This is not to say that an IQ test score is unhelpful. It is of considerable significance, as the medical community recognizes. But in using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number. A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability.
>
> This Court agrees with the medical experts that *when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.*
>
> *It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment.* See DSM–5, at 37 ("[A] person with an IQ score above 70 may have such *severe* adaptive behavior problems .... that the person's actual functioning is comparable to that of individuals with a lower IQ score").
>
> ....
>
> By failing to take into account the standard error of measurement, Florida's law not only contradicts the test's own design but also bars an essential part of a sentencing court's inquiry into adaptive functioning. *Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime.*

*Id.* at 1995; 2001 (citations omitted) (emphasis added).

  

B. Pre–Hearing Assessment by
the Mississippi State Hospital.

¶ 27. In 2009, Drs. Gilbert S. Macvaugh III and Reb McMichael and their team at the Mississippi State Hospital evaluated forty-four-year-old Carr. Carr's expert, Dr. C. Gerald O'Brien, did not interview Carr or assess him personally, but he relied ***935** on the State Hospital team's assessment when forming his opinion about Carr's intellectual functioning.

¶ 28. To assess Carr's intellectual functioning, the team considered three intelligence tests. The earliest took place in 1990 in the context of a pretrial forensic mental evaluation. Dr. William M. Kallman administered then-twenty-five-year-old Carr the Wechsler Adult Intelligence Scale–Revised (WAIS–R). [6] Carr's full-scale intelligence quotient (IQ) score was 70, putting him in "the mildly mentally retarded range." Dr. Kallman did not administer a test for malingering. He noted that Carr "may have exaggerated his psychological distress somewhat," but considered the evaluation a "valid indicator" of Carr's cognitive functioning and saw "no signs of malingering or intentional efforts to distort the data."

¶ 29. The State Hospital team administered two intelligence tests: the Wechsler Adult Intelligence Scale–Fourth Edition (WAIS–IV) and the Stanford–Binet Intelligence Scales, Fifth Edition (SB–5). Carr's full-scale IQ score on the WAIS–IV was 72. Given test error, there was a ninety-five-percent chance that his "true" full-scale IQ score fell between 68 and 77. He scored 70 on Verbal Comprehension, 75 on Perceptual Reasoning, 89 on Working Memory, and 79 on Processing Speed.

¶ 30. On the SB–5, Carr's full-scale IQ score was 75. Given test error, there was a ninety-five-percent chance that his "true" full-scale IQ score was between 72 and 80. He scored 71 on Fluid Reasoning, 72 on Knowledge, 81 on Quantitative Reasoning, 82 on Visual Spatial, and 89 on Working Memory.

¶ 31. The State Hospital team also administered two tests for malingering, the Rey 15–Item Memory Test and the Test of Memory Malingering (TOMM), and neither test suggested that Carr was malingering. Based on Carr's test behavior and his performance on the malingering measures, the State Hospital team considered the WAIS–IV and SB–5 scores to be "valid estimates of his true intellectual ability."

¶ 32. In terms of intellectual functioning, the State Hospital team concluded that Carr was "at worst, functioning in the upper portion of the mild range of mental retardation; or at best, the lower portion of the borderline range of intellectual ability":

> When considering the consistency in ... Carr's Full Scale IQ scores over time and across different instruments (i.e., WAIS–R = 70, WAIS–IV = 72; SB–5 = 75), this seems to suggest that he is likely functioning in the low borderline range of intellectual ability. However, because of the error associated with all intelligence tests (plus or minus five points), and because IQ scores become artificially inflated over time (Flynn Effect), Mr. Carr's IQ scores on the tests that we administered to him do not necessarily rule out the possibility of the diagnosis of mild mental retardation.

For adaptive deficits, the State Hospital team said Carr "*may* have demonstrated significant limitations in at least two areas of adaptive behavior before the age of 18 (i.e., functional academics and work)."

¶ 33. Evidence regarding functional academics conflicted. On one hand, school records showed that Carr had failed third, seventh, and ninth grades. He dropped out after his second attempt at ninth grade. And his grades were always "quite ***936** poor," ranging from failing to barely passing. On the other hand, Carr's absences were excessive, as he missed from twenty-five to forty-seven days each year.

¶ 34. Despite Carr's excessive absences, achievement-test data suggested he "probably demonstrated adaptive behavior deficits in the area of functional academics prior to the age of 18." His eighth-grade achievement-test scores ranged from first to thirty-sixth percentile. He scored similarly on achievement testing done by Dr. Kallman in 1990, achieving third-and fourth-grade levels in reading, spelling, and math.

¶ 35. The State Hospital team could not determine if Carr had adaptive deficits in the area of employment. His work

  

history was contradictory and inconsistent. The State Hospital team also noted limited, inconsistent information concerning Carr's adaptive functioning in the community before his arrest at age twenty-five. Family members who were interviewed all described Carr as having both intellectual and adaptive behavior deficits. But the State Hospital team noted in its report that "concerns exist with regard to the reliability of the information obtained from these family members." [7]

¶ 36. The State Hospital team interviewed one of Carr's former teachers, Cedonia Hunt, and included information from her in its report:

> Hunt reported that she taught Mr. Carr "sometime in the late 70's." She taught him in both "fifth and the sixth grades." She also stated that he was in her "homeroom" in grade six. She is currently 63 years of age and has been retired as a schoolteacher for the last fourteen years.
>
> Asked how well she remembered Mr. Carr, she replied, "Pretty well." Asked if she had ever worked with students diagnosed with mental retardation, she replied, "Yeah." She then noted, "I don't think he was mentally retarded ... he was slow but not retarded."
>
> Asked what type of student Mr. Carr was in her classes, she replied, "Poor." Asked what was this cause for this, she replied, "Home environment and basically didn't want to do it ...[.] I felt he could do better." Asked if he got into trouble during his school years, she replied, "As far as I can remember, yeah, fights and not paying attention." Asked if he missed a lot of school, she replied, "A lot, made D's in most subjects but because of his age, we decided to move him on because smaller children he would be with." Asked if he was ever in any kind of Special Education classes, she replied, "Not that I know of ... I always knew that he could have done better ... it was the environment, the people he was around."
>
> Asked if she thought he had mental retardation, she replied, "I don't think he was ... he might have had a learning disability." Asked if Special Education services were available for students at that time in that school, she replied, "Yes."

The State Hospital team considered Hunt's reliability to be good.

¶ 37. After considering all the information compiled in its fifty-eight-page report, the State Hospital team could not "offer an opinion to a reasonable degree of psychological and psychiatric certainty." It summarized its assessment as follows:

> In summary, Mr. Carr does, in our opinion, have intellectual limitations and may ***937** very well have met the diagnostic criteria for mental retardation before the age of 18. However, we cannot be certain of this because he never received intelligence testing or a standardized assessment of his adaptive functioning before age 18. The only known prior intelligence testing was administered to him by Dr. Kallman within the context of a pre-trial forensic evaluation following his arrest at the age of 25. Dr. Kallman's evaluation suggested that Mr. Carr may have been exaggerating symptoms of mental illness at the time but did not include an assessment of whether or not he may also have been fabricating or exaggerating intellectual deficits at that time as well.
>
> During our evaluation of him, Mr. Carr scored slightly higher on the intelligence testing that we administered to him, suggesting that he is likely functioning in the borderline range of intelligence, as opposed to the mildly mentally retarded range. Similarly, on the achievement testing that we administered to him, Mr. Carr scored somewhat better compared to his achievement test scores when administered similar testing in 1990 by Dr. Kallman, which suggests that Mr. Carr's functional academic abilities are not currently impaired to the extent that Dr. Kallman described during his evaluation of Mr. Carr nearly 20 years ago.
>
> According to all of the professional definitions of, and formal diagnostic criteria for, the diagnosis of mental retardation, there must be evidence of manifestation of the disability during the developmental period (i.e., onset before the age of 18). Also according to the professional definitions, a person with mental retardation may, over time and with proper supports, improve in his or her functioning to the point that they no longer meet the diagnostic criteria for the disability. It is difficult to determine in Mr. Carr's case whether or not his functioning prior to the age of 18 actually indicated that he had mental retardation. There were some data to suggest that had he been properly evaluated for this, he may have received a diagnosis of mental retardation at that time. There also were some data to suggest that he may not have qualified for this diagnosis before the age of 18. Because of these contradictory data, we are unable to state definitively a retrospective opinion to a reasonable degree of psychological and psychiatric

  

certainty that Mr. Carr was not mentally retarded before the age of 18.

In our opinion, Mr. Carr did not appear to be mentally retarded at the time of our evaluation of him. However, our assessment of his more recent functioning, particularly his adaptive behavior over the course of his adult years while on death row, is confounded by how well he appears to function within the structure of a prison environment. Moreover, how well a person functions in prison is a poor index of what his actual level of functioning may be in the community, which is more relevant for making a diagnosis of mental retardation.

C. The circuit court heard conflicting evidence at the hearing.

¶ 38. Three witnesses testified at the *Atkins* hearing: former neighbor Johnie Chaney and Dr. O'Brien for Carr, and Dr. Macvaugh for the State.

¶ 39. At age fourteen, Chaney moved into a house near Carr's. Chaney could not recall Carr's age at that time and conceded that Carr was possibly older than eighteen. The two knew each other and played games and sports together, including basketball and softball. In softball, Carr played in the outfield and did ***938** well at that position. "I told him to run and catch [the ball]," Chaney said, and Carr did so after receiving Chaney's instruction.

¶ 40. Chaney described Carr as a "follower" and said Carr had personal hygiene problems on occasion. "[Carr] came around me a couple of times and he had a odor to him," and Chaney would tell Carr to "freshen up." Chaney also helped Carr with his clothes and shoes. "I used to help [Carr], you know, keep his clothes right on him and tell him about his shoes. He would leave his shoes and things all untied, you know, stuff like that," Chaney explained.

¶ 41. Dr. O'Brien found to a reasonable degree of certainty that Carr was intellectually disabled. Dr. O'Brien reviewed the same data as the State Hospital team, plus Carr's fourth- and fifth-grade-level scoring on the Woodcock–Johnson III achievement test administered by Dr. Victoria Swanson in 2010. But Dr. O'Brien neither tested Carr nor evaluated him, nor did he interview any collateral sources. A paralegal in his office did follow-up interviews with a couple of collateral sources.

¶ 42. Dr. O'Brien found that Carr met the intellectual-deficit criterion based on the "ability testing" done by Dr. Kallman and the State Hospital team, which Dr. Swanson's testing corroborated. "[O]rdinarily an IQ score up to 75 is considered significantly subaverage," Dr. O'Brien said. He did not question the validity of Dr. Kallman's testing, but he did have some concern about not having Dr. Kallman's raw test data. He said he did not like relying on intelligence tests without having such data, but he chose to take Dr. Kallman's testing as reported because the data simply was unavailable.

¶ 43. On cross-examination, the State questioned Dr. O'Brien about why his report had omitted Carr's 89 Working Memory and 79 Processing Speed Index Scores on the WAIS–IV. Dr. O'Brien said he omitted those scores because he had no prior testing with which to compare them. "The only things I included in my little chart were those that could be at least roughly compared with previous tests results," he explained. In his view, the 79 Processing Speed Index Score was "not particularly significant." Yet he acknowledged that the 89 Working Memory Index Score "could be" contraindicative of intellectual disability.

¶ 44. For adaptive deficits, Dr. O'Brien conducted a retrospective analysis and found deficits in all three domains (conceptual, social, and practical) and in eight of the ten skill areas (communication; functional academics; self-direction; leisure; social skills; home living; health and safety; and self-care).

¶ 45. In considering onset before age eighteen, Dr. O'Brien relied primarily on Carr's school records and Hunt's statements corroborating that Carr had performed poorly in school. Carr failed three grades and, according to Hunt, was moved from sixth to seventh grade only because of his size. While acknowledging that Carr's absences could have contributed to his poor performance, Dr. O'Brien did not give that factor much weight. [8] In Dr. O'Brien's view, school records reflect that Carr began reaching his peak academic potential by about the third grade.

***939** ¶ 46. Dr. O'Brien did not see Carr's lack of placement in special education as significant. Though Hunt said special-education services were available, Dr. O'Brien's research showed that was unlikely based on the laws in effect at that time. He also questioned Hunt's memory: she said she had taught Carr in fifth and sixth grades, but records showed she taught him in sixth grade only. Regardless, Dr. O'Brien saw

  

Carr's actual performance in school (which was poor) as more important than whether or not Carr was in special-education classes.

¶ 47. Dr. O'Brien also discounted Hunt's opinion that Carr might have had a learning disability as opposed to being intellectually disabled. A learning disability, Dr. O'Brien explained, implies a deficiency in one or two subjects. But Carr's scores or grades all were low. Moreover, diagnosis of a learning disability requires formal testing. Dr. O'Brien testified further that Carr's achievement-test scores showed "significantly subaverage performance." In eighth grade, at age fifteen, Carr scored in the tenth percentile on the California Achievement Test. Dr. O'Brien noted that Carr's thirty-sixth-percentile score in Spelling on that test was "amazingly high" given his scores in other areas. Dr. O'Brien viewed that score and Carr's thirty-fourth-percentile score in Math Computation as outliers.

¶ 48. The State challenged Dr. O'Brien about his failure to include any information in his report that was contrary to his opinion. Dr. O'Brien replied that his report was designed to be brief and that, in his view, the conflicting data was unsubstantial and did not merit mention:

> I don't believe there are significant warnings and cautions that should [have been included]. I believe there are a number of items within the test data, for example, that are not particularly consistent. However, they are not substantial and significant. There are dozens and dozens of scores that are essentially consistent with his level of functioning as we've talked about it. There are a handful that aren't. I don't think the handful warrants me making a note in this report.

¶ 49. While conceding that Carr has intellectual limitations, Dr. Macvaugh was unable to offer an opinion to a reasonable degree of psychological certainty that Carr is intellectually disabled. Dr. Macvaugh, testified that "[t]here are data, in my opinion, that suggest that Mr. Carr might have mental retardation, and there are data to suggest he might not."

¶ 50. In Dr. Macvaugh's opinion, Carr does not currently satisfy the intellectual-deficit criterion. At the same time, he could not rule out the possibility:

> We had conflicting data as to the intellectual impairment prong. Based on our test in August of 2009, he scored a little north of where someone with mild [intellectual disability] would ordinarily score. However, considering test error, the Flynn [E]ffect, the other issues ... that could potentially affect the validity of test scores, it's possible that he might be in that range that's consistent. He is in that zone of ambiguity.

Dr. Macvaugh testified that Carr was "essentially in that what we call the zone of ambiguity with these IQ test scores. They're all fairly close and fairly consistent. They're all technically at or above the cutoff." Dr. Macvaugh also said that Carr's tests were within the margin of error.

¶ 51. Dr. Macvaugh interpreted the 89 Working Memory and 79 Processing Speed Index Scores on the WAIS–IV differently than Dr. O'Brien. In his opinion, both scores were inconsistent with intellectual disability. Dr. Macvaugh also found ***940** Carr's score of seven on Arithmetic within the Working Memory Index Score to be "significant." Further, Dr. Macvaugh said that Carr's 81 in Quantitative Reasoning (tenth percentile), 82 in Visual Spatial (twelfth percentile), and 89 in Working Memory (twenty-third percentile) were "noteworthy."

¶ 52. This data left Dr. Macvaugh unable to form an opinion to a reasonable degree of confidence as to whether Carr had intellectual deficits before age eighteen. Dr. Macvaugh saw Dr. Kallman's testing as pivotal:

> If that [IQ] score is valid, the 70 from Dr. Kallman from 1990, [Carr] is certainly within range. Excluding a discussion of error. But I don't know that it's valid. And that's the closest score in terms of the nexus between the developmental onset criterion for

  

> the diagnosis. There has to be evidence that the disability manifests itself before the age of 18. He was 25 when he took the test. If it's valid, those are the best IQ data we've got in terms of confirming the presence of the disorder during the developmental period, in terms of the onset. But, again, I can't confirm that.

Unlike Dr. O'Brien, Dr. Macvaugh saw raw data as "paramount." "[T]here could be gross flaws in the scoring or in the administration of the test that make the scores completely useless," he explained. In addition to the lack of raw data, Dr. Kallman did not administer a malingering test.

¶ 53. For adaptive functioning, Dr. Macvaugh reviewed school and Mississippi Department of Corrections records and interviewed collateral sources. Contrary to Dr. O'Brien, he believed that Carr's thirty-fourth and thirty-sixth percentile scores in Math Computation and Spelling, respectively, were both inconsistent with intellectual disability. And even though Carr's grades consistently were failing or near failing, the fact that Carr reached eighth grade was significant:

> In my experience that is rare [for someone who is intellectually disabled to even be in the eighth grade]. Usually folks that have mild mental retardation achieve at about or up to the sixth grade level. They are often in special education; not always, for some of the reasons that Dr. O'Brien was asked about. My understanding and my experience, however, is that it is very uncommon for somebody who has mental retardation or intellectual disability, to make it to the eighth grade and obtain certain achievement test scores with national percentile rankings this high if they had mental retardation. Those factors together would be unlikely, in my opinion. Is it possible? Sure. Is it probable? Probably not.

Dr. Macvaugh also saw Hunt as a credible, reliable source.

¶ 54. Dr. Macvaugh was noncommittal as to whether Carr's nonplacement in special education showed that Carr was not intellectually disabled. On one hand, he believed it would be "very difficult" for someone who is intellectually disabled to make it to ninth grade without special education. Further, some of Carr's achievement-test scores raised doubts as to whether Carr would have been eligible for special education. At the same time, Dr. Macvaugh said other factors could have kept Carr from being placed in special education. Schools sometimes refrain from identifying intellectual impairments because of social stigma, political pressures, economics, racial issues, and over-identification biases. Like Dr. O'Brien, Dr. Macvaugh did not attribute much weight to Carr's excessive absences. On one hand, he said it is hard to learn if you do not attend. But people with intellectual ***941** disabilities often miss school for that very reason: they are embarrassed about their underperformance.

¶ 55. In assessing adaptive deficits, Dr. Macvaugh could not form a definitive opinion. "In my opinion, the possible areas of adaptive deficits that we had concerns about ... consisted of functional academics and employment history. Those were two that [Carr] could possibly have. But the data, again, were contradictory, inconsistent, and didn't fall squarely in one direction or the other."

¶ 56. Finally, Dr. Macvaugh was critical of Dr. O'Brien's methodology. Dr. Macvaugh said he would not have proceeded as Dr. O'Brien did—without testing or evaluating Carr, or personally interviewing collateral sources. "I don't think I have ever seen a forensic psychologist offer a definitive opinion, to a reasonable degree of psychological certainty, without personally evaluating the defendant, without personally collecting the data," Dr. Macvaugh said. He also believed that forensic and ethical guidelines require all data—both supportive and nonsupportive of the expert's opinion—to be included in a report.

### D. The circuit judge found that Carr had failed to prove significantly subaverage intellectual functioning.

¶ 57. After hearing all of the evidence detailed above, the circuit judge issued an order denying Carr's petition. After detailing the various IQ tests administered and the expert's testimony about the tests, the trial judge concluded

  

> It can be said comfortably that Carr's IQ, as demonstrated by the tests which were given, falls somewhere in the 70 to 75 range. Given the applicable and conceded margin [of] error of five (5) points either way which is applicable to such test[s], Carr's actual IQ could range anywhere from a low of 65 to a high of 80. Obviously the lower the IQ, the more mental retardation is suggested. The higher the IQ, the less mental retardation is suggested. This is the inherent flaw in attempting to come to a concrete conclusion regarding a particular subject when the means for doing so relies on a margin of error. Certainly, Carr's intelligence level is at the lower end of the spectrum, but is it *significantly* sub-average? Given the range within which the test results are found and the applicable margin of error, this court cannot find by a preponderance of the evidence that Carr has carried his burden of proof. **While this finding alone is sufficient to deny Carr's claim of mental retardation,** because of the significance of this decision, the court will consider the other two remaining factors.

(Emphasis added). The trial judge then went on to discuss the other two factors. And while he found that Carr had "demonstrated adaptive skill deficits in at least two (2) of the adaptive skill areas noted in the applicable definitions," he did not specify in which two areas he found those adaptive deficits, nor did he discuss the severity or extent of those deficits. [9]

E. The circuit judge used an erroneous legal standard.

**[10]** **[11]** **[12]** **[13]** ¶ 58. The ultimate decision of whether an individual is intellectually disabled ***942** for purposes of the Eighth Amendment rests with the trial judge. *Doss v. State,* 19 So.3d 690, 714 (Miss.2009). The trial judge "sits as the trier of fact and assesses the totality of the evidence as well as the credibility of witnesses." *Id.* The burden of proof "is on the petitioner to show 'by a preponderance of the evidence' that he [or she] is entitled to relief." *Goodin,* 102 So.3d at 1111 (quoting *Doss,* 19 So.3d at 694); *see also* Miss.Code § 99–39–23(7) (Rev.2015) ("No relief shall be granted under this article unless the petitioner proves by a preponderance of the evidence that he is entitled to the relief."). And all three of the factors—significantly subaverage intellectual functioning, significant deficits in adaptive behavior, and manifestation before age eighteen—must be met before the petitioner can be classified as intellectually disabled and declared ineligible for execution under *Atkins* *Doss,* 19 So.3d at 709.

**[14]** **[15]** **[16]** **[17]** ¶ 59. If the trial court denies relief, this Court will not disturb that court's factual findings unless they are clearly erroneous. *Goodin v. State,* 102 So.3d 1102, 1111 (Miss.2012) (quoting *Doss,* 19 So.3d at 694). Factual findings are not clearly erroneous simply because this Court would have decided the case differently. *Booker v. State,* 5 So.3d 356, 358 n. 2 (Miss.2008) (quoting *Easley v. Cromartie,* 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001)). But this limitation upon our scope of review is enforced "*only where the factfinder applied the correct legal standard.*" *McClendon v. State,* 539 So.2d 1375, 1377 (Miss.1989) (emphasis added). On the other hand, "*where ... the trial judge has applied an erroneous legal standard, we should not hesitate to reverse.*" *Id.*(emphasis added). And questions of law are reviewed de novo. *Goodin v. State,* 102 So.3d 1102, 1111 (Miss.2012) (citation omitted).

¶ 60. As discussed above, the current medical literature establishes three criteria for courts to consider: (1) significantly subaverage intellectual functioning, (2) significant deficits in adaptive functioning, and (3) manifestation before age eighteen. *Chase v. State,* 873 So.2d 1013, 1029 (Miss.2004). With regard to the first criterion, this Court recognized that medical literature generally quantifies significantly subaverage intellectual functioning as two standard deviation below the mean full-scale IQ score, 70, but that "[a]ccording to the DSM–IV, 'it is possible to diagnose Mental Retardation in individuals with

  

IQ's between 70 and 75 who exhibit significant deficits in adaptive behavior.' " *Id.* at 1028.

¶ 61. But in *Hall v. Florida,* the United States Supreme Court made clear that states' discretion to establish criteria is not unlimited. *Hall,* 134 S.Ct. at 1998 ("But *Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection."). That Court held that "[t]he legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework." *Id.* at 2000. Relying on "the medical community's diagnostic framework," the Supreme Court further stated "[i]t is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment." *Id.* at 2001.

¶ 62. So according to the Supreme Court, the Florida statute at issue—which categorically excluded from its definition of intellectual disability all persons with an IQ above 70—failed constitutional scrutiny not only because it "fail[ed] to take into account the standard error of measurement, ... but also [because it] bars an essential part of a sentencing court's inquiry into adaptive functioning." *Id.* "[W]hen a defendant's IQ test score falls within the ***943** test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive functioning." *Id.* Thus, a legal standard that views a full-scale IQ score as dispositive of intellectual disability without performing and balancing an interrelated analysis of adaptive functioning, runs afoul of the Eighth Amendment.

¶ 63. The prevailing medical literature—which this Court has adopted as Mississippi's legal standard—confirms this view. The Diagnostic and Statistical Manual, Fifth Edition, states that:

> IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such *severe* adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.

DMS–V at 37 (emphasis added). So subaverage intellectual functioning (the first criterion) must be considered conjunctively with—and balanced with—adaptive functioning (the second criterion). Specifically, when the petitioner's full-scale IQ falls within the possible range for intellectual disability, the factfinder must consider whether the petitioner exhibits such severe deficits in adaptive functioning to support adjudication as intellectually disabled.

**[18]** ¶ 64. Here, the circuit judge held: "It can be said comfortably that Carr's IQ, as demonstrated by the tests which were given, falls somewhere in the 70–75 range." But—despite Carr's full-scale IQ between 70 and 75—the circuit judge failed to consider intellectual and adaptive functioning as an interrelated analysis. Instead, he found that Carr failed to prove subaverage intellectual functioning, and that this failure alone disposed of the case. He stated: "[T]his court cannot find by a preponderance of the evidence that Carr has carried his burden of proof" to show significantly sub-average intellectual functioning. "[T]his finding alone is sufficient to deny Carr's claim of mental retardation." This finding was clearly erroneous as a matter of law.

¶ 65. Then, based on the "significance of [his] decision," the circuit judge stated he would proceed to consider the two remaining criteria. But despite finding that Carr had proven the existence of two adaptive functioning deficits, the circuit judge did not identify those deficits, make any findings regarding their severity, or consider them as part of an interrelated analysis with Carr's intellectual functioning. Because "the medical community's diagnostic framework" recognizes that Carr's IQ between 70 and 75, coupled with "severe adaptive behavior problems" could support a diagnosis of intellectual disability, the circuit judge applied an incorrect legal standard by treating Carr's IQ score alone as dispositive of this case, and by failing to balance and analyze his adaptive functioning deficits with his IQ score. We therefore reverse the trial court judgment and remand this case to provide the circuit judge an opportunity to consider whether Carr's adaptive functioning deficits—which the circuit judge found to exist—are so severe that Carr should be ruled intellectually disabled through an interrelated

  

analysis with his IQ scores, which the circuit judge found to be between 70 and 75. [10]

***944 CONCLUSION**

¶ 66. For the foregoing reasons, we reverse the circuit judge's ruling and remand this case for new factual findings applying the correct legal standard. We therefore reverse the judgment of the Quitman County Circuit Court and remand this case for proceedings consistent with this opinion.

¶ 67. **REVERSED AND REMANDED.**

WALLER, C.J., DICKINSON, P.J., COLEMAN AND BEAM, JJ., CONCUR. MAXWELL, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY COLEMAN, J.; RANDOLPH, P.J., JOINS IN PART. RANDOLPH, P.J., CONCURS IN PART AND IN RESULT WITHOUT SEPARATE WRITTEN OPINION. KING, J., CONCURS IN PART AND IN RESULT WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS, J.

MAXWELL, Justice, specially concurring:

¶ 68. This case presents a battle of experts and under a typical common-sense approach to expert testimony should be affirmed. The judge weighed both side's experts, and after doing so, concluded Carr failed in his burden of proof. While this is generally how our courts handle expert testimony, the majority finds the trial judge erred in this process, essentially for thinking like a jurist, not a doctor.

¶ 69. The majority reverses the judge's decision because he utilized a general legal framework and did not follow "the medical community's diagnostic framework." Though this reasoning is counterintuitive to how our trial courts operate, it is the exact method dictated by the United States Supreme Court's holding in *Hall.* [11] So I am constrained to find the majority correctly applies *Hall* when it finds the trial judge reversibly erred by "failing to balance and analyze his adaptive functioning deficits with his IQ score."

¶ 70. But I write separately because this case is a prime example of the confusion created by *Atkins* [12] and compounded by *Hall.* Undoubtedly, whether someone is ineligible for the death penalty due to intellectual disability is a *legal* question. Yet it is a legal question the United States Supreme Court has said must be largely informed by the *medical* community. [13] And therein lies the problem.

¶ 71. Medicine—and specifically the field of psychology—is a completely different discipline than the law. Indeed, psychology openly embraces ever-evolving definitions [14]—a stark contrast to our common law's doctrine of stare decisis. The trial judge in this case certainly felt this tension. In his final order, he lamented "the difficulty when attempting to make a concrete decision when the factors upon ***945** which the decision must be based are grounded in the soft sciences."

¶ 72. This begs the question—Why are we asking our trial judges to wade into the soft sciences and make *medical* diagnoses? We do not do that in other legal contexts. According to the majority, the trial judge here failed to "recognize [ ] that Carr's IQ between 70 and 75, coupled with 'severe adaptive behavior problems' could support a *diagnosis* of intellectual disability." But our trial judges are not licensed forensic psychologists. Instead, their role as a neutral and detached magistrate necessarily depends on licensed forensic psychologists to give *their* expert diagnoses. This is the very reason why this Court requires every *Atkins* claimant to produce at least one licensed forensic psychologist willing to testify to a reasonable degree of certainty that the claimant meets the adopted clinical definitions of intellectually disabled. [15]

¶ 73. Here, the judge was presented with two expert opinions. Carr's expert, Dr. Gerald O'Brien, testified Carr was intellectually disabled. But O'Brien refused to specify how he reached his conclusions. Further, he admitted he was not personally involved in the investigative process. The State's expert, Dr. Gilbert Macvaugh, by contrast, testified he could not reach a reasonable degree of certainty whether Carr was or was not intellectually disabled, based on the lack of data. Moreover, the one lay witness was "unhelpful"-neither leading credence or doubt to either expert's view. The trial judge ultimately found the State's expert was more credible, agreeing the question of Carr's intellectual disability was "too close to call." The judge then considered this evidentiary finding in light of the applicable legal standard. And he held Carr to his legally required burden of proof. This type of analysis should be legally sufficient, since it is the exactly how judges size up expert testimony in other contexts. But it is not under *Atkins* and *Hall.*

  

¶ 74. Logic dictates we should allow our judges to function like trial judges and to *weigh the evidence*—particularly, the credibility of the expert witnesses and *their* diagnoses—to make a finding whether the claimant met his or her burden of proof to show intellectual disability. It makes no sense to demand our trial judges pretend they are psychologists and to delve into the three criteria that comprise the clinical definition of intellectual disability to make an *independent* diagnosis. But unless and until the United States Supreme Court untethers its Eighth Amendment jurisprudence from the ever-changing clinical definition of intellectual disability, this is the exact approach our trial judges must utilize. Until then, our judges apparently will have to don the hats of psychologists and apply the proper "diagnostic framework." [16]

COLEMAN, J., JOINS THIS OPINION. RANDOLPH, P.J., JOINS THIS OPINION IN PART.

KING, JUSTICE, concurring in part and in result:

¶ 75. Because I disagree with the manner in which the majority reframed the issues on appeal and with the majority's failure to address the issue of Carr's elementary school teacher's opinion, I write separately. I agree, however, with the majority's assessment that the trial court erred in finding IQ alone determinative and with the decision to reverse and remand the case.

***946** ***1. The Standard of Review Argument***

¶ 76. The majority "restated" the issue on appeal as "Is it unconstitutional for Carr to bear the burden of proof here, when the trial judge found that the question of his intellectual disability was 'too close to call'?" Yet, the exact issue raised by Carr was "Will the circuit court's holding that the outcome of the *Atkins* hearing was a tie and that, because of the burden of proof, the State must prevail, result in an unacceptable risk of executing a person with mental retardation in violation of *Atkins v. Virginia* and *Chase v. State?* " While the distinction is subtle, Carr argued that the facts of his particular case create an unacceptable risk of executing a person with an intellectual disability. [17] The majority's phrasing broadens that to a more general question of whether it is unconstitutional for Carr to bear the burden of proof in a close case. The majority has unnecessarily "restated" the issue appealed, and with this I take umbrage. Moreover, it is unnecessary for the majority to address this issue, given that it found the trial court erred in finding IQ determinative, and it reverses and remands because this issue is dispositive.

***2. Reliance on Teacher's Opinion***

¶ 77. The trial court erred in relying on a teacher's opinion documented within the State's report to *directly counter* expert testimony. In other words, the teacher did not testify at the hearing and certainly was not qualified as an expert. The State argues that the teacher's statements were admissible, but that argument misses the point. Carr does not argue that the teacher's statements were inadmissible; rather, he argues that the manner in which the circuit court relied upon those statements was error, as the trial court appeared to improperly give the teacher's opinion the weight of an expert opinion.

¶ 78. The trial court stated in its order:

> *Contrary to O'Brien's opinion,* Carr's sixth grade teacher opined that Carr did not suffer from mental retardation during his earlier years but rather suffered from a learning disability.... She indicated that special education was available during that time period but that Carr was not placed into special education. It was apparent that O'Brien did not put great stock in the opinions of this former teacher. On the other hand, Macvaugh appears to have put more reliance upon the teacher's opinion. Macvaugh suggested that because mental retardation is primarily an impediment to learning, it more often than not is first demonstrated in the area of academics. As such, teachers are often the first to note the signs of mental retardation. As to the ultimate issue of whether Carr demonstrated signs of mental retardation prior to the age of 18, Macvaugh again found the issue "too close to call."

(Emphasis added.) The trial court ultimately concluded that "Some thirty years after grade school, the defense expert reviews Carr's academic record and finds mental retardation, while the individual who actually taught Carr, someone who saw him day after day when Carr was in school and who has no interest in this matter at all, is of the view that Carr was not mentally retarded, but rather suffered from a learning disability."

¶ 79. In both provisions of the order mentioning Carr's teacher, the trial court ***947** uses her opinion to directly counter the expert opinion of Dr. O'Brien. Perhaps this was done because Dr. Macvaugh's expert opinion was *not* in direct opposition to Dr. O'Brien's. Dr. O'Brien found that Carr was mentally

  

retarded, while Dr. Macvaugh found the issue of Carr's mental retardation too close to call. The teacher was the only person of the definitive opinion that Carr was *not* mentally retarded. Yet, the telephone interview of a teacher by the State on September 15, 2009, for a hearing that occurred on February 6, 2013, in no way constitutes an expert opinion.

¶ 80. Mississippi Rule of Evidence 701 provides that lay opinion testimony is limited to an opinion that is: "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Miss. R. Evid. 701. Rule 702 provides that

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Miss. R. Evid. 702. The determination of whether Carr is intellectually disabled is clearly one that requires specialized knowledge. Carr's teacher was never qualified as an expert with such knowledge. While certainly the State's report containing her interview was admissible evidence, relying on her lay opinion that Carr was not mentally retarded, especially to directly contradict the opinion of the defense expert, was improper. Because the trial court improperly treated the teacher's opinion as expert opinion, I believe this also warrants reversing and remanding this case for a new *Atkins* hearing in which the trial court should be more cognizant as to its reliance on such evidence.

¶ 81. For these reasons, I concur with the majority's conclusion that the trial court erred in finding IQ dispositive, and with its assessment that IQ must be examined in conjunction with adaptive functioning to determine whether intellectual disability exists, and I consequently agree with the decision to reverse the judgment and remand this case. However, I disagree with the majority's decision to address the burden of proof argument, an argument that it problematically "restated." I also believe that we should address the issue of the trial court's improper use of the teacher's opinion, and admonish the court not to rely on the opinion of the teacher as if it was an expert opinion.

KITCHENS, J., JOINS THIS OPINION.

**All Citations**

196 So.3d 926

Footnotes

1 The terms "intellectually disabled" and "intellectual disability" have replaced "mentally retarded" and "mental retardation" in the professional vernacular. *Chase v. State,* 171 So.3d 463, 466 n. 1 (Miss.2015) ("*Chase V* "). This Court uses the new terminology in opinions "except where a quotation necessitates use of the older terminology." *Id.*

2 Carr says that he did not receive notice of the circuit court's order denying reconsideration until May 22, 2014.

3 Post-conviction proceedings, of course, are civil actions. Miss.Code Ann. § 99–39–7 (Rev.2015). Yet they are subject to the same terms and conditions as criminal cases for the purposes of appeal. Miss.Code. Ann. § 99–39–25(1) (Rev.2015).

4 *See, e.g., Dickerson v. State,* 175 So.3d 8, 23 (Miss.2015); *Brown v. State,* 168 So.3d 884, 891 (Miss.2015); *Goodin v. State,* 102 So.3d 1102, 1116 (Miss.2012); *Thorson v. State,* 76 So.3d 667, 676 (Miss.2011); *King v. State,* 23 So.3d 1067, 1075 (Miss.2009); *Doss v. State,* 19 So.3d 690, 714–15 (Miss.2009); *Chase v. State,* 873 So.2d 1013, 1029 (Miss.2004).

5 "Each IQ test has a 'standard error of measurement' ... often referred to by the abbreviation 'SEM.' " *Hall,* 134 S.Ct. at 1995. "A score of 71, for instance, is generally considered to reflect a range between 66 and 76 with 95% confidence and a range of 68.5 and 73.5 with a 68% confidence. See DSM–5, at 37 ('Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally ±5 points)....[T]his involves a score of 65–75 (70 ± 5)')." *Id.*

  

6 But the raw data from this testing was not available for review by the State Hospital team or by Dr. O'Brien.

7 Dr. Macvaugh noted during his testimony that family members "may have far more influence or pressure to sway the direction of their descriptions in one way or the other," and that his "index of scepticism is increased" when determining their reliability.

8 He explained his rationale for that as follows: First, Carr missed approximately the same number of days in first and second grades as he did in other years; yet he performed better in those first two grades. Second, Carr performed slightly better when he repeated third grade despite missing approximately the same number of days as he did in his first attempt at that grade.

9 While the judge did not make a specific finding regarding the onset-before-eighteen prong in his initial order, he noted in his order denying Carr's motion for reconsideration that Carr said he had "overlooked" evidence indicating that Carr had manifested signs of intellectual disability before age eighteen. The judge said he "did not ignore [that] evidence." Rather, he "simply had a different take on such evidence as does defense counsel." In short, the trial judge found that Carr had failed to prove the onset-before-eighteen prong as well.

10 Carr also must establish manifestation before age eighteen. Because the circuit judge found that adaptive functioning deficits existed based on evidence which largely focused on Carr's academic performance before age eighteen, we instruct the trial court to review its findings on this prong upon remand.

11 *Hall v. Florida,* —— U.S. ——, 134 S.Ct. 1986, 1998, 188 L.Ed.2d 1007 (2014).

12 *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

13 *Hall,* 134 S.Ct. at 1993.

14 *See id.* at 2004 (Alito, J., dissenting) (pointing out that, "because the views of professional associations often change, tying Eighth Amendment law to these views will lead to instability and continue to fuel protracted litigation," especially when factoring in "that changes adopted by professional associations are sometimes rescinded"). *See also Chase v. State,* 171 So.3d 463, 470 (Miss.2015) ("This Court is faced with the reality of evolving standards for determining intellectual disability in the medical community.").

15 *Chase v. State,* 873 So.2d 1013, 1029 (Miss.2003).

16 *Hall,* 134 S.Ct. at 2000.

17 I note that this hearing was held when the medical term for what is now termed "intellectual disability" was "mental retardation." Thus, to the extent I refer to the hearing or how witnesses at the hearing opined, I may use the terminology used at that time. Otherwise, I will use the term "intellectual disability."

**IN THE CIRCUIT COURT OF QUITMAN COUNTY, MISSISSIPPI**

**ANTHONY CARR** *Petitioner*

*versus*

**Circuit Court No. 5115**
**Supreme Court No. 1997-DR-01609-SCT**

**STATE OF MISSISSIPPI** *Respondent*

## ORDER DENYING PETITION FOR POST-CONVICTION RELIEF

1. Anthony Carr, the petitioner, was convicted of four (4) counts of capital murder and sentenced to suffer death. *See* Carr v. State, 655 So. 2d 824 (Miss. 1995) (*cert. denied*, Carr v. Mississippi, 515 U.S. 1076, 116 S. Ct. 782, 133 L. Ed.2d 733 (1996)). The petitioner's original appeal was rejected by the Mississippi Supreme Court. *See* Carr v. State, 655 So. 2d 824 (Miss. 1995). Thereafter, the petitioner sought relief *via* motion for post-conviction collateral relief. On post-conviction review, the Mississippi Supreme Court denied all of Carr's claims with the exception of the claim that he is mentally retarded and thus cannot be put to death. Atkins v. Virginia, 536 U.S. 304, 321, 122 S. Ct. 2242, 2252, 153 L. Ed.2d 335 (2002). The Mississippi Supreme Court remanded the case to this court for an evidentiary hearing to determine if Carr is mentally retarded within the meaning of Atkins. *See* Carr v. State, 873 So. 2d 991 (Miss. 2004). That hearing was conducted on February 6, 2013, at the Mississippi Department of Corrections facility at Parchman, Mississippi. Both the State of Mississippi and the petitioner were present and represented by counsel. This court has carefully considered the pleadings filed, the evidence and testimony, arguments of counsel, post-hearing filings, and the applicable law, and is now

prepared to issue its ruling.

2. Prior to 2002, while mental retardation of a defendant might have been a factor to be considered in mitigation of sentence, it was not a complete bar to the imposition of the death penalty. This changed in 2002 when the U.S. Supreme Court, in the case of Atkins v. Virginia, *supra*, ruled that the imposition of the death penalty upon those found to be mentally retarded constituted an "excessive" punishment and as such was prohibited by the Eighth Amendment[1]. "Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." Atkins, 536 U.S. at 321 (citing Ford v. Wainwright, 477 U.S. 399, 477, 106 S. Ct. 2595, 2599 (U.S. 1986)). Notwithstanding, the Court left it to the States to determine the proper procedures to be used in enforcing such prohibition. "... [W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." Atkins, 536 U.S. at 317. In the case of Chase v. State, 873 So. 2d 1013 (Miss. 2004), the Mississippi Supreme Court acknowledged the requirements of Atkins and adopted the procedures to be utilized by the trial courts of this State when attempting to assess whether a particular defendant is mentally retarded as contemplated by Atkins. The Chase court also made clear that the protections afforded by the Atkins decision apply to those found to be only

[1] The Eight Amendment to the Constitution of the United State provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Footnote 7 of the Atkins decision makes clear that the Eight Amendment is to be read as barring all excessive punishments: "...we have read the text of the Amendment to prohibit all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." Atkins, 536 U.S. at 311.

*minimally* retarded. ("... *Atkins* exempts *all* mentally retarded persons – even those who are minimally mentally retarded – from execution ... ." Chase, 873 So. 2d at 1026 (¶61).

3. In providing instruction to Mississippi trial courts, the Chase court reviewed the two definitions of "mental retardation" that were discussed in the Atkins case. The first definition was provided by the American Association on Mental Retardation ("AAMR").

> *Mental retardation* ... is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

Chase, 873 So. 2d at 1027 (¶69) (citing Atkins, 536 U.S. at 308 (n.3)). The second definition was provided by the American Psychiatric Association ("APA"), which states in pertinent part:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

Id. The two definitions are virtually identical. The variations are found in the areas of adaptive skills. The AAMR factors includes eight areas of adaptive skills: communication, self-care, community use, self-direction, health and safety, functional academics, leisure, and work; while the APA factors include eleven: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. It appears that some of the factors are combined. Under the AAMR definition

health and safety are treated as one factor while under the APA definition they are listed separately. Also, the AAMR factors do not include a category of social/interpersonal skills.

4. Viewing both definitions, the common factors to be considered with attempting to determine if a particular defendant is mentally retarded appear to be as follows:

a. Significantly sub-average intellectual functioning;

b. Related limitations in two or more of the following applicable adaptive skill areas: communication, functioning academics, self-direction, leisure, social, community use, home living, health and safety, self-care and work; and

c. Manifestation of such mental retardation prior to age 18.

5. Prior to scheduling the hearing in this matter, the petitioner presented to this court a report dated April 6, 2012, authored by Dr. C. Gerald O'Brien, Ph.D. in Clinical Psychology and Forensic Consultant, wherein Dr. O'Brien opined that the defendant did indeed meet the definitions of "mental retardation" as expressed in both Atkins and Chase. With the above definitions/factors in place, this court will now discuss the evidence presented at the hearing on February 6, 2013. Before doing so however, this court will note the obvious - the process of determining if a defendant is mentally retarded, and in particular, looking back some twenty to twenty-five years into the dimly-lit past of a particular individual defendant to determine if such mental retardation was manifested prior to age 18, is fraught with peril. Such a decision is made even more difficult when, as here, qualified experts cannot agree. When dealing with a defendant who may be only marginally mentally retarded, the task becomes even more problematic. Nonetheless, that is the task put before this court.

**Burden of Proof**

6. It is important to remember that the burden of proof, which is "preponderance of the evidence," lies with the Petitioner. "... [T]he trial court must determine whether the defendant has established, by a *preponderance of the evidence*, that the defendant is mentally retarded." Chase, 873 So. 2d at 1029 (¶78) (emphasis added). Discussion of the underlying factors follows.

***A. Sub-Average Intellectual Functioning.***

7. The experts called before this court, Dr. C. Gerald O'Brien for the petitioner and Dr. Dr. Gilbert S. Macvaugh, III, for the state, disagree as to whether Carr can demonstrate that he meets the first prong of the definition of mental retardation, that of "*significantly* sub-average intellectual functioning." Notably, simple sub-average intellectual functioning is not enough, it must be *significantly* sub-average intellectual functioning. It appears that the determining factor in deciding if a particular defendant has *significantly* sub-average intellectual functioning is by reference to IQ testing. While neither expert actually testified as such, the entirety of their respective testimony on this point was dedicated to IQ tests which had been given to Carr. Three such IQ test were actually administered:

a. **1990 - Wechsler Adult Intelligence Scale, Revised, (WAIS - R).** This was the earliest IQ test administered to Carr. He was 25 years of age at the time. It was administered by a Dr. Kallman. The test resulted in a finding that Carr possessed a "full scale IQ" of 70. I f there is difficulty with the results of this test, it is that the "raw data" which led to this score is not/was not available for review by the current experts. Dr. O'Brien testified that although relying on a test when raw data is not available is "not what I ... like to do," (Transcript, p. 93, ll. 11 - 12), he

accepted the results of the test and relied on the same in formulating his opinion. Dr. Macvaugh was not as generous. On direct examination, Macvaugh explained the reasons behind his hesitation in accepting the 1990 test score:

> Q: What is the significance of not having the raw data to review the assessment of an IQ test:
>
> A: It's paramount. Because there could be gross flaws in the scoring or the administration of the test that make the scores completely useless.
>
> Q: So if I'm understanding you, Dr. Macvaugh, one of your hesitancies is the fact that there's no way to validate that score of 70 by Dr. Kallman?
>
> A: Correct.

(Transcript, p. 143).

b. **2009 Wechsler Adult Intelligence Scale, Version IV, (WAIS - IV) administered by the Mississippi State Hospital (MSH).** Carr scored a full scale IQ of 72 on this test. The WAIS - IV test consist of four (4) sub-parts, or sub-tests. During his direct examination, Dr. O'Brien discussed two of these sub-tests: Verbal Competency – where Carr scored a 70, and Performance – where he scored a 75. During O'Brien's testimony, he stated that no scores had been omitted that would have been unfavorable to a finding of mental retardation of Carr.

8. In Dr. Macvaugh's testimony, he described what O'Brien referred to as the "Verbal Competency" sub-test of the WAIS - IV as actually "Verbal Comprehension" and what O'Brien described as the "Performance" sub-test was "Perceptual Reasoning." Mcvaugh also discussed two other sub-tests which O'Brien neither included in his report nor in his testimony: the (a)

Working Memory Index where Carr scored a 89, and (b) the Processing Speed Index, where Carr scored a 79. Contrary to O'Brien's testimony, Macvaugh described these scores as being "contraindicative" of mental retardation. The 89 on the Working Memory Index was described by Macvaugh as being "almost average." When asked on cross-examination, Dr. O'Brien conceded that a Working Memory Index score of 89 "is much higher than you would expect, based on all his other scores," and that "[i]t could be" contraindicative of mental retardation. Macvaugh also testified regarding the arithmetic/mathematics sub-test where Carr scored a seven (7). According to Macvaugh, the average is ten (10). He found this almost-average score to be significant. Macvaugh testified regarding two other areas, both evidenced in an eighth-grade California Achievement Test. On that test, Carr scored in the 34th percentile in math computation and in the 36th percentile in spelling. Again contrary to O'Brien's testimony, Macvaugh testified that such scores would not be consistent with a finding of mental retardation.

c. **2009 Stanford-Benet 5 IQ Test administered by the Mississippi State Hospital (MSH).** This test was also administered by the MSH staff. Carr scored a full scale IQ of 75, which, as Macvaugh testified, would place him "squarely in the borderline range of intelligence." Looking at the five (5) sub-test scores here: in Fluid Reasoning, Carr scored a 71, and in knowledge, he scored a 72. These scores are consistent with mild mental retardation. However, in quantitative reasoning, Carr scored an 81, in Visual Spatial Reasoning, he scored an 82, and in Working memory, he scored an 89. Again, according to Macvaugh, these types of scores are not indicative of mental retardation.

9. Having fully considered the evidence presented and the opinions of the experts, the

court is struck by what Dr. Macvaugh referred to as the "zone of ambiguity." *See* sworn testimony of Dr. Macvaugh. This refers to consistent IQ test results which place an individual at or just above the cutoff for a mental retardation diagnosis. It can be said comfortably that Carr's IQ, as demonstrated by the tests which were given, falls somewhere in the 70 to 75 range. Given the applicable and conceded margin or error of five (5) points either way which is applicable to such test, Carr's actual IQ could range anywhere from a low of 65 to a high of 80. Obviously, the lower the IQ, the more mental retardation is suggested. The higher the IQ, the less mental retardation is suggested. This is the inherent flaw in attempting to come to a concrete conclusion regarding a particular subject when the means for doing so relies on a margin of error. Certainly, Carr's intelligence level is at the lower end of spectrum, but is it *significantly* sub-average? Given the range within which the test results are found and the applicable margin of error, this court cannot find by a preponderance of the evidence that Carr has carried his burden of proof. While this finding alone is sufficient to deny Carr's claim of mental retardation, because of the significance of this decision, the court will consider the other two remaining factors.

***B. Related Limitations in Two or More Adaptive Skill Areas.***

10. Contained in the definitions cited in the Atkins decision were various "adaptive skills" which, depending upon the particular defendant's skill level, would bear upon the issue of mental retardation. Those skills cited in the AAMR definition were: communication, self-care, community use, self-direction, health and safety, functional academics, leisure, and work. Those cited in the APA definition were: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure,

health, and safety. The lists are almost identical. According to the experts who testified, current mental health professionals now group these various adaptive skills into three primary *domains*: conceptual, social and practical. Those adaptive skills contained within each domain are as follows:

Conceptual: Communication, Functioning Academics, Self-Direction.

Social: Leisure, Social

Practical: Community Use, Home Living, Health and Safety, Self-Care and Work.

Different from what was outlined in Atkins, O'Brien testified that instead of a finding of a deficiency in two adaptive skills, current thinking is that a deficiency in only one domain is sufficient to support a finding of mental retardation. Nonetheless, during his testimony, O'Brien touched, albeit briefly, on a few of the adaptive skills noted in Atkins, as follows:

a. Communication: O'Brien defined the skill of communication as the ability to communicate with others, including family members. Communication is also described as the ability to communicate ideas and concepts to others and to receive such communication from others. O'Brien opined that Carr was deficit in his ability to communicate.

b. Self-Direction: O'Brien described the skill of "self-direction" as the ability to manage one's own personal affairs. For example, self direction involves being able to go about and respond to the various demands that arise in everyday life without significant assistance from others and being able to make one's own decisions. O'Brien opined that Carr was deficit in the skill of self-direction.

c. Leisure: The skill of "leisure" was described by O'Brien as the ability to seek out and

find activities that one enjoys; this is related to self-direction. This skill may also be assessed by one's ability to start and complete an activity. O'Brien opined that Carr was deficit in the skill of leisure.

d. Social: This skill was described by O'Brien as being related to communication – but more. It included the ability to *interact* with others. Social skills involve making one's wants and needs known to others and responding to the wants and needs of others in an appropriate manner.

e. Community Use: O'Brien testified that there was insufficient data to make a determination regarding the skill of community use.

f. Work: O'Brien testified that there was insufficient data to make determination regarding the skill of work.

11. In his report of April 6, 2012, O'Brien itemized the domains, each of the adaptive skills contained within domain and, by way of code, the resource[2] upon which he based his opinion. He opined that Carr exhibited deficiencies in all three domains and in eight of the ten adaptive skills. Unfortunately, neither in his report nor through his testimony did O'Brien give the actual basis, or specific information gleaned from these resources, that led to him to his conclusions. When asked about the actual statements and/or investigative notes derived from the interviews with these various resources, O'Brien responded that such was simply too voluminous to bring to the hearing. Given the gravity of the issue at hand, the court was not satisfied with

[2] In this context, the "resource" would be the family members and other individuals that provided information regarding the defendant.

this explanation. Considering that it is the court that must be the final arbiter in this matter, it would have been helpful to hear the statements and interviews upon which O'Brien's based his findings. As it stands, while the court is well aware of O'Brien's conclusions, the court is not aware of the specific facts upon which those conclusions are based.

12. Macvaugh, like O'Brien, was questioned regarding Carr's adaptive skill levels. Macvaugh expressed considerable doubt as to the validity of any such attempted assessment. His doubt arose from the fact that Carr has been incarcerated for a lengthy amount of time and, in Macvaugh's opinion, such tests "were not designed to assess *retrospectively* over a 30-year period in the past a person's adaptive functioning." (Emphasis added). Both experts – and Macvaugh in particular – lamented that collecting data regarding Carr's current lifestyle and adaptive skills is not an index or indicator of his adaptive behavior impairments in the community:

> We can't administer those measures to collect data about their functioning now because his functioning in the prison , for example, is not an index of wether he had adaptive behavior impairments in the community. Because his ability to function in the community is the essence of adaptive behavior for the purpose of mental retardation; not how well he can do in the prison system where there's a lot of support.

(Transcript, p. 144, ll. 20 - 27). Macvaugh opined that any effort to measure adaptive skills at this late date and with Carr having been imprisoned for such a long period of time would be "fraught with measurement error." Like Macvaugh, this court also has significant doubts as to the usefulness of adaptive skill assessments after a defendant has been in prison for an extended period of time. This court agrees that the definitions do not seem to contemplate assessing an

individual who has been in such incarceration. Nonetheless, and despite such concerns, this court is required to draw conclusions regarding Carr's adaptive skill level. Based upon the evidence presented, the court finds that Carr has demonstrated adaptive skill deficits in at least two (2) of the adaptive skill areas noted in the applicable definitions.

**C. Prior to Age 18.**

13. The last determining factor is perhaps the most difficult to assess – looking back some 29 to 30 years to determine if Carr manifested signs of mental retardation prior to his eighteenth birthday.

14. As suggested previously, there are no IQ test to draw from prior to Carr's eighteenth birthday. The IQ test administered nearest Carr's eighteenth birthday was when he was 25. As such, defense expert O'Brien looked to Carr's school performance to formulate his opinions. O'Brien noted that Carr has failed grade 3, grade 7 and dropped out of grade 9. He noted that his grades in those grade levels were significantly below average. O'Brien also noted that Carr's grades in sixth grade were generally in the mid-60s with a couple of 70s. Based upon Carr's below average performance in these lower grades, O'Brien opined that Carr met the third prong of the Atkins test in that Carr manifested mental retardation prior to age 18.

15. Contrary to O'Brien's opinion, Carr's sixth grade teacher opined that Carr did not suffer from mental retardation during his earlier years but rather suffered from a learning disability. (*See* transcript, pp. 76, 77, 163). She indicated that special education was available during that time period but that Carr was not placed into special education. It was apparent that O'Brien did not put great stock in the opinions of this former teacher. On the other hand,

Macvaugh appears to have put more reliance upon the teacher's opinion. Macvaugh suggested that because mental retardation is primarily an impediment to learning, it more often than not is first demonstrated in the area of academics. As such, teachers are often the first to note the signs of mental retardation. As to the ultimate issue of whether Carr demonstrated signs of mental retardation prior to the age of 18, Macvaugh again found the issue "too close to call."

16. There was one lay witness that testified, Mr. Johnie Chaney. Mr. Chaney was a friend of Carr during his earlier years. As to the issue of mental retardation, the testimony of Mr. Chaney was not particularly helpful. Although Chaney knew Carr when they were younger, Mr. Chaney was uncertain of Carr's specific age during that time. Chaney testified regarding Carr playing informal sports: softball and basketball. Chaney's testimony suggested that Carr was somewhat of a loner but that Carr interacted with the other young men in an appropriate manner. Again, this court did not find Chaney's testimony particularly helpful as regards the ultimate issue.

**Conclusion**

17. Carr's case is particularly difficult. Carr's IQ scores all place him in the 70 to 75 range. Given the admitted error of margin, Carr could range from mildly mentally retarded to simply low average intelligence. His test results are ambiguous – on some test he scores downward suggesting mental retardation. In others, he scores in the low intelligence level. Some thirty years after grade school, the defense expert reviews Carr's academic record and finds mental retardation, while the individual who actually taught Carr, someone who saw him day after day when Carr was in school and who has no interest in this matter at all, is of the view that

Carr was not mentally retarded, but rather suffered from a learning disability. This court finds that Macvaugh best sums up Carr's assessment of mental retardation – "too close to call." Macvaugh spoke of the "zone of ambiguity," that being an individual who, in some respects, demonstrates signs of mental retardation but in other respects does not. That is where Carr squarely fits – in this zone of ambiguity. This is the difficulty when attempting to make a concrete decision when the factors upon which the decision must be based are grounded in the soft sciences. This is when the burden of proof becomes the deciding factor. The burden of proof lies with petitioner. There cannot be a tie. As such, based upon the evidence placed before it, and for the reasons heretofore stated, this court finds that Carr has not met the three-pronged Atkins test for mental retardation.

**IT IS THEREFORE ORDERED and ADJUDGED** and for the reasons stated above, the Petition for Post-Conviction Collateral Relief heretofore filed on behalf of the petitioner, **ANTHONY CARR**, is hereby **DENIED**.

**SO ORDERED and ADJUDGED** this the 17 ~~of~~ June, 2013.

CIRCUIT JUDGE