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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas (PCR)
The Honorable Doyet A. Early, III, Circuit Court Judge

C/A No.: 2005-CP-18-1368
(Capital PCR Action)
Appellate Case No. 2014-000387

Kenneth Simmons, #5066,

Respondent/ Petitioner

vs.

State of South Carolina,

Petitioner/Respondent.

REPLY TO RESPONDENT/PETITIONER'S RETURN TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a capital defendant may meet the preponderance of evidence burden of proof required to demonstrate mental retardation to avoid a death sentence where the record reflects a pre-*Atkins* determination by three medical professions that applicant was not mentally retarded in 1999; a 75 IQ test score from 1999; and, to attempt to show onset before age 18, he must rely on historical facts that are not probative of the legal conclusion.

ARGUMENT IN REPLY

This case turns on whether one may carry the preponderance of the evidence burden of proof of mental retardation as a bar to a death sentence on evidence that is, at best, in equipoise. In response to this question, Respondent/Petitioner asserts his case for mental retardation is overwhelming, not close at all, and the assertion to the contrary is "demonstrably false." (Return, p. 9). His argument suffers from two substantial deficiencies. First, he vastly overstates the facts of records – in conflict with the PCR judge's own stated opinion of the evidence – to distance himself from any admission of a "close case." Second, he fails to acknowledge the distinction between a legal determination and medical diagnosis – a distinction not only recognized in case law, but also recognized by the medical community. Petitioner/Respondent, the State, makes this brief reply to address these substantial deficiencies in Respondent/Petitioner's argument in response to the petition.

A. *A Close Case.*

The PCR judge considered this to be close case, with which he struggled greatly. In fact he considered all the evidence, including the IQ score, one of which could have been as high as 80, to not clearly or definitive show mental retardation without question:

> ... not necessarily just with the IQ scores but with all the evidence that was presented by the State and by the Applicant, it presented a case to me that, as you classified it, was a close call.
>
> And, you know, the burden of proof is by the preponderance of the evidence, greater weight of the evidence. It's not beyond a reasonable doubt. And, quite frankly, I struggled with it.

(App. p. 5390, lines 8-14).

While the PCR judge ultimately concluded Respondent/Petitioner demonstrated mental retardation by a preponderance of the evidence, (App. p. 5390, lines 16-20), the PCR judge clearly believed the issue to be close based on the evidence in the case as presented by both parties. Respondent/Petitioner's present position on appeal that the case is overwhelming conflicts with the PCR judge's own view of the evidence. Further, it is in great tension with the record as a whole. Respondent/Petitioner must greatly overstate the facts of record to support such a conclusion.

For instance, Respondent/Petitioner argues the State "falsely contends" there was no IQ test of 70 or below that could definitively suggest a diagnosis of mental retardation. (Return, p.4-5 n.4). Respondent/Petitioner's citation to the record proves the inaccuracy of his assertion and his overstatement of the facts.[1] Respondent/Petitioner first relies upon an affidavit reflecting general guidelines for the South Carolina Department of Education for "requirements for student placement in special education programs...." (See Return, pp. 4-5, n. 4 referencing the Order of Dismissal in this case, and the affidavit, pp. 5300 and 4246-

[1] Respondent/Petitioner liberally asserts in his briefing that opposing arguments and/or evidence are "false," *i.e.* "falsely asserted," "demonstrably false," etc., in regard to this issue and in regard to the issues raised in his cross-appeal. Petitioner/Respondent would respectfully submit that evidence, or an argument on evidence, is not false simply because the opposing party disagrees with its import. For example, in nearly every criminal case, a directed verdict motion is made, and most are denied. Where denied, one would be hard pressed to suggest defense counsel "falsely contended" the record lacks evidence sufficient to submit to the jury. Rather, one would most likely state he or she presented argument on the legal significance of such evidence in the party's view. See *Olympia Equipment Leasing Company, et al v. Western Union Telegraph Company*, 802 F.2d 217, 220 (1986) ("Substantial, indeed spirited, disagreement can reasonably exist over the treatment of the legal questions in this matter and how they are to be addressed."). Respondent/Petitioner's repeated use of such a descriptive term in the instant litigation is not only indicative of vast overstatement of facts, the repeated use of the term simply lessen the impact of the assertion. See Feldman and McBride, *How to Write, Edit, and Review Persuasive Briefs: Seven Guidelines from One Judge and Two Lawyers*, 31 Seattle U.L. Rev. 417 (2008)("... needlessly antagonistic rhetoric... detracts from a brief's persuasiveness").

53). There is simply nothing in the affidavit, or attached portion of materials with the affidavit, that indicates Respondent/Petitioner received a certain score at a certain time as a result of certain and proper administration of an accepted IQ test. Further, his own expert in PCR, Dr. Tasse – the only expert presented who opined Respondent/Petitioner suffered from mental retardation – was aware of the prior school requirements, but did not rely upon or factor in a score of 70 or below based on that information.[2] (See App. pp. 3954-3959; p. 4281). Dr. Tasse testified that he did not see any record indicating testing, did not know if it existed or didn't exist, and was specifically "told none were available." (App. p. 3986). Dr. Tasse was clear that, even though there was an indication Respondent/Petitioner was "sent for - - in a resource class," he "did not see a diagnosis of mental retardation." (App. pp. 3985-3986). In fact, as far as scores from actual school records for Respondent/Petitioner, Dr. Tasse rejected school record indicators of IQ scores of 94, 104 and 69 as products of unreliable testing. (App. pp. 3958-3959).

Even so, because intellectual disability is not confined to an IQ score, technically, the assertion at issue, even as interpreted by Respondent/Petitioner, would be correct. But in regard to this particular case, the point being made is that a diagnosis was not made on the strength of such a score of 70 or under with significant deficits in adaptive functioning

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[2] Petitioner/Respondent does not challenge the existence of the requirements in general, rather, their relevancy to the discussion on specific and proper IQ testing and scores for Respondent/Petitioner, assuming the requirements were indeed followed. The State concedes there is evidence the district identified and considered Petitioner's sister as mentally retarded. (App.p.4001). The district, though, did not identify and consider Respondent/Petitioner as mentally retarded, while in school, when such diagnosis is generally made. (See App. 4001; see also pp. 3985-3988). The State also notes that, in another affidavit, there is an assertion that the need for special education was not identified for Respondent/Petitioner in school until the eleventh grade, which the affiant notes "is somewhat unusual...." (App. p. 4195). For Respondent/Petitioner, that tracks the time period when his mother passed away – a pivotal moment in his life – and his involvement with drugs and alcohol began to escalate. (App. pp. 3868-3871; p. 3832).

before 18. (See Petition, p. 7).[3] Further, the range of plus or minus 5 for a SEM around a score of 70 will not prevent a diagnosis, but does not indicate significant surety as lower test scores would in more profound cases. See, for example, *South Carolina Dept. of Social Services v. C.B.*, 2007 WL 8327981, *1 (S.C.Ct.App. 2007) (noting in termination of parental rights appeal, "Mother's overall IQ was below 35, which is in the severe range of mental retardation.").(See also App. p. 3941, Dr. Tasse's testimony that 40 to 55 would indicate moderate mental retardation). This is the point taken from the PCR judge who was correct in his assessment of the malleability of the evidence in this backward looking review.

Further, and again in overstatement of the facts, Respondent/Petitioner cites to one page in the record to support an assertion that: "Dr. Denis Keyes, conducted a full evaluation prior to trial in 1999, and diagnosed Simmons as intellectually disabled. App. 4153." (Return, p. 5 n. 4). That cite reflects the testimony of trial counsel Jerry Theos, Esq., and again underscores the lack of definitive answers. When asked why he did not present an expert such as Dr. Keyes, Mr. Theos responded:

> Well, there were a couple of reasons as I said. We had at least a couple of conferences that all the experts were present for in my office and we discussed Mister Simmons' mental health generally and specifically the issue of mental retardation and so there was some disagreement as to whether or not he did suffer from mental retardation. Some dispute among the experts and Doctor Keyes felt strong that he did. Some of the other doctors, although they may not have necessarily ruled it out, their testimony may have been in conflict and I wanted to avoid calling experts with conflicting testimony. Secondly, I thought Doctor Keyes would have been unappealing to the jury just based upon his, the way that he presented himself and how he may have come across to a Dorchester County jury... his demeanor, his personality traits, his characteristics.

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[3] The exact quote is as follows: "What cannot be contested on this record is there was no evidence of diagnosis before the age of eighteen or any IQ test of seventy or below which may definitively suggest mental retardation independent of the vague backward looking opinion accepted below." (Petition, p. 7).

(App.p. 4153, lines 7-20). He did not recall receiving a report from Dr. Keyes. (App. p. 4154, lines 2-4). Dr. Keyes was not presented at the PCR hearing. Dr. Tasse (Respondent/Petitioner's expert in the PCR action), testified he reviewed a "file from Doctor Keyes, and he conducted his evaluation 02/05/1999," (App. p. 3925, lines 13-14), including an IQ test, (App. p. 3957, lines 23-25), and an adaptability test, (App. p. 3961). Dr. Tasse later testified again that he reviewed the files from Dr. Keyes. (App. p. 3963). There is no mention of relying on a prior diagnosis in Dr. Tasse's testimony that Respondent has been able to discern. Again, no formal opinion was presented from Dr. Keyes in the PCR action. If a formal opinion was prepared for trial, it was not presented, and, to Petitioner/Respondent's knowledge, has not been tested in the crucible of cross-examination. Further, the defense experts at the time of trial did not agree on mental retardation – a condition admittedly discussed and considered in the defense meetings. Petitioner/Respondent agrees, however, that Mr. Theos testified that "Dr. Keyes felt strongly that he did." (App. p. 4153). Petitioner/Respondent further agrees that state doctors also suspected mental retardation – even gave a provision diagnosis of same – such that Respondent/Petitioner was referred to DDSN for evaluation, (App. pp. 1674-1675), after which a diagnosis of mental retardation was rejected, (App. pp. 1739-1740).

At any rate, the only significant change from 1999 to the present was the *Atkins*[4] opinion. (See generally App. p. 4220, Affidavit of Dr. Lewis Randolph Waid). Dr. Waid, who testified for Respondent/Petitioner at trial, opined Respondent/Petitioner suffers from neuro-cognitive impairments, but not mental retardation. (App. p. 1778). Dr. Waid testified: "He has diminished since high school. And that's an acquired neuro-cognitive impairment ... related to his life-style that has involved poly-substance abuse and dependence... as well

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[4] *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002).

as potential blows to the head from his life-style...." (App. p. 1781, line 14 – p. 1782, line 16). (See also App. pp. 1881-1882; p. 1897, specifically rejecting diagnosis of mental retardation). *Atkins*, of course, did not change medical standards. Further, as Respondent/Petitioner points out by reliance on the above quoted testimony from Mr. Theos, the experts were consulted together, in his office, and discussed "specifically the issue of mental retardation...." (App. p. 4153, lines 7-11). Two critical facts may be drawn from that consultation. The experts disagreed with Dr. Keyes, though he "strongly felt" mental retardation was appropriate, and they did so after vetting the information together.[5] While Respondent/Petitioner asserts he could not have been malingering for thirty (30) years,[6] (see Return, p. 12; see also Order, p. 5301), it is equally true that he did not become an individual suffering from mental retardation by the advent of *Atkins*.

Again, in this close case, especially where there is an IQ score of 75 and a prior rejection of the diagnosis, Respondent/Petitioner cannot meet his legal burden of proof. This flows into the next area of substantial deficiency in Respondent/Petitioner's position – the failure to acknowledge the distinction between medical opinion and legal conclusion.

B. Legal Determination v. Medical Opinion

The legal determination regarding mental retardation as a categorical bar to a death sentence necessarily requires an analysis of the legal sufficiency of the factual findings. *See Ybarra v. State*, 247 P.3d 269, 276 (Nev. 2011) ("the determination whether a capital

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[5] This testimony also conflicts with the assertion from Dr. Waid's affidavit that he was not asked to conduct a formal assessment, unless one should read that he was not asked to do so because the markers were not there, in his opinion. That reading would be consistent with his trial testimony wherein he repeatedly rejected a diagnosis of mental retardation for specific reasons, not the least of which was that Respondent/Petitioner's was an "acquired neuro-cognitive impairment" related to drugs and alcohol. (App. p. 1781, line 19 – p. 1782, line 4). (See also App. p. 1782, lines 22-25, "But clearly the level of alcohol abuse that he has had in his life up to a quart a day of drinking would, even at his age, contribute to diminished functioning.").

[6] Again, Dr. Tasse did not rely on any pre-1998 test. (See App. p. 4281).

defendant is mentally retarded is based on factual conclusions but requires distinctively legal analysis to determine whether the elements of mental retardation have been proven, and therefore, we will review such a determination as a mixed question of fact and law."). This Court has held that the condition is defined by statute as "'significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.'" *Franklin v. Maynard*, 356 S.C. 276, 278-79, 588 S.E.2d 604, 605-06 (2003) (quoting S.C. Code § 16-3-20(C)(b)(10)). Respondent/Petitioner does not clearly embrace the definition that this Court adheres to, rather, appears to shape the interpretation of the statute by reference to medical opinions applying various factors. (See Return, pp. 15-18). While Respondent/Petitioner suggests the State is offering another definition, it appears the opposite may be true. Moreover, there was a rather lengthy discussion at the February 2010 PCR hearing based upon this Court's opinion that accepted the statutory definition. (App. pp. 3974-3976). The definition, as discussed, is broad, less formulaic, than the offered interpretation Respondent/Petitioner would now rely upon. There was no objection or alternate view posed by him at the time of the discussion at the PCR hearing. Consequently, *Franklin v. Maynard* controls.

Simply, the medical profession does not control the legal conclusion – it has plainly stated so. The following is included in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*:

> Although the DSM-5 diagnostic criteria and text are primarily designed to assistant clinicians in conducting clinical assessment, case formulations, and treatment planning, DSM-5 is also used as a reference for the courts and attorneys in assessing the forensic consequences of mental disorders. As a result, it is important to note that the definition of mental disorder included in the DSM-5 was developed to meet the needs of clinicians, public health professionals, and research investigators rather than all of the technical needs of the courts and legal professionals. ...

(DSM-5, p. 25, Cautionary Statement for Forensic Use of DSM-5).

The Cautionary Statement continues, and provides specifically:

> ... there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. In most situations, the clinical diagnosis of a DSM-5 mental disorder such as intellectual disability ... does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder or a specified legal standard (e.g., for competence, criminal responsibility, or disability). For the latter, additional information is usually required beyond that contained in the DSM-5 diagnosis, which might include information about the individual's functional impairments and how these impairments affect the particular abilities in question. It is precisely because impairments, abilities, and disabilities vary widely within each diagnosis category that assignment of a particular diagnosis does not imply a specific level of impairment or disability. ...

(DSM-5, p. 25, Cautionary Statement for Forensic Use of DSM-5).

Dr. Tasse – again, the only doctor to testify as to a diagnosis of mental retardation (who did so while discounting ample evidence of significant drug and alcohol use *after* the death of Respondent/Petitioner's mother) – candidly conceded the limitation of a soft-science opinion: "There's always a degree of uncertainty in any clinical psychological opinion." (App. p. 3991). This is necessarily so when the condition would be considered mild. Again, Dr. Tasse's opinion is highly suspect where significant drug and alcohol use in Respondent/Petitioner's history is uncontested – facts highlighted not only in the social worker's testimony at the PCR hearing, (see App. pp. 3831-3832; pp. 3868-3871), but also by Dr. Waid at trial when he testified Respondent/Petitioner's condition was an "acquired neuro-cognitive impairment" based on same, (App. p. 1781, line 22- p. 1782, line 16).

Respectfully, the State submits that Respondent/Petitioner did not meet his legal burden of proof upon probative evidence of mental retardation. Again, as the State initially asserted in the petition, whether he is actually intellectually disabled has been contested since trial, but he was not diagnosed in school (by the admittedly established program to identify such), and not diagnosed before significant drug and alcohol use in a life-style

conducive to acquired impairment after the death of his mother. The *Atkins* exemption is meant to apply to a discrete and small subsection of individuals with limitations existing in the developmental period. There is little doubt of limited functioning here, but there is great doubt as to cause and time of occurrence.

At any rate, there is evidence in the record from pre-*Atkins* evaluations and opinions that should have defeated the claim. The historical facts simply are not probative and at best rest in equipoise on the issue. Having no probative evidence in the record to support the PCR court's Order, this Court should reverse.

CONCLUSION

For all the foregoing reasons, and all the reasons previously submitted in the petition for writ of certiorari, Petitioner/Respondent submits that this Court should grant certiorari in this case on the issue presented by Petitioner/Respondent and reverse the grant of relief.

Respectfully submitted,

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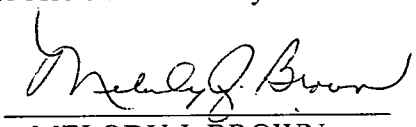
BY: 
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CERTIFICATE OF SERVICE

I, Melody J. Brown, Senior Assistant Attorney General, certify that I have served the foregoing *Reply to Respondent/Petitioner's Return to the Petition for Writ of Certiorari* on counsel for Respondent/Petitioner by depositing one copy of same in the United States mail, postage prepaid, to each attorney, addressed as follows:

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