

psychology. The dissent counters the majority by saying that so long as Dr. Grant qualifies as an expert under the requirements of *Chase* (“qualified expert”) and Mississippi Rule of Evidence 702, concerning the admissibility of expert testimony, the court should not inquire further, but leave the credibility question to the discretion of the trial court.

This case is important because it raises an issue created by *Atkins v. Virginia*. The *Atkins* majority held that executions of the mentally retarded are unconstitutional, even for pre-*Atkins* convictions. However, the U.S. Supreme Court gave virtually no guidance in setting procedures and guidelines for the factual determination of mental retardation and its resultant exemption from the death penalty.

By allowing the appellate judges to decide the factual merits of claims of mental retardation, rather than to permit evidentiary hearings of those claims, the Mississippi Supreme Court appears to reach a result-driven outcome in mental retardation capital case appeals. It is aided in this by a misunderstanding of certain psychological evaluation techniques and by denigration of expertise in a realm where expertise holds sway.

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Standard of Proof Required in Tennessee for a Capital Defendant to Prove Mental Retardation

Clear and Convincing Standard Held Unconstitutional in Postconviction Relief Hearing

In *Howell v. Tennessee*, 151 S.W.3d 450 (Tenn. 2004), the Supreme Court of Tennessee considered an appeal to reopen an inmate’s petition for postconvic-

tion relief on the claim that the inmate was mentally retarded and therefore ineligible for the death penalty.

Facts of the Case

Michael Wayne Howell was convicted of grand larceny and felony murder in 1989 and was sentenced to death. In 1990, Tennessee enacted a non-retroactive law that prohibited the imposition of the death sentence on the mentally retarded. In 2001, the Tennessee Supreme Court decided *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001), and held that the execution of the mentally retarded was unconstitutional on the grounds that it constituted cruel and unusual punishment. It further held that the 1990 statutory bar against the imposition of the death sentence on the mentally retarded could be applied retroactively to 1990.

In 2002, the U.S. Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), and declared the imposition of the death sentence on the mentally retarded to be unconstitutional on Eighth Amendment grounds, but left it to the individual states to adopt appropriate definitions of mental retardation.

Mr. Howell, after a number of failed appeals of his conviction and sentence, filed an application to reopen his petition for postconviction relief based on the new constitutional holdings regarding mental retardation. Mr. Howell, for the first time, argued that he was mentally retarded and his death sentence therefore violated state and federal constitutions. In support of his application and petition, Mr. Howell filed the affidavit of a board-certified clinical neuropsychologist who presented Mr. Howell’s results from the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III) and the Stanford-Binet Intelligence Test. Mr. Howell obtained a full-scale IQ of 73 on the WAIS-III and a composite score of 62 on the Stanford-Binet Intelligence Test. The trial judge reviewed his application and dismissed it, holding that Mr. Howell had failed to make a sufficient evidentiary showing of mental retardation to warrant a postconviction relief hearing.

In appealing this decision, Mr. Howell made several arguments: (1) the state’s use of a precise IQ score, 70, as a “bright line” numerical cutoff contradicts expert psychological evidence that any particular IQ score actually represents a range of IQ scores, because of errors of measurement inherent in intelligence testing; (2) the reliance of the trial judge on the results of only one (the WAIS-III) of several IQ tests was erroneous; (3) the trial judge had applied a clear

and convincing standard of proof against Mr. Howell's factual claim of mental retardation, and this standard was unconstitutionally stringent. Instead, Mr. Howell argued that the "colorable-claim" standard was the proper standard to use. The colorable-claim standard is comparable with the preponderance-of-the-evidence standard and is defined as "a claim that, if taken as true, in the light most favorable to the petitioner would entitle the petitioner to relief under the Post-conviction Procedure Act (quoting Tenn. Sup. Ct. R. 28 2(H)); and (4) in the event that Mr. Howell was granted an evidentiary hearing on his claim of mental retardation, the matter should be decided by a jury, not a judge.

Ruling and Reasoning

The Tennessee Supreme Court found that the language of the Tennessee statute defining mental retardation was clear and unambiguous and therefore should not be interpreted to include any IQ score numerically greater than 70, and thus rejected the "range" of IQ interpretation urged by the defense. However, the Tennessee Supreme Court indicated that although the United States Supreme Court in *Atkins* noted that the WAIS-III was the "standard instrument in the United States for assessing intellectual functioning" (*Atkins*, 536 U.S. 304 at 2245), there was nothing in the record to indicate that other tests of IQ were not accurate tests, and the Tennessee statute did not provide a clear directive regarding which particular intelligence test was to be used. Therefore, the court held that all IQ tests cited in Mr. Howell's motion for postconviction relief be afforded evidentiary weight in considering his claim of mental retardation.

In deciding what standard of evidence should properly be applied to the defendant's motion for a reopening of his petition for postconviction relief, the Tennessee Supreme Court noted a conflict between the state's statute that governs postconviction procedures and the constitutional requirements of due process in the imposition of the death sentence. The Post-conviction Procedures Act required that Mr. Howell meet a clear and convincing evidentiary standard on his mental retardation claim to be granted a petition for relief on that claim. Mr. Howell argued that the defense of mental retardation was not available at the time of his trial or at the time of his filing his first application for postconviction relief in 1997. The defense first became available in *Van Tran v. State* in 2001. Mr. Howell noted that if the

defense of mental retardation had been available at the time of his original trial or at his first motion for postconviction relief, the claim would have required only a preponderance standard.

The court, weighing the interest of the defendant in preserving his life against the interests of the state in seeking the finality of judicial judgments, held that it would be "fundamentally unfair and a violation of due process" to require a petitioner who files for relief for the first time under *Van Tran* or *Atkins* to be held to the standard of clear and convincing evidence. Instead, due process and fundamental fairness require that the defendant be held to the lower colorable-claim standard. The court found that Mr. Howell did meet the colorable-claim standard in presenting his case for mental retardation and granted him an evidentiary hearing for postconviction relief. Further, the court held that the Tennessee statute, which also required proof of mental retardation by clear and convincing evidence at the postconviction hearing, was, under the facts in this case, unconstitutional and a violation of due process. Therefore, Mr. Howell was granted a hearing where he could seek to prove his mental retardation by a preponderance of the evidence.

Finally, moving to the issue of whether a judge or jury should make the determination of mental retardation, the court indicated that in Tennessee the same jury that found the defendant guilty decides whether to impose the death penalty by considering any aggravating or mitigating circumstances. However, the court noted that mental retardation is not considered a mitigating factor to be weighed against aggravating factors by a jury during sentencing. Instead, mental retardation is a "threshold issue that determines whether a defendant is eligible for capital punishment at all." Therefore, the court held that the determination of mental retardation, in any postconviction relief proceeding was to be made by a judge, not by a jury.

Discussion

The dicta of the *Howell* decision and the weighing of the constitutional rights of the mentally retarded as preeminent over the state's interest in seeking finality of its judicial judgments signal an acceptance of the psychological and psychiatric assessment of criminal defendants by mental health professionals. The holding by the Tennessee Supreme Court concerning the proper standard of proof for a claim of mental retardation applies only to those persons who

were convicted and sentenced to death in Tennessee before 1990, who had made their unsuccessful post-conviction appeals prior to the *Atkins* holdings in 2001 and had not been executed by the time of the *Atkins* decision. For those persons in Tennessee tried after *Atkins*, the lower standard of proof of a claim of mental retardation would have applied initially at time of trial. There are a limited number of convicts to whom this part of the *Howell* decision applies.

Of more general application is the Tennessee court's holding that it is appropriate to use a single numerical IQ score to define mental retardation and that measurement and proof of IQ can be based on any of several different IQ tests, rather than just the WAIS-III. However, the Tennessee Supreme Court gave deference to the state statute by recognizing a precise numerical IQ cut-off score of 70 as part of the definition of mental retardation. This expansive acceptance of alternative IQ measurement presages continuing "battles of the experts" as different measurement instruments wielded by defense and prosecution experts will place a defendant below or above the "bright line" cut-off score of 70 IQ. The other two components of the definition of mental retardation—age of onset and life impairment—equally invite clashes of expertise.

Also of note is the court's holding that the claim of mental retardation in postconviction hearings should be decided by a judge, not a jury, even though a jury would decide that same question if it were presented as mitigation during the original trial of a defendant.

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Mitigation in Capital Cases

Nullification Instruction Ruled Unconstitutional

In *Smith v. Texas*, 543 U.S. 37 (2004), the U.S. Supreme Court reviewed the decision of the Texas

Criminal Court of Appeals and considered the constitutionality under the Eighth Amendment prohibition against cruel and unusual punishment of the trial court's instruction to the jury. This instruction directed the jury to answer "no" to one of the special issues (deliberateness and future dangerousness), even if it believed the answers to these questions were "yes" if, after considering all the mitigating evidence, the jury believed that the defendant should not be sentenced to death. This instruction was referred to as the "nullification instruction."

Facts of the Case

In 1991, a Texas jury found LaRoyce Smith guilty of capital murder for murdering one of his former coworkers by pistol-whipping her and shooting her in the back.

At the punishment phase of the trial, the court instructed the jury to consider two special issues when it came to determining whether life imprisonment or death would be imposed:

- (1) Was the conduct of the defendant that caused the death of the deceased committed deliberately, and with the reasonable expectation that the death of the deceased or another would result?
- (2) Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

The jury was instructed by the trial judge to consider also the mitigating evidence; that is, the "evidence that reduces the defendant's personal or moral culpability or blameworthiness. . . ." Furthermore, if it believed that the answers to the special issues were "yes," and if it also believed that because of the mitigating evidence the defendant should not be sentenced to death, then it had to ". . . answer at least one of the Special Issues 'No' to give effect to [its] belief that that the death penalty should not be imposed due to the mitigating evidence. . . ."

The jury considered a variety of mitigating evidence, among which were Mr. Smith's diagnosis of learning disabilities, history of placement in special education classes, and IQ of 78.

The members of the jury were given a jury verdict form that reminded them about answering "yes" or "no" to the special issues but did not mention anything about the mitigating evidence. The jury answered both questions "yes" and sentenced the defendant to death.

The defendant appealed to the Texas Court of Criminal Appeals, stating that the jury instructions were unconstitutional based on *Penry v. Lynaugh*,