Quantum of Evidence of Mental Retardation Required of a Defendant in Application Seeking Postconviction Relief

Defendant Not Entitled to Habeas *Relief on a Claim of Mental Retardation Based Only on the Opinion of One Expert Certified by a "Certification Mill"*

In *Hughes v. Mississippi*, 892 So.2d 203 (Miss. 2004), William Ray Hughes filed an application for leave to seek postconviction relief in the state circuit court, which imposed the death sentence after convicting him of kidnapping, rape, and murder. Mr. Hugues claimed ineffective assistance of counsel because, among other things, his lawyer allowed him to testify despite a psychologist's opinion that Mr. Hughes should not have been allowed to testify because of his diminished mental capacity. Mr. Hughes also sought to avoid execution by seeking to prove his mental retardation, bringing him under the protection of *Atkins v. Virginia*, 536 U.S. 304 (2002).

Facts of the Case

On January 9, 1996, 16-year-old Ashley Galloway disappeared. She was last seen getting into a black pick-up truck at 7:30 AM. Her body was found underneath the floorboards of an abandoned house on January 22, 1996. A pathologist determined that Ms. Galloway had been raped, stabbed, and strangled. On March 27, a knife and Ashley's class ring were found on property close to the home of Willie Ray Hughes. Police questioned Mr. Hughes, a known sex offender. His DNA matched semen samples taken from Ashley's body. Police also learned that Mr. Hughes drove a black pick-up truck. Mr. Hughes' mother told police that he had come home that night with blood on his uniform.

Mr. Hughes was indicted in Tate County for kidnapping, rape, and murder. He was convicted and sentenced to death on November 20, 1996. His conviction and sentence were affirmed in *Hughes v. State of Mississippi*, 735 So.2d 238 (Miss. 1999). He applied for leave to seek postconviction relief in the Tate County Circuit Court based on "ineffective assistance of counsel." As mentioned earlier, Mr. Hughes' claim of ineffective counsel noted that his attorney placed him on the stand even though a defense psychologist opined that Mr. Hughes should not have been allowed to testify because of his diminished capacity.

In addition to his claim of "ineffective assistance of counsel," Mr. Hughes relied on *Atkins v. Virginia*, which bars the execution of mentally retarded inmates as cruel and unusual punishment prohibited under the Eighth Amendment. Prior to trial, the circuit court had ordered that Mr. Hughes undergo a "forensic mental evaluation" to determine competency to be adjudicated and criminal responsibility. W. Criss Lott, PhD, conducted an interview and psychological testing, including the Wechsler Adult Intelligence Scale-Revised. The test revealed a verbal IQ of 72, performance IQ of 94, and a full-scale IQ of 81. Dr. Lott's opinion concluded, "To a reasonable degree of psychological certainty, Mr. Hughes was not suffering from a severe mental illness at the time of the offenses." No comment was made concerning mental retardation.

In May 2001, Mr. Hughes underwent an evaluation by Daniel H. Grant, EdD, a licensed psychologist in Georgia. Dr. Grant's testing revealed a verbal IQ of 65, performance IQ of 69, and a full-scale IQ of 64. Dr. Grant concluded that Mr. Hughes' scores fell within the "mildly deficient" range and that Mr. Hughes lacked normal adaptive skills. He opined that Mr. Hughes was "mildly mentally retarded." The defendant offered the affidavit of Dr. Grant, to the effect that he was mentally retarded, as part of his pleadings for application for postconviction relief.

Ruling

The Supreme Court of Mississippi denied Mr. Hughes' application for leave to seek postconviction relief.

Reasoning

The court went through each of Mr. Hughes' assertions of ineffective assistance of counsel and his claim of mental retardation and refuted each of these.

In ruling whether Mr. Hughes met the standard for mental retardation or even qualified for an evidentiary hearing, the court referred to its earlier holding against a Mental Retardation claim in *Wiley v. State of Mississippi*, 890 So.2d 892 (2004), and noted factual similarities between defendants Wiley and Hughes. The court noted, "Overall, Hughes' adaptive skills seem rather similar to those of Wiley" (*Wiley v. State of Mississippi*, 892 So.2d 203, p 38). Mr. Wiley's adaptive skills included sustained employment, military service, and no special education services while in school. Likewise, Mr. Hughes

worked as an unskilled laborer and did not attend special education classes in school. The court noted another similarity between the two cases. Both defendants had received evaluations from Dr. Grant in support of their respective claims of mental retardation. The court noted, with disparagement, that Dr. Grant's curriculum vitae included certification from the American Board of Forensic Examiners, an organization that the court noted was sharply criticized as a "certification mill" in an article entitled "Expertise to Go" written by Mark Hansen in the American Bar Association's eJournal in February, 2000 (Hansen M: Expertise to go. Am Bar Assoc J 86:44–8, 2000).

Citing its rejection of the mental retardation claim made in Wiley and noting a factual similarity between defendants Wiley and Hughes, the court rejected Hughes' mental retardation claim, finding it factually insufficient to warrant an evidentiary hearing on the issue of mental retardation, Dr. Grant's affidavit notwithstanding.

The dissent in this case argued that there was a factual basis to support Hughes's claim of mental retardation, noting that Dr. Grant was the only expert who addressed the question of mental retardation. The dissent stated that the "court is constitutionally required to order the circuit court to hold a hearing and make the determination" (*Wiley*, 892 So.2d 203, p 53) of whether or not Mr. Hughes is mentally retarded.

Discussion

One of the central issues in this case is the nature of the proceedings necessary to determine whether a defendant qualifies as mentally retarded so as to meet the *Atkins* bar against execution. Is it a matter requiring expert testimony, or may judges decide the merits of the claim without expert testimony? The decision in Hughes holds that in the state of Mississippi, judges may decide whether a defendant meets the criteria for mental retardation based on available evidence, without requiring the testimony of experts.

The case is puzzling, in that a previous Mississippi Supreme Court decision (*Chase v. State of Mississippi*, 873 So.2d 1013, 1029 (Miss. 2004)), held that once there is an affidavit from one qualified expert opining that "to a reasonable degree of certainty, the defendant has a combined IQ of 75 or below, and there is a reasonable basis to believe that, on further testing, the defendant will be found to be mentally retarded" the defendant is afforded an evidentiary hearing on that specific issue. Here, the judges were provided with such an affidavit, but did not follow their own precedent, stating merely that "Hughes has technically complied with the requirements for an evidentiary hearing under *Chase*. Notwithstanding the technical compliance, the evidence of record in this case overwhelmingly belies the assertions that Hughes is mentally retarded." Taking exception to the majority's departure from *Chase*, the dissent stated, "We must either order a hearing for the factual determination of whether Hughes is mentally retarded, or decide the factual question ourselves. The majority erroneously chooses to become a finder of fact and decide the question here."

A second puzzling, and to us disturbing, part of the decision is the majority's failure to recognize the differences between evaluations for competency to stand trial and criminal responsibility and those to determine whether a person is mentally retarded. They rely on Dr. Lott's competency and criminal responsibility evaluations, which make no comment on mental retardation, as sufficient to answer the question of mental retardation. The dissent sums up the quandry succinctly when it writes, "For defendants whose trials were completed prior to *Atkins*, we found ourselves needing the answer to a question which had never been presented to the trial court or jury. Is the defendant mentally retarded and, thus, exempt from the death penalty?" It goes on to note that, since the court does not sit as a finder of fact, but as an appellate court, it must ask the trial court to conduct an evidentiary hearing into the question of whether Mr. Hughes is mentally retarded.

The majority questioned Dr. Grant's credibility and rejected his conclusion, noting that he received certification from a "certification mill." This characterization was taken from the aforementioned Hansen article, wherein Mr. Hansen critically profiled the American College of Forensic Examiners (ACFE), a nonprofit organization that credentials forensic experts. The Hansen article appeared in a non-peer-reviewed journal. While questions concerning the qualifications and training of Dr. Hughes could properly be raised at an evidentiary hearing and might bear on the weight to be afforded his opinions, the virtual exclusion of his testimony by the majority, justified merely on a generality offered in a magazine article, seems result-driven.

The dissent, taking exception to the majority, makes a point of mentioning that in addition to being a Fellow of the ACFE, Dr. Grant is board certified by the American Board of Professional Neuro-

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 postconviction 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 nonretroactive 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