

declined to address whether the state must provide the indigent defendant with an expert specifically hired by the defense.

With *certiorari* having been denied, the *Davis* case is now closed to further arguments (personal communication, April Golden, federal public defender, January, 2019). The *Davis* defense derailed on strategic grounds when, after three requests to the trial court for funds to retain their own expert, they capitulated and used available experts. Their decision effectively abandoned the issue of the interpretation of *Ake* and the right of indigent defendants to a mental health expert retained by the defense.

The question of the interpretation of *Ake* in the *Davis* case, however, is directly addressed by Justice Josephine Hart, who, despite concurring with the decision, was troubled with the way *Ake* had been interpreted. She said, “I believe Arkansas’ prior interpretation of *Ake* is similar to that of the Alabama Court of Appeals in *McWilliams*, which the U.S. Supreme Court declared was ‘clearly incorrect’” (*Davis*, p 571).

As discussed above, *Ake* calls for more than just the appointment of a neutral expert. The expert must be able to assist the defense attorney in the evaluation, preparation, and presentation of the defense. In *McWilliams*, the U.S. Supreme Court commented that the simplest way to meet this requirement is to provide an expert hired specifically for the defense, and many states have adopted this approach. While the *Davis* case may be closed due to tactical decisions, the matter of the right of the indigent defendant to an expert hired by the defense remains open.

## Competence Evaluation Is Insufficient as an *Atkins* Evaluation

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## *Atkins Examination Is Flawed When It Relies on Examination for Competence to Stand Trial*

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In *State v. Russell*, 238 So. 3d 1105 (Miss. 2017), the Supreme Court of Mississippi reversed and remanded the Sunflower County Circuit Court’s order to vacate the defendant’s death sentence following an *Atkins* hearing that was ruled to be flawed because the prosecution had not been afforded the opportunity to examine the defendant.

### Facts of the Case

In 1989, Willie C. Russell stabbed and killed a corrections officer while incarcerated at the Mississippi State Penitentiary at Parchman. He was convicted of murder and sentenced to death by a jury in 1990. Mr. Russell initially appealed the conviction. The conviction was upheld by the Mississippi Supreme Court, but the death sentence was vacated and remanded for resentencing. The court found that Mr. Russell’s habitual offender status hearing was held subsequent to the sentencing hearing rather than preceding it. Under Mississippi law, a person who has been convicted of two or more felonies, and having served one or more years in a state or federal prison, will then “be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation” following conviction for another felony (Miss. Code Ann. § 99-19-81 (2013)). Mr. Russell was resentedenced and was again sentenced to death.

Mr. Russell then filed for postconviction relief. While this was pending in the Mississippi Supreme Court, the U.S. Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Atkins*, the U.S. Supreme Court held that executing a person with intellectual disability is a violation of the Eighth Amendment. Given this decision, the Mississippi Supreme Court granted Mr. Russell permission to amend his postconviction relief petition to include his claim of intellectual disability and therefore preclude his ability to be executed. In 2003, the Mississippi Supreme Court granted Mr. Russell’s petition to proceed in the trial court with his *Atkins* claim.

While pursuing his *Atkins* claim for his murder conviction, Mr. Russell was accused of shooting a corrections officer with a homemade zip gun and charged with aggravated assault. As part of his de-

fense to this charge, he claimed he was incompetent to confess, incompetent to stand trial, and not guilty by reason of insanity. In 2006, the state suggested that the evaluations for both cases be combined into one evaluation. Opposing this, Mr. Russell argued that each case had its own judge and neither had authority over the other's proceedings. The court dealing with the aggravated assault charge agreed with Mr. Russell and he was sent to the state hospital for evaluation of his mental health defenses, but not his intellectual disability. In the transcripts of the evaluation, this distinction was made clear; Mr. Russell's attorney stated, "This isn't going to be a complete *Atkins* assessment" (*Russell*, p 1107).

In 2010, Mr. Russell formally filed an *Atkins* petition with the trial court regarding his sentencing for the 1989 murder of the correctional officer. In response, the state moved to evaluate him for an intellectual disability. Mr. Russell opposed this motion. He argued that the mental health evaluation in 2006 for the aggravated assault charge was sufficient to provide evidence at his *Atkins* hearing. In rebuttal, the state argued that that mental health report did not include a specific evaluation for intellectual disability. In fact, back in 2006, the state's expert opined that he would need a further evaluation to determine whether Mr. Russell had an intellectual disability. The trial court found the prior mental health evaluation was adequate and denied the state's request for further evaluation.

An *Atkins* hearing was held in 2014, and the defense offered testimony from an expert who gathered information from the 2006 mental health evaluation. The state did not offer any testimony and argued there was insufficient information for their expert to provide an opinion with a reasonable degree of psychological certainty. The trial court ruled that Mr. Russell proved that he had an intellectual disability and vacated his death sentence. The state appealed the decision, arguing that the ruling was unfair due to its inability to directly examine Mr. Russell.

#### Ruling and Reasoning

The Supreme Court of Mississippi reversed the order vacating Mr. Russell's death sentence and remanded the matter to the trial court, with instructions that the state's expert be permitted to evaluate Mr. Russell prior to the *Atkins* hearing.

The Mississippi Supreme Court, in a five to four decision, held that "[w]hile *Atkins* determinations are legal decisions, they are decisions that, according to the U.S. Supreme Court, must be informed by medical experts" (*Russell*, p 1110). It explained that "it was the trial judge—not the expert—who opined that no further assessment was necessary" and that "[t]his was an abuse of discretion" (*Russell*, p 1110). In writing the opinion, Justice Maxwell cited *Hall v. State*, 109 So.3d 704 (Fla. 2012) and the need of the court to rely upon the expertise of medical professionals. Justice Maxwell went on to state that, due to the state's expert not being allowed to evaluate Mr. Russell, they could not attempt to disprove through expert testimony Mr. Russell's claim he could not be executed. "Because our *Atkins* procedures clearly contemplate the State responding to the petitioner's evidence with its own expert opinion, the trial court abused its discretion when it restricted the State in this way" (*Russell*, p 1111).

#### Discussion

Two points of particular interest arise in *State v. Russell* concerning the role of forensic psychiatric expert evaluations and testimony. First, this case highlights the need for clear provision and documentation of informed consent prior to initiating a forensic evaluation. A significant point centers on the fact that Mr. Russell rejected the state's request to combine the *Atkins* evaluation for the sentencing for the murder conviction with the mental health evaluation for the aggravated assault charge. Pursuant to the order to only perform a mental health evaluation for the aggravated assault charge, the record clearly documents that Mr. Russell and his attorney were informed that the evaluation would not assess for an *Atkins* intellectual disability argument, and they acknowledged this fact. As noted in Justice Maxwell's opinion, "Indeed, in the transcript from the 2006 clinical interview, Russell's counsel had conceded the evaluation would not be a full *Atkins* assessment" (*Russell*, p 1108). Without this explicit documentation of informed consent to clarify the parameters of the evaluation, the state would have been significantly more challenged to appeal the original trial court's decision to proceed without a further *Atkins* assessment.

The second point focuses on juror responses to psychiatric expert testimony in the sentencing phase of capital cases. In a recent study, the authors ana-

lyzed the impact of psychiatric expert testimony on 214 jurors' determinations of whether the defendant's "mental abnormality" was a significant mitigating factor and the defendant's "dangerousness or propensity to commit future violent acts" was a significant aggravating factor (Montgomery JH, Ciccone JR, Garvey SP, Eisenberg T: Expert testimony in capital sentencing: juror responses. *J Am Acad Psychiatry Law* 33:509–18, 511 (2005)). This study found that expert testimony did not significantly impact the jurors' views of a defendant's future dangerousness. On the other hand, the study determined

that expert testimony significantly influenced the jurors' views of the mitigating factor of a defendant's mental abnormality. This underscores that allowing only one side's expert to testify in a case may unduly influence a jury's sentencing decision. In *State v. Russell*, one could argue that, based upon the results of the above study, the lack of evaluation and subsequent expert testimony by the state regarding Mr. Russell's intellectual disability allowed the defendant's expert to disproportionately influence the jury during the trial's sentencing phase.

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