IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-64,302-02

EX PARTE OBIE D. WEATHERS, III, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS IN CAUSE NO. 2000-CR-2916 FROM THE 399TH DISTRICT COURT OF BEXAR COUNTY

PRICE, J., filed a concurring statement in which JOHNSON, J., joined.

CONCURRING STATEMENT

This is another subsequent post-conviction application for writ of habeas corpus that presents a "close question" with respect to whether the applicant has established an *Atkins* claim of mental retardation by a preponderance of the evidence.[1] In the context of post-conviction applications for writ of habeas corpus, the convicting court is the "original" fact-finder (if only because this Court has no capacity for factual development), and we will

[1] TEX. CODE CRIM. PROC. art. 11.071; U.S. CONST. amend. VIII; *Atkins v. Virginia*, 536 U.S. 304 (2002); *Ex parte Henderson*, 2014 WL 837136, at *1 (Tex. Crim. App. Feb. 26, 2014) (not designated for publication) (Price, J., dissenting).

ordinarily defer to that court's findings of fact and conclusions of law when supported by the record.[2] But that deference is not boundless, and we do not simply rubber-stamp the convicting court's recommendations. After all, we are the court of return in capital post-conviction habeas corpus proceedings.[3] In that capacity, we are the "ultimate" fact-finder, with the prerogative to reject the convicting court's recommendations when we deem it appropriate, even when they are supported by the record, if we think another disposition is manifestly *better* supported by the record.[4] In my view, this would be such a case except for one thing—the applicant failed to raise his *Atkins* claim in his initial post-conviction application for writ of habeas corpus which was filed after *Atkins* was decided.

The applicant ordinarily has the burden to establish an *Atkins* claim only by a preponderance of the evidence.[5] To establish mental retardation, the applicant must demonstrate that he suffers from (1) significant sub-average general intellectual functioning, usually evidenced by an I.Q. score below 70, that is accompanied by (2) related limitations

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[2] *E.g.*, *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008).

[3] *See* TEX. CODE CRIM. PROC. art. 11.071, § 4(a).

[4] *Ex parte Butler*, 416 S.W.3d 863, 879 n.6 (Tex. Crim. App. 2012) (Price, J., dissenting); *Ex parte Spencer*, 337 S.W.3d 869, 880 n.1 (Tex. Crim. App. 2011) (Price, J., concurring); *Ex parte Robbins*, 360 S.W.3d 446, 467 n.14 (Tex. Crim. App. 2011) (Price, J., concurring); *Ex parte Reed*, 271 S.W.3d 698, 754-55 (Tex. Crim. App. 2008) (Price, J., concurring).

[5] *Ex parte Briseno*, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004).

in adaptive functioning, (3) the onset of which occurred prior to the age of eighteen.[6] Because the applicant failed to raise his *Atkins* claim in his first writ application, however, he must now establish, by clear and convincing evidence, that no rational fact-finder would fail to find him mentally retarded.[7] The convicting court's recommended conclusions of law erroneously applied the preponderance standard. Because the convicting court recommended that we conclude that the applicant did not even satisfy the preponderance standard, that error is ultimately inconsequential. While I disagree that the applicant failed to prove mental retardation by a preponderance of the evidence, I agree that relief is not appropriate in this subsequent writ application because he has *not* shown by clear and convincing evidence that no rational fact-finder would fail to find him mentally retarded on the facts presented.

After we granted him permission to pursue his *Atkins* claim in a subsequent post-conviction writ application, the applicant presented testimony from Dr. Joanne Murphey, a double doctorate in school and clinical psychology who has administered more than a thousand I.Q. tests during her career. Murphey first attempted to conduct I.Q. testing for the applicant on May 1, 2011, obtaining a full-scale score of 53 on the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV). Because the applicant was exhibiting "tangential" and "psychotic-like thought processes" during her administration of the WAIS-

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[6] *Id*. at 7; *Howard v. State*, 153 S.W.3d 382, 386 (Tex. Crim. App. 2004).

[7] *Ex parte Blue*, 230 S.W.3d 151, 162-63 (Tex. Crim. App. 2007); TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(3).

IV, however, Murphey believed that this initial testing did not represent "a good measure of [the applicant's] intellectual functioning." So Murphey returned three months later, after the applicant had been medicated. This time she administered the Stanford-Binet Intelligence Test, Fifth Edition, obtaining what she regarded as a valid full-scale score of 65. None of the test results indicated malingering. Murphey also administered the Adaptive Behavior Assessment System II (ABAS-II), an instrument for measuring adaptive functioning, interviewing the applicant's mother, sister, and one of his former teachers, and reviewing additional information that four other respondents provided. The applicant's ABAS scores identified adaptive deficits in three areas: communication, functional academic skills, and social skills. Even if the applicant manifested strengths in other areas of adaptive functioning, Murphey explained, deficits in at least two of the areas identified in the DSM-IV-TR would support the conclusion that the applicant suffered from mental retardation.[8] Although there were no records of any I.Q. testing conducted before the applicant's eighteenth birthday, Murphey was able to extrapolate from grades and the affidavit of one of the applicant's teachers that onset of mild mental retardation occurred prior to that time.

Murphey acknowledged that, in 2008, Dr. Jesse Reed, III, tested the applicant's I.Q., utilizing the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III), and that the applicant had obtained a full-scale I.Q. score of 79. But by that time the WAIS-III was

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[8] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. Text Revision 2000).

almost obsolete, only two months away from being replaced by the more "robust" WAIS-IV. Murphey also invoked the so-called "Flynn Effect," which she described as "well established in the scientific community as valid."[9] She believed that Reed should have waited to evaluate the applicant with the WAIS-IV and that using the outdated WAIS-III instrument had probably resulted in an "inflated" I.Q. score for the applicant in 2008.

In addition, Murphey testified that:

- it is not possible to identify mild mental retardation by appearance.
- "Language and vocabulary is one of the best indicators of intelligence; and so, sometimes there might be some hints [of mild mental retardation], but you could not be sure."
- people with mild mental retardation are capable of "masking" their condition, particularly if they have adaptive strengths in some areas co-mingled with adaptive deficits in other areas.
- mild mental retardation is not associated with any particular personality trait and can co-exist with antisocial personality disorder.
- "people, particularly with mild mental retardation, may function perfectly fine in a world that's familiar and routine and doesn't require high-level thinking and quick decision making, but in a more routine kind of life."
- people with mild mental retardation can often work adequately at repetitive jobs, write letters, even successfully commit crimes.
- disciplinary problems in school could be a function of frustration borne

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[9] This Court has still to address the scientific validity of the so-called "Flynn Effect," *Blue*, 230 S.W.3d at 166, although we have such a case presently pending before us. *See Ex parte Cathey*, 2008 WL 4927446 (Tex. Crim. App. Nov. 18, 2008) (not designated for publication).

of progressively falling behind academically on account of mild mental retardation.

- adaptive behavior on death row is not a good gauge of mild mental retardation because life there is so regimented.

Murphey concluded that, based upon her testing, she believes that the applicant meets the diagnostic criteria for mild mental retardation.

The State countered with testimony from Dr. John Sparks, formerly a psychiatrist at the Bexar County Jail, now retired. In 2000 or 2001, Sparks evaluated the applicant for his competency to stand trial. Such an evaluation, he testified, would typically entail spending half an hour to an hour with the inmate. Sparks had no independent recollection of his interview with the applicant, but from the report he filed for the court he was able to say that he had "seen no evidence that suggested [the applicant] was subaverage in his functioning." Absent such a clinical impression during an examination for competency or sanity, Sparks would not have ordered independent psychological testing for mental retardation. Although he was familiar with the DSM-IV-TR criteria for mental retardation, Sparks admitted that he had acquired no particularized training or broad experience over the course of his career in diagnosing mental retardation, and that it was something he looked for only as it informed his evaluations for competency or sanity. Indeed, from the witness stand, he could not even recall what the third diagnostic criterion for mental retardation was. He nevertheless confidently asserted that he "did not find any information that would warrant my saying [the applicant] was retarded." He had "not even considered [the applicant] to be potentially

retarded." He could tell from his "personal evaluation" that the applicant was capable of functioning at an average level and that no formal testing for mental retardation was necessary. In conducting competency evaluations, Sparks used a written questionnaire that was designed for subjects who function at a sixth-grade reading level. He evidently regarded this as a sufficient protocol for rooting out mental retardation even though he acknowledged that some people with mild mental retardation can read at a sixth grade level.

In its proposed findings of fact and conclusions of law, the convicting court has credited Sparks's testimony over that of Murphey, recommending that we find that the applicant has failed to establish mental retardation by a preponderance of the evidence because of perceived flaws in Murphey's evaluation.[10] For example, with respect to her I.Q. testing, "[s]he found no evidence that [the applicant] had tried to do less than his best work on the I.Q. test, in spite of several factors that the DSM lists as suspicious." Murphey indeed acknowledged that death row was "a fairly stressful environment," the implication being that it is not a place that is conducive to optimal I.Q. test-taking. She also acknowledged that I.Q. testing in the *Atkins* context can be problematic, since the test subject has a built-in motive to malinger. But Murphey saw no indication that the applicant comprehended the legal significance of the testing or that he was malingering.[11] The convicting court also faults

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[10] Again, this was the wrong standard for a subsequent post-conviction writ application when the applicant's initial writ application was post-*Atkins*. *Blue*, 230 S.W.3d at 162-63.

[11] During cross-examination, Murphey testified:

Q. And did you explain to him the purpose of the testing?

A. No.

Q. Okay.

A. Other than that it was a psychological evaluation.

Q. Do you believe, in your opinion, he understood the possible consequences of this testing?

A. No, I do not.

Q. Why not?

A. Because, you know, I do quite a bit of this, and it is not uncommon for the people I'm testing to start talking to me about, [m]y lawyer said I have an Atkins claim and this, that, and the other. Mr. Weathers just kind of said okay. There was not any mention of what the relevance was. I made no mention to him; he made no mention to me.

Q. Well, according to your notes, he was very interested in your test results and asked you repeatedly how he did.

A. How he did and asked me to give him answers when he did not know something, as well.

Q. You've said that there was no evidence of malingering in the test, correct?

A. Yes.

In fact, as Murphey would later explain:

Q. In your opinion, was [the applicant] malingering while he was taking these tests?

A. No, I do not believe [the applicant] was malingering. To the contrary, I think [the applicant] was very competitive. That he was determined to complete tasks that were difficult for him and that there's a certain time for some of these items to be administered, 120 seconds, 180 seconds, after that, no matter even if you get it right, you're given no score for it.

Murphey for "her extreme reluctance to admit that the term she used to describe the result of [the applicant's] earlier testing [by Reed] is not a clinical diagnosis to be found within the DSM." I frankly fail to see the impeaching significance of this observation.[12] Murphey did not deny that, in the abstract, an I.Q. score of 79 would fall within the range of borderline intelligence rather than mild mental retardation. Her point was that, because of the Flynn

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> But [the applicant] just insisted on trying to complete things, and I simply let him do it, so I sat until he either gave up or the time became really to the point that I just had to say we have to move to the next item.

[12] The relevant colloquy, again during Murphey's cross-examination, is as follows:

> Q. Okay. What was Dr. Reed's overall IQ finding?
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> A. I think it was 78 or 79.
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> * * *
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> Q. You characterized that finding as being in the borderline mentally deficient range, correct?
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> A. Well, that was Dr. Reed's assessment. I believe I just took his data.
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> Q. Okay. Borderline mental deficiency is not actually a clinical term; it's not to be found in the DSM?
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> A. Well, we have the borderline range of intelligence, and so that is a term that is frequently used.
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> Q. All right. But it's not -- it's not a clinical term is my question.
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> A. I don't know. I mean, it's -- it's a term used to talk about ranges of scores on tests. So to that extent I guess it's clinical.
>
> Q. You also -- Well, it's not -- it's not a diagnosis that's found in the DSM, correct?
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> A. That's correct.

Effect, such a score on the WAIS-III, administered in 2008, should not necessarily be regarded as sufficient to rule out a diagnosis of mild mental retardation. Any reluctance to recognize that borderline intelligence is not a "clinical term" in contemplation of the DSM-IV-TR is inconsequential. Finally, twice in its recommended findings and conclusions the convicting court observes that "even [Murphey's] own testing showed [the applicant] to be within the error range of not being mentally retarded." The Court today rightly disowns this observation in its order denying relief because it is simply inaccurate. A full-scale score of 65 falls squarely within the range for mild mental retardation even taking into account the five point standard error measurement.[13]

The convicting court also criticizes Murphey's conclusions with respect to the applicant's adaptive functioning. While acknowledging that it is best to obtain a broad range of informants, Murphey herself managed to interview only three individuals, and two of those were family members with a motive to help the applicant establish his *Atkins* claim. But in administering the ABAS, Murphey did not limit herself to the data obtained from her interviews with the applicant's family members; she also took into account the written responses of other informants including a friend, a neighbor, a teacher, and a former employer. In any event, it is hard to fathom why we should choose to discredit Murphey's

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[13] "Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean)." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, at 41 (4th ed. Text Revision 2000).

conclusions as ill informed while at the same time accepting Sparks's, when Sparks conceded that he had interviewed nobody *at all* with respect to the applicant's adaptive behavior, choosing instead to rely on nothing more than his clinical judgment.

The convicting court also impugns Murphey's adaptive deficits conclusion because she "was unwilling to credit evidence contrary to her conclusion." It is true that Murphey evinced some reluctance to accept certain adverse inferences that the State invited her to draw during her cross-examination. For example, school records suggested that the applicant had been placed in special education classes but did not reveal the reason why. The State hypothesized that the applicant might have Antisocial Personality Disorder (ASPD), since he was disruptive in class and failed to turn in his school assignments even though some of his teachers believed he was capable of doing the work. Murphey conceded that the applicant's disciplinary record was consistent with ASPD, but insisted that such a diagnosis would not rule out mental retardation. She was simply unwilling to speculate with respect to the basis for the applicant's placement in special education classes without information about the actual standardized tests that would have been administered as part of that placement, records of which had apparently been destroyed. She also acknowledged that there was anecdotal testimony that suggested that the applicant has certain adaptive strengths. Given that adaptive strengths often coexist with adaptive deficits in people with mild mental retardation, however, and that the diagnosis is still appropriate so long as there are sufficient areas of adaptive deficiencies, it is not surprising that Murphey was unwilling to give

ground.[14]

Finally, in its concluding paragraph, the convicting court stated without elaboration that, "[w]eighing the evidence against the *Briseno* factors, the Court finds that [the applicant] did not meet the standard of proof to find that he is mentally retarded." Only Murphey's testimony expressly addressed the so-called *Briseno* factors.[15] She testified that "many" of

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[14] *See Butler*, 416 S.W.3d at 883 (Price, J., dissenting) ("[T]his emphasis on adaptive strengths rather than adaptive weaknesses runs contrary to standard diagnostic protocol, which I believe the courts are obliged to follow in implementing *Atkins*.").

[15] Those factors are:

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Briseno, 135 S.W.3d at 8-9.

the applicant's family members have regarded him as retarded, that the applicant is not a "leader," that he is not capable of complex planning or of constructing complex lies to cover up his criminal activity, and that, while he can sometimes communicate coherently, "in some areas, no." Sparks did not address the *Briseno* factors at all.[16]

This is not meant to be an exhaustive summary of all of the evidence presented at the post-conviction hearing. I think it is enough, however, to illustrate that the issue of mental retardation, *vel non*, essentially boiled down to a battle between the two experts. The case is indeed a "close question" in the sense that a rational fact-finder *could* choose, I suppose, to discredit Murphey's testimony and to rely instead on Sparks's clinical judgment. And, in an appellate context, I would be constrained to defer to the findings of the court below, subject only to a review for evidentiary sufficiency.[17] But in the ordinary post-conviction habeas corpus context, we are not simply a reviewing court that is limited to reviewing the rationality of the institutional fact finder in the court below. We are the court of return,

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[16] In any event, I no longer regard the *Briseno* factors as useful to inform a clinical diagnosis of mental retardation. *See Lizcano v. State*, 2010 WL 1817772, at *35 (Tex. Crim. App. May 5, 2010) (Price, J., concurring and dissenting) (not designated for publication) (criticizing the *Briseno* factors for "failing . . . to anchor the fact-finder's decision on the specific diagnostic criteria," and, in that respect "we seem to have granted a certain amorphous latitude to judges and juries in Texas to supply the normative judgment—to say, in essence, what mental retardation *means* in Texas (and, indeed, in the individual case) for Eighth Amendment purposes").

[17] *See Ex parte Gallo*, 2013 WL 105277, at *2 (Tex. Crim. App. Jan. 9, 2013) (Price, J., concurring) (not designated for publication) (issue of mental retardation litigated at trial is subject to review on direct appeal for determination whether jury's rejection of the claim was against the great weight and preponderance of the evidence).

which means that we ourselves are the ultimate institutional fact finder. Nothing in the record before us induces me to prefer the product of Sparks's incidental mental retardation evaluation over Murphey's careful application of the appropriate diagnostic criteria as measured by accepted diagnostic instruments. Giving credence to Murphey's testimony, and contrary to the convicting court's recommendation, I would hold that the appellant has demonstrated, at least by a preponderance of the evidence, that he is mildly mentally retarded.

But this subsequent habeas applicant must satisfy a higher burden. Because I cannot say that he has shown by clear and convincing evidence that no rational fact-finder would fail to find him mentally retarded, I agree that the applicant is not entitled to relief in this subsequent writ application.[18]

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DO NOT PUBLISH

[18] Because the convicting court utilized the wrong standard in its recommended conclusions of law, I would not adopt them as the Court does in its order today.