IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-50,791-02

EX PARTE JOHN REYES MATAMOROS, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS IN CAUSE NO. 643410 FROM THE 180TH DISTRICT COURT OF HARRIS COUNTY

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

DISSENTING STATEMENT

On June 13, 2007, we denied post-conviction habeas corpus relief to this applicant,[1] rejecting his *Atkins* claim that he cannot be executed consonant with the Eighth Amendment because he is mentally retarded.[2] While we explicitly adopted some of the recommended findings of fact and conclusions of law of the convicting court, we expressly declined to adopt the convicting court's conclusion that the applicant "fails to show by a preponderance

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[1] *Ex parte Matamoros*, No. WR-50,791-02, 2007 WL 1707193 (Tex. Crim. App., delivered June 13, 2007) (not designated for publication).

[2] *Atkins v. Virginia*, 536 U.S. 304 (2002).

of the evidence that he has significant sub-average general intellectual functioning[.]"[3] Thus, as the federal district court later acknowledged, "the state habeas court ultimately found in [that applicant's] favor on this prong."[4] We nevertheless held that the applicant failed to establish by the requisite level of confidence that "he has sufficient deficiencies in adaptive functioning for a diagnosis of mental retardation or that there was an onset of mental retardation during [his] developmental period."[5]

The State's expert at the *Atkins* state habeas writ hearing was Dr. George Denkowski, a licensed psychologist with experience in diagnosis and treatment of mental retardation. It was largely on the basis of Dr. Denkowski's input that the convicting court was able to recommend finding against the applicant with respect to all three of the diagnostic criteria for mental retardation: general intellectual functioning, adaptive functioning, and onset before age 18.[6] At the evidentiary hearing, the applicant presented ample evidence, including expert testimony, that would have served to establish all three prongs of the diagnostic criteria. Having again reviewed the transcript of the 2006 evidentiary hearing, I, for one,

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[3] *Ex parte Matamoros*, *supra*, at *1.

[4] *Matamoros v. Thaler*, No. H-07-2613, 2010 WL 1404368, at *5 (S.D. Tex., March 31, 2010) (not designated for publication).

[5] *Ex parte Matamoros*, *supra*.

[6] *E.g.*, *Ex parte Hearn*, 310 S.W.3d 424, 428 (Tex. Crim. App. 2010).

would readily have found that the applicant demonstrated mental retardation to the requisite level of confidence—but for Denkowski's contrary testimony.[7]

Since we rejected the applicant's *Atkins* claim in 2007, Denkowski's diagnostic practices have come under considerable professional scrutiny. In April of last year, he entered into a settlement agreement, in proceedings that were brought against him by the Texas State Board of Examiners of Psychologists with the State Office of Administrative Hearings, in which he agreed to discontinue forensic evaluations for mental retardation in *Atkins* cases.[8] The applicant subsequently sought reconsideration in this Court of the denial of relief in view of the settlement agreement. While the Texas Rules of Appellate Procedure do not contemplate the filing of a motion for rehearing following the denial of a post-

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[7] In the context of post-conviction habeas corpus, the convicting court is the "original" fact-finder, and we ordinarily pay great deference to that court's findings of fact and conclusions of law when supported by the record. But that deference is not boundless, and we do not simply rubber-stamp the convicting court's recommendations. This Court is the "ultimate" fact-finder, with the prerogative to reject the convicting court's recommendations on those rare occasions 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. *Ex parte Spencer*, 337 S.W.3d 869, 879-80 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).

[8] *See Maldonado v. Thaler*, 625 F.3d 229, 234 (5th Cir. 2010) (noting the proceedings brought against Denkowski in the State Office of Administrative Hearings); *Pierce v. Thaler*, 604 F.3d 197, 213 (5th Cir. 2010) (noting that this Court had recently found Denkowski's credibility to be lacking in *Ex parte Plata*, No. AP-75,820, 2008 WL 151296 (Tex. Crim. App., delivered Jan. 16, 2008) (not designated for publication)).

conviction application for writ of habeas corpus,[9] we are authorized to revisit final judgments in such matters on our own motion, under extraordinary circumstances.[10] We did so in this case, remanding the cause to the convicting court "to allow it the opportunity to re-evaluate its initial findings, conclusions, and recommendation in light of the Denkowski Settlement Agreement."[11]

Our remand order invited the convicting court to "order affidavits or hold a live hearing if warranted."[12] Accordingly, the applicant offered new affidavits and requested a hearing. The convicting court made no ruling on these matters.[13] Instead, the convicting court simply signed a revised version of the original findings of fact and conclusions of law that was proposed by the State, and announced in open court, at a hearing on March 30, 2012, that it had "totally discounted and did not consider anything in the records provided by Dr. George Denkowski in this matter." Although counsel for the applicant called his new affidavits to the trial court's attention, they are not mentioned in the revised findings and

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9 TEX. R. APP. P. 79.2(d).

10 *Ex parte Moreno*, 245 S.W.3d 419, 427-29 (Tex. Crim. App. 2008).

11 *Ex parte Matamoros*, No. WR-50,791-02, 2011 WL 6241295, at *1 (Tex. Crim. App., delivered Dec. 14, 2011) (not designated for publication).

12 *Id.*

13 The current judge of the 180th Judicial District Court is different than the judge who presided over that court in 2006 when the applicant's initial writ hearing occurred.

conclusions that the trial court has now recommended to us. As in the recent case of *Ex parte Butler*,[14] the process by which these new recommended findings and conclusions were made does not inspire confidence. Contrary to the convicting court, I believe that the applicant has made a fairly compelling showing of mental retardation, and I would not reject his claim without first remanding the cause to the convicting court for additional fact development.

General Intellectual Functioning: With respect to the first prong of the diagnostic criteria for mental retardation, the convicting court acknowledges that this Court has already determined that the applicant has satisfied this prong. I need say no more about it here.

Adaptive Deficits: In *Ex parte Briseno*,[15] we recognized the definition of "limitations in adaptive functioning" that was endorsed by the American Association on Mental Retardation (AAMR, now the American Association on Intellectual and Developmental Disabilities, or AAIDD), *viz*: "Impairments in adaptive behavior are defined as significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales."[16] In *Atkins*, the definition of adaptive deficits noted by the Supreme Court specifically

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[14] *Ex parte Butler*, No. 41,121-02, 2012 WL 2400634, at *12 (Tex. Crim. App., delivered June 27, 2012) (not designated for publication).

[15] 135 S.W.3d 1 (Tex. Crim. App. 2004).

[16] *Id*. at 7 & n.25.

recognized the clinical criteria for measuring adaptive deficits that were developed by the AAMR: "limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work."[17] Limitations in adaptive behavior can be determined using standardized tests such as the Vineland Adaptive Behavior Scales (Vineland) or the Adaptive Behavior Assessment System (ABAS).[18]

The applicant's expert at the 2006 writ hearing, Dr. Susana Rosin, testified that she found sufficient limitations in his adaptive behavior, utilizing the Vineland, to justify a diagnosis of mental retardation, but the convicting court disregarded her results because she admittedly did not follow proper protocol in administering the test. Denkowski administered the ABAS to the applicant, obtaining scores in at least four of the above adaptive skill areas that would indicate clinically recognizable deficits. And Denkowski even conceded that the applicant demonstrated a deficit in one of these adaptive skill areas, functional academics.

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[17] *Atkins*, *supra*, at 309 n.3 (citing the AAMR publication, Mental Retardation: Definition, Classification, and Systems of Support 5 (9th ed. 1992)). In 2002, in its tenth edition of this publication, the AAMR modified the criteria somewhat, consolidating some of the skill areas and requiring significant limitations in only one of the three to justify a diagnosis of mental retardation. *See* AAMR, Mental Retardation: Definition, Classification, and Systems of Support 20-23 (10th ed. 2002). These various definitions, "while following developments in consensus in the clinical field, have retained a consistent core meaning." John H. Blume, Sheri Lynn Johnson and Christopher Seeds, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J. L. & PUB. POL'Y 689, 696 n. 28 (Summer 2009).

[18] *Ex parte Hearn*, *supra*, at 428 & n.10.

He testified, however, that the applicant's scores in the remaining areas were not true indicators of his genuine abilities, based upon, *inter alia*, information he gleaned from the applicant's Texas Youth Commission (TYC) records. For this reason, Denkowski adjusted these scores upward, allowing him to testify that the applicant ultimately did not satisfy the diagnostic criteria for mental retardation. The convicting court's original findings regarding this prong, which we adopted in 2007, relied heavily on this testimony. The applicant now contends that Denkowski artificially inflated the ABAS scores using professionally unacceptable criteria, especially the TYC records. He bases this contention upon an affidavit recently provided by Dr. Thomas Oakland, a psychologist and co-author of the ABAS.

Onset Before 18: At the 2006 writ hearing, the applicant introduced the report of a psychologist, Dr. Ronald Smith, who diagnosed the applicant as suffering from mental retardation as early as 1977, when he was fourteen years old. Rosin relied upon Smith's report to conclude that the applicant's mental retardation preceded his eighteenth birthday. Denkowski testified, however, that Smith's diagnosis was invalid because, insofar as Denkowski could tell from his report, he failed to conduct any assessment of the applicant's adaptive deficits at that time. The applicant now proffers a signed but unsworn affidavit from Dr. Jack M. Fletcher, a psychology professor, opining that Dr. Smith's "assessment was consistent with diagnostic practices in 1977." Dr. Oakland's affidavit echoes this view, maintaining that, in 1977, "the diagnosis of mental retardation did not require the use of a measure of adaptive behavior. The absence of this information should not invalidate an

otherwise legitimate diagnosis of mental retardation." In my view, Smith's diagnosis should count as proof by a preponderance of the evidence that, if the applicant indeed has suffered from mental retardation, he has done so since before he turned 18.

Convicting Court's Revised Findings of Fact and Conclusions of Law. The new recommended findings and conclusions appropriately recognize "that deficits exist in adaptive behavior when an individual has significant limitations in at least two of the ten skill areas or when an individual's composite score from an adaptive behavior instrument is 70 or below."[19] Even after Denkowski adjusted the applicant's scores on the ABAS, the applicant's composite score was still below 70. Denkowski nevertheless persisted in his opinion that the applicant demonstrated insufficient adaptive deficits to justify a classification as mentally retarded. Dr. Oakland now criticizes Denkowski's reliance upon the TYC records as an authoritative source of adaptive-deficit information:

> Dr. Denkowski relies on evidence from the Texas Youth Commission (TYC) to conclude Mr. Matamoros's adaptive skills are normal. He cites evidence that his adaptive skills increased following TYC interventions. His belief overlooks the fact that adaptive behavior cannot be assessed validly when persons are incarcerated or otherwise confined. Moreover, the TYC did not use norm referenced measures to assess adaptive behavior.
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> The [Diagnostic and Statistical Manual] and other authoritative sources describe adaptive behavior or functioning as the effectiveness of the individual to cope with *common life demands* and how well they meet the standards of *personal independence.* Life when incarcerated, by design, differs considerably from life on the outside. Life on the outside has more common life demands, is more complex, and more reliant on one knowing what to do, when, and under what conditions.

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[19] State's Amended Proposed Findings of Fact, Conclusions of Law at 13, #60.

> Additionally, when incarcerated under TYC regulations, youth are less able to display personal independence and instead must follow externally imposed rules and regulations. Behaviors displayed when incarcerated may not be displayed on the outside. There is no evidence that adaptive behaviors Mr. Matamoros seemingly developed while in the TYC facilities transferred to the outside. High rates of recidivism demonstrate this fact for the general population and may apply to Mr. Matamoros.

The convicting court's new recommendations do not address these criticisms.

Instead, the convicting court simply recommends that we find that any problem stemming from Denkowski's testimony is obviated by the fact that the same conclusions may safely be reached even if we discount Denkowski's input, including the scores he obtained from his administration of the ABAS. The proposed findings and conclusions go to great lengths to point out that the federal district court held that, even absent Denkowski's testimony at the 2006 writ hearing, there is evidence—particularly, the TYC records themselves—that still *supports* a finding that the applicant failed to demonstrate a second area of adaptive deficits necessary to support a diagnosis of mental retardation.[20] This apparently explains why the convicting court saw no need for further fact development.

I am unpersuaded. Under the Antiterrorism and Effective Death Penalty Act,[21] the

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[20] *See Matamoros v. Thaler*, *supra*, at *15 (finding that our original findings and conclusions were "reasonable" even disregarding Denkowski's testimony—while nevertheless pointing to information in the TYC records to support our original conclusion that the applicant "does not have significant deficits in the other areas of adaptive behavior" besides functional academics).

[21] *See* 28 U.S.C. § 2254(d)(2) (federal habeas petition "shall not be granted" unless state court adjudication of the claim "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding").

federal courts are required to pay almost insurmountable deference to our fact and credibility determinations. They have no choice. In remanding this case to the convicting court, however, we did not ask for a determination whether it would still be appropriate for *this Court* to *defer* to our original findings and conclusions, as the federal court was obliged to do—essentially, deference stacked upon deference. Given Denkowski's settlement agreement, and the substantial criticisms of his diagnostic methodology, as evidenced by the affidavits the applicant has lately tendered, questions abound. For example, even taking Denkowski's testimony out of the mix, is it appropriate for this Court—the ultimate arbiter of the applicant's mental retardation—to rely on the TYC records as evidence that the applicant suffers no adaptive deficits outside the realm of functional academics, considering (as the convicting court apparently did *not*) Dr. Oakland's criticisms? I would at least remand this cause to the convicting court for further factual development and a recommendation of what findings of fact and conclusions we should come to *now*—not a facile judgment whether we can safely continue to *defer* to the findings and conclusions we made back in 2007.

Because the Court does not, I dissent.

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