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Opinion following transfer by Supreme Court

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Petitioner, v. THE SUPERIOR COURT OF TULARE COUNTY, Respondent; JORGE JUNIOR VIDAL, Real Party in Interest.	F045226 (Tulare Co. Super. Ct. No. 69782-C) **OPINION**

ORIGINAL PROCEEDING; Petition for Writ of Prohibition and/or Mandate and Request for Stay. William Silveira, Jr., Judge.

Phillip J. Cline, Tulare County District Attorney, and Barbara J. Greaver, Deputy, for Petitioner.

No appearance for Respondent.

Michael Shetzer, Tulare County Public Defender, and Berry Robinson, Deputy, for Real Party in Interest.

John T. Philipsborn, for California Attorneys for Criminal Justice, on behalf of Real Party in Interest.

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SEE CONCURRING AND DISSENTING OPINION

In *Atkins v. Virginia* (2002) 536 U.S. 304 (*Atkins*), the United States Supreme Court held that the execution of mentally retarded criminals violates the Eighth Amendment to the United States Constitution. (*Id*. at p. 321.) The court reasoned that "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." (*Id*. at p. 318, fns. omitted.)

The court recognized that "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded.… Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach … with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.' [Citation.]" (*Atkins*, *supra*, 536 U.S. at p. 317, fn. omitted.)

The California Legislature responded by enacting Penal Code section 1376, which defines "mentally retarded," sets forth procedures for determining whether an accused is

mentally retarded, and, if so, precludes imposition of the death penalty.[1] In this case of first impression, we address various issues arising under this statute, which applies to

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[1] All statutory references are to the Penal Code unless otherwise stated.

Section 1376 provides:

"(a) As used in this section, 'mentally retarded' means the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18.

"(b)(1) In any case in which the prosecution seeks the death penalty, the defendant may, at a reasonable time prior to the commencement of trial, apply for an order directing that a mental retardation hearing be conducted. Upon the submission of a declaration by a qualified expert stating his or her opinion that the defendant is mentally retarded, the court shall order a hearing to determine whether the defendant is mentally retarded. At the request of the defendant, the court shall conduct the hearing without a jury prior to the commencement of the trial. The defendant's request for a court hearing prior to trial shall constitute a waiver of a jury hearing on the issue of mental retardation. If the defendant does not request a court hearing, the court shall order a jury hearing to determine if the defendant is mentally retarded. The jury hearing on mental retardation shall occur at the conclusion of the phase of the trial in which the jury has found the defendant guilty with a finding that one or more of the special circumstances enumerated in Section 190.2 are true. Except as provided in paragraph (3), the same jury shall make a finding that the defendant is mentally retarded, or that the defendant is not mentally retarded.

"(2) For the purposes of the procedures set forth in this section, the court or jury shall decide only the question of the defendant's mental retardation. The defendant shall present evidence in support of the claim that he or she is mentally retarded. The prosecution shall present its case regarding the issue of whether the defendant is mentally retarded. Each party may offer rebuttal evidence. The court, for good cause in furtherance of justice, may permit either party to reopen its case to present evidence in support of or opposition to the claim of retardation. Nothing in this section shall prohibit the court from making orders reasonably necessary to ensure the production of evidence sufficient to determine whether or not the defendant is mentally retarded, including, but not limited to, the appointment of, and examination of the defendant by, qualified experts. No statement made by the defendant during an examination ordered by the court shall be admissible in the trial on the defendant's guilt.

"(3) At the close of evidence, the prosecution shall make its final argument, and the defendant shall conclude with his or her final argument. The burden of proof shall be

cases pending in the trial court at the time of its enactment. (*Centeno v. Superior Court* (2004) 117 Cal.App.4th 30, 38, fn. 1; see, e.g., *In re Holladay* (11th Cir. 2003) 331 F.3d

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on the defense to prove by a preponderance of the evidence that the defendant is mentally retarded. The jury shall return a verdict that either the defendant is mentally retarded or the defendant is not mentally retarded. The verdict of the jury shall be unanimous. In any case in which the jury has been unable to reach a unanimous verdict that the defendant is mentally retarded, and does not reach a unanimous verdict that the defendant is not mentally retarded, the court shall dismiss the jury and order a new jury impaneled to try the issue of mental retardation. The issue of guilt shall not be tried by the new jury.

"(c) In the event the hearing is conducted before the court prior to the commencement of the trial, the following shall apply:

"(1) If the court finds that the defendant is mentally retarded, the court shall preclude the death penalty and the criminal trial thereafter shall proceed as in any other case in which a sentence of death is not sought by the prosecution. If the defendant is found guilty of murder in the first degree, with a finding that one or more of the special circumstances enumerated in Section 190.2 are true, the court shall sentence the defendant to confinement in the state prison for life without the possibility of parole. The jury shall not be informed of the prior proceedings or the findings concerning the defendant's claim of mental retardation.

"(2) If the court finds that the defendant is not mentally retarded, the trial court shall proceed as in any other case in which a sentence of death is sought by the prosecution. The jury shall not be informed of the prior proceedings or the findings concerning the defendant's claim of mental retardation.

"(d) In the event the hearing is conducted before the jury after the defendant is found guilty with a finding that one or more of the special circumstances enumerated in Section 190.2 are true, the following shall apply:

"(1) If the jury finds that the defendant is mentally retarded, the court shall preclude the death penalty and shall sentence the defendant to confinement in the state prison for life without the possibility of parole.

"(2) If the jury finds that the defendant is not mentally retarded, the trial shall proceed as in any other case in which a sentence of death is sought by the prosecution.

"(e) In any case in which the defendant has not requested a court hearing as provided in subdivision (b), and has entered a plea of not guilty by reason of insanity under Sections 190.4 and 1026, the hearing on mental retardation shall occur at the conclusion of the sanity trial if the defendant is found sane."

1169, 1172 [applying *Atkins* retroactively]; *Bell v. Cockrell* (5th Cir. 2002) 310 F.3d 330, 332 [same].)

PROCEDURAL HISTORY[2]

[ ]

On January 24, 2001, Eric Jones was shot and killed outside Delano, California, in rural Tulare County. On January 27, 2001, [real party in interest] Jorge Vidal, Jr. [Vidal] and two others were arrested for his murder. Four additional suspects remained at large.

A preliminary hearing was held October 4-5, 2001 and October 11, 2001. At its conclusion, Vidal was held to answer on all charges. On October 24, 2001, the district attorney filed an information charging Vidal and others with capital murder.[3] At his November 2, 2001, arraignment in Superior Court, Vidal entered pleas of not guilty to all

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2 As we are unable to construct a complete procedural history from the exhibits furnished by the parties, we adopt a portion of the "RESPONSE TO PETITION FOR WRIT OF PROHIBITION AND/OR MANDATE AND REQUEST FOR STAY," filed June 14, 2004, with appropriate deletions and additions. Empty brackets [ ] indicate deletions; brackets with material enclosed indicate our insertions or additions, unless otherwise specified. (See *Municipal Court v. Superior Court* (*Gonzalez*) (1993) 5 Cal.4th 1126, 1128-1129 & fn. 1.) Footnotes in the source material have been renumbered sequentially and unnecessary capitalization has been omitted.

Vidal seeks sanctions for the People's failure to summarize relevant testimony (as opposed to Vidal's confession), in violation of California Rules of Court, rule 14. The request is denied.

3 [As nearly as we can ascertain, Vidal was charged with murder (§ 187, subd. (a)); torture (§ 206); unlawful sexual penetration (§ 289, subd. (a)(1)); sexual assault in concert (§ 264.1); kidnapping (§ 207, subd. (a)); false imprisonment (§ 236); unlawful sexual penetration of a person under age 18 (§ 289, subd. (h)); six counts of unlawful possession of a firearm (§ 12021, subd. (c)(1)); two counts of unlawful possession of an assault weapon (§ 12280, subd. (b)); and two counts of receiving stolen property (§ 496, subd. (a)). From the record before us, we are unable to determine with certainty what special circumstances and enhancements were alleged.]

charges and denied all the special circumstance and enhancement allegations. On December 6, 2001, the district attorney announced his intent to seek the death penalty.

On October 1-3, 2003, October 14-15, 2003, October 23-24, 2003, October 28, 2003 and March 8-10, 2004, the Court held an evidentiary hearing on several pretrial motions filed by Vidal. This hearing encompassed the following motions/issues raised by Vidal: a motion to preclude the imposition of the death penalty pursuant to [section 1376] and *Atkins* [ ]; a motion to preclude the imposition of the death penalty based on a violation of the Vienna Convention on Consular [Relations] and [ ] section 834c; and a motion to suppress all of Vidal's statements made to law enforcement after his arrest based on violations of the United States Constitution, *Miranda v. Arizona* (1966) 384 U.S. 436 [*Miranda*], the Vienna Convention on Consular [Relations] and [ ] section 834c. After both sides rested on March 10, 2004, the Court set the matter for argument on March 15, 2004.

On March 15, 2004, after the argument of counsel, the Court ruled from the bench that Vidal had met his burden of proof by preponderance of the evidence and Vidal was found mentally retarded pursuant to [section 1376, subdivision (a)] and precluded the prosecution from seeking the death penalty.[4] In it's [*sic*] ruling, the Court denied Vidal's motion to preclude death based on a violation of the Vienna Convention on Consular [Relations] and [ ] section 834c. The admissibility of Vidal's post arrest statements was taken under submission. At that time, Vidal then attempted to plead guilty to all the charges, special circumstances and special allegations and accept a sentence of life in prison without the possibility of parole. The Court refused to accept Vidal's plea and set the matter for further proceedings on March 24, 2004.

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4 The Court supplemented its ruling from the bench by written order dated March 16, 2004, and attached to the Court's minute order of March 15, 2004. [ ]

On March 24, 2004, the Court denied Vidal's motion to suppress his post-arrest statements on all grounds. Again, Vidal attempted to plead guilty to all the charges, special circumstances and special allegations and accept a sentence of life in prison without the possibility of parole. Again, the Court refused to accept Vidal's plea.

In a dueling battle of petitions seeking pretrial appellate review, Vidal filed his petition for writ of mandate[5] with this Court on March 26, 2004, asking this Court to order the trial court to accept his guilty plea, and on April 1, 2004, the People filed the instant petition asking for review of the trial court's ruling on mental retardation. On April 2, 2004, this Court issued an order to show cause and stayed all trial court proceedings until further notice.[6]

On April 6, 2004, we directed the parties to brief the following issues:

- What constitutes mental retardation for purposes of section 1376?
- What constitutes adaptive behavior for purposes of said statute?
- By what standard does a trial court determine whether a defendant is mentally retarded within the meaning of said statute?
- Did the trial court apply the correct standard in this case?
- By what standard does an appellate court review a trial court's determination of mental retardation under said statute?
- Should this court uphold the trial court's determination that Vidal is mentally retarded within the meaning of said statute?

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5 *Jorge Vidal v. Tulare County Superior Court, The People of the State of California, Real Party in Interest, F045203*. On April 2, 2004, [we] issued an order holding this petition in abeyance pending a resolution of the instant petition.

6 We end our quotation.

The parties additionally addressed whether the People are entitled to pretrial review of a trial court's ruling under section 1376.

In our original opinion, we held that (1) the People are entitled to seek pretrial review of a trial court's ruling under section 1376, and (2) the trial court here applied the wrong measure of general intellectual functioning in determining that real party in interest Jorge Vidal, Jr. (Vidal), is mentally retarded. Accordingly, we directed the trial court to vacate its order and to reconsider the matter in light of our opinion.

After our opinion was filed, the California Supreme Court issued its decision in *In re Hawthorne* (2005) 35 Cal.4th 40 (*Hawthorne*). It subsequently granted review in the present case and transferred the matter back to us with directions to vacate our decision and reconsider the cause in light of *Hawthorne*. Having reviewed the case in the context of that opinion, we again conclude that the People have the right to seek pretrial review and that the trial court erred.[7]

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[7] Because the People cited to, and relied on, Vidal's confession in support of their petition, Vidal originally asked us also to determine (1) whether all of his postarrest statements should be suppressed because they were involuntary and obtained in violation of the United States Constitution, *Miranda*, the Vienna Convention on Consular Relations, and section 834c (which concerns the right of an arrested or detained foreign national to communicate with an official from the consulate of his or her country); and (2) whether the People should be precluded from seeking the death penalty because he was not advised of his right to speak to the Mexican Consulate pursuant to the Vienna Convention on Consular Relations and section 834c.

We decline to address those issues, as they were neither raised by the petition nor encompassed in our order to show cause. To the extent the People relied on Vidal's confession in addressing the issue of mental retardation under section 1376, we note that the confession was also considered by some or all of the experts who testified below. Moreover, Vidal has advised us that the trial court denied his motion to suppress the confession on all grounds. "Neither a writ of prohibition nor a writ of mandate may be used to resolve an issue as to the admissibility of evidence. [Citations.]" (*Ballard v. Superior Court* (1966) 64 Cal.2d 159, 164.) In addition, Vidal has an adequate remedy

FACTS

The circumstances of the alleged offenses are not germane to the issues currently before this court. Accordingly, we recite the evidence adduced with respect to the issue of mental retardation.

Vidal was born October 23, 1969. Spanish was his first language. Beginning about fourth grade, in which Vidal was held back in school, it became apparent to his younger sister that he was not very smart and could not read or write like other children his age. Despite extensive help with his homework, he could not understand his schoolwork. By ninth grade, Vidal had improved somewhat in the way he spoke, but still was unable to use correct grammar. He had trouble in both English and Spanish, never learned to read anything but small words, and never really learned to write. He also had difficulty remembering things such as his chores and household rules.

At some point, Vidal married and moved out of his mother's home and into a small house in Delano, where he lived with his wife and children. He performed seasonal labor in the fields, was loving and caring toward his children, and took care of them from time to time.

Eugene Couture, a licensed psychologist with specialty training in neuropsychology who frequently evaluated people for mental retardation, began seeing Vidal in May 2001. He administered tests, reviewed school records, spoke with Vidal's sisters, reviewed the records from Vidal's two and one-half years in pretrial custody as well as the police reports concerning the offense, and reviewed the videotape and transcript of the statement Vidal gave to police.

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by way of appeal, should he be convicted. (See *Serna v. Superior Court* (1985) 40 Cal.3d 239, 263.) Accordingly, Vidal's confession is properly before us at this time.

Vidal's school records revealed concerns, early on, about his intellectual functioning. He was noted as having language problems beginning in kindergarten, completed a number of individual educational plans (IEP's), and received either special education or resource specialist (RSP) support all through his schooling.[8] Vidal made it to 12th grade, but did not graduate.

Vidal was given achievement tests approximately seven times during the course of his school career. Except for a letter identification subtest on which he scored at the 12th grade level while in 8th grade, he never achieved his grade level or showed much improvement.

In 1980, while in fourth grade, Vidal underwent various types of testing, including the Wechsler Intelligence Scale for Children Revised (WISC-R). This test, which assesses cognitive abilities such as the ability to think, learn, remember, judge, use information (including language), and solve problems, has a number of subtests. These are roughly divided into performance (PIQ) and verbal (VIQ) scores, from which a full scale intelligence quotient (FSIQ) is obtained.[9]

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[8] Special education students score low across all areas. By contrast, RSP students have a discrepancy between one area of functioning, in which they achieve high scores, and another area of functioning, in which their scores are low.

[9] Performance subtests focus on such things as the ability to look at a picture with a piece missing and tell what is missing, arrange pictures in a logical sequence, solve design problems with blocks or puzzles, and correlate symbols and digits as a processing speed index. Such tests tend to be procedural in nature. Verbal subtests include vocabulary (does the person know what the words mean), information (does the person possess common cultural information such as at what temperature water boils), comprehension (judgment questions such as what the person would do if he or she found a letter that was sealed, addressed, and bore a new stamp), oral arithmetic, and a digit span test, which is a measure of attention. Each of the verbal and performance subtests has a scale score, which, when added, result in a total scale score. A norms table then gives the FSIQ score, which is close to, but not exactly the average of, the VIQ and PIQ scores.

Couture explained that IQ tests are designed so that the statistically average IQ (the mean) is 100. The standard deviation is 15 so that, for instance, 85 and 70 are one and two standard deviations below the mean, respectively. Of the population, 68 percent fit between plus or minus one standard deviation, while another 16 percent fit between plus or minus two standard deviations. Only 3 percent score above 130 or below 70. Any test score contains error which, in the case of IQ tests, is condensed into what is called the standard error of measurement (SEM). Thus, an IQ score represents a range. In the case of an IQ score of 70, the range is 62 to 78. Mental retardation is defined as two standard deviations below the mean. In other words, while 70 is the recognized cut-off level, because of the SEM, this actually means anywhere from 62 to 78.

In 1980, Vidal's VIQ was 59, which fell within the impaired (mentally retarded) range; his PIQ was 109, which fell within the average range; and his FSIQ was 81, which was in the low average/borderline mentally retarded range. In 1984, Vidal retook the WISC-R. His VIQ was again 59, while his PIQ was 126, which fell within the high average or even superior range. In 1987, he moved into the adult scales and was given the Wechsler Adult Intelligence Scale Revised (WAIS-R), which follows the same format as the WISC-R but contains higher-level questions to ascertain adult intelligence. His VIQ was 77, which is above the determinative of 70 but within the standard error of measurement (78-62) that would be the mentally retarded range; his PIQ was 119, which was in the high average range; and his FSIQ was 92, which was in the average range.

The fact Vidal's PIQ was consistently significantly higher than his VIQ was an indication of neurological insult, meaning Vidal had a very specific deficit that was almost certainly brain-based. Normally, there will be less than a 10-point difference between someone's VIQ and PIQ. In such circumstances, the FSIQ "has some meaning." When a disparity greater than 10-15 points exists, however, "it then becomes clinical judgment as to the meaning of the scores." In Couture's opinion, where there is a disparity as great as in Vidal's case, the FSIQ score is unreliable. Instead, Couture

believed the skills represented by the VIQ are much more important to someone's ability to survive in the world than the abilities represented by the PIQ. A low VIQ means vocabulary, verbal problem solving, comprehension, and judgment are impaired. Vidal's low scores on the Peabody Picture Vocabulary Test reinforced the conclusion that his ability to understand language was "remarkably impaired." In the 1980's, he was not processing verbal information. Moreover, his academic scores showed that he was not learning. Although he did improve somewhat in math, his language never improved, no matter what the school did with him – a sign, according to Couture, of someone with a severe impairment. In Couture's opinion, "Mr. Vidal doesn't have a problem learning English. He has a problem learning. And that's the essence of what's wrong with him. He has difficulty learning, no matter what it is, in terms of social understanding or verbal behavior."

As for how someone who is low functioning can perform some tasks at an average level, as indicated by Vidal's PIQ scores, Couture explained that some tasks require what is called "procedural learning." An example is riding a bicycle. Many performance skills involve solving visual-spatial puzzles, which have nothing to do with the ability to use language or to think in a sequential manner. In Vidal's case, the fact his PIQ was significantly higher than his VIQ meant he had a substantial deficit in his ability to use and process language and to make sense of the world, apart from visual-spatial tasks. This made Vidal unable to problem-solve and, while he could perform a rote mechanical action which did not involve too many steps, he was unable to understand the implication of things.[10]

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10 Couture noted that he had spent six years in a deaf-blind program in a developmental center. All of his patients had VIQ's in the mentally retarded range because they were deaf and could not perform the tasks. Some actually had good performance skills, but had uniformly been adjudged to be mentally retarded because

A diagnosis of mental retardation has three prongs: subaverage intellectual functioning, occurring before age 18, and deficits in adaptive behavior. In Couture's opinion, Vidal had a history before the age of 18 of subaverage intellectual functioning, as borne out by his test scores.

In April 2003, Couture gave Vidal the WAIS-R and obtained a VIQ of 70 (mentally retarded), a PIQ of 96 (average), and an FSIQ of 78 (borderline mentally retarded). In Couture's first report, dated April 10, 2003, he concluded, based on Vidal's test scores at that time, that Vidal "clearly qualifies for a diagnosis of Borderline Intellectual Functioning, but not for a diagnosis of Mental Retardation."[11] Subsequently, at the defense's behest, Couture performed further testing and evaluation in order to reconsider the issue of mental retardation. In September 2003, he tested Vidal on the Wechsler Abbreviated Scale of Intelligence (WASI), which has four subtests instead of twelve. Vidal's VIQ was 61 (mentally retarded); his PIQ was 99 (average); and his FSIQ was 77 (borderline mentally retarded). Couture also administered the Peabody Picture Vocabulary test in English and Spanish. Vidal scored in the impaired range on both tests, meaning he was equally impaired in both languages.

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they simply could not solve the verbal problems in the world. This was not simply a language-based problem, as there are many deaf people who are not mentally retarded. However, when linguistic disability is placed on top of the basic inability to learn, the result is categorization as a mentally retarded person, even if that person does fairly well in terms of visual identification and puzzle solving.

[11] Based on various tests, Couture believed that the drop in Vidal's PIQ scores between 1987 and 2003, represented, at least in part, an acquired deficit that was brought on by Vidal's long-term methamphetamine abuse and involvement in manufacturing the drug.

Couture also specifically evaluated Vidal's adaptive behavior skills.[12] Adaptive behaviors are those behaviors the individual uses in the community, essentially to get along. The three main areas involved are communication, daily living skills (e.g., dressing, bathing, shopping, using a checkbook), and social living skills (e.g., interpersonal relationships, leisure time, coping skills). Measuring these adaptive skills is part of the definition of mental retardation.

The Vineland Adaptive Behavior Scales are used to measure adaptive behavior. Although the test is not perfect, Couture found it to be the best and most widely accepted instrument available, and he judged it to have "good reliability." Accordingly, he administered the test to Vidal, and also interviewed Vidal's two sisters and ex-wife concerning Vidal's abilities. Although Vidal felt his daily living skills fell into the average range, his sisters and ex-wife felt his skills fell into the impaired/mentally retarded range.[13] All four agreed his communication and socialization skills fell into the impaired/mentally retarded range, and Vidal's composite score also fell within that range.

In his second report, dated September 27, 2003, Couture noted that, since the time of his April report, the Legislature had enacted section 1376. Given this change in the law and his further testing and evaluation, Couture now opined that Vidal met the

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12 According to Couture, his first report was missing such an evaluation, despite his long-standing awareness of the importance of adaptive behavior abilities in diagnosing mental retardation.

13 Couture acknowledged that, to the best of his knowledge, Vidal's sisters had not lived with Vidal during the past 10 years, nor had they observed his behaviors on a daily basis during that time. He also acknowledged that Vidal's ex-wife told one of the detectives that Vidal had never shown signs of being mentally retarded, that he was capable of doing things for himself, and that he could fix things such as stereos, VCRs, and radios. Couture did not feel these answers were inconsistent with his conclusions because her answers to specific questions were consistent with Couture's findings concerning Vidal's overall skill levels.

statutory definition of mental retardation. In so doing, he relied on Vidal's VIQ scores. Couture found Vidal's scores before age 18 to be "roughly similar" to his present scores, in that the VIQ scores obtained on the WISC fell into the mentally retarded range, while the PIQ scores fell into the average range. The adaptive behavior measurements available to Couture indicated that Vidal displayed adaptive behavior deficits before age 18. In Couture's clinical judgment, the pattern of cognitive deficits and impaired VIQ indicated that Vidal was functioning as a mentally retarded person.

Couture disagreed with the notion that, if a mentally retarded person could hold down a job, save money, and support a family, then he or she did not have deficits in adaptive behavior. Such a person might have some adaptive behaviors and might be functioning, but not at "community normal levels." Couture's findings showed that Vidal was not profoundly impaired (hence his ability to obtain a driver's license); however, his adaptive skills were not adequate to his environment as an adult in this culture. He could not "keep up" with his same-age peers as an adult.

Ronald McKinzey was a psychologist with subspecialties in clinical and forensic psychology, neuropsychology, and psychodiagnosis. He was on the panel of psychologists used to review the performance of other psychologists in the event of a complaint to the California licensing board. In connection with this case, he reviewed Vidal's IEP's, various interviews of Vidal's family members, and Couture's reports, including all of his testing.

In McKinzey's opinion, Vidal was not mentally retarded. In his view, the code calls for general IQ, not VIQ or PIQ. General intelligence is used to determine mental retardation because it has long been considered to consist of many different abilities. It refers to a person's overall abilities, not just some "splinter skill" or one isolated weakness in intellectual abilities. Any person has strengths and weakness in his or her intellectual abilities, and IQ tests try to make up for that by sampling a wide variety of abilities. The best estimate of general IQ is the FSIQ score which, in Vidal's case, was

never "anywhere close" to the mentally retarded range.[14] Even if the VIQ was used, a diagnosis of mental retardation requires that the condition be present before age 18, because that is considered the end of the developmental period. Thus, Vidal's scores after that age were irrelevant.[15] Vidal's VIQ at age 17, on the WAIS-R test given March 31, 1987, was 77, "well outside" the mentally retarded range. McKinzey found it incorrect to say the score would fall within the mentally retarded range since the parameters of two SEM's covered scores of 62 to 78. Instead, the "cut score" is 70. Two SEM's – two points – are allowed for error, resulting in a ceiling of 75. Moreover, the SEM for VIQ on the WAIS is three, while the SEM for the FSIQ is two and one-half. Even if three is used, the ceiling is 76. Vidal's score would still not make the cut.

McKinzey was familiar with the Flynn effect, which refers to a phenomenon in which IQ tests seemed to be getting harder at a fairly rapid pace, so that the same raw score on a given test resulted in a lower IQ. Some people in the field concluded that if the test was getting harder, the numbers could be adjusted so that a person who was normal at one point could then be considered abnormal. McKinzey rejected playing what he called "statistical games" with the norms, and found changes in IQ tests and the Flynn effect to be irrelevant. Vidal's FSIQ in 1987 was 92. His VIQ in 1987 was 77. To McKinzey, that should have been the "end of the story." Even considering the Flynn effect and the possibility of some measurement error, an IQ of 92 could not be lowered to 75. According to the general field of psychology, approximately two percent of the

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14 McKinzey did not advocate ignoring the large discrepancy between Vidal's VIQ and PIQ scores, but noted that the accuracy or inaccuracy of averaging such disparate scores to obtain the FSIQ score has not been studied.

15 If a person falls into the mentally retarded range as a result of brain damage incurred after he or she reaches adulthood, the diagnosis is dementia, not mental retardation.

population falls into the range of mental retardation. Vidal did not fall within that category.

McKinzey concluded that the scores Couture obtained on the Vineland scales were irrelevant. The test has no adult norms, lacks a ceiling, and is unadjusted for ethnic or literacy handicaps. The accuracy of the test is unknown. It has no innate reporter status, meaning there is no way to correct for bias of the informant.[16] In McKinzey's opinion, the Vineland was not valid for the kind of use to which it was put in this case.

McKinzey found substantial information in the records which was inconsistent with the notion that Vidal's adaptive functioning was seriously low. For instance, the records showed that Vidal cared for and fed his children, and oversaw their schoolwork. When his ex-wife left him for another man, she left the children with him. He was awarded visitation with the children and, at one point, contacted Child Protective Services when he became concerned about their welfare. McKinzey found all of this to be "inconsistent" with mental retardation. In addition, Vidal was able to drive, had a driver's license, and handled his own medical needs. He handled the family finances and did house cleaning. The records contained reports that he could repair household items, had worked as a jail trusty, had held farmhand jobs, sold drugs, and worked in a drug factory. McKinzey also found independent judgments of teachers and others, based on Vidal's school records, that Vidal was not mentally retarded. Common sense – which McKinzey found at least as accurate as anything else – said he was not mentally retarded.

Keith Widaman, a professor of psychology at the University of California, Davis, had been researching mental retardation for the 22 years and specialized in the area of the structure and development of adaptive behavior and its measurement. With respect to

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16 For example, Vidal's ex-wife gave one estimate of adaptivity when interviewed by the prosecution and another when interviewed by the defense.

this case, he reviewed a number of materials, including the raw protocols for the tests given by Couture and Couture's reports, transcripts of Couture's testimony, and materials written or submitted by McKinzey. Although he reviewed the police reports summarizing Vidal's confession, he did not watch the videotape.

Widaman explained that, in order to be considered mentally retarded, a person must exhibit subaverage general intellectual functioning concurrent with deficits in adaptive behavior before age 18 or during the developmental period. An individual falling two or more standard deviations below the mean – i.e., with an IQ of 55 to 70 – merits identification as mildly retarded.

Whenever a test score is obtained, the concept of SEM must be taken into account. SEM is an index of variability. Thus, a tested score of 100 does not mean the true score is 100, but instead that 100 is the best estimate of the true score. Plus or minus two times the SEM should encompass 95 percent of the scores that a person would obtain on the test. If, for example, the score is 70 and the SEM is three, two times the SEM would give a range of 70, plus or minus 6. If the SEM is four, then the range would be 70, plus or minus 8. The 2002 American Association on Mental Retardation manual states that an IQ of 70 is more accurately understood as a range of confidence with parameters of at least one SEM, or 66 to 74, which would encompass 66 percent probability, or parameters of two SEM's, or 62 to 78, which would account for 95 percent probability.

Both the American Association on Mental Retardation and American Psychological Association manuals use a cutoff range of 70-75, with identification of deficits in adaptive behavior then allowing designation as mildly mentally retarded. However, many tests have SEM's of approximately 4, so then the range would be 62 to 78. Thus, when Couture tested Vidal in September 2003 and found his VIQ to be 61, the score was within the mental retardation range. Using two SEM's, Vidal's September 2003 FSIQ of 77 was also within the range of mental retardation. Vidal's April 2003 FSIQ of 78 on the WAIS-R was at the upper range stated in the American Association on

Mental Retardation of 62 to 78. Vidal's VIQ scores on the tests he took as a child were all within the mentally retarded range. With respect to Vidal's 1980 FSIQ score of 81, however, Widaman opined that, rather than using two SEM's to bring Vidal into the mentally retarded range, it was safer to use the 62 to 78 range as the range of scores consistent with a true score of 70 or below.

Widaman believed the differences between Vidal's VIQ and PIQ scores presented problems in determining the validity of his FSIQ score. In the Wechsler battery each represents a different dimension of intelligence, with the verbal subtests largely assessing "crystallized" intelligence and the performance subtests largely assessing "fluid" intelligence. Given the discrepancy, averaging to obtain a FSIQ score could be misleading. According to Widaman, crystallized or verbal intelligence "is where we live most of our lives." If a person's verbal or crystallized abilities are impaired, it bodes poorly for adjustment in most areas of adult functioning. By contrast, performance tests do not assess complex intellectual functioning; Widaman speculated that PIQ is viewed as an important component of IQ "[p]robably for historical reasons." He personally believed the VIQ score is especially important because one of the hallmarks of people with mild mental retardation is their gullibility. Such people tend to go along with the group and to do what they are told, and they do not necessarily understand what is happening in social interactions. Verbal intelligence and verbal facility are important aspects of social interaction, and Vidal's scores in that regard have consistently and clearly been in the retarded range.

Widaman conceded that, according to the American Psychological Association and American Association on Mental Retardation, a person should be assessed on a general battery. He recognized that "general intellectual functioning" means intellectual functioning in general across a range of types of ability, and that there is "nothing sacrosanct about verbal and performance." He noted, however, that someone with mild mental retardation – especially someone near the cutoff for a diagnosis of retardation –

will frequently obtain a score within the range of mental retardation and almost as frequently obtain a score that is not in the range. Thus, taking a measurement at any single time is not a fully accurate indicator of whether a person is mentally retarded. Widaman recognized that Vidal's 1987 FSIQ was 92 which – even taking into account the Flynn effect – did not meet the criterion of significantly subaverage general intellectual functioning.[17] However, in looking at Vidal's test results at age 17, Widaman determined him to be mentally retarded in part by using his VIQ score as opposed to his general IQ test score.

In his written report, Widaman reviewed the FSIQ scores Vidal obtained before age 18. While none of the scores was sufficiently low for a diagnosis of mental retardation, Widaman wrote: "[A] person with indications of mental disability during adolescence – as is the case with Mr. Vidal – would qualify for a diagnosis of mental retardation if his performance in adulthood were consistent with such a determination. And, the most accurate indicator of a person's mental functioning is the most recent information garnered on that person." On that basis, Widaman looked to Vidal's most recent assessment based on a full battery, which was the April 2003 testing in which his FSIQ score was 78.[18] Based on the Flynn effect, this was an overestimate of Vidal's level of intellectual functioning. Since the test was published in 1982, 21 years earlier, there was a "drift" of approximately 7 points. This meant it was likely that if the test were normed today and Vidal showed the same performance, he would score about seven

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17 According to Widaman, the Flynn effect, which posits a shift in intelligence of approximately 3.3 points per decade after a test is normed, is generally accepted within his field.

18 Widaman opined that the WASI, which was administered to Vidal in September 2003, should not be used to diagnose mental retardation because it is not a full battery and so may not be sufficiently accurate.

points lower. Thus, his FSIQ of 78 was actually 71 or 72, well within one SEM of the cutoff of 70.[19]

Intelligence testing is the starting point for determining mental retardation. Whether by considering the Flynn effect, the SEM, or the difference between VIQ and PIQ, Vidal's IQ score fell within the mentally retarded range. Because he scored approximately as impaired in both Spanish and English versions where both were given, it did not appear to Widaman that lack of facility in English was the reason. Vidal's score meant he could not deal well with verbal material.

The definition of mental retardation contained in the Penal Code comes either directly or indirectly from the American Association on Mental Retardation definition, and so adaptive functioning plays into the equation. Adaptive behaviors are defined as behaviors which enable a person to live independently in the community. They are taken into account in defining mental retardation in large part because a number of people who meet the IQ cutoff have sufficiently high levels of adaptive behavior that they can function well and are never identified by the system as being retarded. Thus, in order to be mentally retarded, a person must meet both criteria: subnormal general intellectual functioning *and* deficits in adaptive behavior. According to Widaman, true scores in either realm "are fairly elusive."

The only way currently to measure for deficits in adaptive behavior is to use one of the standardized instruments such as the Vineland Adaptive Behavior Scales. Widaman considered the Vineland to be a valid test, although he conceded it was not

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19 Moreover, had Vidal been given the Stanford-Binet test instead of a Wechsler battery, the result would have been a lower IQ score because Stanford-Binet heavily weights the verbal component.

perfect. Its reliability met reasonable standards, and it was generally accepted within the field as being properly normed for adults.

When Vidal's two sisters and his ex-wife were the test informants, Vidal's scores on each of the Vineland scales (daily living, communication, and social) were below 70. When Vidal was the informant, his scores on two of the three were below 70. According to the American Psychological Association definition, a person must show deficits in two or more dimensions of adaptive behavior or on the overall total score. Vidal met that criterion with each of the four informants on both the individual scale scores and the overall score.[20]

Widaman's "best guess" was that in verbal intelligence or crystallized abilities, Vidal was in the retarded range. With regard to his overall score, especially taking the Flynn effect into account, he was again in the mild mental retardation range. Such a person can show a range of adaptive behavior scores; some people with mild mental retardation will have adaptive behavior scores above 70. Vidal's were considerably below that level. This was consistent with his intelligence scores. Thus, Widaman's opinion that Vidal was mentally retarded was supported by the results Couture reached on the Vineland.[21]

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20 Widaman rejected the notion Vidal might be malingering (consciously attempting to alter his score), based on the consistency of his IQ test scores and the fact this consistency was mirrored by the consistency across informants of the scores Couture obtained on the Vineland. It would be difficult even for a person who knew a test well to malinger in a way that gave approximately the same scores across time. Moreover, Widaman saw nothing in the materials he reviewed that indicated malingering on Vidal's part.

21 Widaman acknowledged that, whereas intelligence tests are measures of maximal performance at the time of the test, adaptive behavior scales tend to measure typical performance over time and the likelihood of performing a particular skill. What is assessed is not whether the person *can* do something, but whether he or she *does* do it. Thus, for instance, when Vidal scored a zero on "sets the table with assistance," it meant

People who are not mentally retarded rarely show deficits in adaptive behavior. Accordingly, the deficits in adaptive behavior that were consistently reported by Vidal's informants reinforce the notion of mental retardation. The fact Vidal had some abilities, as identified by McKinzey, was not surprising in someone who, like Vidal, was mildly retarded. The law and each of the professional organizations say that a person must show subnormal general intellectual functioning concurrent with deficits in adaptive behavior. Citing a few adaptive competencies does not preclude deficiencies; what is called for in making a diagnosis is a determination of whether there are deficits in adaptive behavior. Adaptive skills can still be present.

According to Widaman, there must be an indication of problems during the developmental period, but a diagnosis of mental retardation is not required. Widaman believed Vidal's deficits were manifested before age 18. Vidal was identified in school records as being learning-disabled, primarily because of his extremely low verbal test scores and correspondingly low levels of academic achievement, and he demonstrated a "clear lack of ability to learn."

Widaman agreed that, if there is a significant reduction in IQ after age 18, the diagnosis is not mental retardation, but dementia of some form. Dementia is a separate diagnosis from mental retardation. Section 1376 defines mental retardation, not dementia. The point of the definition is mental retardation as a developmental disability; hence, there must be indications before a particular age. Widaman believed that if the person met that part of the definition, then the best estimate of the person's intelligence was the most recent testing done on a full-scale battery. It was possible a person could

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he does not set the table with assistance. There is no way to tell whether setting the table was something Vidal did not do by choice rather than due to inability. In short, inability versus choice has no bearing on whether a person gets a high or low score on an adaptive behavior scale.

grow out of mental retardation; it was also possible that chronic, prolonged drug use could depress the person's IQ. Although it would be a judgment call, Widaman believed a diagnosis of mental retardation would be appropriate if there was sufficient documentation of problems during the developmental period and the person now presented with low intelligence and deficits in adaptive behavior.

In Widaman's opinion, it was reasonable to conclude that Vidal was presently mentally retarded. When asked whether it was then reasonable to conclude Vidal was mentally retarded at age 18, Widaman reiterated that mental retardation – especially at the margins – can come and go, and nothing is an infallible sign that a person is or is not mentally retarded. In Vidal's case, his IQ was tested at age 17 years, 6 months. Widaman would have found it "a tough call" whether to conclude he was mentally retarded at that time. He believed that, given Vidal's then-VIQ of 77 and the importance of VIQ for normal, everyday adult functioning, a substantial number of psychologists would say there is a possibility he was mentally retarded, though perhaps not a majority on that particular single testing. What is required is not subnormal total overall intellectual functioning, but subnormal general intellectual functioning. Both VIQ and PIQ scores index general intellectual functioning. Widaman believed it would be reasonable to conclude either that Vidal was mentally retarded or that he was not mentally retarded at age 17 years 6 months. It was his opinion that Vidal was presently mentally retarded and that he met the three criteria of the definition.

The trial court's ruling consisted of both oral and written findings. We conclude that, reasoning the VIQ measurement impinged upon the traits cited by the United States Supreme Court in *Atkins* as bearing upon the constitutionality of executing mentally retarded persons, the court relied on Vidal's 1987 VIQ scores. In light of the commonly accepted standard deviation and the fact there was "provision" for accepting the Flynn effect, the court found Vidal's VIQ deficits to have been well-documented from an early age and to be "significantly subaverage" and "beyond the borderline range" when

considered independently of his PIQ scores. With respect to Vidal's adaptive behaviors, the court refused to reject the Vineland test and found convincing evidence Vidal was "significantly lacking" in the adaptive skill areas of communications, home living, social skills, community use, health and safety, functional academics, and leisure. The court further found that Vidal's various deficits were manifested before age 18. As it determined Vidal had met his burden of proving, by a preponderance of the evidence, that he was mentally retarded (albeit mildly so), it issued an order precluding the People from seeking the death penalty.

DISCUSSION

I

ARE THE PEOPLE ENTITLED TO SEEK PRETRIAL REVIEW?

We turn first to the procedural issue of whether the People may seek review of the trial court's ruling under section 1376 in this matter. Section 1376 is silent on this point, as is the history of the enactment.

"The People have no right of appeal except as provided by statute. [Citation.]" (*People v. Douglas* (1999) 20 Cal.4th 85, 89; *People v. Smith* (1983) 33 Cal.3d 596, 600.) Section 1238 is the governing law; "appeals that do not fall within the exact statutory language are prohibited. [Citation.]" (*People v. Salgado* (2001) 88 Cal.App.4th 5, 11.) Since we "'are precluded from so interpreting section 1238 as to expand the People's right of appeal into areas other than those clearly specified by the Legislature,' [citation]" (*People v. Benavides* (2002) 99 Cal.App.4th 100, 103-104, fn. omitted), we must determine whether a trial court's order, precluding the People from seeking the death penalty based on a pretrial determination that the defendant is mentally retarded, falls within the statutory provisions.

In our view, such an order is appealable pursuant to subdivision (a)(8) of section 1238, as it constitutes "[a]n order … terminating … any portion of the action … entered before the defendant has been placed in jeopardy …."[22] When, as here, first degree murder with one or more special circumstances is charged against an adult defendant, California law permits the People, as part of the criminal prosecution, to seek the ultimate penalty. A finding of mental retardation made pursuant to section 1376, which requires the court to preclude the death penalty in a case in which it otherwise would be constitutionally permissible (*id.*, subds. (c)(1), (d)(1)), necessarily "terminat[es] … [a] portion of the action" (§ 1238, subd. (a)(8)), i.e., the penalty phase portion.

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[22] Subdivision (a) of section 1238 permits the people to appeal "from any of the following: [¶] (1) An order setting aside all or any portion of the indictment, information, or complaint. [¶] (2) An order sustaining a demurrer to all or any portion of the indictment, accusation, or information. [¶] (3) An order granting a new trial. [¶] (4) An order arresting judgment. [¶] (5) An order made after judgment, affecting the substantial rights of the people. [¶] (6) An order modifying the verdict or finding by reducing the degree of the offense or the punishment imposed or modifying the offense to a lesser offense. [¶] (7) An order dismissing a case prior to trial made upon motion of the court pursuant to Section 1385 whenever such order is based upon an order granting the defendant's motion to return or suppress property or evidence made at a special hearing as provided in this code. [¶] (8) An order or judgment dismissing or otherwise terminating all or any portion of the action including such an order or judgment after a verdict or finding of guilty or an order or judgment entered before the defendant has been placed in jeopardy or where the defendant has waived jeopardy. [¶] (9) An order denying the motion of the people to reinstate the complaint or a portion thereof pursuant to Section 871.5. [¶] (10) The imposition of an unlawful sentence, whether or not the court suspends the execution of the sentence, except that portion of a sentence imposing a prison term which is based upon a court's choice that a term of imprisonment (A) be the upper, middle, or lower term, unless the term selected is not set forth in an applicable statute, or (B) be consecutive or concurrent to another term of imprisonment, unless an applicable statute requires that the term be consecutive. As used in this paragraph, 'unlawful sentence' means the imposition of a sentence not authorized by law or the imposition of a sentence based upon an unlawful order of the court which strikes or otherwise modifies the effect of an enhancement or prior conviction. [¶] (11) An order recusing the district attorney pursuant to Section 1424."

A broad construction of section 1238, subdivision (a)(8) is appropriate. In this regard, "we must look to the language of the statute and accord its words their usual, ordinary and commonsense meaning based on the language used and the evident purpose for which the statute was adopted. [Citation.]" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1029-1030.) "Where reasonably possible, we avoid statutory constructions that render particular provisions superfluous or unnecessary. [Citations.]." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 459; *People v. Aguilar, supra*, 16 Cal.4th at p. 1030.) To read the subdivision as applying only where there is a formal "dismissal" – for example, pursuant to section 1385 – would render superfluous the provision "or otherwise terminating" contained in subdivision (a)(8) of section 1238. Instead, "the legislative history of section 1238 indicates that the Legislature intended to expand the prosecution's right to appeal to the extent that it could do so consistent with the double jeopardy provisions of the state and federal Constitutions" (*People v. Craney* (2002) 96 Cal.App.4th 431, 440), "thereby bringing the scope of appeals by the People into conformity with federal law. [Citation.] The committee report [concerning the 1998 amendment, which added the language concerning an order or judgment after a verdict or finding of guilty] cites instances of injustice because section 1385 dismissals could not be appealed after a guilty verdict and states that, without appellate review, legal issues would be decided by trial judges with no procedure to assure uniformity or correctness of trial court decisions. [Citation.]" (*People v. Salgado, supra*, 88 Cal.App.4th at p. 12.) Although the present case does not involve section 1385 or a dismissal following a guilty verdict, the same reasoning holds true: absent appellate review of pretrial determinations under section 1376, the legal issues raised thereby would be decided without any assurance of uniformity or correctness. This cannot have been the intent of the Legislature with respect either to section 1238 or section 1376.

Having determined the trial court's finding here terminated a portion of the action within the meaning of section 1238, subdivision (a)(8), we must decide whether that

finding was made after Vidal was placed in jeopardy, as "[s]tatutory authorization would not permit an appeal which violated the double jeopardy provision of the state or federal Constitution." (*People v. Salgado, supra,* 88 Cal.App.4th at p. 12.)[23]

"The Fifth Amendment of the United States Constitution guarantees that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb ….' This clause applies to the states through the due process clause of the Fourteenth Amendment [citation], and protects defendants from multiple trials. [Citation.] Article I, section 15, of the California Constitution offers similar protection: 'Persons may not twice be put in jeopardy for the same offense ….' Because the California Constitution 'is a document of independent force and effect that may be interpreted in a manner more protective of defendants' rights than that extended by the federal Constitution,' we are guided by those decisions interpreting the double jeopardy clauses of both the United States and California Constitutions. [Citation.]" (*People v. Hatch* (2000) 22 Cal.4th 260, 271, italics omitted.)

"The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." (*Green v. United States* (1957) 355 U.S. 184, 187.) Thus, "[t]he double jeopardy clause protects criminal defendants in three ways: '"It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects

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23 Manifestly, Vidal did not waive jeopardy.

We emphasize that we are concerned *solely* with a section 1376 hearing conducted by the court prior to the commencement of trial. We express no opinion concerning the People's ability to appeal, or the attachment of jeopardy, where the section 1376 hearing is conducted before a jury after the defendant has been found guilty and one or more special circumstances have been found to be true.

against multiple punishments for the same offense."' [Citations.]" (*People v. Massie* (1998) 19 Cal.4th 550, 563; *Schiro v. Farley* (1994) 510 U.S. 222, 229; *North Carolina v. Pearce* (1969) 395 U.S. 711, 717.) "'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' [Citations.]" (*Serfass v. United States* (1975) 420 U.S. 377, 387-388; *Green v. United States, supra,* 355 U.S. at pp. 187-188.) "The purpose of the double jeopardy clause '"would be negated were we to afford the government the opportunity for the proverbial 'second bite at the apple.'"' [Citations.]" (*People v. Salgado, supra,* 88 Cal.App.4th at p. 13.)

"An accused must first suffer jeopardy before he or she can suffer double jeopardy. [Citations.]" (*People v. Angeloni* (1995) 40 Cal.App.4th 1267, 1271.) "In the case of a jury trial, jeopardy attaches when a jury is empanelled and sworn. [Citations.] In a nonjury trial, jeopardy attaches when the court begins to hear evidence. [Citations.] The [United States Supreme] Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of facts, whether the trier be a jury or a judge.' [Citations.]" (*Serfass v. United States, supra,* 420 U.S. at p. 388.)

Just because a court hears evidence on an issue, however, does not mean a "trial" is underway such that jeopardy has attached. In this respect, "trial of the issue of guilt or innocence is the essence of jeopardy. [Citation.]" (*United States v. Vaughn* (9th Cir. 1983) 715 F.2d 1373, 1376.) "Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier '*having jurisdiction to try the question of the guilt or innocence of the accused.*'

[Citation.] *Without risk of a determination of guilt, jeopardy does not attach*, and neither an appeal nor further prosecution constitutes double jeopardy." (*Serfass v. United States, supra,* 420 U.S. at pp. 391-392, italics added; accord, *Richard M. v. Superior Court* (1971) 4 Cal.3d 370, 376; *Curry v. Superior Court* (1970) 2 Cal.3d 707, 712; *People v. Hinshaw* (1924) 194 Cal. 1, 24; *People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217, 1230-1231.) Thus, "[i]n a nonjury trial, jeopardy does not attach until the court begins to hear evidence *from which a factual determination of guilt or innocence can be made*. [Citations.]" (*United States v. Marchese* (10th Cir. 1995) 46 F.3d 1020, 1022, italics added.)

Here, although the court made factual determinations, they involved solely the issue of whether Vidal was mentally retarded within the meaning of section 1376. Indeed, the question of Vidal's mental retardation was the only one the court was empowered to hear. (§ 1376, subd. (b)(2).) Although Vidal's request for a court hearing prior to trial constituted a waiver of a jury hearing on the mental retardation issue (*id*., subd. (b)(1)), at no time did he waive his right to a jury trial on the issue of guilt. Accordingly, the trial court "was without power to make any determination regarding [Vidal's] guilt or innocence"; it did not have jurisdiction to do more than determine the mental retardation issue, "and neither before nor after the ruling did jeopardy attach." (*Serfass v. United States, supra*, 420 U.S. at p. 389.)

"When a criminal prosecution is terminated prior to trial, an accused is often spared much of the expense, delay, strain, and embarrassment which attend a trial. [Citations.] Although an accused may raise defenses or objections before trial which are 'capable of determination without the trial of the general issue,' [citation], and although he must raise certain other defenses or objections before trial, [citation], in neither case is he 'subjected to the hazards of trial and possible conviction.' [Citation.] Moreover, in neither case would an appeal by the [state] 'allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first. [Citations.]"

(*Serfass v. United States*, *supra*, 420 U.S. at p. 391.) In the present case, "the trial had not commenced, literally or constructively.[**24**] It is clear from the record that anything the court considered was only in connection with [the mental retardation issue]. Counsels' arguments on this [issue] did not constitute the presentation of evidence for the purpose of determining guilt or innocence, which is 'the essence of the attachment of jeopardy.' [Citation.] Hence, jeopardy did not attach …." (*United States v. Marchese, supra,* 46 F.3d at p. 1023.)

Nor was the trial court's determination under section 1376 somehow the functional equivalent of an acquittal on the merits. "It is, of course, settled that 'a verdict of acquittal … is a bar to a subsequent prosecution for the same offence.' [Citations.] But the language of cases in which [the United States Supreme Court has] held that there can be no appeal from, or further prosecution after, an 'acquittal' cannot be divorced from the procedural context in which the action so characterized was taken. [Citation.] The word itself has no talismanic quality for purposes of the Double Jeopardy Clause. [Citations.] In particular, it has no significance in this context unless jeopardy has once attached and an accused has been subjected to the risk of conviction." (*Serfass v. United States, supra,* 420 U.S. at p. 392.)

Here, Vidal was not subjected to the risk of conviction. In contrast to sanity proceedings in California, for example, there is no plea of "not guilty by reason of mental retardation." (Compare § 1026, subd. (a) [providing for plea of not guilty by reason of insanity and "trial" on issue of sanity].) Indeed, a finding of mental retardation under section 1376 does not prevent a determination of culpability or all punishment, but

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24 This conclusion is bolstered by the language of section 1376, in which the Legislature carefully distinguished between a mental retardation "hearing" and the criminal "trial." (Compare § 1026, subd. (a), referring to guilt and sanity trials.)

simply precludes imposition of punishment of one particular type. By contrast, "[t]he defense of insanity … arises from 'the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense,' [citation], where other facts established to the satisfaction of the trier of fact provide a legally adequate justification for otherwise criminal acts. Such a factual finding *does* 'necessarily establish the criminal defendant's lack of criminal culpability,' [citation], under the existing law; the fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles,' [citation], affects the accuracy of that determination, but it does not alter its essential character. By contrast, the dismissal of an indictment for preindictment delay[, for example,] represents a legal judgment that a defendant, although criminally culpable, may not be punished because of a supposed constitutional violation.[25]" (*United States v. Scott* (1978) 437 U.S. 82, 97-98, fn. omitted.) The ruling of a judge under section 1376 does not represent a resolution of any of the factual elements of the offense charged; hence, there is no "acquittal" for double jeopardy purposes. (See *United States v. Martin Linen Supply Co.* (1977) 430 U.S. 564, 571; compare *Rodriguez v. Hawaii* (1984) 469 U.S. 1078, 1079-1081 (dis. opn. of Brennan, J.).)

We recognize that where a defendant is convicted of special-circumstance murder, the prosecution seeks the death penalty under a scheme such as that which exists in California, and the trier of fact rejects that punishment, the prohibition against double jeopardy prevents the defendant from being forced to face the death penalty a second

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25 "While an acquittal on the merits by the trier of fact 'can never represent a determination that the criminal defendant is innocent in any absolute sense,' [citation], a defendant who has been released by a court for reasons required by the Constitution or laws, but which are unrelated to factual guilt or innocence, has not been determined to be innocent in any sense of that word, absolute or otherwise.…"

time if his or her conviction is reversed and the People retry the case. (*People v. Henderson* (1963) 60 Cal.2d 482, 495-497.) In such a situation, the trier of fact has determined, based on the circumstances before it and a weighing of aggravating versus mitigating circumstances, that the death penalty, while legally permissible, is not factually appropriate. In essence, the sentence of life imprisonment means "that 'the jury has already acquitted the defendant of whatever was necessary to impose the death sentence.' [Citation.]" (*Bullington v. Missouri* (1981) 451 U.S. 430, 445.) Accordingly, "the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to [such a defendant], with respect to the death penalty, at his retrial." (*Id.* at p. 446, fn. omitted; accord, *Arizona v. Rumsey* (1984) 467 U.S. 203, 209-211; *People v. Superior Court* (*Harris*) (1990) 217 Cal.App.3d 1332, 1340-1342; see *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 106-112 [relevant inquiry is whether first life sentence was acquittal based on findings sufficient to establish legal entitlement to life sentence, i.e., that government failed to prove one or more aggravating circumstances beyond a reasonable doubt].)

In the present case, by contrast, the trial court made a pretrial finding, the legal import of which was *not* the equivalent of an "acquittal" of a death sentence, but instead was that imposition of the death penalty was unconstitutional under *Atkins*. The court made no determination concerning what penalty was factually appropriate under the circumstances of the case; indeed, under California's statutory scheme, it was without power to do so. What took place was a prejeopardy hearing on the constitutionality of the death penalty under *Atkins*, not a trial to determine the punishment to be imposed on Vidal. (See *People v. Jackson* (1991) 1 Cal.App.4th 697, 701.)

"The policy underlying the Double Jeopardy Clause 'is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well

as enhancing the possibility that even though innocent he may be found guilty.' [Citation.]" (*United States v. Gamble* (6th Cir. 1998) 141 F.3d 621, 623.) Where, as here, a particular punishment is precluded "by the judge on a pre-trial motion, none of these concerns is implicated. [Vidal] has endured none of the 'embarrassment, expense, and ordeal' of criminal trial. More importantly, he was never at risk of having the court determine his guilt." (*Ibid*.; see *People v. Superior Court* (*Elder*) (1988) 201 Cal.App.3d 1061, 1069 ["At the pretrial stage there can be little, if any, risk of harassment to the accused since there is no danger of *further* trial or *retrial*"].)

By permitting the People to appeal the trial court's finding under section 1376, we do not expose Vidal to the risk of a second trial on guilt or innocence. Nor do we give the People a "second bite at the apple" in terms of the mental retardation issue. Instead, we clarify what we believe to be the correct legal standard under section 1376, and leave it to the trial court to assess the evidence against that standard.[26] Moreover, permitting the People to appeal from a pretrial finding of mental retardation does not punish a defendant for seeking to have the determination made by the court prior to trial or for waiving his or her right to a jury hearing on the issue. The decision whether to seek a court finding or jury determination is inherently a tactical one; as in all tactical decisions, there are costs and benefits to be weighed and assessed. Permitting the People to seek pretrial review of a finding under section 1376 will not discourage defendants from seeking pretrial determinations; such determinations will – even with the possibility of appellate review – permit them to know early on whether they will be facing the ultimate sanction. Equally as important, a pretrial determination affords a defendant the

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26 Although, as discussed *post*, the trial court may take additional evidence or argument if it chooses to do so, this is not a second chance for the People, but an opportunity for both sides to address the legal requirements of the statute.

substantial benefit of requiring him or her to convince only one person – who presumably knows little or nothing about the underlying offense(s) – that he or she is mentally retarded, instead of 12 people who have already determined the defendant is guilty of death-penalty-eligible crimes.

In light of our determination that a finding of mental retardation pursuant to section 1376 terminates a part of the action and that, at least in the case of a pretrial determination, jeopardy has not attached, we conclude the People may seek review of the trial court's finding in this case pursuant to section 1238, subdivision (a)(8).[27] We further conclude, however, that appeal is not an adequate remedy here. Trial on the murder and other charges is pending, albeit temporarily stayed. "Unwarranted complications would be introduced if that trial were to take place before a ruling on the appeal. A [further] stay of the murder trial would cause unnecessary delay in that proceeding. The issue is clear and may be resolved expeditiously by writ of mandate. [Citations.]" (*People v. Superior Court* (*Bolden*) (1989) 209 Cal.App.3d 1109, 1112.) Accordingly, we conclude the People may seek pretrial review of the trial court's section 1376 finding and orders by way of the instant petition for writ of mandate.

In our view, nothing in *Hawthorne* is inconsistent with this result. Manifestly, because that case arose in the context of a posttrial habeas corpus proceeding

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27 The People's suggestion that an order finding a defendant mentally retarded is appealable as a final judgment in a special proceeding (see *People v. Superior Court* (*Laff*) (2001) 25 Cal.4th 703, 723), is intriguing. A proceeding under section 1368 to determine mental competence is a special proceeding (*People v. Stanley* (1995) 10 Cal.4th 764, 807; *People v. Masterson* (1994) 8 Cal.4th 965, 969) and, hence, a competency determination is appealable (*People v. Fields* (1965) 62 Cal.2d 538, 539-542). Such a proceeding is, in many ways, analogous to one under section 1376. Whether something is a special proceeding or merely a component part of an action can be a close question, however (see *Avelar v. Superior Court* (1992) 7 Cal.App.4th 1270, 1275-1276), and we need not make that determination here.

(*Hawthorne, supra*, 35 Cal.4th at pp. 43-44), the California Supreme Court had no occasion to address the issue of the People's right to pretrial review. Cases are not authority for propositions not presented or discussed. (*People v. Hill* (1974) 12 Cal.3d 731, 766, fn. 34, overruled on other grounds in *People v. DeVaughn* (1977) 18 Cal.3d 889, 896, fn. 5; *General Motors Accept. Corp. v. Kyle* (1960) 54 Cal.2d 101, 114.) Moreover, we find it significant that, under *Hawthorne*, the People have the right to challenge a finding of mental retardation made pursuant to the procedures defined in that opinion. (*Hawthorne*, *supra*, at p. 51.) Such a right of review is in keeping with "established appellate procedures for habeas corpus proceedings" (*ibid*.); affording the People the right of pretrial review in the instant context is similarly in keeping with the Legislature's expansive intent behind section 1238, subdivision (a)(8). (See *People v. Craney, supra*, 96 Cal.App.4th at p. 440.)

II

WHAT CONSTITUTES MENTAL RETARDATION FOR PURPOSES OF SECTION 1376?

As previously stated, subdivision (a) of section 1376 defines "mentally retarded" as "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." We must determine what this means vis-à-vis a defendant who claims he or she is mentally retarded and therefore cannot be executed.[28]

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[28] Because of the procedural posture in which *Hawthorne* arose, at issue in that case was whether the petitioner had made a prima facie showing of mental retardation such that he was entitled to an evidentiary hearing on that question. (*Hawthorne, supra*, 35 Cal.4th at pp. 51-52.) The Supreme Court thus was not called upon to determine whether the petitioner was in fact mentally retarded, or, except to a necessarily limited extent, the appropriate means by which the ultimate determination of that issue is to be made.

"The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first, to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the language of a statute is clear, we need go no further." (*People v. Flores* (2003) 30 Cal.4th 1059, 1063.) Indeed, "'[i]f the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.' [Citations.]" (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698.) "However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]" (*People v. Flores*, *supra*, 30 Cal.4th at p. 1063.) "In the end, we '"must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citation.]' [Citation.]" (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003.)

Clearly, the intent of the Legislature in enacting section 1376 was to comply with the United States Supreme Court's direction in *Atkins*. (See, e.g., Sen. Com. on Public Safety, bill analysis of Sen. Bill No. 3 (2003-2004 Reg. Sess.) as amended Jan. 9, 2003, p. 2.) To this end, the Legislature incorporated the definition of "mentally retarded" which was already used in section 1001.20, subd. (a), noting that the definition was

consistent with the definitions cited in *Atkins*. (*Id*. at pp. 6-7, 11-12; see *Hawthorne*, *supra*, 35 Cal.4th at pp. 47-48.)[29]

Generally speaking, "'[u]npassed bills, as evidences of legislative intent, have little value.' [Citation.]" (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 238.) It is apparent, however, that by enacting Senate Bill No. 3 and rejecting Senate Bill No. 51, which was introduced during the same legislative session, the Legislature refused to establish a rebuttable presumption that a defendant was not mentally retarded where his or her IQ was above 70. (See Sen. Com. on Public Safety, bill analysis of Sen. Bill No. 51 (2003-2004 Reg. Sess.) as introduced, p. 12.)[30] The California Supreme Court in *Hawthorne* likewise declined to do so "for several reasons: First, unlike some states, the California Legislature has chosen not to include a numerical IQ score as part of the definition of 'mentally retarded.' Respondent cites nothing in the language or legislative history of section 1376 to support our insertion

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[29] Section 1001.20, subdivision (a) defines "mentally retarded" for purposes of the diversion of mentally retarded defendants in misdemeanor cases. (See § 1001.21, subd. (b).) Substantially the same definition is incorporated in Welfare and Institutions Code section 6500 [involuntary commitment of mentally retarded persons dangerous to self or others], despite the fact that statute itself contains no express definition of "mentally retarded." (See *Money v. Krall* (1982) 128 Cal.App.3d 378, 397 [finding "mental retardation" to have a generally accepted technical meaning].)

[30] Other major differences in the bills, at least initially, concerned the procedures to be used to establish mental retardation, allocation of the burden of proof, and the standard of proof required. (Compare, e.g., Legis. Counsel's Dig., Sen. Bill No. 3 (2003-2004 Reg. Sess.), as introduced [prosecution would have burden of proving beyond a reasonable doubt that defendant was not mentally retarded] with Legis. Counsel's Dig., Sen. Bill No. 51 (2003-2004 Reg. Sess.), as introduced [defendant would have burden of proving by preponderance of the evidence that he or she was not mentally retarded].) Senate Bill No. 3 underwent several amendments in those respects, but the core definition of "mentally retarded" did not change. (Compare Sen. Bill No. 3 (2003-2004 Reg. Sess.), as introduced with § 1376, subd. (a).)

of a standard the Legislature has omitted. Moreover, statutes referencing a numerical IQ generally provide that a defendant is presumptively mentally retarded at or below that level, rather than – as respondent impliedly argues – that a defendant is presumptively not mentally retarded above it. [Citations.] Second, a fixed cutoff is inconsistent with established clinical definitions [citation] and fails to recognize that significantly subaverage intellectual functioning may be established by means other than IQ testing. Experts also agree that an IQ score below 70 may be anomalous as to an individual's intellectual functioning and not indicative of mental impairment. [Citation.] Finally, IQ test scores are insufficiently precise to utilize a fixed cutoff in this context. [Citations.]" (*Hawthorne, supra,* 35 Cal.4th at pp. 48-49, fn. omitted.)

This rejection of a presumption does not mean, however, that a defendant's IQ score plays no part in a determination of mental retardation under section 1376. (See *Atkins*, *supra*, 536 U.S. at p. 308, fn. 3 [describing "mild" mental retardation in terms of IQ score]; *Hawthorne, supra,* 35 Cal.4th at p. 48 [same].) In *Atkins*, the Supreme Court relied on clinical definitions of mental retardation, as, it noted, had those states which already had statutes barring execution of mentally retarded persons. (*Atkins*, *supra*, at pp. 308, fn. 3, 317, fn. 22.) Section 1376, subdivision (a) tracks the requirements of the clinical definitions sanctioned by *Atkins* (see *Atkins*, *supra*, at p. 318); hence, we turn to the experts relied upon by the United States Supreme Court to determine what the general definition, as contained in section 1376, actually means in terms of assessing a person for mental retardation. (See *Money v. Krall, supra,* 128 Cal.App.3d at p. 397.)

The United States Supreme Court relied upon definitions promulgated by the American Association on Mental Retardation and the American Psychiatric Association. (*Atkins*, *supra,* 536 U.S. at p. 308, fn. 3; *Hawthorne, supra*, 35 Cal.4th at pp. 47-48.) Currently, the American Association on Mental Retardation defines mental retardation as follows: "Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social,

and practical adaptive skills. This disability originates before age 18." (American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports (10th ed. 2002) p. 8 (AAMR).)[31] The American Psychiatric Association states: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C)." (American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000, text revision) p. 41 (DSM-IV-TR).)[32]

Section 1376 and the foregoing clinical definitions all refer, explicitly or implicitly, to *general* intellectual functioning. In keeping with the reasoning of *Atkins* and the intent of our Legislature, we interpret this as meaning a defendant's overall level of intellectual functioning, i.e., his or her general mental capability. (See AAMR, *supra*, at p. 14.) General mental capability "includes the ability to reason, solve problems, think abstractly, plan, and learn from experience, and it reflects a broader capability for comprehending one's surroundings [citation]." (*Id.* at p. 55.) Thus, intelligence "involves several different abilities." (*Id.* at p. 66.)

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31 The United States Supreme Court quoted then-current definitions. Recognizing that the study and definition of retardation is an evolutionary process (see AAMR, *supra*, at pp. xi-xiii), we refer to the most recent definitions.

32 The American Psychological Association uses the same general criteria, but extends the developmental period to age 22. (American Psychological Association, Manual of Diagnosis and Professional Practice in Mental Retardation (1996) p. 13 (APA).)

"Although reliance on a general functioning IQ score has been heatedly contested by some researchers …, it remains, nonetheless, the measure of human intelligence that continues to garner the most support within the scientific community [citation]." (AAMR, *supra*, at p. 51; see Trowbridge, *US Supreme Court Finds Execution of the Mentally Retarded "Cruel and Unusual"; You Have to Pass a Test Before You Can be put to Death?* (April 2003) <http://www.trowbridgefoundation.org/docs/execution.htm> pp. 4-6 [as of Aug. 11, 2004] (Trowbridge).) Accordingly, "[s]ignificant limitations in intellectual functioning are determined from the findings of assessment by using a valid and *comprehensive*, individual measure of intelligence that is administered in a standardized format and interpreted by a qualified practitioner." (APA, *supra*, at p. 13, italics added.) In short, where, as here, IQ scores are available, general intellectual functioning is primarily determined by the defendant's FSIQ score. It is this score which best represents the "functional" or "operational" IQ – the defendant's overall general intellectual functioning. (See AAMR, *supra*, at p. 66 [relying on "global [general factor] IQ" as measure of intellectual functioning].) Although this does not mean a defendant's VIQ and PIQ scores are irrelevant, it does mean a trial court is not free to disregard the FSIQ in determining whether a defendant has significantly subaverage general intellectual functioning within the meaning of section 1376, subdivision (a).

We acknowledge that "[w]hen there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading." (DSM-IV-TR, *supra*, at p. 42.) Such a discrepancy existed here and nothing we say requires a trial court to ignore expert testimony on this point. Nevertheless, "misleading" does not mean wholly unreliable or rejectable out of hand in favor of a less comprehensive (VIQ

or PIQ) score.[33] Although each subscore represents an important component of an individual's intelligence, neither, standing alone, reflects overall intellectual functioning.

This conclusion is supported by the nature of intelligence tests themselves. If VIQ or PIQ were determinative, that would be the only area tested. Instead, tests derived from the work of David Wechsler, which were given here, do not simply assess abilities in one or two areas. Wechsler "conceptualized intelligence as an aggregate and global entity, and he designed his scale to assess the ability of an individual to act purposefully, think rationally, and deal effectively with his or her environment [citation]." (AAMR, *supra*, at p. 60.) Accordingly, the WISC subtests "each measure somewhat different facets of intelligence. Although performance on no one subtest reflects all intelligent behavior, it

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33 "There are many populations of individuals who might have perfectly adequate cognitive skills, but who are not able to demonstrate these on traditional intelligence tests." (APA, *supra*, at p. 92.) Couture offered the prime example of deaf persons who are not mentally retarded, but who are adjudged to have that disability because, as a result of their deafness, they are unable to score well on VIQ tests. The FSIQ scores of such persons would be misleadingly low, as might the scores of blind persons who, we assume, would have difficulty with the visual tasks involved in a number of the PIQ tests.

The Association of Regional Center Agencies (ARCA), which is concerned with regional center eligibility under the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.), advises that eligibility requires a determination, inter alia, whether an individual functions in a manner similar to that of a person with mental retardation, with the operative definition of "mental retardation" being that found in the DSM-IV. ARCA notes: "Occasionally, an individual's Full Scale IQ is in the low borderline range (IQ 70-74) but there is a significant difference between cognitive skills. For example, the Verbal IQ may be significantly different than the Performance IQ. When the higher of these scores is in the low average range (IQ 85 or above), it is more difficult to describe the individual's general intellectual functioning as being similar to that of a person with mental retardation. In some cases, these individuals may be considered to function more like persons with learning disabilities than persons with mental retardation." (Association of Regional Center Agencies Guidelines for Determining "5th Category" Eligibility for the California Regional Centers <http://www.arcanet.org/pdfs/5th.category.guidelines.pdf> p. 2 [as of Aug. 10, 2004].)

is thought that intelligence is reflected in overall performance." (*Ibid.*) Similarly, the Wechsler adult scales are "based on the same concept of global intelligence …; that is, intelligence is viewed as a multifaceted and multidetermined construct that enables an individual to comprehend and deal effectively with the world." (*Id.* at p. 61; but see Trowbridge, *supra,* at p. 6 [noting criticism of current IQ tests – including Wechsler scales – as outmoded].)[34]

Hawthorne is not inconsistent with our determination that a defendant's FSIQ score is the primary factor in assessing his or her general intellectual functioning. In that case, the court noted an expert's assessment, based on performance subtests, that the petitioner was mentally retarded. (*Hawthorne, supra,* 35 Cal.4th at p. 51, fn. 5.) As we previously have described, however, the issue there was whether a prima facie case of mental retardation had been established. Nothing in *Hawthorne* suggests that PIQ or VIQ subtests are a better indication of general intellectual functioning than the FSIQ score, or that any particular score may be relied upon without consideration of other available scores. Similarly, nothing in our opinion precludes or discourages consideration of subtest scores.

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[34] The Wechsler scales "comprise a number of different Verbal subtests which measure such areas as vocabulary knowledge, a general fund of information about the world, verbal abstract reasoning, social judgment and common sense, arithmetic skills, short-term memory and attention. The Performance subtests measure nonverbal areas including visual-motor coordination, perceptual organization, visual abstract reasoning, and attention to detail. The Full Scale IQ score is derived from the raw scores of both the Verbal and Performance IQ scores." (Frumkin, *Mental Retardation: A Primer to Cope with Expert Testimony* (Fall 2003) <http://www.nlada.org/DMS/Documents/1066919805.15/Mental%20Retardation.pdf> p. 2 [as of Aug. 10, 2004] (Frumkin).) "Wechsler's Performance IQ measure and the Wechsler subtest cluster often referred to as a measure of 'freedom from distractibility,' *in combination with* the Verbal IQ measure, have long served important purposes in individual clinical assessment." (APA, *supra,* at p. 88, italics added.)

We now turn the question of what is "significantly subaverage general intellectual functioning" for purposes of section 1376. In this regard, "[t]he criterion … is approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instrument used and the instrument's strengths and weaknesses." (AAMR, *supra*, at p. 37; accord, DSM-IV-TR, *supra*, at p. 41; APA, *supra*, at p. 13; see *Hawthorne*, *supra*, 35 Cal.4th at p. 53 (conc. opn. of Chin, J.).) While there is no "magical line (let alone one determinable by a test score) dividing those who have or do not have" mental retardation (AAMR, *supra*, at p. 35), currently "an IQ between 70 and 75 or lower … is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition. [Citation.]" (*Atkins*, *supra*, 536 U.S. at p. 309, fn. 5; accord, *Hawthorne*, *supra*, 35 Cal.4th at p. 48; DSM-IV-TR, *supra*, at pp. 41-42; APA, *supra*, at p. 15; AAMR, *Fact Sheet: Frequently Asked Questions About Mental Retardation*; *What is Intelligence?* (2002) <http:www.aamr.org/Policies/faq_mental_retardation.shtml>p.3 [as of Aug. 5, 2004]; see *Hawthorne*, *supra*, at p. 51 [experts concluded petitioner was mentally retarded, based in part on IQ scores].)

Although the cutoff for significantly subaverage general intellectual functioning is most often stated as an IQ of 70 (i.e., approximately 2 standard deviations below the mean of 100), "there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning." (DSM-IV-TR, *supra*, at pp. 41-42.)

Not only must the cutoff FSIQ score of 70 be seen as a range, the ceiling of which may be as high as 75, but it appears the assessment of a defendant's IQ score must also take into account measurement error. "The assessment of intellectual functioning

through the primary reliance on intelligence tests is fraught with the potential for misuse if consideration is not given to possible errors in measurement. An obtained IQ standard score must *always* be considered in terms of the accuracy of its measurement. Because all measurement, and particularly psychological measurement, has some potential for error, obtained scores may actually represent a range of several points." (AAMR, *supra*, at p. 57, italics added; Frumkin, *supra*, at p. 2.) Because all tests contain measurement error (AAMR, *supra*, at p. 59), and because the SEM for the FSIQ score on a Wechsler scale is 3.2, "[t]his means that we can be 95% confident that an individual whose tested IQ is 65 has a true IQ score somewhere between roughly 59 and 71." (*Id.* at p. 61.)

In determining a defendant's IQ score, consideration must also be given to the so-called Flynn effect. "Ever since the introduction of standardized IQ tests in the early 20th century, there has been a systematic and pervasive rise in IQ scores all over the world, including the United States. Known as the *Flynn effect* …, [it] causes IQ test norms to become obsolete over time [citations]. In other words, as time passes and IQ test norms get older, people perform better and better on the test, raising the mean IQ by several points within a matter of years. Once a test is renormed, which typically happens every 15-20 years, the mean is reset to 100, making the test harder and 'hiding' the previous gains in IQ scores." (Kanaya et al., *The Flynn Effect and U.S. Policies: The Impact of Rising IQ Scores on American Society Via Mental Retardation Diagnoses* (Oct. 2003) American Psychologist, at p. 778 (Kanaya).) Gains on the Wechsler scales are approximately 0.311 points per year; "[a]lthough there is not a consensus among professionals as to why these gains are occurring or what these gains actually mean (e.g., are we really getting smarter?), all are in agreement that the gains occur …." (*Id.* at p. 779.) The Flynn effect appears to be generally accepted in the clinical field. (See AAMR, *supra*, at p. 56; Trowbridge, *supra*, at p. 8; Frumkin, *supra*, at p. 3.)

In addition to significantly subaverage general intellectual functioning and concurrently-existing adaptive behavior deficits (which we discuss in part III, *post*),

section 1376, subdivision (a) requires that the condition of mental retardation be "manifested before the age of 18." This means the onset of the significantly subaverage general intellectual functioning *and* concurrent deficits in adaptive behavior must occur before age 18 years, although within that limitation, the age and mode of onset may vary. (DSM-IV-TR, *supra*, at pp. 41, 47.) As the AAMR states the requirement, "[t]his disability [mental retardation] originates before age 18." (AAMR, *supra*, at p. 8.)[35]

This does not mean a formal diagnosis of mental retardation must be made at that time. However, there must be evidence from which a conclusion can be reached that the defendant suffered from significantly subaverage general intellectual functioning, together with deficits in adaptive behavior, before that age. (See Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues* (2002) <http://www.deathpenaltyinfo.org/MREllisLeg.pdf> p. 9, fn. 27 [as of Aug. 18, 2004] (Ellis).) In short, there must be evidence that a diagnosis of mental retardation *could have been made* before age 18. Evidence merely of learning disabilities or mental impairment not rising to the level of mental retardation, is insufficient.

The necessary evidence may take many forms. (See AAMR, *supra*, at pp. 93-94.) While we do not attempt to catalogue them here, they presumably will most often include school or other records. When, as here, IQ scores are available from the developmental period, those scores must be given significant weight, although this does not necessarily mean more current or post-age-18 assessments are wholly irrelevant. (See DSM-IV-TR, *supra*, at p. 41 [referring to IQ assessments from, e.g., Wechsler Intelligence Scales *for Children* & Kaufman Assessment Battery *for Children*]; AAMR, *supra*, at pp. 93-94

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35 Although the APA uses a cutoff age of 22 years, it also requires that the concurrent limitations in intellectual functioning and adaptive functioning originate (have their onset) during the developmental period. (APA, *supra*, at pp. 13, 37, 97.)

[diagnosing mental retardation "[t]ypically … requires the administration of an individualized assessment of intelligence, an individualized assessment of adaptive behavior, and a determination made through review of documents and interviews with relevant observers that the disability was present before the age of 18"].)[36] Since mental retardation is not necessarily a static condition (DSM-IV-TR, *supra*, at p. 47), where more than one IQ test has been administered, the test scores obtained closest to age 18 may have the most probative value. This does not mean that other evidence would not likewise be probative or persuasive, nor does it in any way preclude a trial court from taking into account evidence concerning the propriety of basing its decision on, or the accuracy or reliability of, those scores.[37]

We emphasize that we are not inserting a fixed cutoff or particular numerical score into the definition of mental retardation. Both the Legislature and the California Supreme Court have declined to do so. (§ 1376, subd. (a); *Hawthorne*, *supra*, 35 Cal.4th at pp. 48-49.) An individual's IQ score cannot be ignored, however. As Justice Chin emphasized in *Hawthorne*, "[A]lthough Penal Code section 1376 … states no particular intelligence quotient (IQ) below which a person must score in order to be considered mentally

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36 In the present case, Vidal's most recent IQ scores almost certainly were affected by his drug use and probable exposure to toxic materials during his involvement in manufacturing methamphetamine. Whatever the arguments might be about the propriety of executing someone who, for example, committed a crime following a catastrophic brain injury or lowered IQ suffered as an adult (see Ellis, *supra*, at p. 9 & fn. 29), section 1376 and *Atkins* speak to execution only of the mentally retarded (see Frumkin, *supra*, at p. 4). If the onset of the disability occurs after age 18, the disability is not mental retardation. (See DSM-IV-TR, *supra*, at p. 47.) We express no opinion regarding the validity of using a current IQ assessment as evidence of past intellectual functioning in situations in which no reliable IQ scores from the developmental period are available.

37 We have already mentioned the Flynn effect. Scores may also be affected by, inter alia, whether the individual has already been given the same test and how recently. (See, e.g., Trowbridge, *supra*, at p. 7; Frumkin, *supra*, at p. 3.)

retarded, standardized tests like IQ tests remain important. … [S]ection 1376's standard is derived from [*Atkins*]. The *Atkins* court said that then 70-75 IQ range 'is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.' [Citation.] Thus, a person whose IQ score is over 75 is very likely not mentally retarded …. The [AAMR] states … that 'the term "significantly subaverage" has been used by mental retardation professionals to describe the level of impairment found in individuals whose performance *on standardized intelligence tests* places them two standard deviations below the mean; that is, in the lowest two and a half or three percent of the population.' (Italics added.) This formulation is consistent with the *Atkins* court's statement that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, the typical cutoff IQ for the intellectual function prong. [Citation.]" (*Hawthorne, supra*, 35 Cal.4th at p. 52 (conc. opn. of Chin, J.).)

There must be some parameters to the concept of "significantly subaverage general intellectual functioning" as that phrase is used in section 1376; otherwise, death penalty eligibility under the statute (and, by extension, *Atkins*) would vary from case to case, based not necessarily on the constitutionally-permissible considerations of a defendant's individual mental impairment, but on the foundational measure used to make the determination. The failure to establish some sort of workable starting point would open the door to death penalty eligibility determinations based on "practically untrammeled discretion" (*Furman v. Georgia* (1972) 408 U.S. 238, 248 (conc. opn. of Douglas, J.). and could lead to the type of arbitrary and capricious infliction of punishment which the Constitution forbids (*id*. at pp. 274 (conc. opn. of Brennan, J.), 309-310 (conc. opn. of Stewart, J.)).

To summarize: A defendant's FSIQ score is the primary determinant of whether his or her general intellectual functioning is significantly subaverage, as required by

section 1376. The onset (origination) of mental retardation must occur before age 18, and lesser learning disabilities or mental impairments are insufficient.[38]

III

WHAT CONSTITUTES ADAPTIVE BEHAVIOR FOR PURPOSES OF SECTION 1376?

A diagnosis of mental retardation "based exclusively on intellectual functioning and age of onset criteria is clinically inappropriate." (APA, *supra*, at p. 38.) Instead, "[t]o be identified as having [mental retardation], a person must exhibit *both* significantly subaverage intelligence *and* deficits in adaptive behavior during the developmental period." (*Id*. at p. 97, italics added; accord, AAMR, *supra*, at pp. 8, 57; DSM-IV-TR, *supra*, at 41; see *Atkins*, *supra*, 536 U.S. at p. 318.) The intellectual and behavioral deficits must exist concurrently, i.e., at the same time. (§ 1376, subd. (a); DSM-IV-TR, *supra*, at p. 41; APA, *supra*, at p. 13.)

Clinical definitions of adaptive behavior or adaptive functioning are similar to one another: "*Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting" (DSM-IV-TR, *supra*, at p. 42); "*Adaptive behavior* is the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives" (AAMR, *supra*, at p. 73); "Adaptive behaviors are the behavioral skills that people

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38 Nothing in our opinion should be read as failing to recognize the need for clinical judgment or expertise in determining whether an individual is mentally retarded. (See AAMR, *supra*, at pp. 17, 85, 94.) While that clinical judgment or expertise must be exercised with a view to, and considered in light of, the requirements and limitations of the statute, the definition of mental retardation contained in section 1376 leaves room for evolving expert consensus concerning how each of the statute's general definitional requirements are met.

typically exhibit when dealing with the environmental demands they confront" (APA, *supra*, at p. 97). As Couture succinctly put it, "Adaptive behaviors are those behaviors that the individual uses in the community to essentially get along."

"The sole purpose of the adaptive prong of the definition for the criminal justice system is to ascertain that the measured intellectual impairment has had real-life consequences, and thus it is the presence of confirming deficits that must be the diagnostician's focus." (Ellis, *supra*, at p. 8; fn. 25; accord, AAMR, *supra*, at p. 8.) "If an individual does not have significant limitations in the acquisition and/or performance of adaptive behaviors, then the diagnosis of mental retardation is not applicable." (*Id*. at p. 79.) Likewise, given section 1376's definition of mental retardation, if an individual does not have significantly subaverage general intellectual functioning, such a diagnosis is not applicable. Thus, if an individual's general intellectual functioning does not approach the "significantly subaverage" range, a trial court need not consider that person's adaptive behaviors. When the level of intellectual functioning presents a close question, however, such as when the individual's IQ score falls at or near the cutoff point, the existence or nonexistence of deficits in adaptive behaviors may be determinative on the issue of mental retardation. (See DSM-TR-IV, *supra*, at pp. 41-42; APA, *supra*, at p. 15.)

For diagnosis of mental retardation, "significant limitations in adaptive behavior should be established through the use of standardized measures normed on the general population, including people with disabilities and people without disabilities. On these standardized measures, significant limitations in adaptive behavior are operationally defined as performance that is at least two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, and practical, or (b) an overall score on a standardized measure of conceptual, social, and practical skills." (AAMR, *supra*, at p. 13; accord, APA, *supra*, at p. 13.)

"The individual's culture or ethnicity, including … customs that might influence assessment results, must be considered in making a valid assessment." (AAMR, *supra*, at p. 8.) Thus, "[a]daptive behavior scores must be examined in the context of the individual's own culture that may influence opportunities, motivation, and performance of adaptive skills." (*Id*. at p. 75.) "A person whose opportunities to learn adaptive skills have been restricted in comparison to age peers may have acquisition or performance deficits that are unrelated to mental retardation. For example, a person who has not been provided opportunities to make purchases may lack the adaptive skills needed for shopping. Likewise, a person who has not been taught to use money will not have this skill, regardless of his or her potential to understand the concept and use the skill when needed. Finally, if a person possesses certain skills assessed on an adaptive behavior measure but rarely or never has an opportunity to use them, this should be considered in the interpretation of scores. If these factors, which also contribute to individual functioning …, are considered to contribute to lowered scores on adaptive behavior measures, this should be taken into account when scores are interpreted." (*Id*. at p. 86.)

"A diagnosis of mental retardation must take into account the sociocultural context of the individual. The key challenges are to identify sociocultural circumstances that might differ from those of the norm group, to examine the individual's performance in relation to others of the same age and culture, and to evaluate the expectations and opportunities of the individual's culture that might influence an adaptive behavior score. Behavioral expectations may differ across cultural groups, along with education and training in adaptive skills. Assessments, therefore, must consider relevant ethnic or cultural factors." (AAMR, *supra*, at p. 87.)

There was some suggestion in the present case that Vidal's scores in the Vineland Adaptive Behavior Scales were skewed by the fact he was raised in a cultural milieu in which, for example, males were not expected to perform household chores. Widaman himself acknowledged that the test did not distinguish between whether Vidal was unable

to do something and whether he chose not to do it; hence, in interpreting the scores, Widaman had "no idea" whether a score of zero was due to choice or inability. Although we hesitate to say the Vineland scales or Vidal's results were unreliable, since the Vineland – while imperfect – appears to be generally accepted in the relevant scientific field (see AAMR, *supra*, at pp. 84, 88; DSM-IV-TR, *supra*, at p. 42; Frumkin, *supra*, at p. 2), clearly the interpretation of such results must take into account factors such as Vidal's cultural background and its effect on his motivation to perform the tested tasks. (See APA, *supra*, at p. 98; DSM-IV-TR, *supra*, at pp. 2, 46.) Test result interpretation must also take into account possible bias of informants. Although the DSM recommends gathering evidence of deficits in adaptive functioning from reliable independent sources such as teacher evaluation and educational, developmental, and medical history (*id*. at p. 42), such sources may not give a full picture of an individual's limitations. "It is … essential that people interviewed about someone's adaptive behavior be well-acquainted with the typical behavior of the person over an extended period of time, preferably in multiple settings." (AAMR, *supra*, at p. 85.) Often, a parent or immediate relative will be the best source of information about the person's "typical, cross-situational, and independent (i.e., unprompted) adaptive performance." (APA, *supra*, at p. 35.) However, "[t]he consequences of scores to the rater, informant, or individual being rated should also be taken into consideration, as well as the positive or negative nature of the relationship between the rater or informant and the person being assessed [citation]." (AAMR, *supra*, at p. 85.)

Finally, "adaptive behavioral expectations vary by age, so that it is possible to be subaverage during one epoch of life but not during another." (Kanaya, *supra*, at p. 779; see AAMR, *supra*, at p. 75.) As with intellectual functioning, to be relevant to a determination of mental retardation, the onset of adaptive limitations must occur during the developmental period. (APA, *supra*, at pp. 13, 97; DSM-IV-TR, *supra*, at p. 41.) In other words, "[t]o be identified as having [mental retardation], a person must *exhibit* both

significantly subaverage intelligence and deficits in adaptive behavior during the developmental period," which is defined by statute in this case as before age 18. (APA, *supra*, at p. 97, italics added.) Accordingly, evidence must be presented from which a conclusion can be drawn that the defendant was experiencing deficits in adaptive behaviors before age 18, and that these deficits existed at the same time as the requisite limitations in his or her intellectual functioning. (See, e.g., APA, *supra*, at pp. 39-53 [setting out adaptive behavior attainment at various ages].)

IV

BY WHAT STANDARD DOES A TRIAL COURT DETERMINE WHETHER A DEFENDANT IS MENTALLY RETARDED FOR PURPOSES OF SECTION 1376?

The parties agree that the burden is on a defendant to prove, by a preponderance of the evidence, that he or she is mentally retarded within the meaning of section 1376. (§ 1376, subd. (b)(3); see CALJIC No. 8.84.01.) The trial court here applied the proper standard. (See CALJIC No. 2.50.2.)

V

BY WHAT STANDARD DOES AN APPELLATE COURT REVIEW A TRIAL COURT'S DETERMINATION OF MENTAL RETARDATION UNDER SECTION 1376?

"The interpretation of a statute and the determination of its constitutionality are questions of law. In such cases, appellate courts apply a de novo standard of review. [Citation.]" (*People v. Health Laboratories of North America, Inc.* (2001) 87 Cal.App.4th 442, 445; see, e.g., *Burden v. Snowden* (1992) 2 Cal.4th 556, 562.)[39] Accordingly, we determine de novo the meaning of section 1376. By contrast, "mental retardation is a question of fact. [Citations.]" (*Hawthorne*, *supra*, 35 Cal.4th at p. 49.)

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39 We are not concerned here with the constitutionality of section 1376, as no party has raised such a challenge.

Thus, in cases in which a trial court has applied the correct interpretation of the statute, its determination that a criminal defendant is or is not mentally retarded under section 1376 will be reviewed for substantial evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 730.)

VI

SHOULD THIS COURT UPHOLD THE TRIAL COURT'S DETERMINATION THAT VIDAL IS MENTALLY RETARDED WITHIN THE MEANING OF SECTION 1376?

Although the trial court properly employed the preponderance-of-the-evidence standard in deciding whether Vidal is mentally retarded within the meaning of section 1376, we cannot uphold its determination. As previously explained, the court afforded insufficient significance to Vidal's pre-age-18 FSIQ score, inappropriately rejecting that score in favor of the VIQ score as the measure of general intellectual functioning. In so doing, the trial court erred in a way that fundamentally affected its entire ruling.

We emphasize that we are not finding, as a matter of law, that Vidal is or is not mentally retarded within the meaning of section 1376, or that any particular factor is determinative in making that assessment. As the California Supreme Court has stated, mental retardation "is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence. [Citations.]" (*Hawthorne*, *supra*, 35 Cal.4th at p. 49.) We simply hold that, because the trial court here based its decision concerning whether Vidal suffered from significantly subaverage general intellectual functioning on the wrong measure of overall intelligence, the issue must be redetermined using the appropriate assessment. Although the trial court is not required to take additional evidence or argument on the subject, nothing in our opinion precludes it from doing so if it deems such further proceedings to be warranted.

Our concurring and dissenting colleague misperceives our holding, and the import of *Hawthorne*, in this regard. The ultimate determination of whether someone is mentally retarded is one of fact. Nevertheless, the *standard* upon which such a determination is based, is one of law.[40] Nothing in *Hawthorne* purports to alter this basic principle. Moreover, that mental retardation is a question of fact which depends upon an assessment of the individual's overall capacity based on a consideration of all relevant evidence (*Hawthorne*, *supra*, 35 Cal.4th at p. 49), does not mean that *any* fact is necessarily an appropriate consideration. The difficulty with our colleague's approach is that it validates the trial court's reliance on an inappropriate *standard* against which that court then measured the facts. We do not purport to second-guess the trial court's factual determinations, but instead hold that it evaluated those facts against the wrong legal standard.

It is tempting to strive for a definition of mental retardation that is concrete and thus easily applied with uniformity. It does not appear, however, that the subject can be so readily condensed. While the professionals continue their research into the subject of subaverage intellectual functioning, the courts will of necessity face the inconsistencies

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[40] Although we have found no authority addressing this particular issue, cases involving other areas of law are instructive. Thus, for example, in *Divani v. Donovan* (1932) 214 Cal. 447, 453, the California Supreme Court referred to the question whether the trial court applied an erroneous measure of damages as one of law. In *Shubat v. Sutter County Assessment Appeals Bd.* (1993) 13 Cal.App.4th 794, the appellate court reviewed the determination of an assessment appeals board by the standards applicable to judicial decisions (*id*. at p. 800), and stated: "Where it is claimed the Board applied an improper method of valuing a taxpayer's assets, this presents a question of law. We determine 'whether the challenged method of valuation is arbitrary, in excess of discretion, *or in violation of the standards prescribed by law*.' [Citation.] Where it is claimed instead the Board erroneously applied a proper method of valuation, the decision may be overturned 'only when no substantial evidence supports it ….' [Citation.]" (*Id*. at p. 801, italics added.)

of expert testimony and will have to trust in the ability of judges and juries to apply the law in a way that comports with the community standards upon which the decision in *Atkins* is based.

DISPOSITION

Let a writ of mandate issue directing the Superior Court of Tulare County to vacate its order of March 15, 2004, finding Vidal to be mentally retarded within the meaning of section 1376 and *Atkins* and precluding the People from seeking the death penalty, to reconsider the matter in light of this opinion, and to thereafter render a new decision either granting or denying Vidal's motion to preclude imposition of the death penalty pursuant to section 1376 and *Atkins*. The order filed in this court on April 12, 2004, staying trial court proceedings in this matter, shall remain in effect until this opinion is final in all courts of this state, the California Supreme Court grants a hearing herein, or respondent court complies with the directions in this opinion as stated above, whichever shall first occur.

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Ardaiz, P.J.

I CONCUR:

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Vartabedian, J.

DAWSON, J., Concurring and Dissenting

I agree with the majority's conclusion that pretrial appellate review is available to the People after a finding of mental retardation made pursuant to Penal Code section 1376. I do not agree, however, that this matter should be remanded to the trial court for further proceedings on the question whether defendant Jorge Junior Vidal is, in fact, mentally retarded within the meaning of that statute.

We have been directed by the Supreme Court to reconsider our previous opinion in this matter in light of that court's opinion in *In re Hawthorne* (2005) 35 Cal.4th 40. In that opinion, the high court rejected the Attorney General's request that the court "adopt an IQ score of 70 as the upper limit for making a prima facie showing" of significantly subaverage intellectual functioning. (*Id.* at p. 48.) Indeed, the court rejected the idea that any simple IQ score could be used as a cutoff by noting "a fixed cutoff is inconsistent with established clinical definitions [citation] and fails to recognize that significantly subaverage intellectual functioning may be established by means other than IQ testing." (*Ibid.*) The logical inference is that a defendant may be able to prove mental retardation despite having an IQ score—be it PIQ, VIQ or FSIQ[1]—which is above 70. That is precisely what the defendant did here.

The opinion in *Hawthorne* emphasizes "that mental retardation is a question of fact." (*In re Hawthorne*, *supra*, 35 Cal.4th at p. 49.) While we may not agree with the trial court's assessment of the evidence on that issue, we are nonetheless bound to defer to that assessment if it is supported by substantial evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 730.) The majority seeks to avoid this rule by characterizing the trial court's

[1]I use the same acronyms used in the majority opinion and throughout the literature on mental retardation: PIQ (performance intelligence quotient), VIQ (verbal intelligence quotient), and FSIQ (full scale intelligence quotient).

decision as based on "the wrong measure of overall intelligence." (Maj. opn., *ante*, p. 54.) The only way in which the trial court applied the "wrong" measure, however, was in its finding of mental retardation despite an FSIQ score (from tests done when Vidal was 17 years old) above a numerical cutoff which the majority discusses at length. Under *Hawthorne*, the court was permitted to do so.

We are not free to second-guess the trial court's factual determination. Neither are we free to ignore the evidence that supports it. This includes test scores other than those attained by Vidal at age 17: VIQ scores consistently well within the retarded range; FSIQ scores of 78 and 77 attained in the year 2003; expert testimony that FSIQ scores are suspect where, as here, there is a large disparity between VIQ and PIQ scores; evidence that, from early childhood, Vidal could not learn; and testimony from two out of three experts that Vidal is currently mentally retarded and that the condition manifested itself before Vidal was 18 years old. This surely constitutes substantial evidence sufficient to support the trial court's finding.

I agree with the majority that, as a general proposition, FSIQ appears to be the better measure of general intellectual functioning. In this case, however, two experts testified that FSIQ was not the better measure, and they supported their opinions with facts and logic. The record reflects that, in the end, the trial court accepted those opinions.

I would therefore affirm.

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Dawson, J.