IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	**CASE NO. CR 12 566449**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
LONNIE CAGE	)	**JOURNAL ENTRY**
	)	
Defendant	)	

John P. O'Donnell, J.:

STATEMENT OF THE FACTS

Defendant Lonnie Cage is charged with the October 28, 2010 rape and January, 2012 aggravated murder of Lakesha Williams.[1] The aggravated murder counts[2] include specifications that, if proved beyond a reasonable doubt, would make Cage eligible for the death penalty.[3] The indictment also includes charges for other crimes. The state accuses Cage of kidnapping, felonious assault and domestic violence in connection with the events of October 28, 2010, and of aggravated robbery, kidnapping, retaliation and witness intimidation in connection with the events of early January, 2012.[4]

Cage was first indicted for the rape and associated crimes in case 544738 on December 10, 2010. He was scheduled for arraignment on December 27, 2010 but did not appear, so no discovery or other proceedings took place in that case until after his arrest in January, 2012. He was arraigned and assigned counsel then and discovery began.

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[1] Williams is identified in the indictment as Jane Doe.
[2] Counts nine, ten and eleven.
[3] The death penalty specifications include: murder to escape detection (Ohio Revised Code section 2929.04(A)(3)), felony murder (R.C. 2929.04(A)(7)) and retaliation for testimony (R.C. 2929.04(A)(8)).
[4] Another complaining witness - in counts five, seven and eight (alleging felonious assault, domestic violence and child endangering) - is Cage's son. These charges arise from the events of October, 2010.

While the rape case progressed, Cage was indicted on the capital murder and related charges in case number 560406 on May 18, 2012. A week later he was arraigned and two lawyers were assigned to represent him at the expense of the state. On May 31, 2012 Cage filed a motion to appoint Dr. John Fabian as "a consulting expert and psychologist with expertise to perform psychological and cognitive testing and assessment for mitigation in sentencing."[5] That motion was granted, and Fabian appointed, on June 6, 2012.

The defendant was then indicted in this case on August 31, 2012. The indictment here essentially combines the charges from the separate rape and murder cases, and the first two cases have been dismissed.

As discovery went on, defense counsel sought to persuade the state to move to dismiss the capital specifications on the grounds that the defendant, even if he is found guilty of the aggravated murder of Lakesha Williams, is ineligible for the death penalty because he is mentally retarded. That argument rests on the decision of the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that death as a punishment for a mentally retarded criminal violates the Eighth Amendment's proscription against cruel and unusual punishment and is therefore unconstitutional.

Toward that end, sometime before March 22, 2013, the defense attorneys produced to the state a report from Dr. Fabian to support their claim of mental retardation and convince the state that the death specifications should be dismissed.[6] To date, the defendant's efforts to reach a stipulated resolution of the capital specifications have been unavailing. Indeed, rather

[5] Defendant's May 31, 2012 motion in case number 560409 for consulting mental health expert, page 1.
[6] The date of production is not known, but it was clearly in the possession of the state when it filed on March 22 a motion to have Cage examined for competency to stand trial. The report was not attached to that motion and is not part of the trial court record.

than lead to a settlement, Fabian's report prompted the state to file a motion asking the court to refer Cage to the court psychiatric clinic to be evaluated for his competency to stand trial.

Because the parties' informal efforts to resolve the capital specifications have failed and a negotiated plea is unlikely the court must address three areas: expert witness production, the timing of the defense's *Atkins* motion (if any), and the state's March 22, 2013 motion for a competency hearing and to refer the defendant to the court psychiatric clinic for a competency evaluation.[7]

Expert witness production

Rule 16(A) of the Ohio Rules of Criminal Procedure provides that discovery is initiated by demand of the defendant. That demand was made in this case on September 6, 2012 (and in the predecessor capital case on June 4, 2012 and the predecessor rape case on February 8, 2012) and triggered the parties' obligations to provide reciprocal discovery. Criminal Rules 16(H)(2) and 16(H)(5) require a defendant to permit the prosecutor to copy results of mental examinations and written statements by witnesses in the defendant's case-in-chief. Additionally, Criminal Rule 16(K) provides:

> **Expert Witnesses; Reports.** An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

If the defendant intends to call Fabian as a witness – either in a pre-trial *Atkins* hearing, at the first phase of the trial during which the state must prove the elements of the alleged crimes, or at a second phase after guilty verdicts where the defendant is permitted to introduce

[7] Nothing in this entry should be construed as an effort to dissuade the parties from continued plea negotiations. That notwithstanding, the case must be prepared for trial.

mitigation evidence – then the state is entitled to a written report from Fabian. Moreover, Fabian has been working on the case for almost a year and has apparently already produced at least a preliminary report. Therefore, the defendant is ordered to produce to the prosecutor no later than June 12, 2013 a written expert witness report from Fabian that comports with Criminal Rule 16(K). Failure to produce the report will preclude Fabian from testifying as a witness at the guilt or mitigation stages at trial.

The same June 12 expert report disclosure deadline applies to all other expert witnesses of both parties.

Atkins motion

Although *Atkins* barred the execution of the mentally retarded, it did not establish procedures for determining whether an individual is "mentally retarded" for purposes of escaping execution. *State v. Lott*, 97 Ohio St. 3d 303, ¶10 (2002). Rather, the U.S. Supreme Court left it to the states to develop appropriate ways to enforce the constitutional restrictions on executing the mentally retarded. *Id*. The Ohio Supreme Court went on in *Lott* to establish the procedure for considering *Atkins* claims, i.e. defendants' assertions that they are not eligible for execution by virtue of mental retardation.

In *Lott*, the defendant raised his claim through a motion for postconviction relief under R.C. 2953.21 *et seq*. In that context, *Lott* set forth the procedure and standards for "determining whether convicted defendants facing the death penalty are mentally retarded." *Id*., ¶11. The same procedures were deemed to apply to defense claims of mental retardation raised at trial. *Id*. The Supreme Court concluded that "as to capital cases currently pending trial, the trial court should consider defense *Atkins* claims, and hold hearings, in accordance

with the standards set out in this opinion." *Id.*, ¶25. These evidentiary hearings have, predictably, come to be known as *Atkins* hearings.

The procedure set out by the *Lott* decision for an *Atkins* hearing in the case of a defendant awaiting trial requires the presentation of evidence by the defendant, who must prove to the court, not a jury, by a preponderance of the evidence that he is mentally retarded. But *Lott* was silent on whether trial courts presiding over pending cases should convene *Atkins* hearings before, between or after the adjudication and penalty phases of a capital trial, and it appears Ohio's trial courts have taken varied approaches. For example, in *State v. Were*, 118 Ohio St. 3d 448 (2008), the Ohio Supreme Court considered the appeal of a defendant whose *Atkins* hearing was held after a guilty verdict but before the penalty phase evidentiary hearing. The sequence of the trial court proceedings was not a subject of the appeal and nothing in the opinion suggests that it was wrong. On the other hand, in *State v. Williams*, 8th Dist. No. 82364, 2003-Ohio-6342, the *Atkins* hearing was held before trial with no disapprobation from the appellate court.

Having considered the possibilities, this court believes that the best time for a hearing on an *Atkins* motion is after a jury decides that the defendant is guilty and then, after a mitigation hearing, separately recommends the death penalty.[8] Although it is true that Cage has been in the shadow of possible capital punishment since he was indicted in case number 560406, he will not be in real jeopardy of being sentenced to death until a jury says he is guilty and should die for his crimes. His claim of mental retardation will not be justiciable until then since, even if he is mentally retarded, it is not unconstitutional to put an otherwise competent mentally retarded person on trial.

[8] R.C. 2929.03(D)(2).

Therefore, to the extent that Cage desires to pursue an *Atkins* motion with a request that it be decided before trial, he is given leave pursuant to Criminal Rules 12(D) and 12(H) until June 12, 2013 to file it. Based on the reasoning given in this entry the court is then likely to deny the motion to hear the merits of the *Atkins* motion before trial, thus allowing Cage to protect the record and preserve the denial of the pre-trial hearing as possible error. If Cage wishes to file an *Atkins* motion but does not want to preserve an objection to the court's decision on the appropriate sequence of events, then he is given leave to do so until one day after such date as a jury may recommend the death penalty pursuant to R.C. 2929.03(D)(2).

Competency to stand trial

R.C. 2945.37(B) allows the court, the prosecutor or the defendant to "raise the issue of the defendant's competence to stand trial." This court has been unable to find appellate guidance on what exactly it means to "raise" the issue of competency, but it is apparent that the bar is low, and there is no doubt that the prosecutor's motion has sufficiently "raised" the question of Cage's competency to stand trial so that a hearing must be held.[9]

The prosecutor has also asked for an evaluation of the defendant by the court psychiatric clinic, presumably to develop evidence to present at the hearing. Cage opposes a competency evaluation on the grounds that: the plaintiff is trying to interfere with "sensitive defense preparation"[10] for trial; the request is *res judicata* by virtue of a previous ruling in case number 560406; a separate exam could "harm or otherwise taint"[11] psychological testing of Cage by his own expert; and that he will not cooperate with such an exam in any event because it will violate his Fifth Amendment right against self-incrimination.

[9] R.C. 2945.37(B).
[10] Defendant's brief in opposition to the state's motion for a competency exam, filed 04/02/2013, page 1.
[11] *Id.*

Although the statute requires a hearing once the issue of competency is raised, it does not require that the court order a mental evaluation of the defendant.[12] A defendant is presumed competent.[13] The legal tests for mental retardation and competency to stand trial are different and a defendant's mental retardation does not alter the presumption of competency. *State v. Pigge*, 4th Dist. No. 09 CA 3136, 2010-Ohio-6541, ¶28.

Even though the statute allows the prosecutor to raise the issue of competency – and while this court acknowledges a prosecutor's duty to seek justice and not just a conviction, a duty that can justify efforts by the state to prove the defendant is not competent to stand trial – the presumption of competency favors a prosecutor, the advocate who is pursuing the charges on behalf of the people of the state. Thus, as a practical matter it is rare for the prosecutor to raise the issue in the hope that a defendant will be deemed not competent to stand trial. Indeed, the prosecutor's motion arguing that the defendant is "scheming to save his life by creating a phony intellectual disability"[14] shows that the state is eager to prove its case against the defendant at a trial, implying that the prosecutor will advance the position that Cage is competent to stand trial.

Cage's competency to stand trial is already presumed and he has the burden of proving incompetency. *State v. Stanley*, 121 Ohio App. 3d 673, 685 (1st Dist. 1997). Yet the defendant has not evinced an intention to produce evidence in support of the proposition that he is not competent to stand trial. These circumstances, and a closer reading of the state's motion, combine to suggest the state's motion is animated by something other than the desire for a competency exam. The state accuses the defendant of purposely scoring low on an IQ test administered by Fabian as part of "a deliberate strategy of malingering and/or feigning

[12] R.C. 2945.37(A).
[13] R.C. 2945.37(G).
[14] State's motion for a competency exam, filed 03/22/2013, page 7.

intellectual disability in order to defeat the death specification."[15] To counteract that "strategy," the prosecutor describes evidence that is not compatible with a "conclusion of mild mental retardation and [is] inconsistent with a person with a full-scale IQ of 57."[16] As noted above, mental retardation or low intellectual functioning do not equal lack of competency to stand trial. The state's focus on gathering evidence about whether Cage is mentally retarded reveals that what the state really wants is evidence to oppose an eventual *Atkins* motion. And the state will be provided an opportunity to develop such evidence if the defendant moves under *Atkins* to be disqualified from the death penalty by virtue of being mentally retarded.[17] But until then the presumption of competence, the evidence of competency summarized in the state's motion, and the fact that the defendant hasn't claimed incompetency do not justify the state's request for a competency examination. The court therefore denies that request.

As noted above, a hearing is nonetheless necessary since the issue has been raised. The hearing is required to be held within 30 days of the issue being raised, but allows an extension of that time for good cause shown. R.C. 2945.37(C). Good cause for a continuance exists because the court needed time to consider the state's motion and the defendant's brief in opposition. The hearing, at which the defendant will have the burden of showing he is not competent to stand trial, and both parties will be permitted to offer evidence, will be scheduled by a separate docket entry.

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[15] *Id*., p. 7.
[16] *Id*., p. 8.
[17] When a defendant introduces psychiatric evidence and places her state of mind directly at issue, she can be compelled to submit to an independent examination by a state psychiatrist. *State v. Goff*, 128 Ohio St. 3d 169, 2010-Ohio-6317, ¶46.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

SERVICE

A copy of this journal entry was sent by email this ____ day of May, 2013, to the following:

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Judge John P. O'Donnell