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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED

STATE OF OHIO
Plaintiff

2019 APR 19 P 2:38

CLERK OF COURTS
CUYAHOGA COUNTY

ANDRE L JACKSON
Defendant

Case No: CR-87-221195-ZA

Judge: CASSANDRA COLLIER-WILLIAMS

INDICT: 2903.01 AGGRAVATED MURDER WITH VIOLENCE SPECIFICATION
2911.11 AGGRAVATED BURGLARY WITH SPECIFICATIONS
2911.01 AGGRAVATED ROBBERY WITH SPECIFICATIONS

JOURNAL ENTRY

DEFENDANT'S PETITION TO VACATE DEATH SENTENCE IS HEREBY GRANTED. FINAL OPINION AND ORDER. OSJ.

04/18/2019
CPATP 04/18/2019 15:00:18

OSJ

Judge Signature Date

HEAR
04/18/2019

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO,	)	**CR-87-221195-ZA**
Plaintiff,	)	**JUDGE CASSANDRA COLLIER-WILLIAMS**
vs.	)	
ANDRE L JACKSON.	)	
Defendant.	)	**FINAL OPINION AND ORDER**

JUDGE C. COLLIER-WILLIAMS:

This cause came for consideration upon Defendant Andre L. Jackson's Petition to Vacate Death Sentence, filed on May 9, 2003. Said Motion is known as an Atkins Petition, filed per the determination in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which held that capital punishment of intellectually disabled individuals is considered cruel and unusual punishment under the Eight Amendment. For reasons set forth more fully below, this Court hereby GRANTS the Defendant's Petition to Vacate the Death Penalty.

I. FACTUAL AND PROCEDURAL BACKGROUND

In September, 1987, Defendant Andre L. Jackson was charged with Aggravated Murder, Aggravated Burglary and Aggravated Robbery. A jury found the Defendant guilty and he was sentenced to death in April, 1988. The Defendant appealed and the Court of Appeals affirmed the death penalty. In October, 1991, the Supreme Court of Ohio upheld Jackson's sentence.

In 2002, the Supreme Court ruled in *Atkins* that capital punishment of intellectually disabled Defendants violates the Eighth Amendment right against cruel and unusual punishment.

Consequently, on May 9, 2003, the Defendant filed his Petition to Vacate Death Sentence.[1] On March 19, 2007, the State of Ohio filed its Motion for Summary Judgment seeking the dismissal of Defendant's Petition. On January 9, 2009, the State's Motion for Summary Judgment was denied.[2]

On February 23, 2017, a full hearing on the Petition to Vacate Death Sentence was held. The Defendant called a childhood friend, Myron Watson, Esq., his mother, Jackie Graham, his brother, Derek Jackson, Dr. David T. Smith and Dr. Nancy Schmidtgoessling to testify. The State of Ohio called Dr. Michael Arnonoff and Dr. Carla Dreyer to testify. Mr. Watson, Ms. Graham and Mr. Jackson all testified to the impaired adaptive skills of the Defendant.

The parties filed their Post Hearing Briefs on April 3, 2017.[3]

II. LAW AND ANALYSIS

A. STANDARD OF PROOF

In *Atkins,* The United States Supreme Court held that execution of an intellectually disabled individual violated the Eighth Amendment, but left the standards for determining a Defendant's status as intellectually disabled to the State's discretion. *Atkins* at 321. The State of Ohio has not statutorily enacted any standards for determining an individual's status as intellectually disabled. Because of this, the Supreme Court of Ohio established the guiding framework in *State v. Lott,* 97

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[1]The Defendant also filed a Motion for Funding Necessary to Retain a Mental-Retardation Expert on July 3, 2003; a Motion for a Jury Determination on the Issue of Mental Retardation on August 19, 2003; a Motion to Reject the Ohio Supreme Court's "Above-Seventy" Presumption on August 19, 2003; and a Request for a Status Conference and/or Order From Court on December 10, 2003. The docket is silent as to what the rulings were on those motions.

[2]No other motions, rulings, or hearings occurred on this case until a Pretrial was held February 10, 2016.

[3]On January 11, 2017, Defendant filed a Motion for Leave to File a Motion for a New Mitigation Trial. That motion was denied by this Court on February 6, 2017. On March 6, 2017, the Defendant appealed this denial, and the case was stayed while it was pending in the 8th District Court of Appeals. This Court's decision was affirmed, and the case was remanded to this Court on November 28, 2018.

Ohio St.3d 303, 779 N.E.2d 1011 (2002). In *Lott,* the Court held that a Defendant appealing a conviction on *Atkins* grounds must prove all of the following by a preponderance of the evidence:

> "... (1) Significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18..." *Lott,* at 305.

While IQ test scores may be considered, they are not sufficient alone in making a final determination. *Id.* The *Lott* Court states that "This is our standard: In considering an Atkins claim, [1] the trial court shall conduct its own de novo review of the evidence in determining whether the defendant is [intellectually disabled]. [2] The trial court should rely on professional evaluations of Lott's mental status, and consider expert testimony, appointing experts if necessary, in deciding this matter. [3] The trial court shall make written findings and set forth its rationale for finding the defendant [intellectually disabled] or not [intellectually disabled]." *Id,* at 306. *Lott* remains undistinguished by the Ohio legislature.

B. EXPERT REPORTS

Utilizing the *Lott* Court's suggestions, various available expert evaluations throughout the years were utilized as well as the transcripts from the proceedings on February 21, 2017. In considering the Defendant's status as intellectually disabled, the following assessments and expert opinions were considered:

The first available test was administered on May 9, 1978 by Dr. Isidore Helfand in response to a juvenile conviction when the Defendant was 12 years old. Dr. Helfand administered the Wechsler Intelligence Scale for Children (WISC-R), an IQ test.

On February 18 and April 24, 1992, Dr. Nancy Schmidtgoessling evaluated the Defendant, utilizing a Wechsler Adult Intelligence Scale (WAIS-R), Minnesota Multiphasic Personality Inventory (MMPI), and various neuropsychological screenings to evaluate possible brain damage.

In August and September of 1992, Dr. Caroline Everington administered a Quick Score Achievement Test (Q-SAT). She also utilized the Scales of Independent Behavior (SIB) to measure adaptive skills and the Defendant's stepfather was utilized as an informant.

On October 3rd, 2003, Dr. George Schmedlen conducted a Wechsler Adult Intelligence Scale Test (WAIS-III) and a Wide Range Achievement Test-Revision 3 (WRAT-3).

In May of 2016, Dr. David T. Smith conducted a psychological evaluation consisting of clinical interviews with the Defendant, his brother (Derek Jackson), his mother (Jacqueline Graham), and a close childhood friend (Myron Watson); a Stanford-Binet Intelligence Test (S-BV); the Vineland Adaptive Behavior Scales Survey (VABS-II); and items from the Ohio Department of Developmental Disabilities 2010 Ohio Eligibility Determination Instrument (OEDI).

On August 3, 2016, Dr. Carla S. Dreyer evaluated the Defendant administering the Test of Memory Malingering (TOMM), the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV), Wide Range Achievement Test – 4 (WRAT-4) and Adaptive Behavior Assessment System – Third Edition (ABAS-3).

III. **DECISION AND FINDINGS**

(1) ***Significantly subaverage intellectual functioning***

"Most state statutes prohibiting the execution of the [intellectually disabled] require evidence that the individual has an IQ of 70 or below." *Lott,* 97 Ohio St.3d at 305. A full scale IQ score of around 70 to 75 indicates a significant limitation in intellectual functioning. 5 *American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders,* (5th Ed.2013) (hereinafter "DSM-5").

Since the Defendant was 12 years of age, he has been administered six official intelligence tests for which we have been provided the results, with the most recent occurring in 2016. The Defendant scored between 67 (August 2016) and 80 (May 2016) for all these tests. Each test has an average of 100-109 for an "average" human being. Because the Defendant's IQ tests are incredibly close to 70 and each administered test has a standard of error measurement of at least 10, we can presume that the defendant's score is somewhere between 57 and 90. Because this is such a large range and because the highest and lowest IQ scores were obtained in the same year, more weight will be given to expert opinions and the additional evidence provided. Furthermore, The Supreme Court has ruled multiple times that an IQ score alone cannot be determinative of an individual's status as intellectually disabled. *See Hall v. Florida,* 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014); *Brumfield v. Cain,* _ U.S. _, 135 S.Ct 2269, 192 L.Ed.2d 356 (2015).

In considering an Atkins petition, "the relevance of raised or lowered intelligence in prison may not undermine the validity or weight given to scores obtained around the time of the crime or before the defendant's 18th birthday." Edward A. Polloway, *The Death Penalty and Intellectual Disability* (2015). Therefore, our considerations will give more weight to the Defendant's IQ scores closer to the time of the offense rather than those obtained more recently.

On Dr. Everington's 1992 assessment, the assessment closest to the date of the actual offense, the Defendant scored a 77. Dr. Everington noted that this score amounted to "basic survival-level reading and mathematics skills." She further elaborated that "such problems in memory and generalization are a characteristic of persons with mental retardation." Furthermore, Dr. Everington's assessment concluded that "based on the information provided by Andre and others regarding his capabilities, his performance on academic and intelligence tests, and his prior history of developmental delay and probable organic impairment, it is my opinion that he is functioning within the range of mental retardation."

During Dr. Smith's 2016 interview, Defendant expressed concern about not doing well on the evaluation because he would be viewed as intellectually disabled which would make him vulnerable to demeaning comments and treatments by his prison cohorts. This comment is indicative that Dr. Smith was likely able to obtain a reliable score.[4] On the S-BV, the Defendant achieved a score of 80 (the average is 100), which is in the 9th percentile and the average score of an individual aged 9 years, 9 months old. Given that Defendant was 50 years old at the time of this test, a score of 80 is far below expectations for an individual in the Defendant's age range.

It is influential in our determination that the Defendant has significantly subaverage intellectual functioning because two of the IQ tests where Defendant achieved a score higher than 70, the administering professionals (Dr. Everington and Dr. Smith) still opined that the Defendant was functioning in the intellectually disabled range. These professionals had the opportunity to observe the Defendant while taking the assessments and also utilized their industry expertise and knowledge of the circumstances in making their determination. Therefore, their opinions hold weight despite his somewhat higher scores. Additionally, it must be recalled the scores are ultimately subaverage for a person of the Defendant's age.

Lastly, it is generally accepted in the psychological community that "significantly subaverage intellectual functioning" is performance that is at least two standard deviations below the average level for the individual's peers. Marc J. Tasse, *Defining Intellectual Disability,* Spotlight on Disability Newsletter (September 2016). Every professional that evaluated the Defendant noted that his intellectual functioning was at a lower level than expected for someone in his age range.

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[4] This comment is especially disturbing as it further evidences the Defendant's subaverage intellectual functioning in that it implies that he would prefer a finding of "not intellectually disabled" based solely on the potential implications in his prison environment and not the fact that it would uphold his death penalty conviction.

Consequently, it is my conclusion that the Defendant exhibits substandard intellectual functioning.

(2) ***Significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction***

The presence of an intellectual disability also requires a deficiency in two or more adaptive skills. *DSM-5.* Because Defendant's IQ test scores have indicated a significant defect in intellectual functioning, I must next determine whether Defendant exhibits significant limitations in adaptive skills. Intellectual disability involves impairments of mental abilities relating to how an individual copes with everyday tasks. *DSM-5.* These include the conceptual domain (skills in language, reading, writing, math, reasoning, knowledge and memory), the social domain (empathy, social judgment, interpersonal communication skills and retaining friendships), and the practical domain (self-management in personal care, job responsibilities, money management, recreation and organizing school and work tests).

Dr. Everington, in the assessment that occurred closest in time to the offense in August and September of 1992, noted that "Mr. Jackson appears to have related disabilities in several adaptive skill areas...functional academics, social and communications skills, personal living skills and community living skills."

In Dr. Schmidtgoessling's March and April 1992 assessment, she did not perform a true adaptive skills assessment. She did, however, note that "Mr. Jackson lacked the type of experience during his developmental years that are essential to creating an adult who is capable of functioning appropriately in our society." This, along with her assessment of the Defendant's historical record, were indicative to her that the Defendant was impaired in several areas of adaptive functioning.

Dr. Smith's 2016 adaptive skills evaluation concluded that the Defendant scored a 66 (average of 100), which is average for an individual aged 10 years and 6 months old. Dr. Smith indicated that because the Defendant's score is two standard deviations below the average, he is significantly deficient in adaptive functioning. Specifically, Dr. Smith noted that the Defendant was particularly deficient in the areas of written communication, daily living skills, and interpersonal relationships.

Furthermore, the lay witness testimony presented indicates that the Defendant had impaired adaptive skills prior to incarceration. Myron Watson, the Defendant's childhood friend, indicated that the Defendant was not a team player and refused to follow basic rules of schoolyard basketball. Transcript at 37-38. Mr. Watson also indicated that he never saw the Defendant read or write, that the Defendant had no interest in obtaining a Driver's License but still drove, and could not keep a job. Transcript at 38, 47, 48.

The Defendant's mother, Jacqueline Graham, indicated that from a young age the Defendant had difficulties processing what she told him and was very "different" from his two siblings in that he was less well-behaved and needed constant attention. He also refused to do schoolwork. Transcript at 74. His mother indicated that the Defendant had no regard for his own well-being, and engaged in activities like drinking bleach, burning himself on hot water, starting small household fires, and falling off of a playground set which resulted in the loss of all of his teeth. Transcript at 79-80.

Lastly, Defendant's brother, Derek Jackson, testified that the Defendant engaged in risky behaviors and required extra attention from their mother. Transcript at 98, 100. He further confirmed the bleach drinking incident, the fact that the Defendant did not care about schoolwork and received all Fs, and his inability to follow sports. Transcript at 98, 100, 102. Jackson also indicated that the Defendant was unable to manage money or keep a job and did not ever have a

bank account. Transcript at 104. In response to a question regarding the possibility of the Defendant living on his own, Jackson indicated that the Defendant had no concept of working and paying bills and would be unable to survive without the assistance of his family. Transcript at 105.

Nearly every professional who evaluated the Defendant noted a significant or overwhelmingly apparent deficit in some area of adaptive functioning. Despite the fact that the Defendant is in prison, most of the professionals relied on the commentary of those who were closest to the Defendant prior to his incarceration. Furthermore, the lay witnesses at the hearing provided testimony which is highly persuasive that the Defendant exhibited behaviors that evidence adaptive impairments.

Therefore, for all of the above reasons, this Court is confident that the Defendant is significantly impaired in the area of adaptive functioning.

(3) ***Onset before the age of 18***

In considering onset before age 18, the most controlling study originated from Dr. Helfand which was administered when the Defendant was 12 years, 2 months old. Dr. Helfand administered an IQ test, but did not measure the Defendant's adaptive skills. The IQ test was the Wechsler Intelligence Scale for Children (WISC-R) which produced a Full Scale Intelligence Quotient (FSIQ) of 68. A score of 100 is average for this test, with the standard deviation of 15 points below the average constituting "significantly low" compared to the normal population. Dr. Helfand noted that the Defendant "was functioning in the retarded range." Though no adaptive skills were analyzed, Dr. Helfand noted that the Defendant lacked "social sensitivity, social awareness" and would "require special education efforts." The examination further evidenced the Defendant's early lack of adaptive skills in noting that "this is a youngster who needs more supervision and direction [sic] than

others and needs . . . .encouragement for greater social sensitivity, awareness, [and] responsiveness, in order to mitigate the tendency towards more impulsive, rash behavior..."

Dr. Helfand's evaluation of the Defendant's psychomotor skills included the following: "Poor performances here are often found in neurologically impaired individuals or individuals, whose intellectual limitations or qualities may be basically 'organic' or neurological, rather than a function of cultural deprivation." In other words, Dr. Helfand refuted the idea that the Defendant's shortcomings were the result of a poor upbringing and instead insinuated that they were "organic" brain deficiencies, which is persuasive when considering that intellectual disabilities are not related to the child's upbringing, childhood, or educational failures.

Lastly, the lay testimonies of Myron Watson, Jacqueline Graham and Derek Jackson, as discussed above, are all indicative of the Defendant's behavior in childhood and directly prior to the offense. Jacqueline Graham and Derek Jackson's testimony in particular indicate that even as a young child, Andre Jackson exhibited behaviors inconsistent with a "normal" range of adaptive functioning. Further, a review of the Defendant's academic record consistently indicates subnormal performance and no grades above a D except in physical education. A deficit in "functional academics" is an adaptive skill that is relevant to the diagnosis of an intellectual disability. *State v. White*, 118 Ohio St.3d 12, 885 N.E.2d 905 (2008).

Given the above, enough evidence exists to sufficiently conclude that the Defendant's intellectual disability existed well before the age of 18.

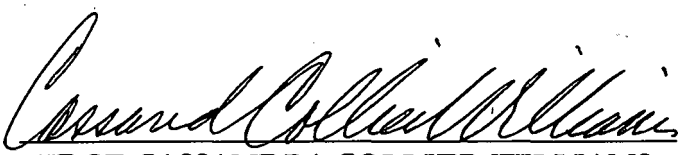
IV. **CONCLUSION**

Having considered all of the evidence provided by both parties, the Court finds that Defendant Andre L. Jackson has established by a preponderance of the evidence that he is indeed intellectually disabled. The evidence presented supports a finding that the Defendant exhibits

significant impairments in both intellectual functioning and adaptive skills, and that the Defendant exhibited this behavior before the age of eighteen.

Consequently, Defendant Andre L. Jackson's Petition to Vacate Death Sentence is hereby **GRANTED**.

IT IS SO ORDERED.



JUDGE CASSANDRA COLLIER-WILLIAMS