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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

STATE OF OHIO
Plaintiff

Case No: CR-87-221195-ZA

Judge: CASSANDRA COLLIER-WILLIAMS

ANDRE L JACKSON
Defendant

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 ATTACHED AND ORDERED RECORDED. OSJ.

08/04/2022
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Judge Signature

Date

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CUYAHOGA COUNTY

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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

STATE OF OHIO)	Case No. CR-87-221195-ZA
)	
Plaintiff/Respondent,)	JUDGE CASSANDRA
)	COLLIER-WILLIAMS
)	
)	
vs.)	
)	
ANDRE L. JACKSON)	
)	<u>FINAL OPINION AND ORDER</u>
Defendant/Petitioner.)	
)	

JUDGE C. COLLIER-WILLIAMS:

Andre L. Jackson, an offender on Ohio's death row, filed a Petition to Vacate Death Sentence on May 9, 2003. Pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.E.2d 335 (2002), Mr. Jackson claims he is intellectually disabled and challenges the imposition of the death penalty against him as cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. After conducting an evidentiary hearing in February 2017 on Mr. Jackson's *Atkins* claim, this Court granted Mr. Jackson's Petition and vacated his death sentence on April 18, 2019, finding him to be intellectually disabled. The State of Ohio appealed this Court's decision. In October 2020, the Eighth District Court of Appeals reversed the judgment of this Court and ordered the case remanded, in light of the Ohio Supreme Court decision of *State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616. For reasons set forth more fully below, this Court hereby GRANTS Petitioner Andre L. Jackson's Petition to Vacate Death Sentence.

I. PROCEDURAL BACKGROUND

In 1988, Defendant Andre L. Jackson was sentenced to death for the murder of Emily Zak. The Supreme Court of Ohio upheld Mr. Jackson's death sentence in *State v. Jackson*, 57 Ohio St.3d 29, 565 N.E.2d 549 (1991). After exhausting all state court appeals, Mr. Jackson filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Ohio. In 2001, the district court denied the petition. *Jackson v. Anderson*, 141 F.Supp.2d 811, 830 (N.D. Ohio 2001). The Sixth Circuit Court of Appeals affirmed the lower court's decision denying Mr. Jackson's petition.

On May 3, 2003, Mr. Jackson timely filed his petition raising an *Atkins* claim. On March 19, 2007, the State of Ohio filed a Motion for Summary Judgment seeking the dismissal of Mr. Jackson's Petition. Mr. Jackson opposed the motion. On January 9, 2009, this Court denied the State's Motion for Summary Judgment, finding that a genuine issue of material fact existed as to whether Mr. Jackson is intellectually disabled.

II. THE 2017 ATKINS HEARING

In February 2017, over the course of two days, this Court conducted a full evidentiary hearing on Mr. Jackson's petition. At the evidentiary hearing, Mr. Jackson called three individuals to testify concerning his youth: his mother, Jacqueline Graham, brother, Derek Jackson, and childhood friend, Myron Watson. Both parties retained expert witnesses to testify. The State of Ohio called Dr. Michael Aronoff and Dr. Carla Dreyer to testify as expert witnesses. Mr. Jackson called Dr. David T. Smith and Dr. Nancy Schmidtgoessling to testify on his behalf as expert witnesses.

The first lay witness to testify was Myron Watson, a childhood friend of Mr. Jackson's. Myron testified that he and Mr. Jackson spent time together almost every day. He testified that he never saw Mr. Jackson reading or writing. In fact, Mr. Jackson would get information from Myron about things in the news that were going on. Myron believed that Mr. Jackson masked his deficiencies by pulling pranks and making jokes as a form of deflection. Myron testified that Mr. Jackson did not have a driver's license, only worked for a short period, did not have a bank account, and never lived by himself. Tr. at 34-49.

The next lay witness to testify was Jacqueline Graham, Mr. Jackson's mother. She testified that, although she has four children, all her time was spent on Mr. Jackson. Jacqueline Graham testified that she did not think that Mr. Jackson processed information. Ms. Graham testified that Mr. Jackson had a limited vocabulary, was very immature, and was not functioning up to his age level. Ms. Graham testified that when he was a small kid, the doctor thought Mr. Jackson had a hearing problem because he was not communicating. Ms. Graham said that Mr. Jackson's grades on his report cards were all F's. Mr. Jackson never had a driver's license and never lived alone. Jacqueline Graham had issues with Mr. Jackson as a child with respect to his safety. Mr. Jackson knocked all his teeth out on the playground, scalded himself with hot water, drank bleach, and started fires in the house. Ms. Graham testified that Mr. Jackson had some temporary jobs at restaurants and doing cleaning. She had to help Mr. Jackson fill out the job applications. She told him what to write and checked his spelling. Tr. at 71-91.

The last lay witness to testify was Derek Jackson, Mr. Jackson's brother. Derek Jackson testified that Mr. Jackson required more of his mother's attention when they were growing up. He said that Mr. Jackson had all F's in school and he never saw Mr. Jackson do schoolwork. He testified that Mr. Jackson was held back in the 7th or 8th grade and that he did not graduate from

high school. Derek Jackson testified that Mr. Jackson did not try to get a driver's license. Derek testified that he did not believe that Mr. Jackson would pass the written part of a driving test. He testified that Mr. Jackson had a job as a dishwasher and at a gas station but neither job lasted long. He does not believe that Mr. Jackson could live alone. Derek testified that Mr. Jackson could not process the concept of getting a bill, working to pay off the bill, and then paying the bill. Tr. at 95-105.

Drs. Smith, Dreyer, Aronoff, and Schmidtgoessling testified at the *Atkins* hearing in 2017. Drs. Smith and Schmidtgoessling on behalf of Mr. Jackson, and Drs. Dreyer and Aronoff on behalf of the State. Drs. Smith, Dreyer, and Aronoff each reported that they reviewed other prior expert reports and affidavits that were provided to them by counsel. Specifically, those documents included: (1) a Court Psychiatric Evaluation report dated May 9, 1978, prepared by Dr. Isidore Helfand; (2) an affidavit prepared by Dr. Caroline Everington following her evaluation of Mr. Jackson in 1992; and (3) an affidavit prepared by Dr. James C. Tanley following his evaluation of Mr. Jackson in 1992.

Mr. Jackson first presented Dr. David T. Smith as an expert witness. Dr. Smith, a clinical psychologist, did his post-doctoral residency and predoctoral internship at Nisonger Center in Columbus, a federally funded organization for developmental disabilities. Dr. Smith's specialty involves disability and childcare psychology. He spent thirty years at Cincinnati Children's Hospital, where eighty percent of his practice was in the area of developmental disabilities. He is recognized as a fellow in the American Association on Intellectual and Developmental Disabilities ("AAIDD"), a national organization. Dr. Smith was involved in a study to reform the adaptive behavior scale that the AAIDD previously used and he has made peer review presentations for the AAIDD. Dr. Smith has testified in two other *Atkins* cases, each time on behalf of the defense.

Dr. Smith assessed Mr. Jackson in 2016 at the Chillicothe Correctional Institute. Dr. Smith's evaluation consisted of clinical interviews with Mr. Jackson himself, Derek Jackson, Jacqueline Graham, and Myron Watson; the Stanford-Binet Intelligence Test, Fifth Edition (2003) ("S-BV"); the Vineland Adaptive Behavior Scales, Second Edition Survey Interview Form ("VABS-II"); and portions of the Ohio Eligibility Determination Inventory ("OEDI"). During Dr. Smith's 2016 assessment, he testified that Mr. Jackson understood why he was being evaluated. Mr. Jackson expressed to Dr. Smith that he did not think that he had an intellectual disability and, in fact, would prefer that the findings show that. Mr. Jackson did not want to spend the rest of his life in prison with the stigma of being somebody who was intellectually disabled.¹

On the S-BV test for intellectual functioning, Mr. Jackson obtained a full-scale IQ score of 80. Dr. Smith stated that an average score would be 100, with a standard deviation of 16. According to Dr. Smith, after factoring in the standard error of measurement ("SEM"), Mr. Jackson's true IQ score would fall between the ranges of 76-84 with a 95% confidence level. Based on this result, Dr. Smith opined in his report that Mr. Jackson "was found to currently be an individual who does not have intellectual disability * * *." However, Dr. Smith opined that Mr. Jackson "functioned in the mild range of intellectual disability *at the time of the crime.*" Dr. Smith addressed the issue of fluctuating IQ scores in his report and during his testimony. Defendant's Exhibit C.

Dr. Smith administered an adaptive skills test, the VABS-II. For this test, Dr. Smith used Mr. Jackson, Myron Watson, and Jacqueline Graham as informants. On the items tested, where there was not at least two people agreeing on Mr. Jackson's ability at the time of the crime, Dr.

¹ The Court finds this comment 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.

Smith deferred to giving Mr. Jackson a higher score. On this test, the average score is 100 and a score of 70 is two standard deviations below the mean and satisfies the adaptive skills criterion for intellectual disability. Mr. Jackson had an overall score of 66. This score means that 99% of people at Mr. Jackson's age at the time of the crime would have scored better on the adaptive skills test. Dr. Smith testified that the result on the VABS-II was similar to adaptive skills testing administered to Mr. Jackson in 1992 by Dr. Caroline Everington. Dr. Smith administered portions of the OEDI to Mr. Jackson, which is used to determine whether an individual is eligible for disability services. The three areas of the OEDI that Mr. Jackson was tested on were: (1) the capacity for independent living, (2) learning, and (3) economic self-sufficiencies. On all three areas, Mr. Jackson showed "substantial functional limitations." Dr. Smith testified that he administered the OEDI to corroborate his findings on the VABS-II. After analyzing the results of the VABS-II and OEDI, Dr. Smith opined Mr. Jackson exhibited adaptive skills deficits. Dr. Smith, within a reasonable degree of psychological certainty, concluded that Mr. Jackson satisfied the second prong of the test for an intellectual disability diagnosis. Defendant's Exhibit C, Tr. at 156-172.

Dr. Smith testified about the third criterion for a finding of intellectual disability, which is that the deficits in intellectual functioning and adaptive behavior skills had an onset prior to the age of eighteen. Dr. Smith found this criterion to be satisfied through records and other information. Tr. at 173-174. Dr. Smith relied on the assessment conducted by Dr. Isidore Helfand at the Cuyahoga County Court Clinic in 1978 when Mr. Jackson was twelve years old. This is the only IQ test administered to Mr. Jackson prior to him reaching the age of 18. On that assessment, Mr. Jackson scored a 68 on the Weschler Intelligence Scale for Children- Revised ("WISC-R"). In the report, Dr. Helfand wrote that Mr. Jackson "functions at the retarded range." Joint Exhibit

B. Dr. Helfand further wrote that Mr. Jackson “would require special education efforts and special educative curriculum.” Dr. Helfand’s report does not contain any indication that the 1978 test results are unreliable. Based on the above factual findings, the Court finds that the May 9, 1978 IQ score administered by Dr. Helfand is accurate and reliable.

Mr. Jackson’s school records provided additional support for Dr. Smith determining that the third criterion for intellectual disability was met. The records show that Mr. Jackson was doing poorly in school. His poor work history also supported a finding of the onset criterion. Furthermore, Dr. Smith concluded, to a reasonable degree of psychological certainty, Mr. Jackson was intellectually disabled at the time of the crime. Tr. at 177-184.

Mr. Jackson next presented the testimony of Dr. Nancy Schmidtgoessling. Dr. Schmidtgoessling is a psychologist practicing since 1979 in the areas of clinical and forensic psychology. Dr. Schmidtgoessling obtained her license to practice psychology in 1979. She worked for the Hamilton County Court Clinic for twenty-six years where she routinely conducted evaluations. Between 1980 and 1992, Dr. Schmidtgoessling gave hundreds of IQ tests for the Court Clinic, Social Security Administration, and the Bureau of Vocational Rehabilitation. She evaluated Mr. Jackson on two occasions in 1992. Dr. Schmidtgoessling administered the Weschler Adult Intelligence Scale - Revised (“WAIS-R”) to Mr. Jackson and he obtained a verbal IQ score of 71, a performance IQ score of 75, and a Full Scale IQ score of 72. The Court notes that Dr. Smith testified to the high level of respect that he and others have for Dr. Schmidtgoessling. Tr. at 185, 408-423.

Dr. Schmidtgoessling testified that the standard error of measurement at the time would have been plus or minus three points. Dr. Schmidtgoessling did not formally perform an adaptive skills assessment. She did, however, note, “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.” Defendant’s Exhibit I. Based on her review of Mr. Jackson’s test results and background information, Dr. Schmidtgoessling concluded that Mr. Jackson might be diagnosed as having organic impairment or mental retardation. However, in 1992 Dr. Schmidtgoessling did not diagnose Mr. Jackson as intellectually disabled. Tr. at 422.

Dr. Schmidtgoessling did not indicate in her affidavit that she had any question concerning the reliability of the 1992 IQ score. Based on the above factual finding, this Court finds that the 1992 IQ score administered by Dr. Schmidtgoessling is accurate and reliable.

The State presented two expert witnesses. First was Dr. Carla Dreyer, the clinical director and a psychologist at the Court Clinic Forensic Services in Cincinnati. She specializes in forensics. Dr. Dreyer evaluated Mr. Jackson in 2016 at the Chillicothe Correctional Institution. She is a clinical psychologist and her practice includes a wide variety of issues in criminal cases including insanity, competency, intervention in lieu, and mitigation of sentences. Her curriculum vitae does not reference intellectual disability hearings. Dr. Dreyer has testified previously in approximately four intellectual disability hearings. In all four of those hearings, she testified for the prosecution. Dr. Dreyer’s publications have been in the areas of competency of juvenile delinquents to stand trial.

Dr. Dreyer reviewed records, spoke with Myron Watson and Jacqueline Graham, and administered testing to Mr. Jackson in 2016. Dr. Dreyer testified that information “strongly suggests” that Mr. Jackson had Attention Deficit Hyperactivity Disorder (“ADHD”) as a child. She testified that Mr. Jackson “did repeat a couple of grades” and might have been in special education classes in the ninth grade. Dr. Dreyer administered the Test of Memory Malingering (“TOMM”), Wechsler Adult Intelligence Scale - 4th Edition (“WAIS-IV”), Wide Range

Achievement Test - 4th Edition (“WRAT-IV”), and the Adaptive Behavior Assessment Scale - 3rd Edition (“ABAS-3”). The TOMM measures effort and malingering. Malingering means “[f]eigning or exaggerating on cognitive or psychiatric difficulties for secondary gain.” According to Dr. Dreyer, there was no indication on this test that Mr. Jackson had malingered. Tr. at 231-273.

On the WAIS-IV, Mr. Jackson scored a 67. Factoring in the SEM, Mr. Jackson’s true IQ fell between a range of 62 and 72, with a 95% confidence level. Dr. Dreyer stated that the average score on the WAIS-IV is 100, with a standard deviation of 15. She testified that she thought Mr. Jackson’s score was an underestimate of his real IQ based on the lack of effort he exhibited during the testing and because only three months prior, he obtained an IQ score of 80. She opined that the higher score achieved with Dr. Smith would be more reliable. Tr. at 278-279.

For adaptive skills, Dr. Dreyer administered the ABAS-3, where Mr. Jackson scored a general adaptive composite score of 81. According to Dr. Dreyer, the individual scores placed Mr. Jackson in the low to average range and were consistent with an individual functioning in the low average range, not a person with an intellectual disability. Dr. Dreyer opined in her report that Mr. Jackson “is not intellectually disabled now, nor has he ever met the criteria for an intellectual disability.” State’s Exhibit 4. She opined that, instead, Mr. Jackson meets the criteria for borderline intellectual functioning and antisocial personality disorder.

Dr. Michael Aronoff testified next for the State. Dr. Aronoff is a psychologist with the Cuyahoga County Court Psychiatric Clinic. In 2003, he performed an assessment of Mr. Jackson to determine whether he was intellectually disabled. Dr. Aronoff reviewed records, interviewed Mr. Jackson, and administered testing, the WAIS-III and WRAT-3. On the WAIS-III, Mr. Jackson obtained a full-scale IQ score of 76. Dr. Aronoff admitted having confusion as to the relevant time

for an intellectual disability assessment, whether it was at the time of the offense, the time of sentencing, or at the time of execution. He based his assessment on Mr. Jackson's functioning in 2003, at the age of thirty-seven, which was sixteen years after the crime. He did not perform adaptive skills testing and instead "conceded to Dr. Everington's results because [he] had nothing to rebut it." Dr. Aronoff also had no question about the IQ score of 68 received by Mr. Jackson in 1978. He further "considered Dr. Schmidtgoessling's testing that was conducted in between February and April of 1992 where [Mr. Jackson] attained a Full-Scale IQ of 72." With the 68 IQ score in 1972 and the 72 IQ score in 1992, and factoring in the standard error of measurement, Dr. Aronoff agreed that both of those scores show significantly subaverage intellectual functioning. Tr. at 367-380.

After the conclusion of the evidentiary hearing, both parties submitted post-hearing briefs. On April 18, 2019, this Court granted Mr. Jackson's petition and vacated his death sentence. The State of Ohio appealed this Court's decision. On October 15, 2020, the Eighth District Court of Appeals reversed the judgment of this Court and ordered the case remanded to determine whether Mr. Jackson is intellectually disabled under the new standard established in *State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616.

III. APPLICABLE LAW

A. Standard of Review

The procedures for post-conviction relief outlined in R.C. 2953.21 et seq. provide the statutory framework for reviewing an *Atkins* claim. The petitioner raising an *Atkins* claim bears the burden of establishing that he or she is intellectually disabled by a preponderance of the evidence. *State v. Lott*, 97 Ohio St.3d, 2002-Ohio-6625, 779 N.E.2d 1011. In considering an

Atkins claim, the trial court shall conduct a de novo review of the evidence in determining whether the petitioner is intellectually disabled. *Id.* at ¶ 18. "The trial court may consider expert testimony and appoint experts if necessary in deciding this issue. The trial court shall make written findings and set forth its rationale for finding the defendant intellectually disabled or not intellectually disabled." *Id.* For purposes of *Atkins*, the relevant point in time for making an intellectual disability diagnosis is the time of the offense or the trial. *Atkins v. Virginia*, 536 U.S. 304, 306-07, 122 S.Ct. 2242, 2244 153 L.Ed.2d 335, 341 (2002). The *Atkins* Court expressly found intellectually disabled defendants "less morally culpable" specifically due to characteristics of such offenders at the time of the offense. *Id.* at 320. The *Atkins* Court stated, "[F]or example, the diminished ability to understand and process information . . . or to control impulses . . . make it less likely" that persons with intellectual disability will be deterred by "the possibility of execution as a penalty." *Id.*

B. State v. Ford Decision and Test

After this Court granted Petitioner Andre Jackson's Petition to Vacate, and while this matter was pending before the Eighth District Court of Appeals, the Supreme Court of Ohio decided *State v. Ford*. In *Ford*, the Supreme Court announced that the *Lott* Test was outdated. In doing so, the *Ford* Court stated, "IQ scores are imprecise and 'should be read not as a single fixed number but as a range.'" *Ford* at ¶ 97, quoting *Hall v. Florida*, 572 U.S. 701, 712, 134 S.Ct 1986, 188 L.E.2d 1007 (2014). The Supreme Court of Ohio set forth an updated three-part test for intellectual disability and held that the rebuttable presumption that a defendant is not intellectually disabled if his or her IQ score is above 70 is no longer valid. *Ford* at ¶ 100. In reaching the decision, the Court analyzed the relatively recent United States Supreme Court decisions of *Hall v. Florida*, *supra* and *Moore v. Texas*, 581 U.S. ___, 137 S.Ct. 1039, 1045, 197 L.Ed.2d 416 (2017),

which struck down state-court decisions on intellectual disability by applying updated medical diagnostic standards.

The *Ford* Court further held that a trial court should consider evidence presented on the “Flynn Effect,” which is a “‘generally recognized phenomenon’ in which the average IQ scores produced by any given IQ test tend to rise over time, often by approximately three points per ten years from the date the IQ test is initially standardized.” *Id.* at ¶ 87, quoting *Black v. Carpenter*, 866 F.3d 734, 738, (6th Cir.2017), fn. 1 (internal quotations omitted). The Flynn Effect is distinct from the standard error of measurement (SEM). *Id.* “The [AAIDD] recommends that in ‘cases in which a test with aging norms is used as part of a diagnosis of [intellectual disability], a corrected Full Scale IQ upward of 3 points per decade for age of the norms is warranted.’” *Id.* at ¶ 90, quoting *AAIDD-11, User’s Guide* at 23. Because it was not discussed in *Hall* or *Moore*, however, the *Ford* Court held that, it is within the trial court’s discretion whether to include the Flynn Effect as a factor in the IQ scores. *Id.* at ¶ 92.

The Supreme Court of Ohio concluded *Ford* with updated criteria for state courts to apply when determining whether an offender is intellectually disabled for purposes of the death penalty. Courts must consider the following three core elements: (1) intellectual-functioning deficits (indicated by an IQ score approximately two standard deviations below the mean—i.e., a score of roughly 70 or lower when adjusted for the [SEM]); (2) Significant adaptive deficits in any of the three adaptive-skill sets (conceptual, social, and practical); and (3) The onset of these deficits while the defendant was a minor. *Id.* at ¶ 100.

IV. DECISION AND FINDINGS

It is unconstitutional to execute a person who is intellectually disabled. *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242 (2002). For a person to be diagnosed as intellectually disabled, the person must satisfy three criteria, those being: a) intellectual functioning deficits b) significant adaptive deficits in any of the three adaptive-skill sets and 3) onset of these deficits while the defendant was a minor. *State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.2d 616, ¶ 100. The standard in *Ford* has replaced the standard in *Lott*. It removes the IQ-based presumption of intellectual disability, requires consideration of an adjustment for SEM when evaluating IQ scores, and removes the requirement that a second adaptive skills deficit must be identified. For purposes of *Atkins*, the relevant point of time for making an intellectual disability diagnosis is the time of the offense or the trial. The date of the offense was June 25, 1987. The trial commenced on March 21, 1988.

A. First Prong: Significantly Subaverage Intellectual Functioning

For an individual to meet the first prong of an intellectual disability diagnosis, he or she must obtain a score on one or more IQ tests that is approximately two standard deviations below the means. *Ford* at ¶ 84. A standardized, normed IQ test must be used to determine if an individual satisfies the first prong of an intellectual functioning diagnosis. *Ford* at ¶ 95. The mean on WAIS IQ tests is 100 and one standard deviation is 15 points, so two standard deviations below is 70. The mean on the Stanford-Binet test is 100 and one standard deviation is 16 points, so two standard deviations below is 68. When assessing an individual's IQ, the standard error of measurement must be considered to account for error involving the examiner, the client or other errors in the

testing process. *Ford* at ¶ 84; *Hall v. Florida*, 572 U.S. 701, 713, 134 S.Ct. 1986 (2014); see American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, (5th ed. 2013) (“DSM-5”). Each IQ test has a SEM, and the SEM for each test is different. “A test’s SEM is a statistical fact, a reflection of the inherent imprecision of the test itself.” *Hall* at 713-714 (citations omitted). “An individual’s IQ test score on any given exam may fluctuate for a variety of reasons. These include the test-taker’s health; practice from earlier tests; the environment or location of the test; the examiner’s demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing. *Id.* at 713, citing the AAIDD-11, *User’s Guide* (2012). “The SEM reflects the reality that an individual’s intellectual functioning cannot be reduced to a single numerical score. For purposes of most IQ tests, the SEM means that an individual’s score is best understood as a range of scores on either side of the recorded score * * * within which one may say an individual’s true IQ score lies.” *Id.*

Mr. Jackson was administered five IQ tests during his life. Mr. Jackson’s IQ test scores are summarized as follows:

DATE	AGE	SCORE	TEST	ADMINISTRATOR
1978	12	68	WISC-R	Dr. Isidore Helfand
1992	26	72	WAIS-R	Dr. Nancy Schmidtgoessling
2003	37	76	WAIS-III	Dr. Michael Aronoff
May 2016	50	80	S-BV	Dr. David Smith
August 2016	50	67	WAIS-IV	Dr. Carla Dreyer

The date of the offense in this case was June 25, 1987 and the trial commenced on March 21, 1988. The 1978 test was administered nine years prior to the crime and ten years prior to trial. The 1992 test was administered five years after the offense and four years after the trial, making it the IQ score received closest in time to the offense and the trial. The 2003 test was administered sixteen years after the offense and fifteen years after the trial. The two 2016 tests were administered twenty-nine years after the offense and twenty-eight years after the trial. These five scores produced an average score of 72.6. Mr. Jackson's raw IQ results range from 67-80. The SEM of each test ranged from plus or minus three to plus or minus five. Thus, Mr. Jackson's true IQ score ranged between 62 and 84.

For purposes of the first prong, Mr. Jackson obtained a score on two IQ tests that is approximately 2 standard deviations below the mean, the 68 in 1978 and the 67 in August 2016. While Mr. Jackson has received three scores above seventy, this Court does not apply the seventy IQ presumption recognized in *State v. Lott*, because the Supreme Court of Ohio subsequently overruled *Lott*. *Ford* at ¶ 100. Furthermore, the score of 72 in 1992, with the SEM factored in would be 69-75. The score of 76 with the SEM factored in would be 71-81. If the lower end of the range of an IQ score falls at seventy or below, the defendant satisfies the first prong for deficits in intellectual functioning. *Moore v. Texas*, 581 U.S. ___, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017). The Supreme Court of the United States has found that the courts commit reversible error when they find that an IQ score of 71 to 75 does not qualify as a score falling within the significantly sub average range for purposes of the first criteria. *Hall*, 572 U.S. 701. In *Hall*, the Supreme Court stated:

Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test. . . . Florida is one of just a few States to have this rigid rule. Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test. By failing to take into account the standard error of measurement, Florida's

law not only contradicts the test's own design but also bars an essential part of a sentencing court's inquiry into adaptive functioning.

Relying on *Hall*, the Supreme Court, in the case of *Brumfield v. Cain*, 135 S. Ct. 2269, 2280, 192 L. Ed. 2d 356 (2015), found unreasonable a state court's conclusion that a score of 75 precluded an intellectual disability finding. Thus, on the 1992 test, the test administered closest in time to the commission of the crime and the trial, Mr. Jackson's score with the SEM factored in was 69-75. The lower end of the range, 69, falls below the seventy mark and satisfies the first prong for deficits in intellectual functioning. Three out of the five tests that Mr. Jackson was administered satisfy the first prong. However, only one score is necessary.

The Court is cognizant of the fact that Mr. Jackson has scored a 76 and 80 on two of his IQ tests, neither of which fall below seventy with the SEM factored in. Neither of the scores persuade the Court. First, the above seventy presumption no longer applies to IQ scores. Second, the medical community, as well as courts, have specifically cautioned against over-reliance on IQ scores in diagnosing intellectual disability: "IQ has typically dominated and thus has been overemphasized both in terms of professional decision making and diagnosis.... This imbalance between intelligence and adaptive behavior does not represent the current conceptualization of mental retardation." *Mental Retardation Definition, Classification, and Systems of Support* (10th ed.). The over-emphasis on IQ test scores skews the diagnosis and ignores expert recognition that IQ scores alone do not determine whether a person is intellectually disabled. It is not unusual for an offender to present multiple IQ scores.

Further, the Court notes that the rise in this IQ score is attributable to years of Mr. Jackson's incarceration. Greenspan and Olley, "Variability of IQ Test Scores," *The Death Penalty and Intellectual Disability*, p. 143 (2015); Lebel and Beaulieu, "Longitudinal Development of Brain

Wiring Continues from Childhood into Adulthood,” *The Journal of Neuroscience*, July 27, 2011. But most important, the date of the offense was June 25, 1987. The date of the trial was March 21, 1988. As stated previously, for purposes of *Atkins*, the relevant point of time for making an intellectual disability diagnosis is the time of the offense or the trial. Accordingly, the Court affords little weight to the IQ scores obtained in 2003 by Dr. Michael Aronoff, and 2016 by Dr. David Smith and Dr. Carla Dreyer, as those IQ scores are furthest away from the time of the offense and the trial.

Dr. Smith addressed the issue of fluctuating IQ scores in his report and during the 2017 hearing. Tr. at 151-152. Dr. Smith stated that the IQ of an individual can change over time and in fact, Mr. Jackson’s IQ did change over time. Dr. Dreyer contended otherwise, stating that IQ scores do not change over time. Dr. Dreyer stated in her report that, “an individual’s intellectual abilities typically remain stable, with the exception of declines in the functioning relating to a brain injury or related process.” State’s Exhibit 4. In response to the question of whether it would be unusual for an individual’s IQ to increase over time, she stated “there could be some mild fluctuation” but that she had “never seen it happen.” Tr. at 284. On cross examination, when she was asked if she was aware of literature that recognized that an individual’s IQ could change over time (other than mild fluctuation), her initial response was consistent with her direct examination: “I’ve never heard of a particular case in that regard, yes.” Tr. at 352. When confronted with a particular passage from the *DSM-5*, she stated, “I’ve just never seen it myself in any of the cases I’ve done.” Tr. at 354. Dr. Dreyer herself did confirm that no basis exists in the psychological literature supporting the now-overruled Lott above 70 presumption.

Due to the vast range of Mr. Jackson's IQ scores and admonishment from the medical community and other courts in relying rigidly on IQ scores, this Court will look to the expert opinions and additional evidence in its determination of intellectual disability.

B. Second Prong: Significant Limitations in Two or More Adaptive Skills

For an individual to meet the second prong for an intellectual disability diagnosis, he or she must have significant adaptive deficits in at least one of three domains of adaptive functioning, conceptual, social, and practical. *Ford, supra*, at ¶ 95. Adaptive skills are those skills that one applies to everyday demands of independent living, such as taking care of oneself and interacting with others. Adaptive behavior tests are designed to assess how a person applies those skills in the tasks of everyday life. When assessing adaptive skills deficits, the focus is on the weaknesses and not the strengths of the individual. *Ford* at ¶ 55.

The individuals who assessed Mr. Jackson's level of functioning administered the following three adaptive tests: (1) Scales of Independent Behavior on August 27, 1992, by Dr. Caroline Everington, (2) Vineland Adaptive Behavioral Scale, Second Edition Survey Interview Form on May 23, 2016, by Dr. David Smith, (3) Adaptive Behavior Assessment System, 3d ed. on August 3, 2016, by Dr. Carla Dreyer

The first person to evaluate Mr. Jackson's adaptive skills was Dr. Caroling Everington in 1992. Dr. Everington attempted to administer the Vineland Adaptive Scales to Mr. Jackson. However, she stated that it was unsuccessful, "as [Mr. Jackson] had little opportunity to perform many of the skills in his present setting and retrospective accounts appeared unreliable. That is, Mr. Jackson's estimation of his level of proficiency in the past was incongruent with all accounts of family members and friends." Joint Exhibit A. She stated that this tendency to overestimate capabilities is common for persons with this level of impairment.

Dr. Everington, however, did administer the Scales of Independent Behavior to assess Mr. Jackson's adaptive skills. To administer the SIB, the examiner interviews "informants" – for example, parents, other relatives, or teachers – who are well acquainted with the person that is being evaluated. The informants provide the examiner with information about the subject's abilities. Dr. Everington used Gene Graham, Mr. Jackson's stepfather, as an informant. In 1992, the SIB was a normed, widely accepted test for measuring an individual's adaptive skills with respect to making an intellectual disability diagnosis. The SIB contains four subsets: (1) Broad Independence, (2) Motor Skills, (3) Social and Communication Skills, and (4) Personal Living and Community Living Skills.

Mr. Jackson obtained scores in the first percentile on each of the subtests with the exception of Motor Skills, when compared with other individuals who were the same age as Mr. Jackson at the time of the offense and trial. Dr. Everington noted, "Mr. Jackson appears to have related disabilities in several adaptive skill areas... functional academics, social and communication skills, personal living skills and community living skills." Dr. Everington stated that Mr. Jackson's scores on the SIB were corroborated by anecdotal information provided by Mr. Jackson. Dr. Aronoff did not evaluate Mr. Jackson's adaptive functioning in his 2003 *Atkins* assessment. However, he conceded to Dr. Everington's conclusions with respect to Mr. Jackson's deficits in adaptive functioning. State's Exhibit 2

Dr. Smith administered the Vineland Adaptive Behaviors Scale, Second edition, Survey Interview Form in 2016. The VABS-II is a reliable test in the intellectual disability field. The test involves questions concerning a person's level of functioning and looks at how well a person blends into their environment. The informants for the assessment were Myron Watson, Jacqueline Graham, and Mr. Jackson himself. For purposes of scoring the test, Dr. Smith looked at whether

two or more of the informants agreed on the answer to a question. If he did not receive two or more of the informants in agreement, he would rely on the higher score. However, most of the time there was agreement.

On the VABS-II, Mr. Jackson obtained scores of: (a) 66 on the overall composite score, (b) 66 on the communication domain, (c) 68 on the Daily Living Skills domain, and (d) 70 on the Socialization domain². The average score is 100 and the standard deviation is 15 points. A score of 70 points and below shows adaptive skill deficits. Mr. Jackson's overall composite score of 66 is the average score of an individual aged 10 years and 6 months old. Below is a table showing the three domains and the three subdomains for each domain:

COMMUNICATIONS (66)	Receptive communication Expressive communication Written communication
DAILY LIVING (68)	Personal self-sufficiency Domestic self-sufficiency Community self-sufficiency
SOCIALIZATION (70)	Interpersonal relationships Play and leisure time Coping skills

Concerning each of the subdomains, Dr. Smith stated the following:

Receptive: Able to understand non-literal expression and follow instructions told to him 5 minutes prior, but he could not follow a story read to him for 30 minutes or longer and could not follow an informational talk given to him for a half hour or longer.

² The correlation between the VABS-II domains and the adaptive skills domains with the intellectual disability definition are that the Communication Domain corresponds with the Conceptual Domain, the Daily Living Domain corresponds with the Practical Domain and the Socialization Domain corresponds with the Special Domain.

Expressive: Typified by an ability to use irregular plurals and give simple directions about how to play a game. However, he could not describe short and long-term goals for himself or what he needs to do to reach them.

Written: Typified by his reported ability to read the sports page of his paper and at the 4th grade level, but he could not address an envelope independently nor write a report that was at least one page.

Personal self-sufficiency: Could care for minor cuts and independently bathe, but he needs help taking medicine and could not seek medical help on his own.

Domestic self-sufficiency: He was able to use common household cleaners and prepare basic foods, but could not plan and prepare a main meal of the day. He also did not use the stove/oven.

Community self-sufficiency: He could tell time, count change for purchases but could not travel reliably on his own for more than a few miles to unfamiliar destinations. He was poor at following time break limits at work and did not earn money at a job for more than three months.

Interpersonal Relationships: He could recognize likes and dislikes of others and met with friends regularly, but he did not talk with others about shared interests and did not place reasonable demands on his friendships (e.g. as he often violated their trust and tried to win by cheating at games).

Play and leisure time: He did not show good sportsmanship and was a poor loser. He only played card games and no board games.

Coping skills: Typified by him being able to keep secrets for a day or so and he would apologize for unintentional mistakes, He did not have good follow-through on arrangements and was impulsive in his decisions rather than thinking about the potential consequences first.

Dr. Smith testified that Mr. Jackson exhibited a “cloak of competence,” meaning that he would try to mask his deficits. He would utilize humor or being silly to deflect attention from his deficiencies. Dr. Smith believed the score on the VABS-II was highly valid and in line with the score Dr. Everington found on the adaptive skills testing in 1992. Dr. Smith stated that if he felt at any time during the testing that he was not receiving information yielding valid results, he would not have continued with the testing. Dr. Smith, within a reasonable degree of certainty, concluded that Mr. Jackson satisfied the second prong of the test for an intellectual disability diagnosis. Specifically, Dr. Smith noted that Mr. Jackson was particular deficient in the areas of written

communications, daily living skills, and interpersonal relationships. At the time of the crime and trial, Mr. Jackson had significant adaptive skills deficits.

Dr. Carla Dreyer administered the Adaptive Behavior Assessment Scale-3rd Edition, which consists of approximately 300 questions covering the three skill set domains of adaptive behavior, each with their own subtests. Each response is scored 0 to 3 to calculate a composite score in each domain and subtests scores in each of the three domains. For reference, subtest scores have a mean of 10 with a standard deviation of 3. Below is a summary of Mr. Jackson’s domain and subtest scores:

CONCEPTUAL (83)	Communication	9
	Functional Academics	7
	Self-Direction	5
SOCIAL (83)	Leisure	7
	Social	7
PRACTICAL (82)	Community Use	5
	Home Living	9
	Health & Safety	7
	Self-Care	8
	Work	5

Dr. Carla Dreyer administered the ABAS-3 test directly to Mr. Jackson. Dr. Dreyer noted that many of the items queried reference skills such as using an ATM machine, cell phone, or the internet, technologies that were not available when he lived in the community prior to his current incarceration. Because of this, many of the items were difficult to rate. She further stated that given the level of supervision and circumstances on death row, Mr. Jackson has had limited opportunity to engage in many of the behaviors queried. As a result, she added and subtracted questions when administering the test to Mr. Jackson. Dr. Dreyer stated, “[d]espite his efforts and attempts to relate the test items to his situation and experience, it is noted that the results must be

considered with extreme caution.” State’s Exhibit 4. Furthermore, it should be noted that Dr. Dreyer used Mr. Jackson as her sole informant on the ABAS-3. Despite speaking with Myron Watson and Jacqueline Graham for information about Mr. Jackson’s childhood, Dr. Dreyer only used Mr. Jackson as the informant for completing the ABAS-3. This is not the recommended procedure because the individual being assessed has a tendency to overestimate his/her abilities. The recommended procedure for administering the test is to interview more than one informant.

In both her report and testimony, Dr. Dreyer relied on the facts surrounding the current offense and other offenses purportedly previously committed by Mr. Jackson. The United States Supreme Court previously rejected using the facts of the crime for assessing adaptive skills. *Moore v. Texas*, __U.S. __, 137 S. Ct. 1039, 1051-52, 197 L.Ed.2d 416 (2017). Dr. Dreyer testified that Mr. Jackson’s low level of functioning was attributable to his anti-social personality disorder. Tr. at 314. The United States Supreme Court previously rejected this specific reasoning. *Brumfield v. Cain*, 576 U.S. 305, 319, 135 S. Ct. 2269, 2280, 192 L.Ed. 2d 356, 367 (2015); *Moore*, 137 S.Ct. at 1051. Dr. Dreyer relied on Mr. Jackson’s behavior in prison to reach her opinion concerning his adaptive skills. The United States Supreme Court previously rejected the contention that prison behavior should be used to assess adaptive skills. *Moore* at 1050. Dr. Dreyer incorrectly concluded that the test results did not warrant a finding that Mr. Jackson had impaired adaptive skills. His scores on the ABAS-3 subtests measuring community use, work, and self-direction fell within the intellectual disability range. One of these scores alone satisfied the second prong of the intellectual disability diagnosis.

Dr. Dreyer has less education, training, and experience than Dr. Smith with respect to diagnosing intellectual disabilities. The Court finds that Dr. Smith’s testimony about Mr. Jackson as to the second prong of intellectual disability is more credible than Dr. Dreyer’s testimony

involving Mr. Jackson as to the second prong. Dr. Dreyer incorrectly found that Mr. Jackson did not have impaired adaptive skills as the time of the offense and trial. Her conclusion concerning the second prong is not credible. Furthermore, Dr. Dreyer incorrectly administered the ABAS-3 to Mr. Jackson. She changed many of the questions on the test. These changes deprived the test of any standardization and could have skewed the results. *DSM-5*, pg. 37; *American Association on Intellectual and Developmental Disabilities*, 12th ed. Table 3.4, Table 3.7, p. 43. Despite speaking with Myron Watson and Jacqueline Graham for information about Mr. Jackson's childhood, Dr. Dreyer used Mr. Jackson as her sole informant for completing the ABAS-3. The recommended procedure is to use more than one informant. *DSM-5*, p. 37; *AAIDD*, 12th ed. Table 3.4, p.31, Table 3.7, p. 43. For the reasons stated above, this Court finds Dr. Dreyer's opinion is not credible concerning Mr. Jackson's adaptive scores at the time of the offense and trial.

Furthermore, the lay witness testimony presented indicates that the Mr. Jackson had impaired adaptive skills prior to incarceration. Myron Watson, Mr. Jackson's childhood friend, indicated that Mr. Jackson was not a team player and refused to follow basic rules of schoolyard basketball. Myron Watson indicated that he never saw Mr. Jackson read or write. Mr. Watson testified that Mr. Jackson had no interest in obtaining a driver's license but still drove, and could not keep a job. Mr. Jackson's mother, Jacqueline Graham, indicated that from a young age, Mr. Jackson 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. Ms. Graham also recalled that Mr. Jackson refused to do schoolwork. His mother indicated that Mr. Jackson 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 a playground set which resulted in the loss of all of his teeth. Lastly, Mr. Jackson's brother, Derek Jackson, testified that Mr. Jackson engaged

in risky behaviors and required extra attention from their mother. He further confirmed the bleach-drinking incident.

Mr. Jackson satisfies the second prong of the *Ford* Test. Mr. Jackson is significantly impaired in the area of adaptive functioning. To satisfy the second prong, it is sufficient that Mr. Jackson have a deficit in only one area. Based on the available evidence, the Court finds that Mr. Jackson suffers significant limitations in the following three adaptive skills: community use, work, and self-direction.

C. Third Prong: Onset Before the Age of 18

The final prong of an intellectual disability analysis is onset of deficiencies before the age of 18. To satisfy this prong, some evidence must exist of the onset of the disability prior to the age of 18. *DSM-5*, p. 33; *AAIDD*, 11th ed., p. 27. When a retrospective diagnosis is required and no diagnosis of intellectual disability was made during the developmental period, the clinician must use other sources of information, including possible obtainable testing data and the person's history, in order to determine the manifestations of possible intellectual disability prior to the age of 18. *AAIDD*, 12th ed. The only expert report available from the time Mr. Jackson was a minor is the report of Dr. Isidore Helfand. Dr. Helfand assessed Mr. Jackson when he was 12-years-old. Mr. Jackson obtained a full-scale IQ score of 68 on the Wechsler Intelligence Scale for Children (WISC-R). Dr. Helfand concluded that Mr. Jackson was "a youngster who functions at the retarded range." Joint Exhibit B.

Additionally, Mr. Jackson's performance in school was poor. His records indicate no grades above a D, except for physical education. Mr. Jackson repeated both eighth and ninth grades in school and eventually dropped out, never even obtaining a GED. 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, 13-14, 2008-Ohio-1623, 885 N.E.2d 905, ¶ 6.

Further, lay testimony establishes that Mr. Jackson did not understand the rules of the games that children played; he never obtained a driver’s license, never lived on his own, or had a bank account. Mr. Jackson held only menial jobs such as cleaning or working in a restaurant for short periods. His mother helped him create job applications.

Dr. Dreyer found that no objective data exists as to the third prong. The Court disagrees. She reaches this conclusion by: (a) finding that a recommendation of placement in special education classes before the age of 18 is not indicative of onset, (b) speculating that the results of Mr. Jackson’s 1978 IQ score is unreliable even though no such evidence exists, and (c) finding that the anecdotal evidence supporting an intellectual disability was consistent only with an anti-social or ADHD diagnosis.

The Court concludes that ample evidence exists to support Mr. Jackson’s intellectually disability existed before the age of 18.

IV. CONCLUSION

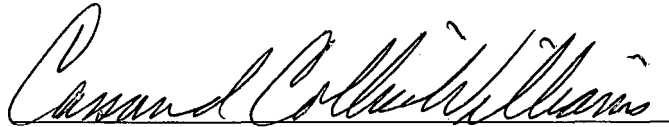
Having considered all of the evidence provided by both parties, this Court finds that Petitioner Andre L. Jackson has established by a preponderance of the evidence that he is a person with an intellectual disability. The evidence demonstrates that Mr. Jackson had an intellectual disability at the time of the offense and trial. The evidence further demonstrates that Mr. Jackson exhibits significant impairment in both intellectual functioning and adaptive skills, and that these deficits manifested prior to the age of 18. In conclusion, Petitioner Andre L. Jackson has

demonstrated the existence of all three prongs for a diagnosis of having an intellectual disability for purposes of the death penalty.

For the reasons set forth in this order, Petitioner Andre L. Jackson's Petition to Vacate Death Sentence is hereby GRANTED. The Court finds that because Andre L. Jackson had an intellectual disability at the time of the offense and his trial, his execution would violate the Eighth Amendment to The United States Constitution. Petitioner Andre L. Jackson's death sentence is hereby vacated. FINAL.

IT IS SO ORDERED.

August 4, 2022
DATE


JUDGE CASSANDRA COLLIER-WILLIAMS