

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellee/Respondent, :
-vs- : Case No. 2006-0295
CLIFTON WHITE III, :
Appellant/Petitioner. : **This is a capital case.**

APPELLANT CLIFTON WHITE III'S REPLY BRIEF

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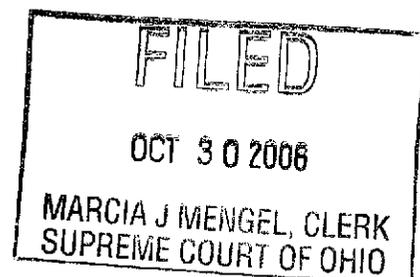


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PREFACE

Appellant Clifton White, III (hereafter, Clifton) now replies to the Appellee's answer brief. Any absence of a specific reply by Clifton is simply to avoid rearguing points of law and fact set out in his merit brief. The absence of a reply to a particular argument raised by the Appellee should not be construed as a concession by Clifton. Clifton stands on his merit brief when no specific reply is made.

The following abbreviations are utilized in this Brief:

"Trial Tr." refers to the transcript from the capital trial.

"Tr." refers to the transcript from the post-conviction evidentiary hearing.

"Entry" refers to the trial court's decision on the mental retardation post-conviction petition. State v. White, Case No. CR96010059 (Summit C.P. Feb. 28, 2005)

"Ct. Ex." refers to the court exhibits admitted at the post-conviction evidentiary hearing.

"Pet. Ex." refers to Petitioner's exhibits admitted at the post-conviction evidentiary hearing.

"Hill Tr." refers to the testimony of Mr. Bradley Hill at the post-conviction evidentiary hearing.

"Hammer dep." refers to the deposition of Dr. David Hammer conducted on Feb. 18, 2004 as part of the post-conviction evidentiary hearing.

"Ct. App." refers to the decision of the Court of Appeals on the mental retardation post-conviction appeal. State v. White, C.A. No. 22591, 2005 Ohio App. LEXIS 6299 (9th Dist. Ct. App. Dec. 30, 2005).

"AAMR" refers to the American Association on Mental Retardation Manual (10th Ed., 2002).

PROPOSITION OF LAW

Appellant Clifton White is mentally retarded. The courts below erred in failing to find Appellant ineligible for execution as his death sentence violates his rights as guaranteed by the Eighth Amendment to the United States Constitution and is contrary to the principles set forth in Atkins v. Virginia, 536 U.S. 304 (2002) and State v. Lott, 97 Ohio St.3d 303, 779 N.E.2d 1011 (2002).

Clifton White is mentally retarded and there is no evidence in the record before this Court to support a different conclusion. In its brief, the Appellee seeks to avoid the established facts of Clifton's mental retardation, denigrate the valid findings of qualified experts and circumvent this Court's decision in State v. Lott.¹ The Appellee takes issue with the conclusions of all the psychological experts who testified as to the accuracy of Clifton's mental retardation diagnosis, including the expert the State selected. The Appellee would have this Court ignore empirically validated testing procedures and the very documents to which the Appellee stipulated as to accuracy and admissibility.

Most significantly, the Appellee would have this Court ignore the impact of Clifton's undisputed IQ score of 52 on Clifton's ability to function in mainstream society. The Appellee would have this Court focus solely on Clifton's strengths and turn a blind eye to his weaknesses. But this is not the manner in which a diagnosis of mental retardation is formulated, nor does it provide an accurate depiction of a mildly mentally retarded person. (Tr. 359-360). To adopt the Appellee's assertions – and to uphold the trial court's erroneous ruling – would enforce misconceptions regarding the mentally retarded and perpetuate a stereotypical view of mentally retarded persons.

¹ 97 Ohio St. 3d 303 (2002).

A. Omissions/Misstatements of Fact

1. IQ affects adaptive skills

Clifton White has an undisputed IQ of 52. (Entry at 16-17; Ct. App. at 8). Despite what the trial judge found and Appellee asserts, an individual with an IQ of 52 is not “fairly well mainstream.” (Appellee’s Brief at 22, quoting Entry at 26; *See*, Pet. Ex. F at p.3 – this score places Clifton in the .1 percentile; Pet. Ex. B at p. 3 – score of 52 places Clifton in the “Extremely Low IQ range”). A person with an IQ of 52 is going to have limitations in everyday life. At no point in the Appellee’s Brief is it explained how, contrary to expert opinion and simple common sense, a person with a 52 IQ does not have any accompanying deficits in adaptive skills. Dr. Fabian, the State’s expert at the mental retardation hearing, testified that “cognitive abilities affect your adaptive behaviors.” (Tr. 467; *See*, Hill Tr. 135-136). Similarly, Dr. Hammer, the defense expert at the mental retardation hearing, testified that in the 70 to 75 range of IQ score is “where you start seeing most people having this significant impact on their daily functioning.” (Tr. 360; *See*, AAMR at 75).

For example, daily functioning includes academic proficiency. Clifton’s school records establish a significant adaptive skill deficit in the area of functional academics. (Ct. Ex. 1 at 983-990). The trial court relied on these school records to demonstrate Clifton’s significant deficit in academics as support for Clifton’s low IQ score and pre-18 onset of low IQ, (Entry at fn.28). Ironically, the court did not afford the records any weight in its finding regarding his limitations in the adaptive skill of functional academics. (*See*, Entry at 25).

2. Facts of the crime do not affect finding of mental retardation

The Appellee recounts at length the facts of the crime as found in the direct appeal decision by this court. (Appellee’s Brief at 2-3, 24). However, the facts of the crime are not

relevant to a determination of mental retardation. Pursuant to Tennard v. Dretke,² the United States Supreme Court decided the facts of the crime are not a factor in determining mental retardation. Atkins does not require “a nexus between [a person’s] mental capacity and [that person’s] crime before the Eighth Amendment prohibition on executing [that person] is triggered.”³ Even if this Court reviews the facts of the crime, the Court will find that it was an impulsive act committed by an individual who lacked normal coping skills and had significantly limited judgment.

Without any basis the Appellee asserts that “The State frankly believes that appellant fully intended to kill Heather Kawczk” (Appellee’s Brief at 24). Clifton was never charged with any crime against Heather Kawczk. (Indictment; Trial Tr. 2064, 2066, 2068). If Appellee “frankly believe[d]” that Clifton meant to kill Heather Kawczk then the State should have prosecuted Clifton on that basis, but he was not prosecuted as such. It is improper for Appellee to now inject personal beliefs in order to shore up its case.

3. Current testing not questioned

The Appellee, at pages 4-5 of its Brief, refers to records compiled prior to Clifton’s capital trial alleging that Clifton may have malingered during a pre-trial evaluation. The Appellee seems to suggest that the prior allegation of malingering affects Clifton’s mental retardation diagnosis now before this Court, but it does not. The psychometric testing administered by the State’s expert and defense expert for the mental retardation hearing is valid. Both the State and defense experts testified that in their professional opinions, Clifton was putting forth his best effort when taking the tests they administered to him. (Tr. 148-149, 168,

² 542 U.S. 274, 124 S.Ct. 2562 (2004).

³ Tennard, 542 U.S. at 287, 124 S.Ct. at 2571-2572.

431). Any allegations now that Clifton malingered on psychology tests administered at trial, prior to his mental retardation hearing, are simply without relevance or merit.

The Appellee also asserts that because Clifton knew the purpose of the mental retardation evaluation the results are somehow invalid. (Appellee's Brief at 8). This assertion has no support because the IQ score of 52 was found valid and reliable by the State's expert and defense expert, was adopted by the trial court, court of appeals and the Appellee. (Entry at 16-17; Ct. App. at 8).

The Appellee, on pages 5 and 24 of its brief, attempts to confuse Clifton's mental retardation diagnosis with a purported prior diagnosis of anti-social personality. Whether Clifton suffers from a comorbid personality disorder was not considered relevant by the experts in rendering their diagnoses of him as mentally retarded, was not a subject at the mental retardation hearing and was not considered as a factor in the trial court's ruling.⁴ Whether or not Clifton suffers from a mental disease in addition to being mentally retarded is simply not relevant to the issue currently before this Court. The Appellee – for the first time – raises an issue that it failed to address at Clifton's mental retardation evidentiary hearing and which played no part in the trial court's decision.

4. Inaccurate facts

The Appellee cites to facts in this case that have been proven inaccurate. The Appellee argues that, in the Psycho-Diagnostic Clinic records from Clifton's capital trial, Clifton's mother said he was a licensed practical nurse. (Appellee's Brief at 5). The Appellee is aware of the inaccuracy of this assertion. Repeated testimony and records from the mental retardation hearing clearly shows that Clifton's mother was not correct in her depiction of him as a licensed practical

⁴ Comorbid disorder refers to an individual having more than one psychological disorder. The population of mentally retarded individuals has a higher prevalence of comorbid mental health disorders. (AAMR at 172) However, a "diagnosis of mental retardation in and of itself does not guarantee the presence of psychiatric illness or disorder." AAMR at 174.

nurse. Clifton's mother had an IQ score in the 50s herself which may account for her confusion. (Tr. 178; Ct. Ex. 1 at 1446, 1453-1454). To the contrary, Clifton was a nurse's aide, a job at which mildly mentally retarded people can succeed. (Appellee's Brief at 7; Amici Curiae Brief at 9; Tr. 91, 186, 566, 569).

The Appellee also relies on a statement by Clifton's mother that Clifton's teachers did not question his intellectual ability. (Appellee's Brief at 5, 23). This statement is contradicted again by the school records, a fact of which the Appellee is well aware. (Ct. Ex. 1 at 983-990). Clifton failed classes, was transferred to Ellet Alternative School and it was recommended that he be tested for a learning disability. (Ct. Ex. 1 at 1539). Further, Appellee asserts that Clifton told Heather Kawczk that "he did not feel like going to school." The Appellee then editorializes that "There was no evidence that laziness equates to mental retardation." (Appellee's Brief at 23). The statement that Clifton did not want to go to school is refuted by Clifton's school records that show he was still voluntarily attending school at the age of 19 when he was in the tenth grade for the third time. (Ct. Ex. at 983, 987). It was the school officials, not Clifton, who no longer permitted his return to school due to his being "overage." (Ct. Ex. 1 at 988). Clifton's willingness to continue his education, even though he was failing his courses – and suffering the stigma of being far older than his classmates – hardly bespeaks "laziness." Additionally, the trial court found Clifton's school records to be "probative corroboration," and not demonstrating a lack of effort. (Entry at fn. 28).

The Appellee appears to take issue with the informants utilized for the SIB-R. (Appellee's Brief at 8, 26). This is odd considering that the State was in agreement that the persons who would act as informants for the adaptive skills testing would be Clifton's family members. (Evid. Hg. Motion in Limine at pp. 2-3). This is a recurrent theme in the Appellee's

brief. It is akin to the Appellee's criticism of the State and defense psychological experts and their use of the SIB-R adaptive skills test. For the mental retardation hearing, the State selected its own expert, did not challenge either expert's qualifications and did not object to the expert's choice of psychometric instruments to assess Clifton's mental retardation. (Tr. 126, 394-395). Because the informants, the test results and the experts' diagnoses are not favorable to the Appellee's position, the Appellee now seeks to dismiss them all as not credible.

Further, both the State and defense experts testified at the mental retardation hearing that Clifton's family members were appropriate informants for this testing, that their answers were not scripted and that they displayed honesty in responding to the questions. (Tr. 175, 177, 438; Hammer dep. 14-15) Dr. Hammer, the defense expert, testified that the information he and the State's expert, Dr. Fabian, received from Clifton concerned his work history and other background information which was also found in the records admitted at the mental retardation hearing pertaining to Clifton's background. (Tr. 312, 441; Ct. Ex. 1 at 1539, 1547-93).

Conversely, Heather Kawczk was not made available to the experts to interview prior to her testimony, and was only produced by the State after the experts rendered their opinions that Clifton is mentally retarded. (Evid. Hg. Motion in Limine; *see* Trial Court's Scheduling Order for Psychological Testing and Order Granting Petitioner's Motion for a Mental Retardation Expert, July 2, 2003). More importantly, after assessing and factoring Heather Kawczk's testimony into their diagnoses, the State and defense experts' opinions remained the same: Clifton is mentally retarded. (Tr. 303, 469; Hammer dep. at 56).

The Appellee also fails to address the complete testimony at the mental retardation hearing concerning the scoring of the SIB-R. The Appellee asserts that Dr. Hammer gave Clifton a score of zero if Clifton had no opportunity to perform a task listed on the SIB-R and there was

no evidence to the contrary. (Appellee's Brief at 8-9). The actual testimony of Dr. Hammer is that in this situation he used his clinical judgment, his knowledge of the particular task and what it involved, and his first-hand observation of Clifton during the testing in arriving at the score. (Hammer dep. 14, 33-34, 37, 46, 59, 61, 71).

The Appellee posits that "when Dr. Hammer thought a score should be a zero, he just left the score sheet blank." (Appellee's Brief at 25). Dr. Hammer actually testified that the SIB-R has suggested starting points for each adaptive skill subscale which is based on the individual's age. (Hammer dep. at 9-10; Pet. Ex. G at p. 2). The beginning items in each subscale that were not scored were "assumed to have a scoring of '3'" (Hammer dep. 15; *See*, Tr. 554), not a zero. This is shown by the scoring tabulation at the end of each subscale. (Pet. Ex. G at pp. 4-17).

Clifton scored below the second grade level in the areas of reading, spelling and math on the Wide Range Achievement Test (WRAT) administered to him for these mental retardation proceedings. (Tr. 432; Pet. Ex. B, F). Both the State's and defense experts testified that Clifton was putting forth good effort on this test, was not malingering and the test was accurate. (Tr. 168-169, 431).

The Appellee refers to a prior WRAT given to Clifton in 1987 where he scored higher than he did on the WRAT administered for the mental retardation hearing. (Appellee's Brief at 9). However, Clifton was not administered the WRAT in 1987, he was given the California Achievement Test (CAT). (Ct. Ex. 1 at 1536). These two tests are different and the specifics of the tests are not a part of the record, except for Dr. Hammer testifying that the WRAT and CAT are scored differently. (Tr. 290). Of most importance, the records and testimony establish that both in 1987 and 2003, Clifton scored significantly below his grade and age level on both tests. (Pet. Ex. B, F; Tr. 285-290, 432).

The SIB-R is without question an empirically proven valid and reliable psychometric instrument in the field of mental retardation.⁵ The SIB-R does not only measure when a person innately knows how to perform a task (Appellee's Brief at 9, 26), it also measures whether a person "could" perform the task. (Pet. Ex. G at pp. 4-17). One of the benefits to the SIB-R is that it takes into account that the person being assessed might not have had the opportunity to attempt every item on the test. The informants are then to use their knowledge of, and experience with, the test subject and give their best estimation on whether the subject could perform the task if given the opportunity. (Tr. 172, 175-176). The psychologist also utilizes that expert's clinical judgment in scoring the item. (Tr. 176-177).

The Appellee refers to the SIB-R when it is used to assess individuals with problem behaviors. (Appellee's Brief at 10). Mr. Brad Hill, one of the authors of the SIB-R, was called as the trial court's expert to provide testimony regarding the development and use of the SIB-R as a psychometric instrument. Mr. Hill testified at length and referred to numerous exhibits regarding the empirical process utilized to establish the excellent validity and reliability of the SIB-R. (Hill Tr. 101, 105, 112-114). Throughout his testimony Mr. Hill noted that the SIB-R easily differentiates between mildly mentally retarded individuals and those who are not mentally retarded, with or without behavior problems. The behavior problem scale was not utilized in Clifton's case because it was not relevant. (Hammer dep. at 50-51; Tr. 557-558).

Mr. Hill was not present for the administration of the SIB-R in Clifton's case but he was able to testify about the consistency between the SIB-R results regarding Clifton and the results of Clifton's IQ test. (Hill Tr. 136). Mr. Hill testified that given Clifton's IQ score of 52, it "didn't surprise" him that Clifton scored a 57 on the SIB-R. (*Id.*).

⁵ J. Jacobson, J. Mulick, "Psychometrics," Manual of Diagnosis and Professional Practice in Mental Retardation, 75-81 (1996).

The Appellee relies solely on Heather Kawczk's testimony and asserts that her testimony does not describe a person who is mentally retarded. (Appellee's Brief at 24). The Appellee's reliance is misplaced. Both the State's own expert and the defense expert either read or heard Heather Kawczk's testimony. Her testimony did not change either of their expert opinions that Clifton is mentally retarded. (Tr. 127-128, 265, 324, 455-456; Hammer dep. at 54-56). In fact, both the State's expert and defense expert testified at the mental retardation hearing that it is not even a close call that Clifton is mentally retarded. (Tr. 303, 469).

The Appellee mischaracterizes the testimony of the State's own expert, Dr. Fabian, pertaining to Clifton's fine motor skills in its Brief. (Appellee's Brief, p. 22). According to the Appellee, "Dr. Fabian testified that appellant had fine motor skills...Yet that expert wrote basically that Appellant can't use his fingers." (Appellee's Brief at 22). However, Dr. Fabian testified further that Clifton's fine motor skills are "adequate to ... zip and unbutton or button his clothes ... putting on a glove, putting his fingers through the spaces for a glove." (Tr. 525). Dr. Fabian testified that "when compared to the normal population" Clifton will have difficulty with some of his fine motor skills. (Tr. 526; *see also* Tr. 333).

The Appellee argues by way of its own interpretation that "none of Kawczk's testimony shows that appellant was a follower instead of a leader." (Appellee's Brief at 23). However, nowhere in Heather Kawczk's testimony does it demonstrate that Clifton was a leader. Further, there was testimony during the mental retardation proceeding regarding this issue "everyone [the informants] agreed that he [Clifton] was 'easily lead or manipulated.'" (Hammer dep. at 39).

The Appellee also asserts that Clifton was adept at a video game, Mortal Kombat. (Appellee's Brief at 8, 24). At the mental retardation evidentiary hearing, Dr. Hammer testified that he is familiar with the game Mortal Kombat. (Tr. 262). He testified from personal

experience and observation that his almost 8 year old grandson is skilled at the game and he identified an article from Entertainment Weekly that lists Mortal Kombat as a game intended for children as young as ten years of age. (Tr. 262-263). The fact that Mortal Kombat can be played successfully by young children demonstrates there is no support for the Appellee's notion that Clifton's ability to play it means he is not mentally retarded. Further, in terms of game-playing, both the State's expert and defense expert gave Clifton the highest score on the SIB-R for being able to play card games so that was factored into the overall scoring of his adaptive skills. (Pet. Ex. G, Section C, No. 14).

The Appellee states that Clifton and Heather Kawczk shopped for furniture to rent. (Appellee's Brief at 7-8). However, Heather Kawczk testified that in terms of furnishing their apartment that she was the one who was concerned with the cost of the furniture they were going to rent, but she did not think Clifton was cognizant of the cost. (Tr. 94-95).

In the Appellee's Brief it adopts the trial court's criticism of the State's own expert at the mental retardation hearing. (Appellee's Brief at 27). The Appellee and trial court found that the State's expert took contradictory positions regarding the testing by the defense trial psychologist, Dr. Eisenberg, for the mitigation phase of Clifton's capital trial. (Id.). However, that finding is inaccurate. Dr. Eisenberg administered only the verbal portion of the IQ test to Clifton and based on that test he diagnosed Clifton as mentally retarded. (Tr. 488-489). The State's expert at the mental retardation hearing testified that while he believed the verbal IQ testing administered by Dr. Eisenberg was reliable, Dr. Eisenberg should not have made a diagnosis of mental retardation because the complete IQ test was not administered, nor was there a test of adaptive skills conducted or a determination of the onset. (Tr. 488-489). The State's expert testified that

even if Dr. Eisenberg's testing was not considered at all, Clifton is still mentally retarded. (Tr. 565).

The Appellee also asserts that the mitigation phase of Clifton's capital trial is relevant to Clifton's diagnosis as mentally retarded. (Appellee's Brief at p. 3-4). However, as this Court held in Lott, the testimony and evidence presented in the mitigation phase of Lott's capital trial was not dispositive of whether, post-Atkins, Lott was mentally retarded.⁶ In this case, Clifton was never administered complete testing for a determination of mental retardation prior to the evidentiary hearing. (*See*, Tr. 277, 458-461, 489).

B. Inapplicable Caselaw

The Appellee, on pages 12, 19-20 and 23 of its Brief, cites to Ex parte Briseno.⁷ First, the Briseno case is a Texas case that is of questionable authority in its application to Clifton's case. The experts who testified at Clifton's mental retardation hearing pointed out the need for standardized and normed tests which is contrary to the holding in Briseno.⁸ (Tr. 246-247, 353-354; Hill Tr. 139-141; *See*, AAMR at 83). More importantly, the law in Ohio, which was decided by this Court, is Lott which is this Court's implementation of Atkins v. Virginia.⁹

The Appellee speculates that the Ohio legislature may someday enact legislation that reflects the Briseno decision. (Appellee's Brief at 12). Such speculation should hold no influence in Clifton's case. Briseno was decided two years ago and the Ohio legislature has certainly not acted to embrace that decision in any form for Ohio.

⁶ Lott, 97 Ohio St.3d at 306-307.

⁷ 153 S.W.3d 1 (Tex. Crim. App. 2004).

⁸ Briseno, 135 S.W. 3d at 18-19.

⁹ 536 U.S. 304 (2002).

C. Ohio Mental Retardation Cases

The Appellee recaps some of the mental retardation cases filed in Ohio pursuant to Atkins and Lott but these cases are all factually different from Clifton's case. For example, in State v. Stallings,¹⁰ the defendant's IQ was above 70 and neither psychological expert could say that he was mentally retarded, just that mental retardation could not be ruled out.¹¹ In Clifton's case, both the State's expert and defense expert testified at the mental retardation hearing that it was not even a "close call" that Clifton is mentally retarded. (Tr. 303, 469).

The Appellee cites to State v. Were,¹² but in Were there was conflicting expert testimony about whether Were was mentally retarded. Were's IQ score of 69 on the Stanford-Binet test was found to not meet the criteria for significantly subaverage intellectual functioning.¹³ Clifton has established that he has significantly subaverage intellectual functioning. (Pet. Ex. B, F; Entry at 16-17; Ct. App. at 8).

In State v. Murphy,¹⁴ conflicting expert testimony was presented with opposing views on whether Murphy is mentally retarded. The trial court found that his IQ scores were consistently above 70.¹⁵ Additionally, the defense expert testified that she could not say with certainty that Murphy's intellectual functioning met the criteria for mental retardation.¹⁶ In contrast, there is no question that Clifton's IQ score demonstrates significantly subaverage intellectual functioning. (Tr. 303, 469).

¹⁰ 2004-Ohio-4571, 2004 Ohio App. LEXIS 4167 (9th Dist. Ct. App. Sept. 1, 2004).

¹¹ Stallings, 2004-Ohio-4571, *P 8-13, 2004 Ohio App. LEXIS 4167, 5-8.

¹² 2005-Ohio-376, 2005 Ohio App. LEXIS 348 (1st Dist. Ct. App. Feb. 4, 2005).

¹³ Were, 2005-Ohio-376, *P 77, 2005 Ohio App. LEXIS 348, 30.

¹⁴ 2005-Ohio-423, 2005 Ohio App. LEXIS 467 (3rd Dist. Ct. App. Feb. 7, 2005).

¹⁵ Murphy, 2005-Ohio-423, *P 19, 2005 Ohio App. LEXIS 467, 10.

¹⁶ Murphy, 2005-Ohio-423, *P 13, 2005 Ohio App. LEXIS 467, 7.

In State v. Burke,¹⁷ the case was remanded back to the trial court for a new Atkins hearing. Previously, Burke's IQ was tested at a 78 and the issues for the hearing are the utility of the Flynn effect and the standard error of measurement associated with the IQ test.¹⁸ Neither of these issues is relevant to Clifton's IQ score of 52. (*See*, Entry at 16; Appellee's Brief at 15).

In State v. Lynch,¹⁹ there was conflicting expert testimony about whether Lynch was mentally retarded and the trial court found Lynch to not be mentally retarded. Lynch's IQ was tested at a 72 and the trial court noted that he lived independently and had the same job for 19 years as well as took a cross-country trip on his own.²⁰ Factually the Lynch case is distinguishable from Clifton's case.

The Appellee cites to Hooks v. Oklahoma,²¹ as support but, again, the case is not at all similar to Clifton's. In Hooks, there were a variety of IQ scores with the most reliable ones being a 72 and a 76.²² And, unlike Hooks, Clifton did not "run[] a prostitution ring over a period of several years."²³

In Lagway v. Dallman,²⁴ the case was ultimately reversed. The District Court held that where the trial judge's "factual conclusion is based on either an erroneous rule of law or arbitrary disregard of objectively reliable expert psychiatric evidence, the finding is not entitled to a presumption of correctness."²⁵ In Clifton's case, objectively reliable expert psychological evidence was presented and the trial court erred in finding to the contrary.

¹⁷ 2005-Ohio-7020, 2005 Ohio App. LEXIS 6285 (10th Dist. Ct. App. Dec. 30, 2005).

¹⁸ Burke, 2005-Ohio-7020, *P 12, 51, 54, 2005 Ohio App. LEXIS 6285, 10, 35, 38.

¹⁹ 2006-Ohio-5076, 2006 Ohio App. LEXIS 4967 (1st Dist. Ct. App. Sept. 29, 2006).

²⁰ 2006-Ohio-5076, *P 11, 2006 Ohio App. LEXIS 4967, 6.

²¹ 126 P.3d 636 (OK Crim. App. Dec. 7, 2005).

²² Id. at 640.

²³ Id. at 644.

²⁴ 806 F.Supp. 1322 (N.D. Ohio 1992).

²⁵ Id. at 1342.

D. Strengths and Weaknesses

With respect to Clifton's adaptive skills, the Appellee focuses on a single tree and as a result, fails to see the forest. Both in the expert testimony at the mental retardation hearing and as briefed to this Court, mentally retarded people have strengths as well as weaknesses. (Tr. 181-182, 290-291; AAMR at 8). Mr. Hill testified that when utilizing the SIB-R, a judgment can not be made from one item, it is the entirety of the test that matters. (Hill Tr. 136).

Some of the strengths of mentally retarded people mirror those of non-mentally retarded people. Mildly mentally retarded people find "[t]heir main difficulties are usually seen in school work. Socioculturally, when academic achievement is not required, they may have few difficulties."²⁶ Further, "[f]or the most part, behavioral, emotional, and social problems and the concomitant needs for treatment and support, [of mildly mentally retarded people] parallel those found in persons with normal intelligence."²⁷ Mildly mentally retarded people can do some of the same basic things as non-mentally retarded people. (Tr. 181, 183-184, 453; DSM at 41) They can have jobs, drive cars, their own place of residence, relationships, children who they love and protect, and not have any traits or behaviors that distinguish them from non-mentally retarded people. (Tr. 181, 183-184, 453, 534-535; DSM at 41.). The Appellee – like the trial court – fails to understand these distinctions and chooses to rely instead on stereotypes of the mentally retarded.

E. Conclusion

From the age of fourteen to the present, Clifton has been administered various tests to assess his cognitive functioning and abilities. The results of these tests consistently reveal that

²⁶ *Comprehensive Textbook of Psychiatry VI*, Harold I. Kaplan, M.D., Benjamin J. Sadock, M.D. 1995 at p. 2209.

²⁷ *Id.*

Clifton's intelligence is significantly sub-average, and that Clifton is mentally retarded. (Pet. Ex. B, F; Ct. Ex. 1 at 1532-1544). The record before this Court fully supports the conclusion that the trial court erred in failing to find that Clifton is mentally retarded. Both the State's expert and defense expert testified at the mental retardation hearing that Clifton's scores on the WAIS-III, WRAT-3, SIB-R, the bates-stamped records and the information from the informants for the SIB-R, including Heather Kawczk, all pointed to one conclusion which is: Clifton is mildly mentally retarded. (Tr. 180, 182, 273, 298, 365-366, 458, 467-468; Ct. Ex. 1). This information demonstrates "*convergent validity*, or the consistency of information obtained from different sources and settings." AAMR at 86.

Pursuant to the definition of mental retardation, the State and defense experts easily found Clifton to be mildly mentally retarded, meeting all three criteria of: 1) significantly subaverage intellectual functioning; 2) significant limitations in adaptive skills and 3) onset prior to the age of 18. (Tr. 299-300, 303, 467-468; Lott²⁸). This diagnosis of mental retardation was not even a close call for the experts. (Tr. 303, 469).

Clifton White, III, is therefore not eligible for the death penalty pursuant to this Court's decision in Lott and the United States Supreme Court's decision in Atkins. This Court should reverse the judgment of the trial court and the court of appeals and remand Clifton's case to the trial court with an order that Clifton be re-sentenced to life in prison.

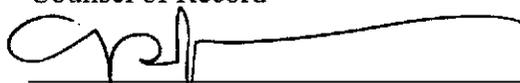
Respectfully submitted,

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²⁸ Lott, 97 Ohio St.3d at 305.



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COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **APPELLANT CLIFTON WHITE III'S REPLY BRIEF** was forwarded by first-class, postage prepaid U.S. Mail to Richard S. Kasay, Assistant Summit County Prosecutor, 53 University Ave., 7th Floor, Akron, OH 44308, on this 30th day of October, 2006.



COUNSEL FOR APPELLANT

#245498

APPENDIX TO APPELLANT CLIFTON WHITE III'S REPLY BRIEF

LEXSEE 2005 OHIO 7020

State of Ohio, Plaintiff-Appellee/Cross-Appellant, v. Mark E. Burke, Defendant-Appellant/Cross-Appellee.

No. 04AP-1234

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2005 Ohio 7020; 2005 Ohio App. LEXIS 6285

December 30, 2005, Rendered

SUBSEQUENT HISTORY: Reconsideration denied by, Motion denied by *State v. Burke*, 2006 Ohio 1026, 2006 Ohio App. LEXIS 935 (Ohio Ct. App., Franklin County, Mar. 7, 2006)

Discretionary appeal not allowed by *State v. Burke*, 109 Ohio St. 3d 1506, 2006 Ohio 2998, 849 N.E.2d 1027, 2006 Ohio LEXIS 1914 (2006)

Appeal after remand at *State v. Burke*, 2006 Ohio 4597, 2006 Ohio App. LEXIS 4540 (Ohio Ct. App., Franklin County, Sept. 7, 2006)

PRIOR HISTORY: [**1] APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 89CR-12-5617B).

State v. Burke, 1993 Ohio App. LEXIS 6268 (Ohio Ct. App., Franklin County, Dec. 28, 1993)

DISPOSITION: Judgment reversed and case remanded.

COUNSEL: Ron O'Brien, Prosecuting Attorney, and Steven L. Taylor, for appellee/cross-appellant.

Carol A. Wright, for appellant/cross-appellee.

JUDGES: BRYANT, J. BROWN, P.J., concurs. McGRATH, J., dissents.

OPINION BY: BRYANT

OPINION:

(REGULAR CALENDAR)

BRYANT, J.

[*P1] Defendant-appellant Mark E. Burke, appeals from a judgment of the Franklin County Court of Common Pleas denying his petition for post-conviction relief pursuant to *Atkins v. Virginia* (2002), 536 U.S. 304, 122

S. Ct. 2242, 153 L. Ed. 2d 335. Because defendant is entitled to two attorneys when raising an *Atkins* claim for the first time, we reverse.

[*P2] In 1990, defendant was convicted of aggravated murder and aggravated robbery. The jury recommended to the trial court that defendant be given the death penalty. The trial court accepted the jury's recommendation and sentenced defendant to death. Defendant appealed. In *State v. Burke* (Dec. 28, 1993), Franklin App. No. 90AP-1344, 1993 Ohio App. LEXIS 6268, this court affirmed defendant's conviction and sentence. On appeal, the Ohio Supreme Court affirmed. *State v. Burke* (1995), 73 Ohio St.3d 399, 1995 Ohio 290, 653 N.E.2d 242. [**2] Defendant's petition for writ of certiorari was denied on March 25, 1996. *Burke v. Ohio* (1996), 517 U.S. 1112, 116 S. Ct. 1336, 134 L. Ed. 2d 486. On September 19, 1996, defendant filed a petition for post-conviction relief. The trial court denied defendant's petition in a decision rendered February 17, 1998. This court affirmed in *State v. Burke* (Feb. 17, 2000), Franklin App. No. 99AP-174, 2000 Ohio App. LEXIS 539; the Ohio Supreme Court did not allow the appeal. *State v. Burke* (2000), 89 Ohio St.3d 1452, 731 N.E.2d 1139. On May 22, 2001, defendant filed an application to reopen his direct appeal pursuant to App.R. 26(B), and this court denied defendant's application in *State v. Burke*, Franklin App. No. 90AP-1344, 2001 Ohio 4067. On appeal, the Ohio Supreme Court affirmed. *State v. Burke*, 97 Ohio St.3d 55, 2002 Ohio 5310, 776 N.E.2d 79.

[*P3] In 2002, the United States Supreme Court rendered its decision in *Atkins*, supra, holding that execution of a mentally retarded individual is unconstitutional. Based upon *Atkins*, defendant filed his second petition for post-conviction relief. Pursuant to the standards set forth in *State v. Lott*, 97 Ohio St.3d 303, 2002 Ohio 6625, 779 N.E.2d 1011. [**3] the trial court found defendant is not mentally retarded and denied the petition. Defendant appeals, assigning the following seven errors:

ASSIGNMENT OF ERROR NO. 1:

THE TRIAL COURT'S REFUSAL TO CONSIDER RELEVANT EVIDENCE, INCLUDING BUT NOT LIMITED TO THE FLYNN EFFECT OR THE STANDARD ERROR OF MEASUREMENT, DENIED [DEFENDANT] HIS RIGHTS TO DUE PROCESS, EQUAL PROTECTION, THE EFFECTIVE ASSISTANCE OF COUNSEL, AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS.

ASSIGNMENT OF ERROR NO. 2:

THE TRIAL COURT'S REFUSAL TO GIVE EFFECT TO THE EXPERT'S FINDING THAT [DEFENDANT] HAD SIGNIFICANT ADAPTIVE LIMITATIONS DENIED [DEFENDANT] HIS RIGHTS TO DUE PROCESS, EQUAL PROTECTION, THE EFFECTIVE ASSISTANCE OF COUNSEL, AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS.

ASSIGNMENT OF ERROR NO. 3:

[DEFENDANT] MET HIS BURDEN OF PROVING MENTAL RETARDATION BY A PREPONDERANCE OF THE EVIDENCE AND THE TRIAL COURT'S FINDING TO THE CONTRARY WAS AGAINST THE WEIGHT OF THE EVIDENCE. EXECUTING A PERSON WHO IS MORE LIKELY THAN NOT MENTALLY RETARDED [**4] VIOLATES THE *DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT* AND THE *EIGHTH AMENDMENT* PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

ASSIGNMENT OF ERROR NO. 4:

THE OHIO COURT'S IDENTIFICATION OF A SINGLE, ARBITRARY IQ

SCORE OF 70 TO CREATE A REBUTTABLE PRESUMPTION THAT A DEFENDANT IS NOT MENTALLY RETARDED IF HIS IQ SCORE IS ABOVE THAT NUMBER VIOLATES THE *EIGHTH AMENDMENT* PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT, AS WELL AS THE RIGHT TO DUE PROCESS, THE RIGHT TO EQUAL PROTECTION, AND THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS. THE PRESUMPTION HERE OPERATED TO DENY [DEFENDANT] HIS CONSTITUTIONAL RIGHTS.

ASSIGNMENT OF ERROR NO. 5:

[DEFENDANT] WAS ENTITLED TO HAVE HIS CULPABILITY WITH RESPECT TO THE DEATH PENALTY DECIDED BY A JURY WHICH REFLECTS THE CONSENSUS IDENTIFIED BY THE SUPREME COURT IN *ATKINS V. VIRGINIA*. THE REFUSAL OF THE TRIAL COURT TO ORDER A NEW SENTENCING HEARING DENIED [DEFENDANT'S] RIGHTS TO DUE PROCESS, EQUAL PROTECTION OF THE LAW, EFFECTIVE ASSISTANCE OF COUNSEL, AND THE RIGHT TO BE FREE FROM THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED BY THE UNITED STATES [**5] CONSTITUTION AND THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO. 6:

THE PROCEDURE SET FORTH IN *STATE V. LOTT* AND FOLLOWED BY THE TRIAL COURT FAILS TO PROVIDE CONSTITUTIONALLY ADEQUATE PROCEDURES FOR THE DETERMINATION OF [DEFENDANT'S] MENTAL RETARDATION. BOTH THE *EQUAL PROTECTION CLAUSE* AND THE *SIXTH AMENDMENT* REQUIRE A JURY DETERMINATION OF MENTAL RETARDATION.

ASSIGNMENT OF ERROR NO. 7:

THE TRIAL COURT ERRED IN FAILING TO APPOINT TWO ATTORNEYS IN THIS CAPITAL POST-CONVICTION PROCEEDING. THE REFUSAL TO APPOINT TWO ATTORNEYS RESULTED IN THE DENIAL OF [DEFENDANT'S] CONSTITUTIONAL RIGHTS TO DUE PROCESS, EQUAL PROTECTION, EFFECTIVE ASSISTANCE OF COUNSEL, AND FREEDOM FROM ARBITRARY, CRUEL AND UNUSUAL PUNISHMENT.

[*P4] The state also asserts a single cross-assignment of error:

THE TRIAL COURT ERRED IN STRIKING SECONDARY MATERIALS AS "HEARSAY," AS THOSE MATERIALS WERE RELEVANT UNDER THE "LEGISLATIVE FACTS" DOCTRINE TO THE LEGAL AND POLICY QUESTIONS OF WHAT STANDARDS WILL GOVERN THE ESTABLISHMENT OF MENTAL RETARDATION FOR PURPOSES OF THE EIGHTH AMENDMENT.

[*P5] In *Atkins*, the United States Supreme Court held that executing mentally retarded [**6] criminal defendants is "excessive and that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Id.* at 321. Explaining, the court stated that "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." *Id.* at 318. As the court observed, "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." *Id.* "Their deficiencies," the court stated, "do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." *Id.*

[*P6] Aware of the point of controversy in its decision, the court further observed that "to the extent [**7] 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." *Atkins*, at 317. By footnote, the court described mild mental retardation as typically applied to individuals with an IQ level of 50-55 to 70. *Id.* at 309, fn. 3.

[*P7] Although *Atkins* declared execution of the mentally retarded to be unconstitutional, the court did not establish procedures for determining if a person is mentally retarded. Rather, *Atkins* left to the states the development of appropriate means of enforcing the constitutional restriction. *Lott*, at P10. Accordingly, the Ohio Supreme Court in *Lott* outlined the procedures to be followed in Ohio when determining whether a defendant is mentally retarded under *Atkins*.

[*P8] *Lott* stated the procedures for post-conviction relief outlined in *R.C. 2953.21 et seq.* provide the statutory framework for reviewing an *Atkins* claim, and in that [**8] framework the court concluded it constitutionally could require that a defendant prove mental retardation by a preponderance of the evidence. *Lott*, at P21. In order to take advantage of the preponderance of the evidence standard, as opposed to the clear and convincing standard of proof normally required when filing an untimely or successive petition for post-conviction relief, *Lott* determined a defendant had to file the claim within 180 days of the *Atkins* decision. *Lott*, at P24. Defendant filed his petition within the 180-day period.

[*P9] As to the substantive aspects of a defendant's mental retardation claim, *Lott* determined that "clinical definitions of mental retardation, cited with approval in *Atkins*, provide a standard for evaluating an individual's claim of mental retardation." *Lott*, at P12. Following the lead of other states, *Lott* set forth a three-part test to determine a defendant's mental retardation claim under the principles announced in *Atkins*. According to *Lott*, a defendant must demonstrate: (1) significantly sub-average intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, [**9] self-care, and self-direction, and (3) onset before the age of 18. *Id.* An individual must meet all three requirements to satisfy *Lott's* definition of mental retardation.

[*P10] Explaining the significance of an IQ to the three-part test it set forth, *Lott* determined that, although IQ alone is not determinative, "there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70." *Id.* In support, the court noted that most states prohibiting the execution of mentally retarded persons "require evidence that the individual has an IQ of 70 or below." *Id.*

[*P11] *Lott* further ordered trial courts to conduct their own de novo review of the evidence to determine

whether a defendant is mentally retarded. "The trial court should rely on professional evaluations of [defendant's] mental status, and consider expert testimony, appointing experts if necessary, in deciding [the] matter." *Id. at P18*. Consistent with the procedures employed in post-conviction proceedings under *R.C. 2953.21*, the court stated that "the trial court shall make written findings and set forth its rationale for finding the defendant [**10] mentally retarded or not mentally retarded." *Id.* Lastly, the court determined "these matters should be decided by the court and do not represent a jury question. In this regard, a trial court's ruling on mental retardation should be conducted in a manner comparable to a ruling on competency (i.e. the judge, not the jury, decides the issue)." *Id.*

[*P12] Applying the procedures set forth in *Lott*, the trial court determined defendant did not meet his burden of proving mental retardation by a preponderance of the evidence. The trial court found defendant failed to demonstrate sub-average intellectual functioning because his full scale IQ was 78, above the cutoff of 70. The trial court did not find persuasive defendant's evidence that the "Flynn effect" inflated his IQ score, and the court similarly refused to account for any standard measurement error reflected in defendant's IQ score. As the trial court explained, "after due consideration, the Court will not accept the Flynn Effect as being sufficiently authoritative. In addition, neither of the Courts, *Lott* nor *Atkins*, mention or provide for consideration of the Flynn Effect or margins of error in determining whether [**11] a defendant is mentally retarded." (Trial Court Opinion, at 11.) The trial court further found that although defendant has some limitations in various areas of adaptive skills, such limitations may have been due to defendant's alcohol abuse or failure to attend school. In any event, "the adaptive limitations are not significant enough to overcome [defendant's] burden of proof." *Id. at 12*.

[*P13] According to the evidence defendant presented, defendant's first IQ test, known as a Cattell 3 test, was administered in 1970 when he was nine years old. No overall score was given for that test; instead, a notation stated the test was "too low to score." Upon entering the Ohio Department of Rehabilitation and Correction in 1982 at the age of 21, defendant was given a Beta intelligence test; he scored within a range of 80 to 89. For mitigation purposes at defendant's trial, defense expert psychologist Dr. James P. Reardon tested defendant's IQ in August 1990 using the Wechsler Adult Intelligence Scale-Revised ("WAIS-R"). Defendant's verbal IQ was 76, and his performance IQ was 88, for a full scale IQ of 78. Dr. Reardon also administered the Minnesota Multiphasic Personality Inventory [**12] ("MMPI") and the Tennessee Self Concepts Scale. Based on those two tests, Dr. Reardon found that defendant had extreme difficulty

in interpersonal and social functioning and had low self-esteem.

[*P14] Based on the WAIS-R test, Dr. Reardon classified defendant in 1990 as borderline mentally retarded and within the lowest six percent of the population. Dr. Reardon also diagnosed defendant as having borderline personality disorder. At the post-conviction relief hearing in April 2004, Dr. Reardon modified his opinion regarding defendant's mental status following additional interviews but no further testing. Dr. Reardon testified that after accounting for the Flynn effect and standard measurement error, defendant is mildly mentally retarded.

[*P15] At the April 2004 hearing, Dr. Reardon described the Flynn effect as a phenomenon claiming that as an intelligence test moves farther from the date on which it is normed, the mean score of the population as a whole on that test increases, thereby inflating an individual's score. Dr. Reardon testified he was unaware of the Flynn effect in 1990, even though the first article on the topic was published in 1984. Dr. Reardon explained [**13] that since 1990, much more research has been done to verify the existence of the Flynn effect. Dr. Reardon did not mention at either the 1990 or 2004 hearings whether he accounted for standard measurement error in 1990.

[*P16] At the original trial, Dr. Reardon testified at length to defendant's childhood. Defendant was exposed to a chaotic home situation, where his mother, an alcoholic, left the home when defendant was about five years old. Following her departure, defendant and his two brothers lived alternately with their father and their paternal grandparents. At a fairly early age, defendant was living "a lot on the streets." (Mitigation Tr. Vol. II, at 119.) As Dr. Reardon explained, "I think that this kind of chaos and lack of structure and lack of reassurance and affection and so forth played a very significant role in the formulation of [defendant's] personality. And certainly it was a major factor in a lot of his later behavior and a lot of his later difficulties." *Id. at 120*. As a result of the lack of structure at home, guidance, and love and affection, defendant, according to Dr. Reardon, was very suspicious and untrusting. In addition to the emotional deficiencies [**14] in defendant's childhood, Dr. Reardon testified that defendant had severely crossed eyes at birth. At that time, doctors recommended that defendant have surgery to correct the problem, but the surgery did not occur until defendant was five years old.

[*P17] Dr. Reardon also reviewed defendant's school records. Defendant obtained mostly C's in kindergarten; C's and D's in first grade; C's, D's and F's in second grade and D's and F's in third grade. The school records indicate defendant needed glasses but had no co-

operation from home on the issue. Dr. Reardon testified defendant was having trouble in school "largely because he was having vision difficulties." *Id.* at 122. Defendant's grades went up in the fourth, fifth, and sixth grades to mainly B's and C's, and even a few A's. From the seventh grade forward, however, defendant's grades dropped again to mainly D's and F's. During these years, defendant was absent or tardy a significant number of days.

[*P18] Defendant began using alcohol at age 13. Dr. Reardon stated defendant acknowledged that he is an alcoholic and has been for a long time. From age 13 forward, he drank whatever he could get and whenever he could get it, [**15] contributing to his decline in school attendance. Dr. Reardon testified that "when you look at his school record, it's pretty apparent that around the ninth grade, eighth grade, which would have been within a year or two of when he started doing the alcohol, his attendance at school begins to go downhill." *Id.* at 130.

[*P19] Dr. Reardon's 1990 testimony that defendant suffered from borderline personality disorder was premised on a diagnosis stemming from defendant's pattern of unstable and intense interpersonal relationships, impulsiveness in terms of criminal behavior and alcohol abuse, volatile mood, inappropriate intense anger or bad temper, marked and persistent identity disturbances, including poor self image, chronic feelings of emptiness and boredom, and frantic efforts to avoid real or imagined abandonment. Defendant had no close friends and relied heavily on his children and Yvette Wilkes, defendant's long-time partner. Dr. Reardon testified defendant had significant limitations in maintaining employment because he did not like to be told what to do and because he abused alcohol. Dr. Reardon stated that defendant is highly self-critical and naive, although not particularly [**16] manipulative.

[*P20] Dr. Reardon testified in the mitigation phase of defendant's 1990 trial that although he could have made a dual diagnosis of borderline personality disorder and anti-social disorder, he did not do so. Dr. Reardon explained that defendant exhibited anti-social traits, but defendant was not a classic anti-social personality because Dr. Reardon felt defendant showed remorse for his actions and was emotional. Dr. Reardon testified that a "true" anti-social has no remorse and lacks emotional capacity. Dr. Reardon concluded defendant could adjust to prison life and could be productive as a father.

[*P21] Defendant testified at length on his own behalf during the 1990 trial. According to defendant, he met the victim at work and lived with him for a short time after defendant and Wilkes had an argument. Defendant repeatedly denied stabbing the victim. Defendant testified his cousin Tanner did the actual stabbing, although defendant did not stop him. Tanner's sister testi-

fied she heard Tanner and defendant singing a song the day after the homicide about going to Lucasville because they killed the victim.

[*P22] Defendant testified at the trial that he [**17] owned a car in the past and made payments. Defendant further testified that he cooked for his children, changed diapers, and did housework. Defendant stated that after work on the night of the murder, defendant cashed his check and bought a 40-ounce beer. He admitted he was an alcoholic and has had blackouts resulting from alcohol abuse. Defendant also stated he had a bad temper that was made worse from alcohol, and when he was angry, "it's hard to be under control period." (Trial Tr. Vol. V, at 114.) Defendant also admitted that when the police interviewed him after the murder, he did not tell them the whole story.

[*P23] In his fourth, fifth, and sixth assignments of error, defendant challenges the procedures the trial court followed, per *Lott*, to determine whether defendant is mentally retarded. Defendant acknowledges this court is bound by the procedures the Ohio Supreme Court set forth in *Lott, supra*, and has raised the issues to preserve them for further review.

[*P24] In the fourth assignment of error, defendant claims *Lott's* rebuttable presumption that defendant is not mentally retarded if his full-scale IQ score is above 70 violates defendant's [**18] constitutional rights. Defendant asserts that presumption, as well as *Lott's* requirement that defendant prove by a preponderance of the evidence he is mentally retarded, are constitutionally impermissible. Despite defendant's arguments, we are bound to adhere to the rules and procedures the Ohio Supreme Court set forth. *Cooke v. Montgomery Cty.*, 158 Ohio App.3d 139, 2004 Ohio 3780, at P39, 814 N.E.2d 505 (noting "appellate courts are bound by and must follow the decisions of the Ohio Supreme Court, which are regarded as law unless and until reversed or overruled"); *State v. Tinker, Franklin App. No. 03AP-1203*, 2005 Ohio 2289. Because *Lott* established the rebuttable presumption and placed the burden of proof on defendant, defendant's fourth assignment of error is overruled.

[*P25] In the fifth assignment of error, defendant contends he is entitled to have a new sentencing hearing, with a new jury to determine the death penalty, in order to reflect the national consensus identified in *Atkins*. Defendant, however, points to nothing in *Atkins* or *Lott* that requires the trial court to hold a new sentencing hearing. Rather, if the trial court determines [**19] a defendant is mentally retarded, the defendant is not subject to the death penalty. Because nothing in *Lott* requires a new sentencing hearing, defendant's fifth assignment of error is overruled.

[*P26] Citing *Ring v. Arizona* (2002), 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 in support, defendant's sixth assignment of error claims that a jury must act as the fact finder to determine whether defendant is mentally retarded. Again, *Lott* held the issue of mental retardation is a question of fact for the judge, not a jury, to determine. Because we must follow Ohio Supreme Court precedent, defendant's sixth assignment of error is overruled.

[*P27] In the first assignment of error, defendant raises issues concerning the "Flynn effect" and standard measurement error in connection with defendant's full-scale IQ score of 78. His second assignment of error contends the trial court erred in finding his limitations in adaptive skills did not warrant a finding that defendant is mentally retarded. By the third assignment of error, defendant claims the trial court's conclusion that defendant is not mentally retarded is against the manifest weight of the evidence.

[*P28] [**20] A determination of mental retardation involves findings of facts. As such, the reviewing court must determine whether sufficient competent, credible evidence exists to support the trial court's conclusion. *State v. Were, Hamilton App. No. C-030485, 2005 Ohio 376*. "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment." *Macklin v. Ohio Dept. of Rehab. & Corr., Franklin App. No. 01AP-293, 2002 Ohio 5069, at P20*, citing *Estate of Barbieri v. Evans* (1998), 127 Ohio App.3d 207, 211, 711 N.E.2d 1101. Under those parameters, we first address defendant's second assignment of error, where he maintains the trial court erred in finding that his limitations in adaptive skills were insufficient to overcome his burden of proof.

[*P29] As stated by the American Association on Mental Retardation ("AAMR"), mental retardation is a disability characterized by significant limitations in both "intellectual functioning and in adaptive behavior." *Commonwealth v. Miller* (Pa. 2003), 64 Pa. D. & C.4th 46. Adaptive behavior is defined [**21] as the collection of conceptual, social, and practical skills that people have learned so they can function in their everyday lives. *Id.*, citing AAMR 10th Ed. (2002). The adaptive skills element of the three-part *Lott* test is to ensure that a defendant is not an individual who simply does not perform well on tests, but rather is a truly disabled individual. *Id.*

[*P30] Although experts offer insightful opinions, the adaptive behavior criteria are subjective, and experts will offer opinions on both sides of the issue. *In re Rodriguez* (Tex.2005), 164 S.W.3d 400; *In re Briseno* (Tex. 2004), 135 S.W.3d 1 (stating that while there is expert opinion testimony in this record that would support a

finding of mental retardation, there is also ample expert testimony evidence to support the trial court's finding that the applicant was not mentally retarded); *Were, at P80* (noting expert testimony "that finding a serious deficiency in adaptive behavior required more than just anecdotal evidence").

[*P31] Defendant's AAMR evidence, admitted in the 2004 hearing, cites examples of conceptual, social, and practical skills. Conceptual skills include [**22] language, reading, writing, money concepts and self-direction. Examples of social skills include interpersonal relationships, responsibility, self-esteem, gullibility, naivete, following rules, obeying laws, and avoiding victimization. Practical skills include daily activities such as eating, mobility, bodily elimination, dressing, meal preparation, housekeeping, transportation, taking medication, money management, and telephone use. Practical skills also include occupational skills and maintaining a safe environment.

[*P32] In addition to the testimony he offered at the 1990 mitigation hearing, at the April 2004 hearing, Dr. Reardon testified defendant had trouble handling money. Dr. Reardon stated that defendant gave Wilkes his paychecks and usually took some money to buy beer. Although Dr. Reardon concluded that defendant lacked self-direction, overall Dr. Reardon did not feel defendant had significant limitations in conceptual skills or in most daily living tasks included within practical skills, other than employment skills.

[*P33] With respect to social skills, Dr. Reardon testified defendant had significant deficits. According to Dr. Reardon, defendant lacked good [**23] interpersonal skills, meaning defendant had limited encounters with family, had very few friends, and had a stormy on-again off-again relationship with Wilkes. Dr. Reardon testified defendant had difficulty maintaining employment, as evidenced by defendant's numerous jobs. According to Dr. Reardon, defendant did not like supervision or being told what to do. He further testified defendant had poor self-esteem, was gullible and was a follower who could easily be tricked or manipulated. Consistent with those observations, Dr. Reardon noted defendant did not avoid victimization, as evidenced by defendant's being stabbed by his older brother. Dr. Reardon opined that defendant was under Tanner's control and followed Tanner's lead on the night of the murder, and he based his opinion on his conversations with defendant and his review of defendant's and Tanner's videotaped interviews with police.

[*P34] The state did not present any expert testimony to discount Dr. Reardon's diagnosis and evaluation of defendant. Rather, the state relied exclusively on its cross-examination of Dr. Reardon. On cross-

examination, Dr. Reardon admitted defendant lied to the police in the videotaped interview [**24] following the murder. Dr. Reardon acknowledged he based his conclusion that defendant was a follower, manipulated by Tanner, on defendant's version of events. In addition, Dr. Reardon agreed with the prosecution that defendant has "significant antisocial traits," (PCR Tr., at 106) and admitted that many of the deficiencies he discussed are as consistent with anti-social personality traits as with someone who suffers from mental retardation. Dr. Reardon further acknowledged his previous testimony that, given where defendant came from and the way he was reared, it would be difficult for defendant not to have problems with relationships because defendant was not properly socialized.

[*P35] Speaking to defendant's schooling, Dr. Reardon acknowledged a number of things could have affected defendant's school performance other than his being mentally retarded. His improved grades in the fourth, fifth, and sixth grades could be explained by defendant's obtaining glasses, while his subsequently declining grades could be explained by excessive absences and tardiness, in addition to significant alcohol use. Defendant's school records do not indicate he was labeled mentally retarded; nor [**25] was defendant recommended for special education classes. Dr. Reardon admitted that many people who lack self-direction are simply anti-social and not mentally retarded.

[*P36] Addressing various aspects of defendant's behavior through the prosecution's cross-examination, Dr. Reardon admitted defendant's affidavit and his writings in prison, including the "kites," or messages, within the prison system, seemed adequate. He nonetheless cautioned that defendant may have taken a long time to write them or may have had assistance. Dr. Reardon agreed, however, that defendant's poor choices regarding money did not necessarily mean he was mentally retarded. Dr. Reardon also acknowledged that defendant initiated the idea of getting a gun to scare not the victim of the murder, but another individual with whom defendant had argued earlier in the day, and that defendant was the one who wanted to go back with Tanner to beat up that individual. Moreover, defendant, not Tanner, was the one whose history was connected to the victim.

[*P37] In the end, a part of Dr. Reardon's testimony supports the trial court's determination that defendant did not suffer significant adaptive limitations [**26] as a result of mental retardation. According to Dr. Reardon, defendant's limitations in conceptual and practical skills are not substantial; his deficits manifest themselves in his social skills. Dr. Reardon, however, testified defendant's lack of social skills could be explained by defendant's anti-social traits as opposed to mental retardation. Although defendant displays deficits in his ability

to maintain employment, the evidence allowed the trial court reasonably to conclude that defendant's limitations were not a result of mental retardation, but the lack of structure and guidance in defendant's childhood and his "anti-social" traits. Indeed, other evidence reflects defendant played and coached football, is capable of taking care of his children, and is a good father. Defendant's school records indicate he received average and above average grades in regular classes during the fourth, fifth, and sixth grades; his grades then fell, but at the same time defendant had poor attendance and was "living on the streets." Given the evidence, the trial court could conclude defendant's deficiencies were as easily a result of defendant's bad temper and aggressive tendencies resulting from [**27] alcohol abuse and living on the streets as from mental retardation.

[*P38] Further, defendant's trial testimony indicates he clearly understood the questions posed by his counsel as well as those the prosecution posed. Indeed, during cross-examination, defendant often became impatient and irritated, answering the prosecution's questions with his own question. *Briseno, supra* (holding that defendant failed to establish significant limitations in adaptive functioning where his behavior showed good survival skills in response to a chaotic home environment, defendant's repeated criminal conduct was consistent with anti-social personality disorder, prison officials testified defendant behaved normally, and defendant testified clearly, coherently, and responsively at *Atkins* hearing); *Were, supra* (holding no significant limitations in adaptive skills where defendant rose to leadership positions in prison gang, was articulate in court and wrote and presented motions, and defendant had no significant limitations in communication, daily living skills, or socialization).

[*P39] Defendant suggests mental retardation has many different origins and the inquiry [**28] is whether a real world impact results from the intellectual impairment. Defendant states, "the fact that there is a possibility of an alternative source for one or more of the adaptive limitations does not preclude a mental retardation diagnosis." (Appellant's Brief, at 24.) While defendant's suggestion is legitimate, it does not follow that every individual who exhibits some limitations in adaptive skills is mentally retarded. Mental retardation, even mild retardation, is *not* a common occurrence. *Atkins, supra* (noting only one to three percent of the population is so limited as to be classified as such). Defendant still must prove that significant adaptive limitations more likely than not result from mental retardation. *Atkins; Lott, supra*.

[*P40] Other courts have ruled that where sufficient evidence demonstrates an alternative explanation to mental retardation, a finding of mental retardation is not

mandated. *In re Bowling* (C.A.6, 2005), 422 F.3d 434 (denying defendant's application under *Atkins* where his IQ was above 70 and evidence "that he has limitations [is] just as indicative of the other psychological [**29] disorders from which he suffers [alcohol abuse, personality disorder, and attention deficit hyperactivity disorder] as they are of low level intellectual functioning"); *In re Rodriguez, supra* (stating that *Atkins* applicant's history of inhalant abuse and unfortunate upbringing leading to anti-social traits may be the cause of limitations in adaptive skills as opposed to applicant's being mentally retarded); *Black v. State*(Tenn.2005), 2005 Tenn. Crim. App. LEXIS 1129, App. No. M2004-01345-CCA-R3-PD (noting expert testimony that defendant suffered from personality problems or psychological difficulties are issues separate and apart from whether defendant was mentally retarded); *Briseno, supra* (observing the evidence suggested that defendant's behavior was consistent with anti-social personality disorder rather than mental retardation).

[*P41] Because the record contains competent, credible evidence to support the trial court's finding, defendant's second assignment of error, premised on the record before us, is overruled. Because defendant must prove all three prongs of the *Lott* test, his third assignment of error, contending the trial court's conclusion that defendant [**30] is not mentally retarded is against the manifest weight of the evidence, is also overruled.

[*P42] In the seventh assignment of error, defendant contends the trial court erred in refusing to appoint two attorneys to represent him in this capital post-conviction proceeding. Defendant points out that the *Lott* procedures apply equally to both capitally charged indigent defendants and capitally charged post-conviction defendants. Noting that capitally charged indigent defendants pursuing a defense under *Atkins* are entitled to two attorneys, defendant contends two attorneys must be appointed to indigent defendants pursuing an *Atkins* defense for the first time, even if under post-conviction relief procedures.

[*P43] At least one Ohio court has addressed the issue defendant raises. *State v. Lorraine, Trumbull App. No. 2003-T-0159, 2005 Ohio 2529*. In *Lorraine*, the court held that "a capital defendant is entitled to the appointment of two certified attorneys when an *Atkins* claim is raised for the first time in a post conviction petition." *Lorraine, at P51*. The defendant in *Lorraine* argued that because an *Atkins* claim presents a new [**31] constitutional issue, appointment of counsel was warranted in accordance with *Sup.R. 20*. The state argued that a capital defendant has no right to appointed counsel in post-conviction proceedings because such proceedings are civil in nature. *Id.*

[*P44] *Sup.R. 20* provides for appointment of counsel for indigent defendants that have "been charged with or convicted of an offense for which the death penalty can be or has been imposed." *Sup.R. 20(A)*. Under those circumstances, "the court shall appoint two attorneys certified pursuant to this rule." *Sup.R. 20(C)*. Applying *Sup.R. 20*, *Lorraine* concluded that after conviction and imposition of the death sentence, the indigent defendant asserting a first-time *Atkins* claim maintains the right to two attorneys. *Lorraine, supra*.

[*P45] Explaining, the court acknowledged post-conviction proceedings have long been held to be civil in nature. It nonetheless concluded the *Atkins* and *Lott* cases "when read in context with *Sup.R. 20* appear to establish a special category for the appointment [**32] of counsel regarding the determination of mental retardation in capital cases, which would require the appointment of two certified attorneys to represent a capital defendant in a *Lott* case undertaking." *Lorraine, at P49*. The court premised its conclusion particularly on the fact the constitutional issue raised under *Atkins* and *Lott* was not and could not have been previously litigated to the extent now authorized. *Id. at P50*. Noting the *Lott* court recognized the significance of "this first opportunity" to raise the issue and held that an *Atkins* claim is not barred by res judicata, *Lorraine* concluded *Lott's* preservation of the constitutional claim underscored "the importance of providing a capital defendant with the opportunity to fully present his constitutional issue, even in the post-conviction context." *Id.*

[*P46] Pursuant to *Lorraine*, coupled with *Lott*, an indigent capital defendant raising an *Atkins* claim for the first time in a post-conviction petition filed within 180 days after *Atkins*, should be afforded the same opportunity "to fully present his constitutional issue" that is afforded a capital defendant who now is able to [**33] raise the issue at trial. An appeal of a first time *Atkins* petition is akin to a direct appeal of the issue, and in a direct appeal defendant would be entitled to two attorneys. Accordingly, we hold an indigent capital defendant raising an *Atkins* claim for the first time in a post-conviction proceeding is entitled to be represented by two certified attorneys. Defendant's seventh assignment of error is sustained.

[*P47] Because this matter must go back for a hearing, we address defendant's first assignment of error and the state's assignment of error on cross-appeal to the extent of determining whether the trial court properly should admit evidence regarding the Flynn effect and the standard margin of error as they relate to IQ assessment.

[*P48] In the first assignment of error, defendant contends the trial court improperly refused to find the "Flynn effect" sufficiently authoritative and improperly

refused to consider standard margins of error in connection with petitioner's full-scale IQ score of 78. The trial court found petitioner did not satisfy the first criteria of the three-part test enunciated in *Lott* because petitioner "has an IQ of 78, well above the [**34] 70 required for the rebuttable presumption." (Trial Court Opinion, at 12.) Defendant contends that, had the trial court considered the Flynn effect and measurement error, his IQ score would be 70, satisfying the first part of the three-part test.

[*P49] Although the case law specifically addressing the subject is sparse, a few courts have commented on or specifically decided the issue. The Fourth Circuit held that a trial court must consider evidence of the Flynn effect and determine "the persuasiveness" of the evidence. *Walker v. True* (C.A.4, 2005), 399 F.3d 315; *Walton v. Johnson* (C.A.4, 2005), 407 F.3d 285. California recognizes that the Flynn effect must be considered when assessing an individual's IQ. *People v. Superior Court* (Calif.2005), 129 Cal. App. 4th 434, 28 Cal.Rptr.3d 529, 558-559, overruled on other grounds (stating that, "in determining a petitioner's IQ score, consideration must be given to the so-called Flynn effect"); *In re Hawthorne* (Calif.2005), 35 Cal. 4th 40, 24 Cal.Rptr. 3d 189, 105 P.3d 552 (finding that mental retardation is not measured according to a fixed intelligence test score but constitutes an assessment of overall capacity based [**35] on a consideration of all relevant evidence).

[*P50] In *State v. Murphy*, Marion App. No. 9-04-36, 2005 Ohio 423, the defense expert testified to the defendant's IQ and took into account the Flynn effect; the state's expert did not mention it. The trial court found the defendant was not significantly lacking in adaptive skills and did not discuss whether the Flynn effect was considered. On the other hand, the Supreme Court of Kentucky has held that because its statute sets an IQ score of 70 as the cutoff and the statute is unambiguous, neither the Flynn effect nor standard margins of error properly are considered. *Bowling v. Commonwealth* (Ky.2005), 163 S.W.3d 361. Tennessee has similarly ruled. *Howell v. State* (Tenn.2004), 151 S.W.3d 450, 456 (holding that the statute setting a bright-line cutoff at 70 should not be interpreted to make allowances for measurement error or "other circumstances whereby a person with an IQ above seventy could be considered mentally retarded").

[*P51] Here, although the trial court's decision is subject to differing interpretations, it appears the trial court considered the testimony of Dr. Reardon. [**36] the defense expert regarding the Flynn effect. Indeed, the trial court directed specific questions to Dr. Reardon at the post-conviction hearing, and after due consideration the trial court determined Dr. Reardon's testimony was not persuasive. We conclude that a trial court must

consider evidence presented on the Flynn effect, but, consistent with its prerogative to determine the persuasiveness of the evidence, the trial court is not bound to, but may, conclude the Flynn effect is a factor in a defendant's IQ score. The AAMR, a leading authority on the definition of mental retardation, does not suggest that an IQ score must reflect adjustment for the Flynn effect.

[*P52] Defendant also contends the trial court improperly refused to apply any measurement error in this case. According to the AAMR, any IQ score must be adjusted to account for measurement error. In discussing *Atkins* claims, courts have recognized that intelligence tests have some level of measurement error depending on the test given. *In re Hawthorne* (noting that IQ test scores are imprecise and are considered to have measurement error); *State v. Williams* (La.2002), 831 So. 2d 835 (observing [**37] that any IQ test must account for standard margins of error); *Miller, supra*; *In re Bowling*, at 442, dissenting opinion (noting "there appears to be considerable evidence that irrebuttable IQ ceilings are inconsistent with current generally-accepted clinical definitions of mental retardation and that any IQ thresholds that are used should take into account factors, such as a test's margin of error, that impact the accuracy of a particular test score"); *Walker, supra* (holding that on remand the trial court must consider whether the Virginia statute permits consideration of measurement error).

[*P53] In accord with the AAMR's standard, measurement error must be considered in determining an individual's IQ score. Unlike Kentucky and Tennessee, Ohio has not established an absolute cutoff IQ score to determine mental retardation. Rather, *Lott* adopted a rebuttable presumption that an individual is not mentally retarded if his or her IQ score is above 70. Accounting for measurement error is one way to rebut the presumption. *In re Bowling, supra*, dissenting opinion (noting Ohio's rebuttable presumption in relation to IQ scores as opposed [**38] to an absolute cutoff score). Indeed, in *Lott*, the Supreme Court observed the petitioner's claim that he was mentally retarded was based on an IQ score of 72 after taking into account a five-point margin of error. Although *Lott* did not specifically state that measurement error must be considered, the court remanded the matter to the trial court for a hearing on mental retardation and mandated application of a rebuttable presumption.

[*P54] In the final analysis, the AAMR standard requires adjustment of IQ scores to account for a margin of error. Thus, we conclude the trial court must adjust, however nominally, an IQ score for measurement error and consider an expert's testimony regarding size or degree of the measurement error applicable to the particular intelligence test. In this case, the court erred in failing to consider Dr. Reardon's testimony regarding measurement

error. Because the Flynn effect is a proper subject for evidentiary proof, and because the trial court must consider standard margin of error in determining defendant's IQ, we sustain to that extent defendant's first assignment of error and overrule the state's assignment of error on cross-appeal.

[*P55] [**39] Having overruled defendant's second, third, fourth, fifth, and sixth assignments of error and the state's assignment of error on cross-appeal, but having sustained defendant's seventh assignment of error and his first assignment of error to the extent indicated, we reverse the judgment of the trial court and remand this matter to the trial court for a new *Atkins* hearing consistent with this opinion.

Judgment reversed and case remanded.

BROWN, P.J., concurs.

McGRATH, J., dissents.

DISSENT BY: McGRATH

DISSENT: McGRATH, J., dissenting.

[*P56] Being unable to agree with the majority's sustaining of the seventh assignment of error, I must respectfully dissent.

[*P57] The majority based its reversal of the seventh assignment of error relying on the language and rationale of *State v. Lorraine, Trumbull App. No. 2003-T-0159, 2005 Ohio 2529*. In *Lorraine*, the reviewing court found, as does the majority here, that the *Atkins* and *Lott* cases "when read in context with *Sup.R. 20* appeared to establish a special category for the appointment of counsel regarding the determination of mental retardation in capital cases, which would require [**40] the appointment of two certified attorneys to represent a capital defendant in a *Lott* case undertaking." See *Lorraine, at P49*. This view is based upon the observation that on post-conviction relief, the appellant here is having the first opportunity to present a "constitutional issue," in the trial court. However, nothing in the *Lott* decision indicates that this first opportunity to present the mental retardation issue, requires the appointment of two attorneys in a post-conviction relief proceeding. Indeed, the only adjustment recognized by the Ohio Supreme Court in *Lott* was to take what was in fact a successive petition for post-conviction relief (with a clear and convincing burden of proof for the petitioner) and say that it is more akin to a first petition which would require only a preponderance of the evidence burden of proof. See *Lott, at 306*. What is more relevant to the question presented here, however, is the fact that the Ohio Supreme Court in *Lott* specifically requires that a petitioner in an *Atkins* post-conviction claim be governed by the proce-

dures specifically set forth by *R.C. 2953.21*. *R.C. 2953.21(1)(2)* [**41] explicitly provides that the court shall appoint as counsel "only an attorney" who is certified pursuant to *Sup.R. 20*. Although the majority quotes from *Sup.R. 20*, it is clear that other than setting forth the qualifications for certification of counsel in a capital case, *Sup.R. 20* does not portend to govern procedures of post-conviction relief. Indeed, both the Ohio Supreme Court in *Lott* and the legislature by way of *R.C. 2953.21* provide otherwise. Furthermore, there is no due process right to appointed counsel for a death penalty post-conviction proceeding. *Murray v. Giarratano (1989), 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1*. The interplay between the rules of superintendence and the post-conviction statute, as it relates to appointed counsel, is appropriately recognized in *State v. D'Amborsio (Mar. 16, 2000), Cuyahoga App. No. 75076, 2000 Ohio App. LEXIS 1038*, wherein the court stated that in any post-conviction proceeding, the defendant has only the rights granted by the legislature. Ohio statutory law provides that an indigent defendant who received the death penalty is entitled to [**42] appointed counsel for filing a motion for post-conviction relief, *R.C. 2953.21(1)(1)*, and the appointed counsel must be certified to represent defendants charged with the death penalty under the rules of superintendence. However, nowhere in *R.C. 2953.21* has the legislature required the appointment of two attorneys for this purpose.

[*P58] Appellant has argued that a trial defendant presenting the issue of mental retardation in the trial court would have a right to two attorneys, whereas a post-conviction defendant presenting the same issue would only have one attorney. However, that is true of any defendant presenting any factual issue to a trial court under post-conviction relief, which is a statutorily created meaningful corrective process, but certainly not a trial. Other differences pertain also like the inability of a petitioner to raise ineffectiveness of counsel in post-conviction and the fact that the petitioner does not have a jury trial of the issue. It is simply a different and statutorily controlled protective process.

[*P59] To agree with the majority would be to enlarge *Sup.R. 20* [**43] not only beyond its words but into an area reserved specifically for the legislature.

[*P60] This dissent does not speak to the wisdom of providing two certified counsel for *Atkins/Lott* trial court presentations on post-conviction relief, and I am acutely aware of the many fine reasons for doing so raised by appellant's brief. However, I do not agree that the appointment of two attorneys is either constitutionally required or appropriate under Ohio law without further legislative action. I cannot find that a trial judge abuses his or her discretion by applying the law of Ohio as it currently exists.

[*P61] Therefore, I would overrule assignment of error number seven.

appellant's evidence but on balance simply did not find it persuasive. Again, I would affirm.

[*P62] As to assignment of error number one, I believe that the trial court has given due consideration to

LEXSEE 2006 OHIO 5076

STATE OF OHIO, Respondent-Appellee, vs. RALPH LYNCH, Petitioner-Appellant.

APPEAL NO. C-050914

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

2006 Ohio 5076; 2006 Ohio App. LEXIS 4967

September 29, 2006, Date of Judgment Entry on Appeal

NOTICE: [**1] THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABUS AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

PRIOR HISTORY: Criminal Appeal From: Hamilton County Court of Common Pleas. TRIAL NO. B-9804522. *State v. Lynch*, 2001 Ohio 3914, 2001 Ohio App. LEXIS 5765 (Ohio Ct. App., Hamilton County, Dec. 21, 2001)

DISPOSITION: Affirmed.

COUNSEL: David H. Bodiker, Ohio Public Defender, Kathryn L. Sandford and Richard J. Vickers, Assistant State Public Defenders, for Petitioner-Appellant.

Joseph T. Deters , Hamilton County Prosecuting Attorney, and William E. Breyer , Assistant Prosecuting Attorney, for Respondent-Appellee.

JUDGES: MARK P. PAINTER, Judge. HILDEBRANDT, P.J., concurs. (Judge Rupert A. Doan was a member of the panel, but died before the release of this decision.)

OPINION BY: MARK P. PAINTER

OPINION:

DECISION.

MARK P. PAINTER, Judge.

[*P1] Petitioner-appellant Ralph Lynch presents a single assignment of error challenging the Hamilton County Common Pleas Court's judgment denying his postconviction petition seeking relief from his death sentence because he was mentally retarded. We affirm.

[*P2] Lynch was convicted in 1999 of aggravated murder and sentenced to death. In 2002 the United States Supreme Court ruled in *Atkins v. Virginia* n1 that executing a mentally [**2] retarded person violates the proscription against cruel and unusual punishment contained in the *Eighth Amendment to the United States Constitution*. In 2003, Lynch presented an *Atkins* claim in a post-conviction petition. Following a hearing, the common pleas court denied the petition.

n1 (2002), 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335.

1. *The Mental-Retardation Criteria*

[*P3] In advancing an *Atkins* claim, the defendant bears the burden of proving by a preponderance of the evidence that (1) he suffers from "significantly subaverage intellectual functioning," (2) he has experienced "significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction," and (3) the manifestations of mental retardation appeared before the age of 18. n2

n2 *State v. Lott*, 97 Ohio St.3d 303, 2002 Ohio 6625, 779 N.E.2d 1011, at P12.

[**3]

[*P4] At the hearing on Lynch's *Atkins* claim, Lynch and the state each presented expert opinion testimony by a clinical psychologist. Lynch's expert concluded that Lynch was mentally retarded, while the state's expert concluded that he was not. Based on the evidence adduced at the hearing, the trial court concluded that Lynch had failed to prove his claim.

A. Significantly Subaverage Intellectual Functioning

[*P5] The Ohio Supreme Court has cautioned that an IQ test score is merely one measure of intellectual functioning that "alone [is] not sufficient to make a final determination on [the mental-retardation] issue." n3 Nevertheless, the court has declared that a full-scale IQ score above 70 gives rise to "a rebuttable presumption that a defendant [is] not mentally retarded." n4

n3 *State v. Lott, supra, at P12.*

n4 *Id.*

[*P6] On an IQ test in 1999, after he had been incarcerated for about a year awaiting trial, Lynch received a full-scale score of 72. Thus, Lynch[**4] was presumptively not mentally retarded.

[*P7] Lynch attempted to rebut that presumption with the testimony of Dr. Timothy L. Rheinscheld, a mental-retardation specialist. Dr. Rheinscheld testified that Lynch's IQ score should be adjusted by a standard error of measurement of plus or minus five, to produce a range between 66 and 77. And he noted that Lynch had scored significantly below average on the arithmetic subtest.

[*P8] The experts testified to other matters probative of Lynch's intellectual functioning. Lynch had lived alone for 18 years and had worked for the same trash-collection company for 19 years, repairing tires and providing roadside service and general labor. His work records showed that he had been a productive employee and had been dependable in his attendance. His friends and coworkers had considered him "slow," and he had difficulty reading. But he had a good memory. And he had once driven alone from Ohio to Oregon. Over the years, Lynch had relied on friends and a credit counselor to help him with matters such as managing his money, maintaining his car, and making doctors' appointments. He had also accumulated significant credit-card and loan debt [**5] and had once been compelled to declare bankruptcy.

[*P9] Dr. Rheinscheld conducted a three-hour clinical interview with Lynch, and he reviewed various documents. He testified that, although Lynch had performed his job productively, he had worked best under direct supervision at a job that a mildly mentally retarded person could do. Dr. Rheinscheld stated that mildly mentally retarded people commonly lived independently, and that while Lynch had lived alone, others had helped him manage many routine activities. On cross-examination,

Dr. Rheinscheld conceded that few mildly mentally retarded people could match Lynch's efforts to conceal and to avoid responsibility for his crime. But he ultimately concluded that Lynch "function[ed] in the [mildly]-mentally retarded range" of intelligence.

[*P10] The state's expert, Dr. W. Michael Nelson, disagreed. He conceded that Lynch's IQ score should have been adjusted by a standard error of measurement of plus or minus five, and that the adjustment positioned Lynch in the "borderline" range of intelligence. But he concluded, based on Lynch's IQ score and the facts revealed in the substantial documentation submitted in the case, that [**6] Lynch was "not * * * functioning in the range of mental retardation."

[*P11] The trial court concurred with Dr. Nelson. The court found that Lynch's full-scale IQ score of 72 gave rise to the presumption that he was not mentally retarded. But the court accepted that applying the standard error of measurement placed his IQ in a range between 66 and 77. The court acknowledged Lynch's financial difficulties, the perception that he was "slow," and his reading limitations. But the court noted that he had, for a substantial number of years, lived independently and held the same job, that he had been a dependable worker with excellent attendance, that he had a good memory, and that he had successfully planned, budgeted for, and completed a solo cross-country trip. From this, the court concluded that Lynch had failed to prove significant subaverage intellectual functioning.

B. Significant Limitations in Adaptive Skills

[*P12] Much of the evidence probative of Lynch's intellectual functioning was also probative of his adaptive skills. Dr. Rheinscheld's clinical interview with Lynch included a test designed to measure adaptive behavior. And he again cited Lynch's need [**7] for direct supervision at work, his need for assistance by others in managing his routine activities, and his financial difficulties. Dr. Rheinscheld conceded on cross-examination that Lynch's adaptive skills could also have been adversely affected by mental illness or his cultural environment. And he acknowledged that Lynch had had few previous contacts with the criminal justice system and few disciplinary problems at work or in prison. But he posited that a structured environment, rather than fully developed adaptive skills, accounted for the paucity of Lynch's rule infractions. Based on the interview and the documents submitted in the case, Dr. Rheinscheld found "significant" weaknesses in Lynch's "social skills," or ability to obey the law, and in his "functional academics," or ability to manage money.

[*P13] The trial court again agreed with Dr. Nelson that the record did not support Dr. Rheinscheld's conclusion. The court noted Lynch's limited prior contacts with

the law and his ability to function well in prison. And the court found that the limitations in Lynch's ability to manage money were not significant. Thus, the court concluded that Lynch had failed to prove significant [**8] limitations in his adaptive skills.

C. Onset Before Age 18

[*P14] Evidence that Lynch had manifested mental retardation before the age of 18 was scant. A school report classified Lynch as mentally retarded. But he did not take an IQ test before the age of 18. He performed poorly in school, was placed in special-education classes when he was fifteen, and eventually dropped out. On this evidence, Dr. Rheinscheld concluded that Lynch's mental retardation had manifested itself before the age of 18.

[*P15] The trial court characterized the evidence on this criterion as "sparse." And the court expressly declined to make a finding, because its conclusion that Lynch was not mentally retarded had rendered the criterion "irrelevant."

II. We Affirm

[*P16] An appellate court will not reverse a trial court's determination of the issue of mental retardation if the determination was supported by reliable, credible evidence. n5 We conclude that reliable, credible evidence supported the trial court's determination that Lynch had not proved by a preponderance of the evidence that he was mentally retarded. We, therefore, overrule the assignment of error and [**9] affirm the trial court's judgment.

n5 *State v. Were* (Feb. 4, 2005), 1st Dist. No. C-030485, 2005 Ohio 376.

Judgment affirmed.

HILDEBRANDT, P.J., concurs.

(*Judge Rupert A. Doan was a member of the panel, but died before the release of this decision.*)

LEXSEE 2005 OHIO 423

STATE OF OHIO, PLAINTIFF-APPELLEE v. JOSEPH D. MURPHY, DEFENDANT-APPELLANT

CASE NUMBER 9-04-36

COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, MARION COUNTY

2005 Ohio 423; 2005 Ohio App. LEXIS 467

February 7, 2005, Date of Judgment Entry

SUBSEQUENT HISTORY: Discretionary appeal not allowed by *State v. Murphy*, 106 Ohio St. 3d 1415, 2005 Ohio 3154, 830 N.E.2d 347, 2005 Ohio LEXIS 1362 (2005)

US Supreme Court certiorari denied by *Murphy v. Ohio*, 2005 U.S. LEXIS 7733 (U.S., Oct. 17, 2005)

PRIOR HISTORY: **[**1]** CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court. *State v. Murphy*, 1991 Ohio App. LEXIS 3014 (Ohio Ct. App., Marion County, June 26, 1991)

DISPOSITION: Judgment affirmed.

COUNSEL: DAVID H. BODIKER, Ohio Public Defender, Pamela J. Prude-Smithers, Kathryn L. Sandford, Attorney at Law, Columbus, OH, For Appellant.

JIM SLAGLE, Prosecuting Attorney, Marion, OH, For Appellee.

JUDGES: Shaw, J. ROGERS and BRYANT, JJ., concur.

OPINION BY: Shaw

OPINION: Shaw, J.

[*P1] The defendant-appellant, Joseph D. Murphy, appeals the July 30, 2004 judgment of the Marion County Common Pleas Court determining that he is not mentally retarded pursuant to the standard outlined by the Supreme Court of Ohio in *State v. Lott*, 97 Ohio St.3d 303, 779 N.E.2d 1011, 2002 Ohio 6625.

Procedural History:

[*P2] In September 1987, Murphy was sentenced to death following his convictions for aggravated murder, aggravated robbery, aggravated burglary, and extor-

tion. His conviction was affirmed by this court, see *State v. Murphy* (June 26, 1991), 3rd Dist. No. 9-87-35, 1991 Ohio App. LEXIS 3014, unreported, as well as the Supreme Court of Ohio, see *State v. Murphy* (1992), 65 Ohio St.3d 554, 605 N.E.2d 884, cert. denied *Murphy v. Ohio* (1993), 510 U.S. 834, 126 L. Ed. 2d 75, 114 S.Ct. 109. **[**2]** Murphy filed a petition for post-conviction relief, which the trial court denied, and we affirmed. See *State v. Murphy* (May 12, 1995), 3rd Dist. No. 9-94-52, 1995 Ohio App. LEXIS 1963, unreported, appeal not allowed, 74 Ohio St. 3d 1405, 655 N.E.2d 184. Additionally, Murphy sought habeas corpus relief in the federal court system, but that case is being held in abeyance pending the litigation before this Court.

[*P3] In 2002, the United States Supreme Court decided *Atkins v. Virginia* (2002), 536 U.S. 304, 153 L. Ed. 2d 335, 122 S.Ct. 2242, which held that the execution of mentally retarded criminals violates the *Eighth Amendment's* prohibition against cruel and unusual punishment. In *Atkins*, however, the Court left the determination of whether a criminal defendant is mentally retarded to the states. *Id. at 317*. Consequently, the Supreme Court of Ohio adopted a three-prong test in order to determine whether a criminal defendant is mentally retarded in order to avoid execution. *Lott*, 97 Ohio St.3d at 305.

[*P4] On August 21, 2002, Murphy filed a post-conviction petition in the Marion County Court of Common Pleas arguing that he is mentally retarded pursuant **[**3]** to the standard outlined in *Lott* and, therefore, cannot be put to death because of the United States Supreme Court's decision in *Atkins*. In March, 2004, the trial court held an evidentiary hearing on Murphy's claim, and on June 30, 2004, the trial court determined that Murphy was not mentally retarded and, subsequently, denied Murphy's petition for post-conviction relief. It is from this judgment that Murphy appeals alleging one assignment of error.

The Evidentiary Hearing

[*P5] At the evidentiary hearing to determine whether Murphy was mentally retarded, both sides presented one expert witness. Murphy offered the testimony of Dr. Caroline Everington, a special educator, who researches and teaches in the area of mental retardation. Conversely, the State presented Dr. James Sunbury, a clinical psychologist, who specializes in several different criminal psychological evaluations, including determining whether defendants are competent to stand trial.

[*P6] In her testimony, Dr. Everington noted that in order to be classified as mentally retarded according to the definition established by the American Association of Mental Retardation (AAMR), one must have [**4] (1) significant subaverage intellectual functioning; (2) significant deficits in adaptive skills; and (3) the condition had to be manifested before the age of 18. Accordingly, while testifying Dr. Everington reviewed all six IQ tests administered to Murphy when he was 18 years old and younger, as well as Murphy's adaptive skills and whether his mental condition was manifested before he reached the age of 18.

[*P7] The first test administered to Murphy was in 1975 when he was 9 years old. Murphy scored an 86, but Dr. Everington cautioned that the version of the test administered to Murphy was out of date at the time he took it. Dr. Everington testified that Murphy was given the Wechsler Intelligence Scale for Children (WISC), which was replaced in 1974 by the Wechsler Intelligence Scale for Children-Revised (WISC-R). Consequently, Dr. Everington concluded that this score was not a reliable indication of Murphy's IQ because of the Flynn effect—a phenomenon that increases people's IQ test score over time as a test becomes out dated and more standardized. In this case, Dr. Everington noted that the WISC was approximately 28 years old; therefore, in her opinion, the Flynn effect [**5] inflated Murphy's score.

[*P8] Second, Dr. Everington discussed the IQ test that was administered to Murphy in 1978 when he was 13 years old. On this test, Murphy scored a 76. Dr. Everington testified that Murphy was given the proper IQ test during the evaluation, i.e. WISC-R.

[*P9] Third, Dr. Everington testified to the next IQ test, which Murphy took in 1979 when he was 14 years old. Murphy scored a 54 on this examination, and Dr. Everington noted that the original test administrator stated in his report that Murphy's low score was not a proper evaluation of his ability.

[*P10] Fourth, Dr. Everington reviewed the IQ test results of the examination administered to Murphy in 1980 when he was 15 years old. Dr. Everington again testified that Murphy was given an out dated test, i.e. the

original WISC. Thus, Dr. Everington stated that Murphy's high score, an 83, is not a reliable indication of his true ability because of the Flynn effect.

[*P11] Fifth, Dr. Everington discussed the results of the IQ test administered to Murphy in 1981 when he was 16 years old. On this test, Murphy scored a 76, and Dr. Everington testified that the proper test was administered. [**6]

[*P12] Finally, Dr. Everington examined the results of the IQ test given to Murphy in 1983 when Murphy recently turned 18. Dr. Everington testified that the proper exam was administered in this case, and Murphy scored an 82. Dr. Everington testified that she was "troubled" by this score because it did not seem to align with Murphy's previous IQ scores. Moreover, Dr. Everington attempted to retrieve the original protocols for this examination in order to determine if the test was scored correctly; however, she was unable to locate the necessary information.

[*P13] In her conclusion as to whether Murphy meets the first prong of the AAMR standard for mental retardation, Dr. Everington found that Murphy's scores of 54 and 82 were likely outliers, i.e. numbers not statistically linked to the rest of the scores. Dr. Everington testified that, in her opinion, Murphy is functioning at a 75, which is right on the border of mental retardation. Dr. Everington noted that the inconsistency among Murphy's IQ scores made it difficult to determine whether Murphy was within the mentally retarded range. The record states:

Q: Now, we've gone through all of the reports of the IQ [**7] tests that were administered to Mr. Murphy both before he turned 18 and some after he turned 18. What do those reports, in their totality, tell you about Mr. Murphy's intellectual functioning?

A: Those reports in their totality—again this is a difficult case because it is not—it is not a clean cut IQ scores, and clearly in the cut off for mental retardation. You have some that are in that range and some that are not. So it's—it's really difficult to say with absolute certainty that his intellectual functioning has consistently been in the mental retardation range because of the variation of the scores.

Evidentiary Hearing Tr. at 74.

[*P14] Next, Dr. Everington testified to Murphy's deficient adaptive skills. Initially, Dr. Everington noted that Murphy's evaluations testing did not include much adaptive skills testing; therefore, there was limited information on which to base her assessment. Consequently, in order to attempt to get an accurate opinion of Murphy's adaptive skills, she had to talk with the individuals that were involved in Murphy's life prior to him going to prison for murder. n1

n1 Dr. Everington stated that it is commonly accepted that one may lose adaptive skills while being in prison or on death row.

[**8]

[*P15] In her attempt to retrospectively evaluate Murphy's adaptive skills, Dr. Everington talked with Murphy's brother, grandmother, and his social worker, as well as administered another test. Dr. Everington testified that Murphy's relationship with his social worker yielded the best indication of his adaptive skills. In her conclusion, Dr. Everington stated all of the people interviewed indicated that Murphy was "slower than the other kids." Moreover, Dr. Everington testified that, in her opinion, Murphy's test score, coupled with the interviews of close friends and family, indicated that Murphy meets the second prong of the AAMR criteria for mental retardation.

[*P16] Finally, Dr. Everington testified that Murphy's problems began when he was a young child and continually worsened as he grew older. In her conclusion, Dr. Everington stated that even though Murphy's wide range of IQ scores made it difficult to confidently place Murphy within the mental retardation range, reviewing his adaptive skills score coupled with his IQ scores indicated that Murphy's condition manifested prior to the age of 18.

[*P17] On cross-examination, the State highlighted three points [**9] for the judge to consider when making his determination of whether Murphy is mentally retarded. First, the State pointed out that every time Dr. Everington testified in a criminal case as to the issue of mental retardation, she has found the defendant to be mentally retarded. Second, the State noted that while Dr. Everington does do educational research in the field of mental retardation, she is not a licensed psychologist and cannot administer IQ tests or make an initial determination based on those tests whether someone is mentally retarded. Finally, the State highlighted that throughout all of Murphy's IQ testing, beginning with his IQ test in 1975 and continuing until today, no psychologist or psychiatrist has ever concluded that Murphy was mentally retarded.

[*P18] Conversely, the expert witness for the State, Dr. Sunbury, reviewed the examination he administered to Murphy prior to Murphy's murder trial in 1987. Dr. Sunbury stated that, in his opinion, Murphy did have subaverage intelligence but his intelligence was not so *significantly* subaverage to be diagnosed as mentally retarded. In an IQ test administered to Murphy to assist in Dr. Sunbury's determination of whether [**10] Murphy was competent to stand trial, Dr. Sunbury opined that Murphy's score, a 66, was not an accurate reflection of Murphy's true intellect. Furthermore, Dr. Sunbury testified that he believed Murphy's true IQ is between 70-80. Admittedly, Dr. Sunbury testified that he did not perform any adaptive skills testing on Murphy, but he testified that an adaptive skills analysis was not necessary unless Murphy's IQ was below 70. Moreover, Dr. Sunbury testified that while Murphy did not have an extended or complex vocabulary, he was able to converse with Dr. Sunbury in an interview and during testing without problems.

[*P19] Based on this testimony, the trial court made the following findings of fact in concluding that Murphy was not mentally retarded:

1. The Defendant does not possess significantly sub-average intellectual functioning which is a necessary requirement to be classified as being mentally retarded.
2. Even though the Defendant-Petitioner has been evaluated by eight different psychologists, not a single one has diagnosed him as being mentally retarded.
3. Defendant-Petitioner's IQ has consistently been found to be in excess of 70, which provides [**11] a presumption that he is not mentally retarded.
4. After reviewing the tape recordings of the interviews with the Defendant-Petitioner, this Court cannot conclude that the Defendant-Petitioner lacked adaptive skills such as communication, and self-direction. In fact, this Court was impressed with Defendant-Petitioner's ability to communicate and logically carry on a conversation with police officers.
5. Any difficulties that the Defendant-Petitioner possesses did have an onset before age 18.

Judgment Entry at p. 3-4.

Assignment of Error

THE TRIAL COURT COMMITTED CLEAR ERROR WHEN IT DENIED APPELLANT MURPHY RELIEF ON HIS CLAIM THAT HE IS MENTALLY RETARDED UNDER *ATKINS V. VIRGINIA*, 536 U.S. 304, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (2002). APPELLANT'S DEATH SENTENCE VIOLATES THE CONSTITUTION BECAUSE HE IS IN FACT MENTALLY RETARDED.

[*P20] The Ohio Supreme Court expressly held that a defendant on death row may litigate an *Atkins* claim to determine whether the defendant is mentally retarded in a petition for post-conviction relief pursuant to R.C. 2953.23(A)(1)(b) if the petition is filed within 180 days of the *Lott* decision. [**12] n2 *Lott*, 97 Ohio St.3d at 307. R.C. 2953.23(A)(1)(b) states that a court may not entertain a second petition or successive petitions for post-conviction relief unless "the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petitioner asserts a claim based on that right." R.C. 2953.23(A)(1)(b). Accordingly, the Ohio Supreme Court opined that raising an *Atkins* claim is within the application and purpose of R.C. 2953.23(A)(1)(b). *Lott*, 97 Ohio St.3d at 306. We note that Murphy's claim was filed within 180 days of the *Lott* decision, and, therefore, is within the guidelines outlined in *Lott* and R.C. 2953.23(A)(1)(b).

n2 Petitions filed later than the 180 days are subject to the standards for untimely and successive petitions for post-conviction relief. *Lott*, 97 Ohio St.3d at 307.

[**13]

[*P21] In *Lott*, the Ohio Supreme Court adopted the three prong test created by the AAMR to determine whether a defendant was mentally retarded and barred from execution pursuant to *Atkins*. *Id.* at 305. The *Lott* court stated that the burden is on the defendant to prove by a preponderance of the evidence that he or she has (1) significant subaverage intellectual functioning; (2) significant limitations in two or more adaptive skills; and (3) onset before the age of 18 in order to be diagnosed as mentally retarded. *Id.* at 305 and 307. While IQ tests are one of many factors to determine the defendant's mental capability, they are not alone sufficient to make a final

determination. *Id.* Nevertheless, the Supreme Court of Ohio held that "there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70." *Id.*

[*P22] In considering an *Atkins* claim, the trial court must conduct its own de novo review of the evidence, which should include professional evaluations and expert testimony, to determine whether the defendant is mentally retarded. *Id.* at 306. Once the trial court makes its determination [**14] of the defendant's mental status, its decision will not be disturbed absent an abuse of discretion. See *State v. Stallings*, 9th Dist. No. 21969, 2004 Ohio 4571, at P5 ("We begin by noting that a trial court has discretion to grant or deny a petition for post-conviction relief. As such, this court will not reverse a trial court's decision absent an abuse of discretion.") (internal citations omitted). An abuse of discretion requires more than an error in judgment; it implies unreasonable, arbitrary, or unconscionable conduct by the court. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140.

[*P23] After reviewing the extensive psychological testimony provided by Dr. Everington and Dr. Sunbury, we conclude that the trial court did not abuse its discretion in determining that Murphy was not mentally retarded. First, Murphy was interviewed by at least eight psychologists since he was a child and no one has ever diagnosed him to be mentally retarded. Second, an extensive review of the record shows that Murphy's IQ scores were consistently above 70. Moreover, even his lowest scores, a 54 in 1979 and a 66 in 1987, were discredited by [**15] both expert witnesses. Third, Dr. Everington, the defense expert witness, testified that Murphy was functioning at an approximate IQ of 75, which is within the mental retardation range but above the score of 70 that the Ohio Supreme Court indicated creates a rebuttable presumption that the defendant is not mentally retarded. Fourth, and perhaps most importantly to the issue of subaverage intellectual functioning, Dr. Everington further testified that "it's really difficult to say with absolute certainty that his intellectual functioning has consistently been in the mental retardation range because of the variation of the scores."

[*P24] In conclusion, therefore, even if this Court were to determine that the second and third prongs of the *Lott* were met, we cannot conclude that the trial court's determination that Murphy did not possess significantly subaverage intelligence was unreasonable, arbitrary, or unconscionable. Thus, the assignment of error is overruled, and the determination of the trial court is affirmed.

Judgment Affirmed.

ROGERS and BRYANT, JJ., concur.

LEXSEE 2004 OHIO 4571

STATE OF OHIO, Appellee v. MICHAEL D. STALLINGS, Appellant

C.A. No. 21969

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT
COUNTY

2004 Ohio 4571; 2004 Ohio App. LEXIS 4167

September 1, 2004, Decided

SUBSEQUENT HISTORY: Appeal denied by *State v. Stallings*, 2005 Ohio 204, 2005 Ohio LEXIS 78 (Ohio, Jan. 26, 2005)

PRIOR HISTORY: [**1] APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO. CASE No. CR 1997 05 1118(A). *State v. Stallings*, 89 Ohio St. 3d 280, 2000 Ohio 164, 731 N.E.2d 159, 2000 Ohio LEXIS 1697 (2000)

DISPOSITION: Judgment of the Court of Common Pleas affirmed.

COUNSEL: DAVID H. BODIKER, Ohio Public Defender, JOSEPH E. WILHELM, Chief Counsel, Death Penalty Division, Columbus, Ohio, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney and RICHARD S. KASAY Assistant Prosecuting Attorney, Akron, Ohio, for Appellee.

JUDGES: EDNA J. BOYLE. SLABY, P. J., BATCHELDER, J., CONCUR.

OPINION BY: EDNA J. BOYLE

OPINION: DECISION AND JOURNAL ENTRY

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BOYLE, Judge.

[*P1] Appellant, Michael D. Stallings, appeals the judgment of the Summit County Court of Common Pleas denying his petition for post-conviction relief. This Court affirms.

I.

[*P2] Appellant was convicted and sentenced to death in 1998 for the aggravated murder of Rolisha Shepherd during the commission of aggravated robbery and aggravated burglary. A detailed description of Appellant's crime was given in *State v. Stallings* (2000), 89 Ohio St.3d 280, 2000 Ohio 164, 731 N.E.2d 159, which affirmed Appellant's death sentence. Appellant's attempts [**2] to obtain post-conviction relief pursuant to R.C. 2953.21 were unsuccessful. See *State v. Stallings* (2000), 90 Ohio St.3d 1404, 734 N.E.2d 835. Thereafter, Appellant filed a federal habeas corpus claim. While that case was pending, the U.S. Supreme Court decided *Atkins v. Virginia* (2002), 536 U.S. 304, 153 L. Ed. 2d 335, 122 S. Ct. 2242. In *Atkins*, the Court held that the *Eighth Amendment* prohibits the execution of mentally retarded persons. *Id. at 321*. Appellant then filed a successor post-conviction petition asserting that he is mentally retarded. The federal court dismissed Appellant's habeas petition without prejudice to allow him to litigate his *Atkins* claim in state court.

[*P3] Appellant was granted an evidentiary hearing on his *Atkins* claim by the trial court. The trial court heard evidence on August 28, 2003 and September 4, 2003. Subsequently, the trial court denied Appellant's petition on January 16, 2004, finding that Appellant had failed to establish that the onset of his significantly subaverage intellectual functioning and significant limitations in two or more adaptive skills occurred before Appellant reached [**3] the age of 18. Appellant timely appealed, raising one assignment of error.

II.

ASSIGNMENT OF ERROR

"THE TRIAL COURT COMMITTED CLEAR ERROR WHEN IT DENIED APPELLANT RELIEF ON HIS CLAIM UNDER *ATKINS V. VIRGINIA*, 536 U.S. 304, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (2002). APPELLANT'S DEATH SENTENCE VIOLATES THE CONSTITU-

TION BECAUSE HE IS IN FACT
MENTALLY RETARDED. *U.S. CONST.*
AMENDS. VIII, XIV; OHIO CONST. ART.
I, § 9, 16."

[*P4] In his sole assignment of error, Appellant argues that the trial court erred when it found that Appellant did not establish the onset of mild mental retardation by age 18. We disagree.

[*P5] We begin by noting that a trial court has discretion to grant or deny a petition for post-conviction relief. *State v. Elkins, 9th Dist. No. 21380, 2003 Ohio 4522, P5*. As such, this court will not reverse the trial court's decision absent an abuse of discretion. *Id.* Abuse of discretion requires more than simply an error in judgment; it implies unreasonable, arbitrary, or unconscionable conduct by the court. *Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140*.

[*P6] In 2002, the U.S. Supreme Court ruled that [**4] executing the mentally retarded violated the *Eighth Amendment of the U.S. Constitution*. See *Atkins v. Virginia (2002), 536 U.S. 304, 153 L. Ed. 2d 335, 122 S. Ct. 2242*. However, *Atkins* did not set forth the procedures to be utilized in making the determination of whether an individual is mentally retarded. However, following *Atkins*, the Ohio Supreme Court delineated the procedures applicable to a claim of mental retardation. See *State v. Lott, 97 Ohio St.3d 303, 2002 Ohio 6625, 779 N.E.2d 1011*. The Court set forth three requirements that must be met before a finding of mental retardation could be made. Those requirements are as follows:

"(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." *Id. at P12*.

[*P7] The Court went on to hold that the defendant bears the burden of establishing that he is mentally retarded by a preponderance of the evidence. *Id. at P21*. The Court noted that most statutes prohibiting the execution of the mentally retarded require a showing that the individual's IQ is below [**5] 70. As such, a rebuttable presumption is created that a defendant is not mentally retarded if his IQ is above 70. *Id. at P12*. It is with this general framework that we examine the decision of the trial court.

[*P8] The trial court first determined that Appellant's IQ was found to be above 70 on several different occasions. Therefore, a rebuttable presumption arose that Appellant was not mentally retarded. The trial court went on to find that this presumption was rebutted with regard to the first and second prong of the test set forth by *Lott*. However, the trial court found that Appellant had not rebutted the presumption with regard to establishing the onset of mental retardation before the age of 18.

[*P9] Neither party contests that the trial court accurately determined that Appellant established that he currently has significantly subaverage intellectual functioning and significant limitations in two or more adaptive skills. However, Appellant contends that he produced sufficient evidence to prove by a preponderance of the evidence that the onset of his mental retardation occurred before the age of 18.

[*P10] On his behalf, Appellant presented two experts at [**6] the trial court evidentiary hearing. Dr. Luc LeCavalier testified on Appellant's behalf as follows. LeCavalier administered the Wechsler Adult Intelligence Scale, Third Edition ("WAIS-III") to determine Appellant's IQ. Appellant's composite full scale IQ was found to be 74. LeCavalier noted that the WAIS-III has a standard error of measurement of four. He explained that this meant that Appellant's IQ could be as low as 70 and as high as 78. LeCavalier also administered the Scales of Independent Behavior-Revised ("SIB-R") to determine whether Appellant's adaptive skills were deficient. He went on to testify that Appellant was deficient in all three major domains tested by the SIB-R and was deficient in 12 of the 14 subcategories that were tested. All of these tests were administered when Appellant was 26 years old. LeCavalier admitted that the only IQ test that was performed prior to Appellant turning 18 indicated that Appellant's full scale IQ was 76. However, the standard error of measurement for the test administered when Appellant was 16 years old was six. Therefore, Appellant's IQ could have been as low as 70 and as high as 82. Finally, LeCavalier was asked whether Appellant's [**7] mental retardation was present before the age of 18. He responded that "there's a lot of information that suggests that the deficits were present in the period of development."

[*P11] However, under cross-examination, his testimony was equivocal as to whether Appellant was mentally retarded, stating, "it's impossible for me to rule out mental retardation, and I think it would be unethical to say that with 100 percent certainty that he does or does not have mental retardation." Further, he indicated that Appellant's IQ was also tested when he was 21 years old, and those results placed Appellant's IQ in the range of 70 to 82 as well. LeCavalier admitted that Appellant was not classified as mentally retarded as a result of the IQ

test he was given at the age of 21. LeCavalier also admitted that Dr. Bendo, who was called to testify on Appellant's behalf at his original trial, did not classify Appellant as mentally retarded. As such, LeCavalier testified that despite IQ tests at the age of 16, 21, and just prior to trial, Appellant was never classified as mentally retarded.

[*P12] Dr. John Fabian also testified on behalf of Appellant at the trial court evidentiary hearing. [**8] He administered an IQ test to Appellant, which resulted in a full scale IQ of 72. He went on to testify that the standard error of measurement for the test he administered is four, leading to an IQ ranging from 68 to 76 based upon his examination of Appellant. He also testified that Appellant had major deficits in his adaptive functioning. These included having a difficult time having appropriate interpersonal relationships, developing appropriate work skills, and lacking functional academic skills. Additionally, Dr. Fabian testified that Appellant was never specifically tested for mental retardation before the age of 18. He stated that upon his review of Appellant's IQ test that was performed when Appellant was 16 years old that Appellant definitely had adaptive behavior deficits prior to the age of 18.

[*P13] However, on cross-examination regarding whether Appellant's retardation was present before the age of 18, Dr. Fabian admitted that "no one will ever know what [Appellant's] IQ was at that point[.] Further, he acknowledged that his conclusion was simply that mental retardation could not be ruled out.

[*P14] At the conclusion of the evidentiary hearing, the trial [**9] court also indicated that it would review the entire record for evidence relevant to the court's determination of whether Appellant had met his burden in demonstrating mental retardation. As such, the trial court was left with conflicting testimony. Both experts at the evidentiary hearing testified that Appellant met all three prongs of the test developed by *Lott*. However, both admitted that the only IQ test administered to Appellant before age 18 indicated that he was not mildly mentally retarded, returning an IQ ranging from 70 to 82 once a standard error measurement is included. Further, the experts indicated that Appellant was tested on three prior occasions; the testing when Appellant was 16 years old, the testing when Appellant was 21 years old, and the testing done at the time of Appellant's trial in order to present evidence of mitigating factors. None of the three

doctors who had tested Appellant prior to Dr. Fabian and Dr. LeCavalier concluded that Appellant was mentally retarded.

[*P15] As a result, we cannot conclude that the trial court acted in an arbitrary, unreasonable or unconscionable manner. The only scientific evidence presented to the trial court indicated [**10] that Appellant's IQ was above 70. Further, neither expert could state that the onset of Appellant's mental retardation was before the age of 18. Accordingly, Appellant's sole assignment of error is overruled.

III.

[*P16] The judgment of the Summit County Court of Common Pleas denying Appellant's petition for post-conviction relief is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed to Appellant.

Exceptions.

EDNA J. BOYLE

FOR THE COURT

SLABY, [**11] P. J.

BATCHELDER, J.

CONCUR

LEXSEE 2005 OHIO 376

STATE OF OHIO, Plaintiff-Appellee, vs. JAMES WERE, Defendant-Appellant.

APPEAL NO. C-030485

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

2005 Ohio 376; 2005 Ohio App. LEXIS 348

February 4, 2005, Date of Judgment Entry on Appeal

NOTICE: [**1] THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

SUBSEQUENT HISTORY: Motions ruled upon by, Remanded by *State v. Were*, 106 Ohio St. 3d 1529, 2005 Ohio 5146, 835 N.E.2d 379, 2005 Ohio LEXIS 2116 (2005)

Appeal after remand at *State v. Were*, 2006 Ohio 3511, 2006 Ohio App. LEXIS 3468 (Ohio Ct. App., Hamilton County, July 7, 2006)

PRIOR HISTORY: Criminal Appeal From: Hamilton County Court of Common Pleas. TRIAL NO. B-9508499. *State v. Were*, 94 Ohio St. 3d 173, 2002 Ohio 481, 761 N.E.2d 591, 2002 Ohio LEXIS 239 (2002)

DISPOSITION: Affirmed.

HEADNOTES: DEATH PENALTY - PROSECUTOR - EVIDENCE

SYLLABUS: A jury does not have to find beyond a reasonable doubt that a defendant is not mentally retarded before the death penalty can be imposed; under state law, mental retardation is an issue to be decided by the trial court, and the Ohio Supreme Court's procedures in *State v. Lott*, 97 Ohio St.3d 303, 2002 Ohio 6625, 779 N.E.2d 1011, for determining whether a defendant is mentally retarded are unaffected by *Blakely v. Washington* (2004), 542 U.S. 296, 159 L. Ed. 2d 403, 124 S.Ct. 2531.

It was not prosecutorial misconduct for the prosecutor to mention prison gangs and their role in the murder of a corrections officer; the prosecutor appropriately stated that the defendant was a member and leader of one of the gangs in an effort to rebut the defendant's argument that

he was a scared outsider who was manipulated by the gangs.

It was not improper for the state to introduce in the penalty phase of a capital prosecution [**2] an audiotape of the defendant's discussions with other inmates during a prison riot, because the tape was offered to rebut the defendant's mitigating factors that he was mentally retarded and that he had only a minor role in the murder of a corrections officer.

Providing a jury with a transcript of a tape recording is permissible when necessary as a listening aid and when the trial court gives appropriate instructions to the jury that the transcript is not evidence.

COUNSEL: Mark E. Piepmeier, Lucasville Special Prosecutor, and William E. Breyer, Assistant Special Prosecutor, for Appellee.

H. Fred Hoefle and Chris McEvelley, for Appellant.

JUDGES: MARK P. PAINTER, Judge. HILDEBRANDT, P.J., and SUNDERMANN, J., concur.

OPINION BY: MARK P. PAINTER

OPINION:

DECISION.

MARK P. PAINTER, Judge.

[*P1] In April 1993, inmates rioted at the Southern Ohio Correctional Facility in Lucasville, Ohio. On the fifth day of the eleven-day riot, inmates killed Corrections Officer Robert Vallandingham. Defendant-appellant James Were was convicted in 1995 of one count of kidnapping and two counts of aggravated murder for his participation in Vallandingham's kidnapping and death. We affirmed his [**3] convictions. But the Ohio Supreme Court reversed, holding that Were was

deprived of a fair trial because the trial court failed to hold a competency hearing. n1

n1 *State v. Were*, 94 Ohio St.3d 173, 2002 Ohio 481, 761 N.E.2d 591.

[*P2] After a second trial, a new jury again found Were guilty of one count of kidnapping and two counts of aggravated murder. The jury recommended the death penalty for the murder convictions, and the trial court again sentenced Were to death. We affirm.

I. The Case for Murder

[*P3] After the inmates surrendered and the riot was officially over, authorities took over 5,000 photos and 20,000 samples of physical evidence from the prison. Despite this, no physical evidence relating to Vallandingham's death remained. Because of the lack of physical evidence, the state's case against Were consisted almost completely of witness testimony and several "tunnel tapes." The tunnel tapes were audio recordings secretly made of the inmates during the riot. [**4]

[*P4] In sum, the state presented the testimony of nine witnesses. The state presented Lieutenant Howard Hudson of the Ohio State Highway Patrol, who was the chief officer in charge during the riot, and Dr. Patrick Fardal, the pathologist who conducted the autopsy on Vallandingham. The state also called as witnesses six inmates who were either in the prison during the riot or incarcerated with Were after the riot. Finally, the state presented Mark Piepmeier, the Lucasville Special Prosecutor, who testified about previous statements made by Were when he had testified in other Lucasville prosecutions.

[*P5] Lieutenant Hudson testified that in April 1993 he was the Sergeant supervisor of the Office of Investigative Services for the Ohio State Highway Patrol. Hudson explained that the Ohio State Highway Patrol had the authority and responsibility to investigate offenses that occurred on state-owned property, which included the state penal institutions.

[*P6] Hudson testified that, in 1993, the Lucasville prison was the state's maximum-security institution. The riot began shortly after 3:00 p.m. on April 11, 1993. Hudson arrived on the scene at about 6:00 that night, and [**5] except for going home once to shower and change clothes, he was "onsite 24 hours a day for the entire eleven days of the riot."

[*P7] Hudson testified that, soon after the start of the riot, the inmates had taken over the entire L-complex, also called L-block, of the prison. L-complex contained eight cellblocks, and each cellblock contained 80 cells.

The inmates also had taken control of the gymnasium and the recreational yard. When Hudson arrived, several hundred inmates were outside in the yard, and about four hundred were inside L-block. The inmates held twelve correction officers as hostages, including Vallandingham.

[*P8] Prior to the riot, three main gangs existed in the prison. The largest and most powerful gang was the Muslims. They numbered about 90, and their leaders included Carlos Sanders, also known as Hasan, Stanley Cummings, Leroy Ellmore, and James Were. The second largest gang was the Aryan Brotherhood, a white supremacy group headed by George Skatzes and Jason Robb. The Aryans had about 60 members. Other Aryan leaders included Roger Snodgrass, Tramp Johnson, and Jesse Bocook. The third and smallest gang of about 20 members was the Black Gangster Disciples, [**6] led by Anthony Lavelle. Despite the existence of the three gangs, the majority of inmates did not belong to any gang.

[*P9] The Muslims initiated the plan of April 11 to revolt and take over a part of the prison. But once the rebellion began, the other gangs apparently seized the opportunity and joined in. Inmates testified that each of the three gangs quickly staked out separate territory within L-block and held their own hostages. The gangs controlled who came and went within their secured areas.

[*P10] Hudson testified that, in the evening of the first day of the riot, the inmates placed five dead bodies in the yard, all inmates. The inmates also placed two severely injured inmates in the yard and released four of the twelve corrections officers, each of whom had severe head injuries. Late in the evening of the first day, the inmates in the yard were surrounded by authorities and taken back into the part of the prison not under inmate control.

[*P11] Early in the second day of the riot, the inmates placed a sixth inmate body out in the yard. Hudson testified that communication with the inmates began shortly after the inmates took control, but that organized negotiations [**7] did not begin until the second day. Also on the second day, the power and water were turned off inside L-block.

[*P12] Underneath the entire L-complex lay large tunnels that contained all the plumbing and electrical wiring for each individual cell above. Authorities maintained control of these tunnels throughout the riot. On the second day, with the hope of locating the hostages and launching a rescue mission, SWAT members placed Ohio State Highway Patrol listening devices in crevices below the cells. Hudson testified that this equipment--small body-wire packs with microphones--was not very

sophisticated, and that the batteries had to be changed every two or three hours.

[*P13] Shortly after this equipment was installed, the FBI supplied more sophisticated equipment. The FBI had high-speed silent drills and "spike mikes" the size of a pencil eraser. The FBI equipment did not require batteries, and the line from the microphone plugged directly into a tape recorder. The FBI set up ten separate listening stations under L-complex. Hudson testified that a total of 591 90-minute tapes, later called the tunnel tapes, were recorded during the riot.

[*P14] Despite the obvious [**8] differences in philosophies, the leaders of the separate gangs worked together during the riot to negotiate with prison officials. Prison officials spoke with a number of different inmates throughout the negotiations.

[*P15] Hudson testified that they first spoke with an inmate named James Bell, a Muslim. They then spoke with Skatzes, a captain in the Aryan Brotherhood. Additionally, they spoke to Lavelle, the leader of the Black Gangster Disciples. Near the end of the riot, prison officials dealt with Robb, the co-director of the Aryans.

[*P16] On April 14, the fourth day of the riot, the public information officer for the Department of Corrections made a statement to the media in response to a question about threats from the inmates. She stated that there had been threats made throughout the riot, but that threats were a standard part of negotiations. According to Hudson, the media spin placed on her statement made it sound as if the authorities did not take the inmates seriously. The inmates, who were following the news on battery-operated televisions and radios inside the prison, became very angry.

[*P17] The next morning, shortly after 9:00 a.m., Skatzes, who [**9] was handling negotiations at that time, told prison officials that if they did not turn the water and power on by 10:30 a.m., the inmates would kill a guard. Authorities did not turn the power or water on. At 11:10 a.m., four masked inmates carried out into the yard the dead body of Vallandingham wrapped in sheets and blankets.

[*P18] Fardal, the forensic pathologist who performed the autopsy on Vallandingham, estimated that Vallandingham was killed sometime in the morning of April 15, 1993. He also testified that Vallandingham had died by ligature strangulation.

[*P19] During Officer Hudson's testimony, the state played for the jury two of the tunnel tapes. The first tape, number 61, was recorded on the morning of April 15, 1993, from 8:07 until 8:52. The second tunnel tape, number 32, was recorded on April 17, 1993, from 11:30 a.m. to 12:45 p.m.

[*P20] The quality of the tapes was poor, due to the acoustics of the prison and background noise. As an aid, the court allowed the jury to have transcripts of the tunnel tapes that were prepared by Officer Hudson and other investigators.

[*P21] Before trial, Were had objected to the jury having the transcripts of [**10] the tapes while listening to them. The court initially sustained Were's objection. It stated that the transcripts prepared by Hudson would not be admitted. The court then ordered the court reporter to listen to the tapes and make new transcripts.

[*P22] A few days later, the court reporter testified that she had listened to the tapes five or six times and created new transcripts. She stated that she had worked with Hudson to identify the voices. She testified that the tapes were very difficult to hear and understand, and that portions of her transcripts differed from those of Hudson. She also stated that she felt that, given the short time she was given to create the transcripts, they did not "meet a standard that I'm used to as a court reporter."

[*P23] The court then reversed its earlier decision. It decided to admit the transcripts created by Hudson as an aid for the jury. At trial, when the jury listened to the tapes, the court told the jury that the tapes were the evidence and that the transcripts were not. The court told the jurors that the transcripts were given to them only to help them to understand the tapes. The court also instructed the jurors that if there [**11] was a discrepancy between a transcript and the tape, they were to rely only on the tape.

[*P24] At trial, Hudson testified that he had listened to the tapes at least several dozen times in the ten years since the riot and had worked with other investigators to identify the voices on the tapes. Hudson also testified that he was personally familiar with the voices of Were, Lavelle, Robb, Cummings, Snodgrass, and Skatzes. He also testified that investigators had listened to the tapes with several different inmates who had helped to identify the voices. Hudson testified that he and other investigators had spent "months and months, if not years" creating the transcripts. He stated that it was an "ongoing, lengthy process throughout the investigation and then throughout the other hearings and trials." He testified that the transcripts were a reasonably fair, true, and accurate account of the tapes.

[*P25] On tape 61, recorded the morning that Vallandingham was killed, the inmate leaders discussed killing one of the prison guards. On the tape, Were described himself as a hardliner and urged the others to be firmer in the negotiations. Were said, "We give a certain time, a certain [**12] time. If it's not on in a certain time, that's when a body goes out."

[*P26] The state played for the jury the second tunnel tape, number 32, which was recorded on April 17, 1993, from 11:30 a.m. to 12:45 p.m. This was several days after Vallandingham had been killed. On the tape, a recording of another meeting of the inmate leaders, Were argued that the hardliners should control the negotiations.

[*P27] Were said, "If everybody can recall when we first started to see improvement in here, when we sent an officer out there, that is when we started to get to see some improvement. * * * When that officer went out there, that body went out there, that is when they began to see that we is serious, because all along they said that we are not serious. * * * It has been turned over to the hardliners, then when that body was still out there, that is when we started receiving some benefits."

[*P28] Were continued, "They trust the hardliner because that is when they sent our stuff in cause they seen we was not bullshitting. I am putting it just like this (inaudible) now if we have to throw another body, it will let people know the hardliners will put their foot down and (inaudible) [**13] do we have to, no, I don't want to kill another guard. Do you know why, cause what I think. I don't give a damn you understand if some of the hostages die slow, or die at all, if I have to die, or we have to die, so I feel then if I cut off a man's fingers, I will cut the man's hand off and go out there and say now, I am going to let you know we ain't interested in killing your hostages. They'll die slow, since you all want to play games."

[*P29] A short time later, Were said, "They only respect firmness. That is the only thing they going to respect. * * * I don't give a damn if it has to be on national TV, for them to see me personally, cut one of them dudes hands off and give it to them and spit it out of my mouth for them to know how serious I am about what we believe in. I don't care nothing about no electric chair. I don't care nothing about no other case. I care about what the people and only about the people in here. We got what they want and they got what we want. * * * See if you don't put a hardliner on, or we don't stand firm and work together, we are not going to achieve what we are trying to achieve."

[*P30] Hudson testified that the quality of tunnel tape [**14] 32 was better than number 61, but that it was still difficult to understand. He testified that the transcript would help the jury to decipher the voices on the tape. He stated that the transcript was a fair, true, and accurate rendition of the conversations on the tape. Before playing the tape, the court again told the jury that the tape was evidence but that the transcript was not, and that the transcript was provided only to assist the jury in understanding the tape.

II. Inmate Witnesses

[*P31] Steve Macko testified that when the riot began, he heard, amid the commotion, Officer Vallandingham order all the inmates into their cells. Macko then saw Vallandingham go to the phone and eventually lock himself in the officers' bathroom. After Vallandingham secured himself in the bathroom, inmates succeeded in breaking into the cellblock.

[*P32] Macko testified that Skatzes went to a console and opened up the cell doors, freeing all the prisoners in that cellblock. Macko came out of his cell and watched as Were and other inmates took a metal desk and began battering the door to the bathroom containing Vallandingham. After numerous blows with the desk, the inmates broke [**15] through the bathroom door. Macko saw Were, Reginald Williams, and several others remove Vallandingham from the bathroom, handcuff him, and lead him away. Macko testified that he never saw Vallandingham again.

[*P33] Reginald Williams, a Muslim, testified that, during the early part of the riot, he was instructed by Sanders to see if any corrections officers remained in L-1. On his way to L-1, he saw inmates beating on a bathroom door. The inmates told him that a corrections officer had barricaded himself in the bathroom. Williams testified that he told the inmates to stop beating on the door, and that he went to the door and asked who was inside. Vallandingham identified himself. According to Williams, he gave Vallandingham his word as a Muslim that if he came out, nothing would happen to him. Vallandingham came out.

[*P34] Williams testified that one inmate hit Vallandingham in the back of the head, and that other inmates took his keys and watch. Williams testified that he, Were, and Sanders took Vallandingham out of the bathroom and escorted him to the L-6 shower area. They handcuffed him and put a sheet over his head.

[*P35] Williams also testified that, before [**16] the riot, Were was considered one of the leaders of the Muslims in the prison. During the riot, Were wore a striped referee's shirt, signifying that he was allowed access to any area controlled by the prisoners.

[*P36] Williams testified that, during the riot, he acted as a security guard for Sanders and escorted Sanders to the meeting of the inmate leaders held on the morning of April 15. According to Williams, Were was at the meeting, and after it ended, Were was "pretty hyper." Williams testified, "He was talking about that he would do it, he would take care of it, and hardliners was going to take over."

[*P37] Williams further testified that, after the riot, he was sent to a prison in Mansfield, Ohio. In June 1993,

Williams and Were were transported together from Mansfield back to Lucasville. As they approached the prison in Lucasville, Williams noticed that Were looked worried. Williams asked Were what was bothering him. Were whispered to Williams, "I think they know I killed that guard."

[*P38] Roger Snodgrass testified that, throughout the riot, he was chief of security for the Aryan Brotherhood. In that position, Snodgrass attended most of the meetings of [**17] the inmate leaders. He testified that he was at the meeting of the leaders on the morning of April 15, 1993. According to Snodgrass, Were was one of the hardliners who wanted to kill a corrections officer to show that the inmates were serious. Snodgrass testified that a vote was taken, and that Were voted, along with everyone else, to kill a corrections officer. The leaders also decided that Vallandingham would be the guard to be killed, because he had seen Sanders and Cummings kill another inmate when the riot started.

[*P39] Thomas Taylor testified that, during the riot, the Muslims locked him in his cell for his own protection. While in his cell, Taylor could see the corrections officers that the Muslims held hostage, including Vallandingham. Taylor testified that, at a certain point during the riot, many inmates became upset at a statement made by a prison spokeswoman. The inmates said that they had to show some force and had to show what they were willing to do. Soon after that, Taylor saw Were and another man come to Vallandingham's cell, take him out, and lead him away. Taylor testified that, a short time later, he heard that an officer had been killed.

[*P40] Sherman [**18] Simms testified that, during the riot, the Muslims controlled the area containing his cell, so he stayed in a different area. On the morning of April 15, a Muslim inmate named Artiste allowed Simms into his cell for a few minutes to collect some of his personal belongings.

[*P41] To leave his cell area, Simms had to walk by the shower, where he noticed a crowd of people. Simms testified that, as he approached the shower area, he saw Were standing with his back to him and watching what was going on in the shower. As Simms walked by, Were turned around, saw Simms, and asked him what he was doing in the area. Simms told Were that Artiste had let him in, and Were confirmed that with Artiste. While that exchange took place, Simms looked into the shower and saw that a person was being strangled. Simms testified that he first saw two people choking the person with a rope. He then saw an individual put a weight bar against the person's throat.

[*P42] Were then told Simms that he would have to help carry the body out. Were directed the inmates to

wrap the body in sheets. Simms and three other inmates carried the body out to the recreation yard.

[*P43] Charles Austin testified [**19] that he met Were in 2001 when they were both in prison in Youngstown, Ohio. The two had numerous conversations while in their cells and in the recreation area. Austin testified that Were told him that he was the one who had kidnapped, robbed, and killed Officer Vallandingham. Were stated that he had strangled Vallandingham, and that Sanders had instructed him to carry the body out to the yard.

[*P44] Finally, Mark Piepmeier testified that he was the lead special prosecutor for crimes committed during the Lucasville riot. Piepmeier said that Derrick Cannon was an inmate indicted for crimes committed during the riot, and that Were had testified at Cannon's trial on his behalf. According to Piepmeier, Were testified that he was present when Vallandingham was killed.

[*P45] In his defense, Were presented the testimony of four inmates. Thomas Blackmon testified that, in the year after the riot, Sherman Simms and Reggie Williams had each separately told him that the state was pressuring them to say that Were was involved in Vallandingham's death.

[*P46] Gregory Durkin, a member of the Aryan Brotherhood, testified that at one point during the riot he was with Skatzes while [**20] Skatzes was on the phone with the negotiators. Anthony Lavelle handed Skatzes a note to read to the negotiators, informing them that the hardliners were taking over. Durkin testified that he attended all the meetings of the inmate leaders as security for Skatzes, except for several meetings where he had to wait outside the door. He testified that there was never a vote to kill a guard, and that he did not consider Were to have been one of the hardliners.

[*P47] Brian Eskridge testified that, before and during the riot, he was a Gangster Disciple, which was similar to a Black Gangster Disciple. He testified that after the prison spokeswoman made the statement that enraged the inmates, Lavelle told him that they needed to kill a corrections officer to show that they were serious. Eskridge did nothing at the time. The next day, he heard that Vallandingham had been killed. According to Eskridge, the day after the killing, Lavelle was angry at him for not participating in the killing. As punishment, Lavelle had Eskridge beaten up.

[*P48] Aaron Jefferson also testified that, before Vallandingham was killed, Lavelle had approached him about killing a guard.

[*P49] The final [**21] witness called by Were was Lieutenant Hudson. Hudson explained that tunnel tape 60 was recorded on April 16, 1993, from 12:11 a.m.

to 8:36 a.m. Hudson also testified that the transcript for tape 60 was prepared in like manner with the transcripts for tapes 61 and 32. The tape was played and the jury was given the transcript. The trial court again told the jury that the tape was the evidence, and that the transcript was only an aid.

[*P50] On the tape, the inmates discussed their grievances with the prison administration and their goals for the negotiations. Lavelle said to another inmate, "You must understand now where George, Robb, and I, we have to concern ourselves now, with we're going to wind this thing up with our own safety, and especially with us keeping off that death row over there about that guard getting offed. I don't care about the inmates, cause they are going to say we did it."

III. Mental Retardation - A Jury Question?

[*P51] In this appeal, Were advances twenty-four assignments of error. In his first and twenty-third assignments, Were argues that the jury should have participated in the determination of whether he was mentally retarded.

[*P52] [**22] In *Atkins v. Virginia*, the United States Supreme Court held that an execution of a mentally retarded criminal is a cruel and unusual punishment prohibited by the *Eighth Amendment*. n2 In *State v. Lott*, the Ohio Supreme Court established procedures for determining whether an individual is mentally retarded for purposes of escaping execution. n3

n2 *Atkins v. Virginia* (2002), 536 U.S. 304, 153 L. Ed. 2d 335, 122 S.Ct. 2242.

n3 *State v. Lott*, 97 Ohio St.3d 303, 2002 Ohio 6625, 779 N.E.2d 1011.

[*P53] First, the *Lott* court adopted a three-part definition of mental retardation. The definition requires (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 of the dysfunction before the age of 18. n4 The court also held that the defendant bears the burden of establishing that he or she is mentally retarded by a preponderance of the evidence. n5

n4 *Id. at P12*.

[**23]

n5 *Id. at P21*.

[*P54] The *Lott* court then decided that mental retardation is a factual issue that should be resolved by the trial court. The court further held that a trial court should conduct a de novo review of the evidence, including professional evaluations of the defendant. The trial court should then make written findings giving its rationale for its finding on the issue of mental retardation.

[*P55] The *Lott* court specifically held that "these matters should be decided by the court and do not represent a jury question. In this regard, a trial court's ruling on mental retardation should be conducted in a manner comparable to a ruling on competency (i.e., the judge, not the jury, decides the issue)." n6

n6 *Id. at P18*.

[*P56] In *Blakely v. Washington*, the United States Supreme Court held that a trial court cannot enhance a penalty beyond the statutory maximum based on any factors other than [**24] those on which the jury has found the defendant guilty. n7

n7 *Blakely v. Washington* (2004), 542 U.S. 296, 159 L. Ed. 2d 403, 124 S.Ct. 2531.

[*P57] Were notes that the jury did not make any finding concerning whether he was mentally retarded. Instead, the trial court followed *Lott* and held a mental-retardation hearing. The court found that Were had not proved by a preponderance of the evidence that he was mentally retarded. After the jury found the existence of the appropriate aggravating circumstances and recommended the death penalty, the trial court adopted that recommendation as its sentence.

[*P58] Were argues that if a jury had found that he was mentally retarded, he could not have received the death sentence. Therefore, Were contends that non-retardation was an essential fact that the jury should have decided before the court could have imposed a lawful death sentence.

[*P59] But Were misconstrues *Blakely*. The court's finding of non-retardation did not enhance Were's penalty. The finding [**25] of non-retardation simply meant that there was nothing to prevent the court from imposing the maximum penalty of death. The issue of retardation can affect a sentence only by mitigating it. It can never enhance it.

[*P60] To follow Were's logic, for a court to impose the death penalty, a jury would have to find beyond a reasonable doubt that a defendant was not mentally retarded. This would be an almost impossible burden. It would be especially difficult when a defendant, such as Were, refused to take any tests or to speak with any professional sent to evaluate him.

[*P61] We conclude that the procedures set forth in *Lott* for determining whether a defendant is mentally retarded are unaffected by *Blakeley*. Under *Lott*, a court, not a jury, should decide whether a defendant is mentally retarded. Therefore, we overrule Were's first and twenty-third assignments of error.

IV. Mental-Retardation Hearing

[*P62] In his second assignment of error, Were argues that the trial court's finding that he was not mentally retarded was based upon insufficient evidence and was contrary to the manifest weight of the evidence.

[*P63] After the jury found Were [**26] guilty of kidnapping and aggravated murder, the court held a hearing to determine whether Were was mentally retarded. Were admitted the videotaped testimony of Jacalyn McCullough, a prison teacher with a special-education background who had worked with Were while he was incarcerated.

[*P64] McCullough testified that all students in the prison took tests to initially assess their academic level. She said that Were tested in the lowest of three classifications, and that in reading, math, and writing, he functioned at approximately a second- or third-grade level.

[*P65] McCullough testified that she worked with Were for over a year, and that he was a hard-working and conscientious student during that time. But despite his hard work, Were was not able to advance much and found even simple assignments frustrating.

[*P66] McCullough testified that Were had trouble comprehending and retaining abstract concepts. She said that Were was never able to do work at a level that would have allowed him to pass the pre-GED test, which was essentially a sixth-grade-level test. She further testified that she believed, based on Were's comprehension and reading ability, that in a normal [**27] school setting he would have been a special-education student. She also believed that he would have been considered developmentally handicapped.

[*P67] Were also introduced the transcripts of previous testimony given by Daniel Coleman, Danny Grant, and John William Harris. All three were inmates with Were at various times.

[*P68] Coleman testified that he helped Were with his school work. He testified that Were had trouble un-

derstanding directions and remembering explanations. He also said that Were had asked him to explain legal papers that he received while in prison.

[*P69] Grant and Harris both testified that they helped Were with his legal filings. Grant said that Were had difficulty understanding explanations and needed things repeated before he understood. Harris testified that he had to explain things to Were several times before he understood. He also said that Were would sometimes ask the same question five minutes after getting an answer. Grant said that he would draft Were's legal motions, and that Were would simply copy the motions in his own handwriting.

[*P70] Were called Dr. David Hammer, a psychologist and expert on mental retardation. Hammer [**28] stated the three-part definition of mental retardation. Hammer explained that, in general, an IQ score around 70 qualified a person as mentally retarded. Hammer testified that Were had taken two IQ tests as a child. When he was seven, Were scored a 69. When he was twelve, Were again scored a 69.

[*P71] Hammer testified that, based on McCullough's testimony, he thought that Were had sub-average ability in several adaptive behaviors. Specifically, Hammer noted Were's difficulty in reading comprehension and his inability to do simple tasks, such as make change for a dollar. Hammer testified that, in his opinion, Were was mildly mentally retarded.

[*P72] Dr. Timothy Rheinscheld, a clinical psychologist with a specialization in mental retardation, also testified on Were's behalf. Rheinscheld testified that, in his opinion, Were was mentally retarded. Rheinscheld testified that his opinion was based on the two IQ scores of 69 measured before Were was 18. He also based his opinion on deficits in Were's adaptive behavior as revealed by McCullough's testimony and by Were's prison record.

[*P73] On cross-examination, both Hammer and Rheinscheld testified that the type of IQ [**29] test that Were took as a child was the Stanford-Binet. Both testified that the Wechsler test was the current standard IQ test. Both acknowledged that, on the Wechsler test, a score below 70 was considered mentally retarded, but that on the Stanford-Binet test, a score below 68 was considered mentally retarded. Both also acknowledged that claims of cultural bias had been made against the IQ tests administered when Were was a child. These charges had led to changes in the tests and to the adoption of the adaptive-behavior aspects of the mental-retardation definition.

[*P74] The state presented only one witness at the mental-retardation hearing. Dr. Michael Nelson, a clini-

cal psychologist, testified that, in his opinion, Were was not mentally retarded.

[*P75] Nelson testified that on the Stanford-Binet test, a person with a score of 69 would not be classified as mentally retarded. He also testified that concerns about cultural bias within the IQ tests had led to the adoption of the other factors to determine mental retardation. Nelson stated that cultural bias tended to depress the IQ scores of minorities such as Were. Nelson also stated that most of the IQ test scores had [**30] a margin of error of plus or minus five points.

[*P76] Nelson further testified that he did not find that Were had any serious deficits in adaptive functioning. Nelson noted that Were was considered a leader in a prison gang, and that he had "somewhat stable work functioning over three years" while out of prison.

[*P77] The trial court found that Were had not proved by a preponderance of the evidence that he was mentally retarded. The trial court stated that Were's IQ scores of 69 were unreliable, given the cultural bias of the tests at the time Were took them. The court also said that even if the test scores were reliable, a score of 69 was not indicative of mental retardation. In its written findings, the court noted that Were had risen to leadership positions while in prison. The court also found that Were was articulate in court and wrote and presented numerous motions. Finally, the court found that Were had "no significant limitations in communication, daily living skills and socialization."

[*P78] An appellate court will not reverse a trial court's finding on mental retardation provided that there was credible and reliable evidence supporting the trial court's [**31] conclusion. n8

n8 See *State v. Hicks* (1989), 43 Ohio St.3d 72, 79, 538 N.E.2d 1030; *State v. Williams* (1986), 23 Ohio St.3d 16, 19, 23 Ohio B. 13, 490 N.E.2d 906.

[*P79] All three experts agreed that, at the time that Were took the IQ tests, the tests were culturally biased against minorities. Nelson testified that the effect of this bias would have been to artificially lower a minority's score. All three experts agreed that any IQ test would likely have a margin of error of about plus or minus five points. Nelson testified that Were's two test scores of 69 were not scores reflecting mental retardation.

[*P80] Nelson testified that finding a serious deficiency in adaptive behavior required more than just anecdotal evidence. He noted that Were not only was a

member of the Muslim prison gang, but had a position of authority in the gang. Nelson also stated that Were was involved in writing motions for the court and was able to comprehend the impact of his statements.

[*P81] We [**32] conclude that there was credible and reliable evidence to support the trial court's finding that Were was not mentally retarded. Therefore, we overrule Were's second assignment of error.

IV. Jury Instruction on Death Penalty

[*P82] In his third assignment of error, Were contends that the trial court erred when it did not instruct the jury that the death penalty was not an option if the jury found that Were was mentally retarded.

[*P83] As we have previously discussed, the Ohio Supreme Court in *Lott* established procedures for determining whether a defendant is mentally retarded. The trial court followed the *Lott* procedures. The court found that Were was not mentally retarded. It was not an issue for the jury to determine. Therefore, there was no reason for the court to instruct the jury that the death penalty was not an option if it found Were to be mentally retarded.

[*P84] We note that the trial court did allow the jury to consider Were's claim of mental retardation as a mitigating factor in the penalty phase. And the court told the jury that before it could recommend the death penalty, the state had to prove beyond a reasonable doubt that the [**33] aggravating factors outweighed the mitigating factors.

[*P85] In his fourth assignment of error, Were argues that the trial court erred when it did not instruct the jury that the state was required to prove beyond a reasonable doubt that Were was not retarded before he could receive the death penalty. Were's argument has no merit. Given that the state was *not* required to prove beyond a reasonable doubt that Were was not retarded before the jury could recommend the death penalty, the trial court did not err in omitting that instruction. Therefore, we overrule Were's third and fourth assignments of error.

V. Penalty Phase

[*P86] In his fifth assignment of error, Were argues that the evidence in the penalty phase established that he was mentally retarded, and that he could not therefore receive the death penalty. In his sixth assignment of error, he claims that the aggravating circumstances did not outweigh the mitigating factors beyond a reasonable doubt.

[*P87] The jury returned its guilty verdict for aggravated murder with two specifications. First, the jury found that Were had committed aggravated murder pur-

posely and with prior calculation and design [**34] while he was a prisoner in a detention facility. Second, the jury found that Were had committed aggravated murder purposely and with prior calculation and design during a kidnapping. These specifications, found beyond a reasonable doubt, served as the aggravating factors in the penalty phase.

[*P88] In mitigation, Were presented evidence of his mental retardation. He introduced the testimony of McCullough, the prison teacher, and two psychologists, Drs. Hammer and Rheinscheld. All three echoed their previous testimony at the mental-retardation hearing (which was not in front of the jury). The state presented no evidence concerning Were's alleged mental retardation.

[*P89] Were also introduced as a mitigating factor that he was not the principal offender, that is, the actual killer of Vallandingham. In addition, the court instructed the jury to consider any other factors that weighed in favor of a sentence other than death.

[*P90] Were argues that without any evidence from the state to rebut his evidence of mental retardation, the jury had no choice but to find Were mentally retarded. That is not so.

[*P91] The state cross-examined each of Were's witnesses. And [**35] the Ohio Supreme Court has stated that expert testimony, even when uncontradicted, is not necessarily conclusive. n9 The state also introduced the tunnel tapes, allowing the jury to assess for itself Were's mental abilities. We conclude that the evidence presented by Were in this phase did not establish that he was mentally retarded.

n9 See *State v. Dickerson* (1989), 45 Ohio St.3d 206, 210, 543 N.E.2d 1250.

[*P92] In addition, evidence of Were's alleged mental retardation was presented to the jury only as a mitigating factor. Even if the jury had determined that Were had some mental deficiency, under statute, "the existence of any of the mitigating factors * * * does not preclude the imposition of a sentence of death." n10

n10 R.C. 2929.04(C).

[*P93] We also reject Were's contention that [**36] he had only a "minor" role in Vallandingham's murder. Were admitted to both Reggie Williams and Charles Austin that he had killed Vallandingham. The evidence showed that Were was involved in the decision

to kill Vallandingham and in carrying that decision out. We conclude that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt.

[*P94] Therefore, we overrule Were's fifth and sixth assignments of error.

VI. Competency

[*P95] In his next two assignments of error, Were argues that he was legally incompetent to stand trial. Therefore, he contends that the trial court violated his due-process rights and should not have overruled his motion for a new trial.

[*P96] Were's previous convictions for kidnapping and murdering Vallandingham were overturned by the Ohio Supreme Court because he did not receive a competency hearing. Upon remand, the trial court held a competency hearing.

[*P97] As he had prior to his first trial, Were refused to cooperate with any professionals sent to evaluate him. Therefore, the state presented two witnesses, both prison employees who had numerous interactions with Were. Alan Barr, a correctional [**37] program specialist, and Marva Allen, a unit manager, testified that Were's behavior was always responsive and appropriate. Both said that Were had a good understanding of prison rules. Allen stated that prison workers kept a log of Were's activities, and that all of his behavior was normal. Allen also testified that Were could fill out prison forms on his own and that he knew he was being tested for competency.

[*P98] Were presented the testimony of the three inmates, Coleman, Grant, and Harris, who later testified at his mental-retardation hearing. All three testified as they would at the retardation hearing. All three said that Were had difficulty understanding and remembering instructions and explanations. Coleman testified that Were was able to read and write. Were also introduced the testimony of a previous attorney, John Mackey, who stated that he believed that Were exhibited signs of paranoia.

[*P99] The trial court then found that, by a preponderance of the evidence, Were was competent to stand trial. A few months later, the court reopened the competency hearing. The court allowed Were to present two additional witnesses, Jacalyn McCullough and Dr. David Hammer. [**38]

[*P100] Both provided similar testimony to that given at Were's later mental-retardation hearing. McCullough testified that Were had difficulty with learning. Dr. Hammer testified that Were's low IQ and paranoia interfered with his ability to cooperate with his attorneys.

After this additional testimony, the trial court again held that Were was competent to stand trial.

[*P101] In a competency hearing, a defendant is presumed competent to stand trial. n11 The burden was on Were to prove by a preponderance of the evidence that he was incapable of understanding the nature and objective of the proceedings against him or of presently assisting in his defense. n12 We will not reverse a trial court's finding on competency provided that there was credible and reliable evidence supporting the trial court's conclusion. n13

n11 See *State v. Were*, 94 Ohio St.3d 173, 174, 2002 Ohio 481, 761 N.E.2d 591.

n12 Id.

n13 See *State v. Hicks* (1989), 43 Ohio St.3d 72, 79, 538 N.E.2d 1030; *State v. Williams* (1986), 23 Ohio St.3d 16, 19, 23 Ohio B. 13, 490 N.E.2d 906.

[**39]

[*P102] The trial court stated that much of Were's evidence at the competency hearing related to his intelligence, but not necessarily to his competence. The trial court then found that Were was capable of communicating with his lawyers when he chose to. We conclude that there was credible and reliable evidence supporting the trial court's pretrial conclusion that Were was competent to stand trial. We also conclude that Were's post-trial motion for a new trial based on his incompetency was properly denied.

[*P103] Therefore, Were's seventh and eighth assignments of error are overruled.

VII. Alleged Prosecutorial Misconduct

[*P104] In his ninth assignment of error, Were argues that there were several instances of prosecutorial misconduct in the penalty phase of his trial. To address these arguments, we must determine (1) whether the prosecutor's conduct was improper, and (2) if so, whether it prejudicially affected Were's substantial rights. n14 The touchstone of the analysis "is the fairness of the trial, not the culpability of the prosecutor." n15 We will not deem a trial unfair if it appears clear beyond a reasonable doubt that the jury would have recommended [**40] the death sentence even without the alleged misconduct. n16

n14 See *State v. Lamar*, 95 Ohio St.3d 181, 2002 Ohio 2128, 767 N.E.2d 166, at P121; *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 14 Ohio B. 317, 470 N.E.2d 883.

n15 See *State v. Skatzes*, 104 Ohio St.3d 195, 2004 Ohio 6391, 819 N.E.2d 215, at P181, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 71 L. Ed. 2d 78, 102 S.Ct. 940.

n16 See *State v. Treesh*, 90 Ohio St.3d 460, 464, 2001 Ohio 4, 739 N.E.2d 749.

[*P105] During the penalty phase, the prosecutor stated, "But for the Muslims, the Black Gangster Disciples, the Aryans, Officer Vallandingham would be alive to this day. They sat and plotted his murder and put it into effect. Nothing in James Were's background, his past, his character, diminished or affected that. The defense psychologist even told you that he knew what he was doing was wrong, that he would have known, that his degree of mental state, his degree of learning, that [**41] to participate in the death of a fellow human being was wrong, and he knew it." The court overruled the defense's objection to the statement.

[*P106] Were now argues that the reference to the prison gangs would have caused fear in the average person and suggested to the jury that Were should die because he was involved with a gang.

[*P107] But with the statement viewed in a larger context, the prosecutor was responding to an argument Were's counsel had made. In her opening statement, Were's counsel urged the jury to think of him as a scared fourth-grader, "surrounded by violence and weapons and egged on by leaders who didn't want to get their own hands dirty."

[*P108] The prosecutor responded, "A picture was painted in opening statement, picture this through James Were's eyes. Fourth-grade boy out there in that hallway with weapons and violence and the chaos that was going on. He tests to the ability of a fourth or fifth grader, so look at it through that point of view. But you heard him speak and he wasn't a scared fourth or fifth grader out there in the hallway trying to hide and protect himself and save his life. He was one of the leaders of this entire thing. [**42] But for the Muslims, the Black Gangster Disciples, the Aryans, Officer Vallandingham would be alive to this day * * *."

[*P109] The prosecutor's mention of the gangs and Were's involvement was not improper. The prosecutor rebutted Were's assertion that he was an outsider manipulated by the gangs. The prosecutor tried to bring

attention to the evidence that showed that Were was not only in the Muslim gang, but a leader, and that he had a vote in the decision to kill Vallandingham.

[*P110] Were also argues that his background and character were mitigating factors. He asserts that if they were not considered as mitigating factors, they should not have been mentioned or considered at all. But the purpose of the state's reference to Were's background and character was to assert that they were not mitigating. The state did not attempt to argue that they were aggravating circumstances.

[*P111] Were further argues that the prosecutor mischaracterized Dr. Rheinscheld's testimony about when he had listened to the tunnel tapes. On cross-examination, Rheinscheld testified that he had only listened to one of the tunnel tapes. He said that he did not remember what Were had said [**43] on the tape. He also stated that he had listened to the tape while driving to court to testify that morning. He did say that he had listened to it a "little bit" the week before.

[*P112] In argument, the prosecutor said that the doctor had not reviewed the two tapes that the jury had listened to. Upon objection, the prosecutor clarified, stating that Rheinscheld had heard part of one tape in the car while he was on the way to testify. We conclude that the state did not mischaracterize Rheinscheld's testimony. There was nothing incorrect or improper in the prosecutor's statement.

[*P113] Were's next objection is that the prosecution played portions of a tunnel tape for the jury during the penalty phase.

[*P114] In *State v. Gumm*, the Ohio Supreme Court stated, "Counsel for the state at the penalty stage of a capital trial may introduce and comment upon * * * evidence rebutting the existence of any statutorily defined or other mitigating factors first asserted by the defendant." n17

n17 See *State v. Gumm*, 73 Ohio St.3d 413, 1995 Ohio 24, 653 N.E.2d 253, syllabus.

[**44]

[*P115] The state played portions of tunnel tape 32 in the penalty phase to rebut Were's mitigating factors. Those factors were that he was mentally retarded and that he had only a minor role in Vallandingham's death. Therefore, it was not improper for the state to play the tunnel tape during the penalty phase.

[*P116] But Were further argues that, by playing the tape, the state based its argument for the death penalty on nonstatutory aggravating circumstances. Were

contends that the playing of the tunnel tape focused the jury's attention on the nature and circumstances of the offense. And under *State v. Wogenstahl*, "it is improper for prosecutors in the penalty phase of a capital trial to make any comment before a jury that the nature and circumstances of the offense are 'aggravating circumstances.'" n18

n18 See *State v. Wogenstahl*, 75 Ohio St.3d 344, 1996 Ohio 219, 662 N.E.2d 511, paragraph two of the syllabus.

[*P117] But Were does not specifically explain how the prosecution [**45] implied to the jury that the nature and circumstances were aggravating circumstances. The tunnel tapes were, of course, related to the nature and circumstances of Were's offenses. But they also rebutted Were's assertions that he was mentally retarded and that he did not play a significant role in the murder.

[*P118] Furthermore, the record shows that the state and the trial court correctly identified the statutory aggravating circumstances. And the state did *not* directly state or imply that the nature and circumstances of Were's offenses were aggravating circumstances. Therefore, playing the tunnel tape was not prosecutorial misconduct.

[*P119] Finally, Were argues that the cumulative effect of the prosecutor's prejudicial statements rendered his death sentence unconstitutional. Because we have found no prosecutorial misconduct, there was no cumulative error.

[*P120] Therefore, we overrule Were's ninth assignment of error.

VIII. Irrelevant Evidence in Penalty Phase

[*P121] In his tenth assignment of error, Were argues that irrelevant evidence was admitted during the penalty phase. Were contends that tunnel tape 32 and the autopsy photographs were [**46] irrelevant because they were unrelated to either of the aggravating circumstances.

[*P122] We have already determined that the admission and playing of tunnel tape 32 was proper. It was offered to rebut Were's assertions of mental retardation and that he had a minor role in the murder.

[*P123] In addition, the state offered tunnel tape 32 to prove the aggravating circumstance of prior calculation and design. In *Gumm*, the Ohio Supreme Court held that it was proper for the state at the penalty stage of a

capital trial to introduce any evidence relevant to the aggravating circumstances. n19

n19 See *State v. Gumm, supra, syllabus*.

[*P124] The state admitted one autopsy photograph showing that Vallandingham had been strangled. The state argued that death by strangulation was indicative of prior calculation and design.

[*P125] Both the tape and the one autopsy photograph admitted during the penalty phase were relevant to the aggravating circumstances. Therefore, we overrule [**47] Were's tenth assignment of error.

IX. Death Penalty

[*P126] In his eleventh assignment of error, Were argues that his death sentence was disproportionately severe when compared with sentences imposed for similar offenses. This argument has no merit.

[*P127] The Ohio Supreme Court has already addressed this issue in *State v. Steffen*. n20 In *Steffen*, the court held, "The proportionality review required by *R.C. 2929.05(A)* is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed." n21 The Ohio Supreme Court has summarily rejected this same argument numerous times since. n22 We therefore overrule this assignment of error.

n20 See *State v. Steffen (1987)*, 31 Ohio St.3d 111, 31 Ohio B. 273, 509 N.E.2d 383.

n21 *Id.* at paragraph one of the syllabus.

n22 See *State v. Robb*, 88 Ohio St.3d 59, 86, 2000 Ohio 275, 723 N.E.2d 1019; *State v. Lamar*, 95 Ohio St.3d 181, 2002 Ohio 2128, 767 N.E.2d 166, at P23; *State v. Hoffner*, 102 Ohio St.3d 358, 2004 Ohio 3430, 811 N.E.2d 48, at P87; *State v. Mink*, 101 Ohio St.3d 350, 2004 Ohio 1580, 805 N.E.2d 1064, at P110.

[**48]

[*P128] In his twelfth assignment of error, Were claims that the trial court failed to enter a sufficient sentencing opinion. Specifically, he contends that the court did not explain its reasons for finding that aggravation outweighed mitigation. He also argues that the court found the nature and circumstances of the offense to be aggravating circumstances.

[*P129] In *State v. Skatzes*, the Ohio Supreme Court stated, "A trial court is not required to accept or assign weight to mitigating evidence. Even if the trial court failed to explain its weighing process, inadequate explanations do not create reversible error. Moreover, any error in the trial court's sentencing opinion can be cured by our independent review." n23

n23 See *State v. Skatzes, supra, at P176*.

[*P130] Based on this, we conclude the trial court sufficiently explained its reasons supporting its findings. We also are firmly convinced that the trial court did not transform the nature and circumstances of the crime into aggravating [**49] circumstances. Therefore, we overrule Were's twelfth assignment of error.

[*P131] In his thirteenth assignment of error, Were argues that the death penalty is unconstitutional. Were offers nine reasons why the death penalty is unconstitutional. Seven of the claims are as follows: (1) the death penalty is without penalogical justification; (2) the death penalty is imposed in a discriminatory manner; (3) the double use of the underlying felony is unconstitutional; (4) the weighing process in mitigation is unconstitutional; (5) the Ohio statutes fail to provide for mercy; (6) *Crim.R.11(C)(3)* encourages guilty pleas; and (7) the standards for appellate review are insufficient.

[*P132] The Ohio Supreme Court has already addressed and rejected these seven claims. n24 They require no further discussion from us.

n24 See *State v. Beuke (1988)*, 38 Ohio St.3d 29, 38-39, 526 N.E.2d 274. See, also, *State v. Steffen, supra, at 125-126*; *State v. Brown (1988)*, 38 Ohio St.3d 305, 320-321, 528 N.E.2d 523.

[**50]

[*P133] Were also claims that the Ohio Supreme Court's decisions in *Gumm* and *Wogenstahl* have rendered the death penalty unconstitutional. Specifically, he contends that *Wogenstahl* requires the jury to weigh improper, nonstatutory aggravating circumstances.

[*P134] In *Wogenstahl*, the court stated that *Gumm* had not made Ohio's death-penalty scheme unconstitutional. n25 The court then clarified its holding in *Gumm*, explicitly stating, "In the penalty phase of a capital trial, the 'aggravating circumstances' against which the mitigating evidence is to be weighed are limited to the specifications of aggravating circumstances set forth in *R.C. 2929.04(A)(1) through (8)* that have been alleged in the

indictment and proved beyond a reasonable doubt." n26 The court further acknowledged that the state can present evidence concerning the nature and circumstances of the aggravating circumstances. But the court admonished, "It is wholly *improper* for the state to argue or suggest that the nature and circumstances of the offense are 'aggravating circumstances.'" n27

n25 See *State v. Wogenstahl, supra, at 355-356.*

[**51]

n26 See *State v. Wogenstahl, supra, paragraph one of the syllabus.*

n27 *Id. at 355.*

[*P135] Were contends that a jury, having heard the nature and circumstances of the aggravating circumstances, would then have difficulty weighing *only* the statutory aggravating circumstances against the mitigation. We disagree. A jury is given explicit instructions about what it should consider. The jury should be able and is presumed to follow the trial court's instructions. n28

n28 See *State v. Ahmed, 103 Ohio St.3d 27, 2004 Ohio 4190, 813 N.E.2d 637, at P93.*

[*P136] Finally, Were argues that the death penalty is unconstitutional because the Ohio Supreme Court can overturn a conviction as being against the manifest weight of the evidence in a capital case only where the crime was committed after January 1, 1995. He claims that because the Ohio Supreme Court cannot review [**52] his weight-of-the-evidence claim, he cannot receive a full and fair appeal of his convictions and sentence.

[*P137] The Ohio Supreme Court has addressed this issue. In two other Lucasville riot cases involving the death penalty, the court acknowledged that it could only review manifest-weight claims for crimes committed after January 1, 1995. n29 The court then stated that it could treat a manifest-weight claim as a challenge to the legal sufficiency of the evidence. Therefore, Were's arguments have no merit, and we overrule his thirteenth assignment of error.

n29 See *State v. Sanders, 92 Ohio St.3d 245, 254, 2001 Ohio 189, 750 N.E.2d 90; State v. Skatzes, supra, at P134.*

X. Sufficiency and Weight

[*P138] In his fourteenth and fifteenth assignments of error, Were argues that his convictions were supported by insufficient evidence and were against the manifest weight of the evidence. In his sixteenth assignment, he argues that the trial court erred when it denied his [**53] *Crim.R. 29* motion for acquittal.

[*P139] In criminal cases, the legal concepts of sufficiency of the evidence and weight of the evidence are distinct. n30 A challenge to the sufficiency of the evidence attacks the adequacy of the evidence presented. Whether the evidence is legally sufficient to sustain a conviction is a question of law. n31 The relevant inquiry in a claim of insufficiency is whether any rational factfinder, viewing the evidence in a light most favorable to the state, could have found the essential elements of the crime proved beyond a reasonable doubt. n32

n30 See *State v. Thompkins, 78 Ohio St.3d 380, 386, 1997 Ohio 52, 678 N.E.2d 541.*

n31 *Id.*

n32 See *State v. Jenks (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.*

[*P140] A challenge to the weight of the evidence attacks the credibility of the evidence presented. n33 When evaluating the manifest weight of the evidence, we must review the entire [**54] record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. n34 The discretionary power to reverse should be invoked only in exceptional cases "where the evidence weighs heavily against the conviction." n35

n33 See *State v. Thompkins, supra, at 387.*

n34 See *id.; State v. Martin (1983), 20 Ohio App.3d 172, 175, 20 Ohio B. 215, 485 N.E.2d 717.*

n35 See *State v. Martin, supra*.

[*P141] While Were concedes that the crimes against Vallandingham were committed, he claims that he was not responsible. But the state presented ample evidence linking Were to the crimes.

[*P142] Steve Macko testified that he saw Were and others break down the door to the bathroom where Vallandingham was hiding at the start of the riot. [**55] He watched Were and others handcuff and lead Vallandingham away. Reginald Williams testified that he, Were, and others took Vallandingham out of the bathroom, handcuffed him, and removed him to a secure site. Roger Snodgrass testified that Were was one of the inmate leaders who voted to kill a corrections officer. Thomas Taylor testified that, shortly before Vallandingham was killed, he saw Were and another man take him out of his cell and lead him away. And Sherman Simms testified that he saw Were supervising a group of men strangling a person.

[*P143] In addition, several months after the murder, Were told Williams, "I think they know I killed that guard." And several years after the murder, Were confided in Charles Austin that he had kidnapped, robbed, and killed Officer Vallandingham.

[*P144] The state also presented the two tunnel tapes. Were himself was heard describing how the inmates were not taken seriously until "that body went out there." He also stated that he did not want to kill another guard.

[*P145] We conclude that a rational factfinder, viewing the evidence in a light most favorable to the state, could have found that the state had proved beyond [**56] a reasonable doubt that Were had committed the offenses of kidnapping and aggravated murder. Therefore, the evidence presented was legally sufficient to sustain his convictions.

[*P146] Were makes much of the cross-examination of each of the inmate witnesses. Obviously, all had previous convictions for serious crimes. Many admitted that they did not initially come forward with their accounts of what they had witnessed during the riot. Most admitted that they had received or would receive some recognition from the state for their participation in Were's trial.

[*P147] But the jury was free to believe some, all, or none of the testimony of the witnesses. Our review of the record does not persuade us that the jury clearly lost its way or created a manifest miscarriage of justice in finding Were guilty of his crimes.

[*P148] Therefore, we overrule these three assignments of error.

XI. Tunnel Tapes

[*P149] In his seventeenth assignment of error, Were claims that the trial court erred when it overruled his motion to suppress the tunnel tapes. In his eighteenth assignment, he argues that allowing the tunnel tapes into evidence violated his right to private [**57] communications.

[*P150] In *State v. Robb*, the Ohio Supreme Court considered the same argument. n36 *Robb* involved the same factual background of the Lucasville prison riot and the tunnel tape recordings. In *Robb*, the appellate court had held that the tunnel tapes should have been suppressed. The Ohio Supreme Court reversed.

n36 See *State v. Robb, supra, at 65-68*.

[*P151] In *Robb*, the state had argued that rioting inmates did not have a reasonable expectation of privacy. The state had claimed that it was, therefore, not bound by the statutory limits on warrantless recordings of oral conversations.

[*P152] The Ohio Supreme Court admitted that privacy expectations were not a part of the pre-1996 statutory scheme in former *R.C. 2933.51 et seq.* The court then stated, "However, we cannot reasonably interpret former *R.C. 2933.51 et seq.* as granting a statutory right to privacy in communications between rioting [**58] inmates. The General Assembly could not have envisioned creating such a right in a state prison under siege. Granting privacy rights in these circumstances makes no sense in view of the state's interest in operating a prison and, in this case, restoring order, saving the lives of hostages and nonrioting prisoners, and protecting state property. [A] statute should not be interpreted to yield an absurd result.'

[*P153] "Nevertheless, we hold that former *R.C. 2933.51* did not protect the inmate conversations in this case, but for an entirely different reason. Ohio law provided (and still provides) a specific statutory exception for federal electronic interceptions. Former *R.C. 2933.52(B)(1)* stated that Ohio restrictions on electronic interceptions do not apply to an interception that is 'made in accordance with section 802 of the 'Omnibus Crime Control and Safe Street Act of 1968,' 82 Stat. 237, 254, 18 U.S.C. 2510 to 2520 (1968), as amended.'

[*P154] "In this case, FBI agents, acting under the authority of federal law, installed and monitored the electronic interception and recording devices that [**59] were used. Federal law explicitly defines 'oral communi-

cations' as only those 'exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.'" n37

n37 *Id. at 66.*

[*P155] The court went on to explain that the inmates had no right to expect any privacy in their cells. It stated, "The idea that rioting prisoners are entitled to privacy in plotting the deaths of guards and other prisoners is absurd." Therefore, the inmates' oral communications were not protected under the federal law. n38

n38 *Section 2510(2), Title 18, U.S.Code*

[*P156] The *Robb* court also stated clearly that federal law, not state law, should control. The court noted that inmates "repeatedly asserted in negotiations that they wanted to consult with FBI officials and wanted the FBI [**60] to oversee the negotiations and surrender to protect their civil rights." n39

n39 *See State v. Robb, supra. at 67.*

[*P157] Under the authority of *Robb*, we conclude that it was not error to deny Were's motion to suppress the tunnel tapes. Also, admission of the tapes into evidence did not violate Were's right to private communications. Therefore, we overrule his seventeenth and eighteenth assignments of error.

XII. Transcripts of Tunnel Tapes

[*P158] In his nineteenth assignment of error, Were argues that the trial court erred when it allowed the jury to receive and review the transcripts of the tunnel tapes.

[*P159] Where there are no "material differences" between a tape admitted into evidence and a transcript given to the jury as a listening aid, there is no prejudicial error. n40

n40 *See State v. Waddy (1992), 63 Ohio St.3d 424, 445, 588 N.E.2d 819.*

[**61]

[*P160] In *State v. Mason*, the trial court allowed the jury to have the transcripts of a tape recording during its deliberations. A detective had testified that the tran-

scripts were accurate. And the trial court had instructed the jury that the transcripts were "merely an aid to facilitate listening." The court also instructed the jury that if it found any difference between the tape and transcript, "You should disregard the transcript and use your own judgment as to what was said." The Ohio Supreme Court held there was no prejudicial error.

[*P161] We have similarly held that providing a jury with a transcript is permissible when necessary as a listening aid and when the trial court gives appropriate instructions to the jury that the transcripts are not evidence. n41

n41 *See State v. Crawford (1996), 117 Ohio App.3d 370, 380, 690 N.E.2d 910 (Painter, J., concurring); see, also, State v. Miller, 1st Dist. No. C-010543, 2002 Ohio 3296, at P8; In re Garrett (July 31, 1996), 1st Dist. No. C-950243, 1996 Ohio App. LEXIS 3233; State v. Lansaw (Feb. 5, 1999), 1st Dist. No. C-980067, 1999 Ohio App. LEXIS 298.*

[**62]

[*P162] Were does not challenge the accuracy of the transcripts given to the jury. He complains only that a comparison between the transcripts created by Lieutenant Hudson and those created by the court reporter showed some differences.

[*P163] But Hudson testified that he and his office had spent months, if not years, listening repeatedly to the tapes in an attempt to make the transcripts as accurate as possible. It was unlikely, given the poor quality of the tapes, that the court reporter could have duplicated Hudson's extensive efforts in a mere weekend by herself. Hudson testified that the transcripts were fair and accurate renditions of the conversations on the tapes.

[*P164] In addition, the trial court clearly and repeatedly instructed the jury that the tapes were evidence and that the transcripts were not. The court told the jurors that the transcripts were to be used only as an aid in understanding the tapes. The court further instructed the jurors that if there was a discrepancy between a transcript and a tape, they were to rely only on the tape.

[*P165] We conclude that there was no prejudicial error in allowing the jury to have the transcripts of [**63] the tapes. Therefore, we overrule Were's nineteenth assignment of error.

XIII. Evidence Excluded

[*P166] In his twentieth assignment of error, Were claims the trial court erroneously excluded evidence.

[*P167] Aaron Jefferson, a defense witness, testified that, shortly before Vallandingham was killed, Anthony Lavelle had approached him about killing a guard. The state objected on hearsay grounds to Jefferson stating exactly what Lavelle had said to him. The court sustained the objection. Jefferson was allowed to explain only the gist of the conversation with Lavelle.

[*P168] Were now argues that the statement by Lavelle was admissible as an exception to the hearsay rules. He claims it was an admission against Lavelle's penal interest under *Evid.R. 804(B)(3)*.

[*P169] The general rule is that hearsay is not admissible. n42 But a statement made against the declarant's interest, such as an incriminating statement, is admissible, *as long as the declarant is unavailable as a witness.* n43

n42 *Evid.R. 802.*

n43 *Evid.R. 804(B)(3).*

[**64]

[*P170] There is nothing in the record to explain why Lavelle would not have been available to testify at Were's trial. In fact, the transcript shows that when the defense proffered Lavelle's statement for the record, the prosecutor stated, "Judge, Lavelle is up at Warren right now. I could have him down here at 1 o'clock." Given that Lavelle was available as a witness, his statement to Jefferson was not admissible as a statement against interest.

[*P171] In addition, as the state points out, virtually all the details of Lavelle's conversation with Jefferson were elicited in Jefferson's testimony anyway. Therefore, little or no prejudice would have resulted if the exclusion of the statement had been improper.

[*P172] Accordingly, we overrule Were's twentieth assignment of error.

XIV. Jury Question and Instructions

[*P173] In his twenty-first assignment of error, Were argues that the trial court incorrectly answered a question from the jury during the jury's deliberations.

[*P174] During the guilt-phase deliberations, the jury wrote the following question to the court: "Our question is about inference. Inference was discussed under the 'aggravated [*65] murder of Vallandingham during the kidnapping of Vallandingham,' under the section that explains and discusses purpose. (It was only under 'purpose' that inference was discussed.) Can we

infer/use inference for all of the charges and apply inference to any charge, or to any definition. And use inference at any time to a decision or verdict."

[*P175] The court responded to the jury, "You have my instructions in writing, and if you want to look at them, at the beginning of the instructions, I told you that evidence may be of two kinds; direct or circumstantial or a combination of the two." The court then explained what direct evidence and circumstantial evidence were.

[*P176] The court continued, "So you may reasonably infer, if you care to do so, all of the evidence in this trial, all of the evidence in the trial. But if you do make that inference, the inference that you end up with must be established beyond a reasonable doubt. But, yes, the answer to your question is. can we infer/use inference for all of the charges and apply inference to any charge and any definition and use inference at any time to come to a decision or verdict? The answer is yes." This was the correct [**66] response--to refer the jury to the written instructions and to further explain in different language.

[*P177] At trial, Were did not object to the court again telling the jury the definitions of circumstantial and direct evidence. Were objected to an instruction that the jury could "use an inference on the aggravated murder charge."

[*P178] Were apparently now objects to the portion of the original jury instruction that stated "the purpose with which a person does something may be inferred by you from the manner in which it was done, the means or the weapon, if any, that was used, and all of the other facts and circumstances. However, I can tell you that if a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the intent to cause death may be inferred by you. However, you are never required to make that inference. Whether you do or not is up to you."

[*P179] Were argues that he was not the "hands-on" killer of Vallandingham. He claims that the court should not have instructed the jury that it was permitted to infer his purpose from the conduct of the "hands-on" killer.

[*P180] But the court did not instruct the jury [**67] to infer Were's purpose from someone else's conduct. The court correctly told the jury that it could infer Were's purpose and intent from the weapon or any other fact and circumstance of the killing. The Ohio Supreme Court has stated, "Intent may be inferred from the circumstances surrounding the crime." n44

n44 See *State v. Herring*, 94 Ohio St.3d 246, 266, 2002 Ohio 796, 762 N.E.2d 940.

[*P181] The trial court also clearly stated that it was optional whether the jury chose to use inference. There was nothing in the court's instruction that could have reasonably been understood to relieve the state of its burden of persuasion on an element of the offense. n45 In addition, the court's statement concerning the use of inference to establish purpose was taken almost verbatim from the Ohio Jury Instructions. n46

n45 See *State v. Gross*, 97 Ohio St.3d 121, 2002 Ohio 5524, 776 N.E.2d 1061, at P102.

[**68]

n46 4 Ohio Jury Instructions (2004), Section 503.01.

[*P182] Therefore, we overrule Were's twenty-first assignment of error.

[*P183] In his twenty-second assignment of error, Were claims that the trial court failed to instruct the jury on the law of aiding and abetting and complicity. Our review of the record reveals that the trial court did not make such an error.

[*P184] In the jury instructions, the court stated, "An individual is an accomplice if he aids, if he supports, if he assists, if he encourages, if he cooperates with, if he advises, or if he incites, urges, the principal offender in the commission of the crime; and also, if he shares the criminal intent of the principal. However, mere association with the principal or presence at the scene of the crime, that is not enough. Rather, the State must establish that this defendant took some affirmative action to assist, encourage, or participate in the crime by some act of his, by some word of his, or by some gesture of his. Participation with a criminal intent may be inferred by you from the [**69] defendant's action, by the defendant's presence, by the defendant's companionship and conduct, either before or after the commission of the particular offense involved.

[*P185] "Therefore, to prove complicity, the State must prove beyond a reasonable doubt, one, that an act or acts on the part of Mr. Were contributed to the aggravated murder or the kidnapping of Vallandingham; and, two, that there was a specific intent on the part of Mr. Were to aid in that aggravated murder and the kidnapping of Vallandingham. Now this theory of law of complicity, aiding and abetting. I want you to remember that,

because that is the essence of what the State of Ohio claims Mr. Were did."

[*P186] Because there was nothing improper about the court's jury instructions, we overrule Were's twenty-second assignment of error.

XV. Ineffective Assistance of Counsel

[*P187] In his twenty-fourth and final assignment of error, Were argues that he received ineffective assistance of counsel.

[*P188] To establish ineffective assistance of counsel, Were must demonstrate that his counsel's performance fell below an objective standard of reasonable competence, and that there was a [**70] reasonable probability that, but for such deficiency, the outcome of the trial would have been different. n47 Judicial scrutiny of counsel's performance must be highly deferential. n48 A court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. n49

n47 See *Strickland v. Washington* (1984), 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraphs two and three of the syllabus.

n48 See *Strickland v. Washington*, *supra*, at 689; *State v. Bradley*, *supra*, at 142.

n49 *Id.*

[*P189] Were has apparently filed his complaints about ineffective assistance of counsel directly with the Ohio Supreme Court. In the papers he filed, Were alleges that his appellate counsel refused to include instances of his trial counsel's wrongdoing in his appeal. He claims that his appellate counsel was paid off by his trial counsel to cover up both [**71] trial counsel's and the state's wrongdoing during his trial. But Were offers no proof to support this claim.

[*P190] More specifically, Were claims that his trial counsel refused to address the fact that his indictment was improper. But included in the papers Were filed are letters to Were from his trial counsel explaining that she had investigated his indictment as he had wished and had found no problems with it.

[*P191] Were also complains that his trial attorneys did not "raise the issue" that he was sent to a different correctional facility for a 30-day observation as part

of his competency evaluation. But, again, a letter to Were from his trial counsel discussed the issue. Were's counsel told him that because he had refused to talk to any mental-health professionals, the court's only option was to order Were to be observed as closely as possible to help with the competency determination. His trial counsel told him that if he did not want to be observed and would be willing to cooperate with a mental-health professional, she would ask the court to grant an independent evaluation.

[*P192] Were further complains that he had wanted other witnesses at his competency [**72] hearing. These witnesses included John Mackey, his first trial attorney, and Jacalyn McCullough, his prison teacher. But the record shows that Were's counsel did present both of these witnesses at Were's competency hearing.

[*P193] Were lists other complaints, but nothing in Were's letter to the Supreme Court demonstrates that his trial counsel's performance fell below an objective standard of reasonable competence. In addition, Were has failed to demonstrate how he was prejudiced by any of the alleged deficiencies.

[*P194] We conclude that Were has failed to show that he received ineffective assistance of counsel at his trial. Therefore, we overrule his twenty-fourth assignment of error.

[*P195] Because we have overruled each of Were's assignments of error, we affirm the trial court's judgment and sentence.

Judgment affirmed.

HILDEBRANDT, P.J., and SUNDERMANN, J., concur.

THE CONSTITUTION OF THE UNITED STATES
AMENDMENTS TO THE CONSTITUTION

US CONST AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor
cruel and unusual punishments inflicted.