IN THE SUPREME COURT OF OHIO

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

NOTICE OF ADDITIONAL AUTHORITY OF APPELLANT CLIFTON WHITE, III

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NOTICE OF ADDITIONAL AUTHORITY OF APPELLANT CLIFTON WHITE, III

Pursuant to S.Ct. Prac. R. IX Section 8, Appellant, through counsel, submits the following authority in support of oral argument:

1. State v. Yarbrough, Case No. 96CR000023 (Shelby County, OH 2/28/07).

Respectfully submitted,

DAVID H. BODIKER
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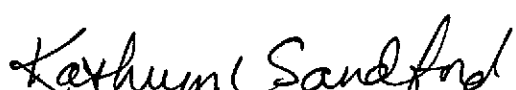

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **NOTICE OF ADDITIONAL AUTHORITY OF APPELLANT CLIFTON WHITE, III** 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 20th day of April, 2007.

COUNSEL FOR APPELLANT

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IN THE COMMON PLEAS COURT OF SHELBY COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO	*	CASE NO. 96CR000023
Plaintiff-Respondent	*	
vs.	*	
KEVIN YARBROUGH	*	DECISION ORDER/ENTRY
Defendant-Petitioner	*	

* *

This matter is before this Court on the Defendant's Petition for Post-Conviction Relief. Defendant Yarbrough was convicted of Aggravated Murder in this Court and following a mitigation hearing was sentenced to death on December 22, 1997. Defendant's current Petition raises a claim of mental retardation under *Atkins v. Virginia* 536 U.S.304 (2002), thus making him ineligible for the death penalty.

An evidentiary hearing was held on October 19, 2006. Yarbrough presented the testimony of Dr. David Hammer, Dr. Beverly Gordon, Sam Yarbrough, Jr. and Emma Gresham. The State of Ohio (Respondent) presented no mental retardation expert during the hearing but instead offered, and which the Court accepted, the mitigation transcript testimony of Dr. Douglas Johnson. Respondent also offered the live testimony of Yarbrough's former girlfriend, Elizabeth Johnson. Both parties have submitted their post hearing briefs and the matter is now before this Court for decision.

The Standard for Mental Retardation

In *Atkins v. Virginia*, the United States Supreme Court declared it was unconstitutional to execute persons with mental retardation, but left it to the individual states to set standards for

determining mental retardation. 536 U.S. 304, 321 (2002). In *State v. Lott*, the Ohio Supreme Court set the following standard, based on "clinical definitions of mental retardation":

(1) significantly subaverage intellectual functioning.

(2) significant limitation in two or more adaptive skills, such as communication, self-care, and self-direction, and

(3) onset before the age of 18.

Lott, 97 Ohio St. 3d 303, 305, 779 N.E.2d 1011, 1014 (2002). This standard adopts the 1992 American Association of Mental Retardation (AAMR) and the American Psychiatric Association (APA) definitions of mental retardation.

The 1992 AAMR definition states that "[m]ental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skills areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." (AAMR, 9th Ed. P. 1; Tr. 49).

The APA's definition of mental retardation published in the Diagnostic and Statistical Manual – IV (DSM-IV-TR) is "significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home-living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. The onset must occur before age 18 years." (DSM-IV-TR at p. 39). The APA (DSM-IV-TR) has the same definition of mental retardation as the AAMR. (Tr. 51-52). Furthermore, the APA generally utilizes the most current version of the AAMR's definition of mental retardation to arrive at its definition. (Id.).

After *Atkins* was decided in 2002, the AAMR published an updated definition of mental retardation: "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." (AAMR 10th Ed. P. 23; Tr. 50). This new definition rearranged the previous 10 categories of adaptive behavior skills into three broad areas. (Id.). To be found to have adaptive behavior skills deficits under this new definition, a person must

have deficits in one of the three newly labeled areas, conceptual, practical, and social; or a low "overall score on a standardized measure of conceptual, social, and practical skills." (Id.).

Dr. Hammer diagnosed Kevin Yarbrough as a person with mental retardation. Dr. Hammer expressed this opinion, to a reasonable degree of psychological certainty, in his written report and during his testimony. (Tr. 126-27; Pet. Ex. 5, p. A-75).

At Yarbrough's evidentiary hearing, this Court qualified him as a psychological expert in the area of mental retardation after Respondent stipulated to his credentials. (Tr. 47; Pet. Ex. 4, A-69-75). Dr. Hammer testified that he reviewed the following records in the evaluation process of Yarbrough: Educational Records – Elementary, Secondary, and Paine College; Mitigation transcript; Prior post-conviction records; Shelby County Police interviews; Department of Rehabilitation and Corrections records; Report of Dr. Beverly Gordon; Deposition of Sam Yarbrough; and Deposition of Emma Gresham. (Tr. 57). The Educational Records and Report of Dr. Beverly Gordon are contained in Petitioner Yarbrough's Exhibits For *Atkins* Post-Conviction Hearing. (Ex. 1 and 3, respectively). Respondent stipulated to the admission of Yarbrough's Exhibits For *Atkins* Post-Conviction Hearing records into evidence. (Tr. 171).

Dr. Hammer conducted clinical interviews of Yarbrough at Mansfield Correctional Institution on November 3, 2003 and August 9, 2004. (Tr. 56; Pet. Ex. 4, A-69-75). During these interviews, Dr. Hammer administered the Wechsler Adult Intelligence Scale, third Edition (WAIS-III); the Scales of Independent Behavior-Revised (SIB-R), and the Wechsler Individual Achievement Test – Second Edition (WIAT-II). (Tr. 58, 99, 118).

Dr. Hammer also conducted clinical interviews with the following persons who were familiar with Yarbrough during his developmental and post-developmental stages (i.e., before and after the age of eighteen): Ms. Evelyn Stringer (maternal aunt), Ms. Betty Kemp (maternal aunt), and Ms. Emma Gresham (former special education teacher).

Significantly Subaverage Intellectual Functioning

Dr. Hammer concluded, to a reasonable degree of psychological certainty, that Yarbrough suffers from significantly subaverage intellectual functioning, that this serious limitation was present when Dr. Hammer evaluated Yarbrough, and it was present before Yarbrough turned 18.

The legal, psychological, and psychiatric standards defining mental retardation require evidence of significantly subaverage intellectual functioning. This aspect of the three-prong mental retardation diagnostic matrix focuses on a person's Intellectual Quotient (IQ) as measured by standardized, psychometrically normed testing instruments.

"Significantly subaverage intellectual functioning" is broadly defined as an IQ measured lower than two standard deviations below the norm on an appropriate, standardized IQ test. For most IQ tests, the "norm" is 100, and each "deviation" is 15 points; thus, "two standard deviations below the norm" means an IQ test in the range of 70, taking into account the standard error of measurement at work in any standardized test. See *Atkins,* 536 U.S. at 309, Fn. 5; citing 2 B. Sadock & V. Sadock, Comprehensive Textbook of Psychiatry (2952) (7th Ed. 2000).

Dr. Hammer determined that Kevin Yarbrough has a Full Scale IQ of 69 as measured by the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III). (Tr. 68-69; 77). This meets the AAMR 1992 and 2002 definition for significantly subaverage intellectual functioning as well as the APA's DSM-IV-TR definition (Tr. 69). All three definitions require an IQ two standard deviations below the mean, considering the standard error of measurement. (Tr. 69; Pet. Ex. 5 at P. 5, A-74). The mean of the WAIS-III is 100, and a standard deviation is 15 points; thus, an IQ of 70 qualifies as mentally retarded. (Tr. 61). Yarbrough's Full Scale IQ of 69 falls below 70 and within the "Mild Mental Retardation" range. (Tr. 69; Pet. Ex. 5 at p. 3, A-72).

The WAIS-III is the leading standardized intelligence test currently used in the psychological field, and is referenced in the AAMR and APA manuals. (Tr. 58-59; AAMR 10th Ed. P. 59-62; DSM-IV-TR p. 4). The Verbal section of the WAIS-III consists of the following six subtests: vocabulary, similarities, arithmetic, digit span, information, and comprehension. (Tr. 87-88). The Verbal section tests a person's verbal conceptual abilities. (Id.). The Performance section of the WAIS-III consists of the following five subtests: picture completion, digit symbol, block design, matrix reasoning, and picture arrangement. The Performance section tests a person's non-verbal conceptual abilities. (Tr. 59). Yarbrough obtained the following scores for the WAIS-III:

Full Scale IQ:	69
Verbal IQ:	76
Performance IQ:	69

These scores fall into the mild mental retardation range. (Tr. 87).

A review of Yarbrough's prior IQ testing corroborates Dr. Hammer's result. In 1964, when Yarbrough was age 6 years, 10 mos., he was referred for intellectual evaluation by his school teacher due to poor academic performance and obtained a score of 54 on the California Mental Maturity Scale. On June 3, 1964, Dr. R. V. Heckel conducted a formal intelligence test. Yarbrough obtained a Full Scale IQ of 70 on the Wechsler Intelligence Scale for Children (WISC). (Tr. 79; Pet. Ex. 1 at A-4; Pet. Ex. 5 at P. 1, A-70). At age 14, Dr. Peter Cranford administered the WISC and Yarbrough was reported to have a Full Scale IQ of 68. (Tr. 80).

For purposes of the mitigation hearing at Yarbrough's 1997 capital trial, Dr. Douglas Johnson reported Yarbrough's Full Scale IQ as 86 on the Wechsler Adult Intelligence Scales – Revised (WAIS-R). (Tr. 82). Yarbrough was tested with the WAIS-R again in 1999 by Dr. Michael Gelbort. (Tr. 83). Yarbrough's Full Scale IQ, at that time, was reported at 78. (Id.). Yarbrough was 40 and 42 years old, respectively, at the times of Drs. Johnson's and Gelbort's testing.

Respondent argues that Defendant Yarbrough has been tested at least five times since age 7 with results varying from a low of 68 to a high of 86. Specifically, he was tested in June of 1964 with an IQ of 70, in October of 1971 with an IQ of 68, in 1997 with an IQ of 86, in 1999 with an IQ of 78, and in 2004 with an IQ of 69. Respondent contends that the early tests were given at a time that IQ tests were culturally biased against minorities and could have lowered the test results and cited *State v. Were* in support thereof. Accordingly, the Respondent contends that based on this history or track record, who is to say what an IQ test now or in the future might result. In fact, it argues that if the lifetime scores of Yarbrough were averaged, his IQ scores would average 74.2.

The Court does not find Respondent's argument persuasive for several reasons. First of all, Respondent's Drs. Johnson and Gelbort failed to conduct proper mental retardation evaluations. At the time of their evaluations, the AAMR's 1992 clinical definition of mental retardation required: (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. Mental Retardation: Definition, Classification, and Systems of Supports, p. 1 (American Association on Mental Retardation, 9th ed. 1992). The evaluations of Drs. Johnson and Gelbort fail to address the adaptive skills and onset prongs of the mental retardation definition.

Drs. Johnson and Gelbort both relied solely on IQ score to render their opinions that Yarbrough is not a person with mental retardation. This is an unacceptable and insufficient means of rendering an opinion as to whether Yarbrough is a person with mental retardation. (Tr. 91-92); See also *Lott*, 97 Ohio St. 3d at 305, 779 N.E.2d at 1014 ("While IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination on this issue.").

Furthermore, the Court finds the intelligence testing by Drs. Johnson and Gelbort are problematic for other reasons. First, the two WAIS-R tests administered by Drs. Johnson and Gelbort were given after the WAIS-R was revised and the WAIS-III was released. The WAIS-R was released in 1981 and the WAIS-III was released in 1997. Intelligence tests must be updated and re-normed as society has been proven to have improved intelligence as time passes. (Tr. 60). During the time before a test is re-normed it has been established that psychologists must account for the improved intelligence of society. This is known as the "Flynn Effect." The "Flynn Effect" indicates that IQ test scores rise on the average of six points or more over a twenty year period, i.e., .33 per year. (Tr. 62, 143-43; Pet. Ex. 5 at p. 2, A-71). Second, the WAIS-R had a highest confidence interval on the Full Scale score of plus or minus eight points (Tr. 140, 159).

Third, Dr. Johnson's score appears problematic as Dr. Gelbort administered the same exam two years later and scored Yarbrough's IQ significantly lower. Dr. Johnson measured Yarbrough's Full Scale IQ at 86. Dr. Gelbort measured Yarbrough's Full Scale IQ at 78. This disparity alone points to problems that eviscerate the reliability of both of these IQ tests.

Intelligence becomes fairly stable after age 9 to 12 years old. (Tr. 80-81). Other than the 1997 and 1999 tests, Yarbrough scored in the mild mental retardation range on each intelligence test as a child. (Tr. 79-87; Pet. Ex. 1 at A-4; Pet. Ex. 5 at p. 1, A-70). The eight point difference can only be explained by an administration or scoring error as Dr. Gelbort's score should have been higher than Dr. Johnson's test results under the "Flynn Effect." (Pet. Ex. 5 at p. 2, A-71). Therefore, absent some scoring or administration error, the 1997 and 1999 WAIS-R tests should have measured IQ scores more consistent with Yarbrough's childhood IQ scores.

Furthermore, Dr. Johnson's testimony pre-dated *Atkins*. Dr. Johnson was engaged to evaluate Yarbrough's general mental health and testify as to his observations. Dr. Johnson was not asked to evaluate Yarbrough for the purposes of assessing mental retardation. He did not

employ the proper tests to diagnose mental retardation, nor did he testify as to the adaptive skills and onset prongs of the mental retardation definition as required by the 1992 AAMR manual. As for Dr. Gelbort, he likewise did not evaluate Yarbrough's adaptive skills or onset issues as he was asked to perform a neuropsychological evaluation. (Tr. 86). This is a different type of evaluation from a mental retardation evaluation. (Id.). For the foregoing reasons, the Court finds Dr. Johnson's and Dr. Gelbort's measures of Full Scale IQ to be unreliable.

Significant Limitations in Adaptive Skills

Dr. Hammer concluded, to a reasonable degree of psychological certainty, that Yarbrough suffers from significant limitations in adaptive skills; that these limitations exist concurrently with his intellectual functioning deficits now, and were present before Yarbrough turned 18.

The legal, psychological, and psychiatric standards defining mental retardation require evidence of significant limitations in adaptive skills. This aspect of the three-prong mental retardation diagnostic matrix focuses on a person's adaptive skills as measured by standardized, psychometrically normed testing instruments.

Under the AAMR's 1992 definition, adaptive behavior deficits are defined as "limitations in two or more of the following applicable adaptive skills areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work." (AAMR 9th Ed. P. 1). Likewise, the APA defines adaptive behavior skills deficits as "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home-living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." (DSM-IV-TR at p. 39).

In 2002, the AAMR published an updated definition of mental retardation. The new definition requires "significant limitations* * *in adaptive behavior as expressed in conceptual, social, and practical adaptive skills." (AAMR 10th Ed. P. 23). This new definition rearranged the previous 10 categories of adaptive behavior skills into three broad areas. (Tr. 50). To be found to have adaptive behavior skills deficits under the new definition, a person must have deficits in one of the three newly labeled areas or "an overall score on a standardized measure of conceptual, social, and practical skills." (Id.).

Importantly, it is understood, if not expected, that adaptive strengths will co-exist with adaptive weaknesses. (Tr. 54-55; AAMR 10th Ed. P. 8). That means that a person with deficits so significant as to merit a mental retardation diagnosis may well have co-existing strengths that, to the untrained eye, seem inconsistent with a mental retardation diagnosis (especially a mild mental retardation diagnosis).

According to the AAMR, significant limitations in adaptive behavior should be established through the use of standardized testing. (Tr. 97-98; AAMR 10th Ed. P. 83). This testing must be normed on the general population including people with disabilities and people without disabilities. To have adaptive skills deficits, there must be a scoring of at least two standard deviations below the mean in either (a) one of the three types of adaptive behavior: conceptual, social, or practical skills; or (b) an overall score that establishs significant limitations in adaptive behavior sufficient for diagnosis.. (AAMR 10th Ed. P. 23).

The AAMR explains that "regardless of the purpose of diagnosis (e.g. service eligibility, benefits eligibility, legal eligibility), adaptive behavior should be measured with a standardized instrument that provides normative data on people without mental retardation." (AAMR, 10th Ed. P. 83).

Dr. Hammer utilized the Scales of Independent Behavior-Revised (SIB-R), which is one of the adaptive behavior tests the AAMR "consider[s] to have adequate psychometric properties and contain normative data on the general population." (Id. At p. 77). The SIB-R qualifies as significant limitations in adaptive behavior.

The SIB-R is comprised of a number of subtests, each assessing a different skill, starting with easier items and progressively becoming more difficult (Tr. 101-02). An overall score, called the "Broad Independence Score" is arrived at based on the total performance on those subtests. (Tr. 101-02, 106). Each question falls within a subtest or cluster of questions in the SIB-R. The scores for each item within a cluster are added together. (Tr. 101). The scores are then statistically converted to an age-equivalent number which is understandable to a lay person. (Id.). One individual item within a domain cannot be used to make a judgment concerning the person's abilities – all of the items within the subtests need to be taken into account by way of factoring them into the SIB-R's psychometrically normed, statistically sound formula for determining how an individual compares to the norm. (Tr. 101-05).

Dr. Hammer's unrefuted SIB-R test scores confirm that Yarbrough suffers from adaptive behavior skills deficits that fall within the range of person with mental retardation.

Dr. Hammer determined that Yarbrough's overall score on the SIB-R was 68, placing him in the mild mental retardation range. (Tr. 105-07; Pet. Ex. 5 at p. 4, A-73). Also, his score in the conceptual domain was more than two standard deviations from the mean, placing Yarbrough within the mild mental retardation range. (Tr. 105-07). Under the 1992 AAMR and APA definitions, Yarbrough was more than two standard deviations from the mean within the social skills, communication, and functional academics domains. (Tr. 105-06, 119-20; Pet. Ex. 5 at p. 4-5, A-73-74).

Yarbrough's Broad Independence Score (or full scale score) on the SIB-R was 68. (Tr. 105; Pet. Ex. 5 at p. 4, A-73). The mean on the SIB-R is 100, and the standard deviation is 15 points. (Tr. 106). Thus, Yarbrough's score of 68 places him more than two standard deviations below the mean, establishing that he is in the mildly mentally retarded range for adaptive skills. The Broad Independence Score of 68 is equivalent to the functioning of a 14 year old. (Tr. 111). Yarbrough's scores on the four clusters of the SIB-R were as follows:

Motor Skills	99
Social/Communication	59
Personal Living	73
Community Living	62

(Tr. 105-06, 110-11; Pet. Ex. 5 at p. 4, A-73). The Social/Communication and Community Living scores are within the mildly mentally retarded range. (Tr. 106, 110-11; Pet. Ex. 5 at p. 4, A-73). Within the clusters, Yarbrough's age equivalent scores were as follows:

Community living area, time and punctuality	8 years, 10 months
Money and value	13 years, 1 month
Work Skills	14 years, 3 months
Language comprehension level	8 years, 11 months
Language expression	13 years, 6 months
Social interaction	9 years, 3 months

The higher scores on the Motor Skills and Personal Living Skills are consistent with the findings of Dr. Hammer from his review of the records, interviews of family members, the Deposition of Sam Yarbrough, Jr., Deposition of Emma Gresham, and the testimony of Ms. Johnson. (Tr. 112-13). Higher scores in these categories simply prove that adaptive strengths co-exist with adaptive weaknesses.

With respect to the 1992 AAMR and APA's DSM-IV categories of adaptive skills, the Courts finds that Yarbrough has significant limitations in at least, but not limited to, the following: (1) functional academics: evidenced by the results on the WIAT-II and school records (Tr. 119-20; Pet. Ex. 5 at p. 5, A-74); (2) social skills: demonstrated by the result on the SIB-R for the domain of Social/Communication cluster (Tr. 105-06, 110-11; Pet. Ex. 5 at p. 4, A-73); and (3) communication: demonstrated by the result on the SIB-R for the domain of Social/Communication cluster. (Tr. 105-06, 101-11; Pet. Ex. 5 at p. 4, A-73).

Dr. Hammer followed the accepted protocol for administering the SIB-R. He did not rely only on Yarbrough's self-reported information. Rather, Dr. Hammer relied on information he received from what psychologists call "reliable informants" – those who know and/or knew the individual over a period of time. Dr. Hammer administered the SIB-R to Yarbrough on November 3, 2003. Dr. Hammer then confirmed Yarbrough's self-reporting using the records he had reviewed and his interviews of Ms. Stringer, Ms. Kemp, and Ms. Gresham. (Tr. 99-101). In addition, Dr. Hammer reviewed the video deposition testimony of Sam Yarbrough, Jr. and Emma Gresham, and he heard and responded to Respondent's witness, Elizabeth Johnson.

In addition to administering the SIB-R test to Yarbrough, Dr. Hammer administered the Wechsler Individual Achievement Test – 2nd Edition (WIAT-II). The results on the WIAT-II confirm Dr. Hammer's conclusion that Yarbrough manifests intellectual and adaptive skills deficits that fall within the range of those with mental retardation.

The WIAT-II is a test of functional academics (i.e. an academic achievement test). Functional academics is an adaptive skill listed in the 1992 AAMR definition and DSM-IV definition of mental retardation. (Tr. 115). The WIAT-II complements the SIB-R for testing functional academics as it tests achievement level in an educational setting, which is not covered by the SIB-R. (Tr. 115, 117). This test consists of six subtests in the areas of Word Reading, Reading Comprehension, Pseudoword Decoding, Numerical Operations, Math Reasoning, and Spelling. (Tr. 116, 118). The number of items answered correctly are tabulated and then a statistical table for the person's age reports a corresponding grade-equivalent number, percentile rank, and other meaningful data. The WIAT-II is a valid and reliable objective test that is relevant to both the intellectual functioning and adaptive behavior skills prongs of the definition of mental retardation. (Tr. 115-16). The WIAT-II Standard Score of 100 is average for an age group, similar to IQ scores. (Tr. 119).

On the WIAT-II, Yarbrough's test results yielded the following results.

Subtest	Std. Score	Grade Equivalent	Percentile
Word Reading	40	2:7	<0.1
Reading Comprehension	40	1:5	<0.1
Pseudoword Decoding	65	1:0	1.0
Numerical Operations	66	3:3	1.0
Math Reasoning	48	3:1	<0.1
Spelling	54	2:5	0.1

(Tr. 119-20; Pet. Ex. 5 at p. 4, A-74). The "responses on the majority of the Written Expression subtests were especially poor and they did not yield valid scores other than in the area of Spelling." (Tr. 119-20; Pet. Ex. 5 at p. 4, A-73). According to Dr. Hammer, "[t]hese achievement scores demonstrate that Yarbrough has a grasp of the basic, rote academic skills in reading, math and spelling, however, he has very limited ability in the application of these skills for the intermediate and advanced academic skills. His academic achievement ranges from a grade equivalent of the first grade to the beginning of the third grade." (Tr. 119-20; Pet. Ex. 5 at p. 5, A-74).

The Court finds Yarbrough's stark results on the WIAT-II converge with his test results on the WAIS-III (IQ prong) and the SIB-R (adaptive skills prong), confirming Dr. Hammer's opinion that Yarbrough is a person with mental retardation.

Mental Retardation Manifested and Originated Before Eighteenth Birthday

The inclusion of the "onset before age 18" requirement into the definition of mental retardation is to demonstrate "that there was something going on during the developmental period." (Tr. 93). This necessitates some evidence of significant limitations in both intellectual functioning and adaptive behavior skills during that period. (Id.) Sources of information for determining onset prior to age 18 include records and anecdotal evidence. (Tr. 94). Yarbrough took several academic and psychological testes before age 18. Yarbrough's scoring on each of those tests is consistent with his current diagnosis of mental retardation. (Tr. 94; Pet. Exs. 1 at A-4-8; 5 at p. 1, A-70).

Consistency between records, anecdotal evidence, and testing is crucial to a valid and reliable diagnosis. (AAMR 10th Ed. P. 86). Dr. Hammer reviewed Yarbrough's records from childhood, along with interviewing his family and elementary school teacher, and these sources indicate an onset of mental retardation prior to age 18. (Tr. 125-26). Yarbrough's records

contain numerous examples of significantly subaverage intellectual functioning and adaptive behavior skills deficits throughout his lifetime, as indicated below (Tr. 120-26):

Age 6

- Completes the California Mental Maturity Scale – scored 54
- Completes the Wechsler Intelligence Scale for Children – Full Scale IQ 70

Ages 8 to 14 (Primary School)

- Placed into Educable Mental Retardation classes for grades 1-8 (Pet. Ex. 1, P. A-3)

Age 14 (8th Grade)

- Completes the Wechsler Intelligence Scale for Children – Full Scale IQ 68
- Completes the Wide Range Achievement Test (Testing determine performance level on a-grade equivalent)

Arithmetic	2.3 grade level
Spelling	2.6 grade level
Reading	2.4 grade level

Ages 15 to 18 (Secondary School)

- Placed in Pre-Vocational class – which is special education. (Pet. Ex. 1, p. A-1).

(Tr. 121-23). In addition to the above-referenced records, Yarbrough's school teacher provided anecdotal evidence that he was properly placed in EMR and Pre-Vocational classes. (Tr. 126; Gresham Depo. p. 17-18).

Ms. Emma Gresham was an educable mental retardation (EMR) school teacher at Levi White Elementary School in Augusta, Georgia. (Gresham Depo. p. 4; Pet. Ex. 1, p. A-3). Although Yarbrough was good with his hands, at age 14 he was reading at a third grade level. (Gresham Depo. p. 16; See also S. Yarbrough Depo. pp. 10, 12, 41 (noting Yarbrough was slower thanthe rest of the kids)). Normally, a 14 year old would be in ninth grade. (Gresham Depo. p. 28). Yarbrough's grades at age 14, which were B's, are equivalent to B's in third grade. (Gresham Depo. p. 27). Thus, Yarbrough was functioning at a third grade level rather than at the ninth grade level as other 14 year olds. Since Yarbrough's IQ was about 70, he was properly placed in EMR classes. (Gresham Depo. p. 11, 17-19).

With evidence proving that Yarbrough's intellectual functioning and adaptive behavior deficits were at the mental retardation level prior to the age of 18, the Court finds that Yarbrough meets the final prong of mental retardation under Lott.

The Court is cognizant of Respondent's reliance on the test results of Drs. Johnson and Gelbort and of their opinions. However, the Court finds that they were not qualified to make determinations regarding Yarbrough's status as a person with mental retardation and that they both failed to follow the psychological community's standards and required procedures for making such a determination. Their results and opinions are therefore unreliable and not well founded.

Accordingly, based upon the evidence adduced, the Court finds that the Petitioner has sustained his burden of proof; that he is a person with mental retardation and as a result is excluded from the death penalty under *Atkins*. The Petitioner's Petition is hereby granted.

The Clerk of this Court is directed to deliver a copy of this Entry to Counsel for the Defendant, the Defendant, the Prosecuting Attorney, the Shelby County Sheriff's Department, the Sidney Police Department, Dave Schmidt – Shelby County Jail, the Prison Warden, and the Court.

IT IS SO ORDERED.

Judge John D. Schmitt, Retired Judge
Recalled to Service pursuant to Ohio
Constitution, Art. IV, Section 6(C) and
R.C. 141.16 and assigned to the Shelby
County Common Pleas Court for this matter.