

IN THE SUPREME COURT OF OHIO

STATE OF OHIO :
Appellee, :
vs. : Case No. 2010-0944
JEREMIAH JACKSON :
Appellant. : **This is a Capital Case**

**ON APPEAL FROM THE
CUYAHOGA COUNTY COURT OF COMMON PLEAS
CASE NO. CR-09-532145-A**

**APPELLANT JEREMIAH JACKSON'S APPLICATION FOR REOPENING
PURSUANT TO S.CT. PRAC. R. 11.06**

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A. Procedural History

This Court denied Jackson’s Direct Appeal on September 2, 2014. Jackson subsequently filed a Motion for Reconsideration and to Stay the Issuance of the Mandate on September 11, 2014. Jackson’s Motion for Reconsideration was denied on April 8, 2015. A certified copy of the Judgment Entry and the Mandate was sent to the Clerk of the Court of Common Pleas for Cuyahoga County on April 8, 2015. S. Ct. Prac.R. 18 .04 (A)(1). Appellant Jeremiah Jackson requests that this Court grant his Application for Reopening based upon the ineffective assistance of counsel during Jackson’s direct appeal. S.Ct. Prac. R. 11.06 and *State v. Murnahan*, 63 Ohio St. 3d 60 (1992).

B. Jackson’s direct appeal counsel were constitutionally ineffective.

The Due Process Clause guarantees effective assistance of counsel on a criminal appeal as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985). Appellate counsel must act as an advocate and support the cause of the client to the best of their ability. See, e.g., *Anders v. California*, 386 U.S. 738 (1967); *Penson v. Ohio*, 488 U.S. 75 (1988). Appellate counsel failed to raise meritorious claims in Jackson’s Direct Appeal proceedings. See Exhibit A; Propositions of Law

I, II, III, and IV *infra*. Appellate counsel's failure to raise these claims constitutes ineffective assistance of appellate counsel. See e.g. *Franklin v. Anderson*, 434 F.3d 412 (6th Cir. 2007). Because appellate counsel were prejudicially ineffective in this case, this Court must reopen Jackson's appeal. *State v. Murnahan*, 63 Ohio St. 3d 60 (1992). S.Ct. Prac. R. 11.6..

C. Propositions of Law

PROPOSITION OF LAW NO. I: A capital defendant's Sixth Amendment right to a jury trial is violated when the trial court prejudicially fails to ensure that the defendant's waiver of a jury trial is knowing, intelligent, and voluntary. U.S. Const. Amends. VI, XIV; Ohio Const. Art. I, § 5.

The right to trial by jury is guaranteed by both the Sixth Amendment of the United States Constitution and Article I, Section 5 of the Ohio Constitution, as well as O.R.C. § 2945.17. Waivers of constitutional rights must not only be voluntary, but must also be knowing and intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. See, e.g., *Brady v. United States*, 397 U.S. 742, 750 (1970). The "better practice [is] for the trial judge to enumerate all the possible ramifications of a waiver of a jury." *State v. Jells*, 53 Ohio St. 3d 22, 25 (1990). These ramifications should include the following:

- A) Jackson would be giving up his right to a two-stage sentencing process before a death sentence could be imposed, and replacing it with a one-step process, since a jury can only make a recommendation of death, and the trial judge must then make his or her own independent determination whether death is the appropriate penalty. He would, therefore, also be giving up ten possible vetoes of his death sentence, since in a jury trial, thirteen people (twelve jurors **and the judge**) have to agree that the death penalty is appropriate before it may be imposed.
- B) The opportunity for reversal of a conviction and/or death sentence on appeal is greatly diminished for numerous reasons, including the following: 1) all of the pre-trial motions defense counsel had filed or would raise during trial regarding jury issues would become moot, and there would be no voir dire or jury instruction issues; 2) judges in Ohio are presumed to have ignored all inadmissible evidence, even if they deemed it admissible at trial; and 3) any prejudicial evidence is deemed less prejudicial if heard by judges.

- C) The appellate issues he was forgoing by waiving a jury trial such as those issues involving voir dire, jury instructions, various objections and improper comments.
- D) The jury waiver may be withdrawn at any time before the commencement of trial.

On March 22, 2010, Jackson executed a waiver of trial by jury. The trial court did not conduct the necessary inquiry to determine whether Jackson was making a knowing and intelligent waiver with sufficient awareness of the relevant circumstances and likely consequences. The trial court only informed Jackson that:

- A) With a jury trial, all twelve jurors have to agree on a finding of guilt. Tr. 217.
- B) For a jury to determine the death penalty is appropriate, all twelve jurors have to agree and that if one juror refuses to vote for death that death is no longer an option. Tr. 221.
- C) If he is tried by a three-judge panel that all three judges have to agree on the conviction and sentence of death. Tr. 224-25.

The trial court failed to inform Jackson of the appellate issues that he would be forgoing, including any errors in voir dire and instructional issues. This was extremely important since this Court has found error on these issues in the past. *See, e.g. State v. Gross*, 97 Ohio St. 3d 121, 152 (2002) (“allowing alternate jurors to sit in on sentencing deliberations constituted error...”), *State v. Brooks*, 75 Ohio St. 3d 148, 162 (1996) (“the jury instruction undermined the reliability of the jury verdict and risked erroneous imposition of the death sentence, thereby materially prejudicing Brooks' right to a fair trial.”)

The trial court also relied on trial counsel and Jackson to determine whether Jackson’s rights had been explained to him, despite the fact that the trial court repeatedly questioned whether trial counsel were diligently working on the case and the fact Jackson may not have understood what trial counsel was telling him based on Jackson’s low IQ. Tr. 26, 27, 55.

More process is due in a capital case where the defendant's life is at stake, yet in this case there was barely any process. See, *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 292 (1998) (five Justices recognized a distinct "life" interest protected by the Due Process Clause in capital cases above and beyond liberty and property interests.). The trial court violated Jackson's Sixth Amendment right by failing to ensure that his waiver of trial by jury was knowing and intelligent.

PROPOSITION OF LAW NO. II: A capital defendant is denied the right to the effective assistance of counsel when counsel prejudicially fails to request an expert to adequately prepare the defense case for trial. U.S. Const. Amends. VI, XIV; Ohio Const. art. I §§ 5, 10.

Trial counsel were ineffective for failing to move the trial court for appointment of an expert in intellectual disability to adequately prepare the defense case at Jackson's trial. *Atkins v. Virginia*, 536 U.S. 304 (2002); *State v. Lott*, 97 Ohio St.3d 303 (2002). As a result, counsel's performance "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Ake v. Oklahoma*, 470 U.S. 68 (1985).

Trial counsel hired Dr. John Fabian to prepare a mitigation report. Tr. 21. While preparing his report, Dr. Fabian administered the WAIS-IV IQ test to Jackson which resulted in a Full Scale IQ of 75. Tr. 242, 2001; Defense Exhibit A at p. 9. Despite Jackson's low IQ, trial counsel told the trial court that they were not pursuing an *Atkins* claim. Tr. 142. The trial court informed trial counsel that the court wanted to have a hearing to determine whether the *Atkins* issue was "considered, diligently investigated, and a justifiable decision made not to pursue it." Tr. 144. During the hearing, trial counsel unreasonably relied on Dr. Fabian's testimony and mitigation report as reasons for not pursuing an *Atkins* claim. Both the United States Supreme Court and Ohio courts have found "significant differences between expert testimony offered for mitigation purposes and expert testimony offered for *Atkins* purposes." *State v. Bays*, 159 Ohio

App. 3d. 469, 475 (2nd App. Dist. 2005); *See also Bobby v. Bies*, 556 U.S. 825, 836 (2009), “Mental retardation as a mitigator and mental retardation under *Atkins* and *Lott* are discrete legal issues.”

Jackson’s IQ score was within the 70-75 point range considered to be indicative of significantly subaverage intellectual functioning and mild intellectual disability.¹ The 75 IQ test score should not have ended the inquiry whether Jackson was intellectually disabled – there is only a rebuttable presumption that he was not intellectually disabled. “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.” *Lott*, 97 Ohio St. 3d. at 305. The State’s expert, Dr. Aronoff, pointed out during the proceedings that “adaptive behavior deficits” and “onset of [intellectual disability] before the age of 18” were other factors that had to be considered in evaluating whether Jackson had intellectual disability. Tr. 194, 200. *See also*, AAIDD, 11th Ed. at p. 1.

Given that Dr. Fabian found that Jackson “[had] problems with some basic proficiencies” (tr. 1991-99), “didn’t seem to do well in school developmentally” (tr. 1999), “[had] cognitive impairments in various areas including low intelligence, deficient academic achievement abilities” (*id.*), “had problems with learning comprehension” (*id.*), “was slow with everything. Didn’t do well in school, could not read well” (tr. 2000), had poor grades in school and never obtained a GED (Def. Ex. A at pp. 4-5) and on the Woodcock-Johnson-3 test he scored at the 6.9 grade level, 11 years 8 months age equivalent (tr. 2004), it was incompetent for further testing not to be conducted by an intellectual disability expert. Dr. Fabian failed to address these issues in his report since it was prepared solely for mitigation purposes.

¹ Intellectual Disability, Definition, Classification, and Systems of Support, American Association on Intellectual and Developmental Disabilities (AAIDD), 11th ed. at 34-35, 40; Diagnostic and Statistical Manual of Mental Disorders 5th Ed., at 37.

Trial counsel also failed to consider the standard error of measurement (SEM) for the IQ test Dr. Fabian administered to Jackson. “[A]n IQ test result cannot be assessed in a vacuum ... the assessment of intellectual functioning through the primary reliance on IQ tests must be tempered with attention to possible errors in measurement.” *Brumfield v. Cain*, 2015 U.S. LEXIS 4058, *17 (June 8, 2015). Dr. Aronoff testified that based on the SEM, Jackson’s IQ score of 75 could be as low as 71 “which could leak into the range of somebody having a presumption of being mentally retarded.” Tr. 194.

Trial counsel were also seemingly unaware that Ohio courts have found individuals to be intellectually disabled despite having IQ scores above 70. In *State v. Gumm*, 864 N.E.2d 133, 139 (1st App. Dist. 2006), the *Atkins* issue was litigated and after an evidentiary hearing, the trial court found that the Petitioner’s IQ was above 70. However, after considering “evidence demonstrating significantly subaverage intellectual functioning and significant limitations in his social, self-direction, and functional-academics adaptive skills” with the onset prior to the age of eighteen, the presumption against a finding of intellectual disability was rebutted. *Id.*

The *Atkins* issue was also litigated in *Greer*, supra. The trial court reviewed evidence that Greer’s IQ was 75. The trial court took into account the SEM, anecdotal evidence, the results of the adaptive skills testing and expert testimony to determine the defendant had significantly subaverage intellectual functioning. *State of Ohio v. Greer*, Judgment Entry (Finding of Fact and Conclusions of Law) at 23, No. CR 1985-02-0176, (Summit Cty. C.P. May 21, 2008).

The need for an intellectual disability expert was further demonstrated during Dr. Fabian’s testimony on cross examination about the raw data from the WAIS-IV. When asked about inconsistent markings on the WAIS-IV answer sheet, Dr. Fabian testified: “I probably

either got ahead of myself or I made a mistake”, “I don’t know why I did that. I don’t have an explanation...” Tr. 2062-63.

Trail counsel’s reliance on Dr. Fabian and his mitigation report left them woefully unprepared to address Jackson’s *Atkins* issues. An expert in intellectual disability would have assisted the trier of fact in understanding Jackson’s limited cognitive abilities and the effect these limitations had on his actions the day of, and leading up to, the homicide. Counsel, however, unreasonably failed to fully investigate and develop this issue even though available information demonstrated the need for this type of examination. *Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1995).

PROPOSITION OF LAW NO. III: A capital defendant is denied the right to the effective assistance of counsel when counsel prejudicially fails to support the motion to suppress statements with available evidence. U.S. Const. Amends. V, VI, XIV; Ohio Const. art. I §§ 5, 10.

Trial counsel filed a Motion to Suppress Statement’s Obtained in Violation of [Jackson]’s Constitutional Rights on January 19, 2010. However, trial counsel failed to present key information that not only would have supported their motion, but would have shown the State violated Jackson’s Fifth Amendment rights.

Jackson was arrested on June 20, 2009. Jackson gave a statement to Detective Diaz on June 22, 2009. State’s Ex. A326. Between his arrest and making the statement, Jackson was not allowed to make a phone call to an attorney. Jackson told detectives that he wanted to call his attorney, Harvey Bruner. *Id.*. Mr. Bruner had represented Jackson in a prior criminal case and represented Jackson in the instant case until he was replaced with an attorney from the Cuyahoga County Public Defender’s Office. Tr. 7-8.

During the statement the following dialogue occurred:

Jackson: “I ain’t even phone call. I ain’t even phone call yet. So I hope -”

Det: “You haven’t talked on the phone to anyone yet?”

Jackson: “They been treating me like shit.” State’s Ex. A326 at 35.

A little later in the statement Jackson states that “I’d like to get my phone calls when I want my phone calls.” *Id.* at 49, 50.

These statements by Jackson should have been put before the court as support for the motion to suppress. The statements by Jackson demonstrate that despite asking the deputies for the opportunity to make a phone call to his attorney, Jackson was never able to call his attorney prior to being interrogated when he made an incriminating statement. The absence of these statements as evidence to support Jackson’s motion to suppress led the trial court to dismiss the motion on February 16, 2010.

An accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him. *Edwards v. Arizona*, 451 U.S. 477 (1981). Trial counsel were ineffective for failing to present evidence of Jackson’s statements to Detective Diaz because they would have demonstrated that the State violated Jackson’s Fifth Amendment privilege against self-incrimination.

PROPOSITION OF LAW NO. IV: A capital defendant is denied the right to the effective assistance of trial counsel when trial counsel prejudicially fails to conduct an adequate mitigation investigation. U.S. Const. Amends. VI, XIV; Ohio Const. art. I §§ 5, 10.

Defense counsel has a duty to investigate a capital defendant’s background for mitigating factors. *State v. Johnson*, 24 Ohio St. 2d 87 (1986). It is only after a full investigation of all the mitigating circumstances that counsel can make an informed, tactical decision about which information would be helpful in the client’s case. *Id.* at 90, citing, *Picken v. Lockhart*, 714 F.2d

1455 (1983); *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995); *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003).

A mitigation specialist was utilized for Jackson's trial. Tr. 1986. The individuals interviewed were listed in Dr. Fabian's report. These individuals included Jackson's mother, father, and his brothers Clem and Joe. Defense Ex. A at pp. 2-5. These people should have been presented at the mitigation phase of the trial to humanize Jackson for the three-judge panel.

Family members and friends can provide vivid first-hand accounts of the poverty and abuse that characterize the lives of many capital defendants. These witnesses can also humanize the client by allowing the jury to see him in the context of his family, showing that they care about him, and providing examples of his capacity to behave in a caring, positive way, such as attempting to protect other family members from domestic violence or trying to be a good parent and provider.

ABA Guidelines for the Appointment and Performances of Defense Counsel in Death Penalty Cases, Commentary p. 113. Jackson's family members could have presented intimate, relevant and detailed information about his background and upbringing.

Trial counsel must complete "a constitutionally adequate investigation before settling on a particular mitigation theory." *Sears v. Upton*, 561 U.S. 945, 954, fn. 10 (2010). Trial counsel knew Dr. Fabian had contacted Jackson's family members in preparing his report. This should have led trial counsel "to investigate further" and meet with Jackson's family members and prepare them to testify during the mitigation hearing. *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). Trial counsel's reliance on Jackson in deciding who to testify during the mitigation hearing was unreasonable. Jackson's mental cognition was determined to be low, his ability to reasonably make that decision should also have been addressed. Tr. 146. Also, "[t]he duty to investigate exists regardless of the expressed desires of a client." *Hamblin v. Mitchell*, 354 F.3d 482, 493 (6th Cir. 2003).

Trial counsel failed to present viable and relevant mitigating evidence for a sentence less than death. *Kubat v. Thieret*, 867 F.2d 351 (7th Cir. 1989). Trial counsel's deficient performance in representing Jackson undermined confidence in the outcome of his capital trial. The trier of fact did not have an opportunity to consider relevant mitigating factors in violation of Jackson's Sixth, Eighth and Fourteenth Amendment rights.

D. Conclusion

Appellant Jackson requests that this Application for Reopening be granted. S.Ct. Prac. 11.06 and *State v. Murnahan*, 63 Ohio St. 3d 60 (1992).

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **APPELLANT JEREMIAH JACKSON'S APPLICATION FOR REOPENING PURSUANT TO S.CT. PRAC. R. 11.06** was forwarded by regular U.S. mail to Timothy McGinty, Cuyahoga County Prosecutor, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on the 6th day of July, 2015.

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