IN THE SUPREME COURT OF MISSOURI

STATE EX REL	)	
	)	
ANDREW LYONS	)	
Petitioner	)	
v.	)	Case # SC 88625
	)	
LARRY CRAWFORD and	)	
	)	
JEREMIAH NIXON	)	
Respondents	)	

PETITION FOR WRIT OF MANDAMUS

PETITIONER'S REPLY BRIEF

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I. Overview

This Court's Special Master has made findings, by a preponderance of the evidence, that Mr. Lyons is mentally retarded, in that Mr. Lyons has significantly subaverage intelligence and substantial retardation-related deficits in two or more functional categories, with the onset of the retardation having occurred prior to Mr. Lyons turning 18 years of age (Master's Report, p. 8-16). In his brief filed on behalf of Mr. Lyons, counsel for Mr. Lyons first endeavored to outline for the Court all of testimony and evidence generated during Mr. Lyons' trial, during direct appeal, during State and Federal post-conviction proceedings, and during the hearing before the Special Master (Petitioner's Brief, p. 7-77). In the next part of his brief, Counsel for Mr. Lyons then drew heavily from those records to demonstrate the strong support to be found therein for the conclusions reached by the Special Master, and to concomitantly counter what differing opinions were offered by Respondents' expert, Dr. Kline (Petitioner's Brief, p. 81-121). Finally, counsel for Mr. Lyons directly confronted and answered a host of contrarian positions taken by Respondents over the course of these proceedings (Petitioner's Brief, p. 121-133).

Respondents employ their brief to reprise the arguments which they made to the Special Master. Unfortunately, Respondents have determined, in most cases, to advance their original positions taken before the Master without mentioning, much less answering, the counterarguments briefed to this Court by counsel for Mr. Lyons. In this Reply Brief, undersigned counsel will gladly provide retort to those arguments by Respondents which address the points made in Mr. Lyons brief. However, in those many cases in which Respondents failed to address the many counterarguments to their positions set forth in Mr. Lyons' brief, undersigned counsel will, at the risk of being redundant, simply remind about the previously-made arguments which Respondents have chosen to ignore.

II. Respondents'arguments in favor of an incredibly contorted reading of Section 565.030.6 are unsupported and unsupportable

1. Respondents' attempt to avoid the strong findings by the Master through use of a strained reading of the statute

The Special Master legitimately and clearly found that the preponderance of the available evidence favored a finding of mental retardation (Master's Report, p. 8-17). The Special Master specifically singled out for consideration the pre-age-18 documentation which exists (Master's Report, p. 17). Though that documentation was, as the Master put it, "scant" owing to the unilateral decision to destroy much of the documentation made by the school district which provided Mr. Lyons his

pre-age-18 education, the surviving items, as the Master put it, "speak for themselves" regarding Mr. Lyons' catastrophic academic deficiencies (Master's Report, p. 14-15; Exhibit 102).

Unable to mount much by way of arguments against the Master's finding of mental retardation as based on the entire body of the presented evidence, Respondents seek a contrived reading of the statute which would then, in the opinion of Respondents, prohibit the Court from considering any evidence other than certain sorts of documentary evidence about the pre-age-18 onset of retardation which might exist, particularly IQ test scores of 70 or below on tests administered prior to age 18 (Respondents' Brief, p. 13-18). As will be explained hereinafter, there is nothing to justify, much less support, such a tortured reading of the statute, save Respondents' audacity in making an argument in favor of that reading.

2. Newspaper articles do not provide a legitimate source for legislative history

Respondents first claim that they can parse the intent of the legislators who enacted Section 565.030.6 RSMO; however, Respondents do not resort to any generally-accepted source for finding of legislative history, but instead ask that this Court rely upon newspaper articles written a year before and at the time of enactment of the legislation (Resp. Brief, p. 13-17). Respondents cite no holding of this Court, or of any other Court for that matter, authorizing such an approach to

ascertainment of legislative history. Undersigned counsel, for his part, has found no instance in which the Courts of this State have even commented on the propriety of using newspaper articles to accurately account for legislative history. However, undersigned counsel has found that State Courts across the country have, over the years, weighed in on the subject, roundly rejecting many invitations by disgruntled litigants to have benefit of a newspaper-generated spin favorable to their causes placed upon legislative enactments, those Courts consistently finding the press too fickle a source to accurately account for legislative intendment. ***Torao Takahashi v. Fish and Game Commission***, 186 P.2d 805, 813 (Cal. 1947), *rev'd on other grounds* 334 U.S. 410 (1948); ***Responsible Use of Rural and Agricultural Land (RURAL) v. Public Service Commission of Wisconsin***, 619 N.W.2d 888, 895-896 (Wis. 2000); ***Petition of Quechee Service Co., Inc.,*** 690 A.2d 354, 366, fn. 7 (Vt. 1996); ***Mitchell v. Rayl***, 665 P.2d 1117, 1119-1120 (Kan.App. 1983); ***Matter of State Farm Mutual Auto Insurance Co.***, 392 N.W.2d 558, 569 (Minn.App. 1986); ***Hulcher v. Commonwealth***, 575 S.E.2d 579, 582-583 (Va.App. 2003). As the Courts in these sister states found, there are reasons aplenty for this Court to reject Respondents' reliance upon the shifting sands of the press as the foundation for any discussion of legislative intent.

3. There is nothing in the statute, or even in Respondents' newspaper articles, hinting that the statute's requirement for pre-age-18 documentation amounts to a

requirement for any particular form of documentation, much less a pre-age-18 IQ test score

Respondents are correct to note that Section 565.030.6 RSMO requires that mental retardation be "manifested and documented before eighteen years of age". Where Respondents leap from the beaten path is in claiming that the term "documented" necessarily requires any particular form of documentation, for instance the existence of a pre-age-18 IQ test score below 70 (Respondents' Brief, p. 18). Of course, there is nothing in the statute itself to support such a claim. But even in Respondents' precious newspaper articles, in which there is described a "compromise" by a "fragile coalition", there is nothing reported about the need for the pre-age-18 mental retardation condition to be "documented" in any particular way. To the contrary, the very newspaper article quotation lifted by Respondents accounts only for an agreement upon the use of the term "documented", with no claim about any "compromise" or "coalition" that the documentation have any particular form (Respondents' Brief, p. 15). If it had been the intention of the legislature to have such a requirement regarding a particularized form documentation, such a requirement could have easily been discussed and adopted. It obviously was not, contrary to the impressions which Respondents attempt to leave.

4. There is nothing to be found in the holdings of this Court hinting that the statute's requirement for pre-age-18 documentation amounts to a requirement for a pre-age-18 IQ test score

Respondents further claim to find support from this Court's holdings for their position about the primacy of a pre-age-18 IQ score of 70 or below (Respondent's Brief, p. 15-16). However, Respondents reach this point by carefully teasing out only the Court's brief references to pre-age-18 test scores in each case, and ignoring the bulk of the Court's findings and holdings in each case.

Thus, it is certainly true, as contended by Respondents, that in Ernest Lee Johnson's post-conviction case, this Court mentioned Johnson's higher-than-70 scores obtained on IQ tests administered to him prior to age 18. ***Johnson v. State***, 102 S.W.3d 535, 538 (Mo.banc 2003). However, this Court ultimately decided that, despite the childhood scores, Mr. Johnson was still entitled to a trial by jury upon the subject of his mental retardation, particularly in light of other, post-age-18 evidence which might lead a reasonable fact finder to conclude that Mr. Johnson was mentally retarded. ***Johnson v. State***, 540-541.

After Mr. Johnson's consequent jury trial, this Court again examined the available evidence, and again noted Mr. Johnson's pre-age-18 IQ scores. ***State v. Johnson***, 244 S.W.3d 144, 152 (Mo.banc 2008). However, in that case, this Court was confronted with a jury finding against Johnson's mental retardation

contention, and an argument by Johnson that the evidence was so strong that a determination in favor of mental retardation should have been directed in his favor. ***State v. Johnson***, 151-152. This Court decided those issues against Mr. Johnson, not on the basis of the pre-age-18 scores, but on the basis of the body of the evidence as a whole. ***State v. Johnson***, 152-156.

Similarly, Respondents are able, in ***Goodwin v. State***, 191 S.W.3d 20, 27-29 (Mo.banc 2006), to tease out the fact that Goodwin scored higher that 70 on a pre-age-18 IQ test. However, this Court decided against Mr. Goodwin's claim of mental retardation, not on that basis, but because three experts, including Goodwin's own expert, unanimously agreed that all of the available evidence led to the conclusion that Goodwin was not mentally retarded. ***Goodwin v. State***, supra.

On the flip side, Respondents are correct to point out that this Court upheld a lower Court mental retardation finding in ***In re Competency of Parkus***, 219 S.W.3d 250, 256 (Mo.banc 2007), which finding was supported by a low, pre-age-18 IQ score. However, Respondents fail to note that the pre-age-18 IQ score was but one among a host of factors supporting the lower Court's finding of mental retardation. ***In re Competency of Parkus***, supra.

Respondents are also correct to contend that, in ***Taylor v. State***, 126 S.W.3d 755, 762-763 (Mo.banc 2004), there was no evidence presented regarding pre-age-

18 IQ scores and this Court found mental retardation not proven in that case. However, this Court decided that case, not on the basis of the lack of a pre-age-18 IQ score, but for the twin reasons that Taylor failed to properly raise the issue and that there was no evidence of any kind presented which supported a finding mental retardation. ***Taylor v. State***, supra.

To sum up, the holdings by this Court not only do not support Respondents contrived reading of the statute; those holdings fly in the face of such a reading.

5. Contrary to Respondents' contentions, this Court has never questioned the necessity of receiving non-documentary information to decide the issue of mental retardation

Respondents also claim that their reading of the statute draws support from supposed generalized misgivings by this Court over evidence about a defendant's retardation as received from family members, those misgivings supposedly voiced by this Court in ***State v. Johnson***, 156 (Respondents' Brief, p. 17-18). Respondents take the comments in ***Johnson*** out of context. As already noted above, in the ***Johnson*** case, this Court was considering whether evidence of mental retardation was so overwhelming that a contrary jury verdict could not stand. ***State v. Johnson***, 152-156. In its process of finding that the evidence was actually underwhelming, this Court focused on several problems with the testimony from Johnson's key expert, including the expert's lack of credentials, the

expert's predominant employment as a defense expert, the expert's position as the only expert in the case who had found mental retardation, and the expert's singular reliance upon anecdotes of family members for his findings regarding adaptive behaviors. ***State v. Johnson***, 156. This Court never denounced the expert for any of these; the Court only noted them as factors which could explain the jury's rejection of the expert's opinion. ***State v. Johnson***, supra. Naturally enough, in every case in which mental retardation has been found, family members have testified to support the conclusion. ***Atkins v. Virginia***, 536 U.S. 304, 308-309 (2002); ***In re Competency of Parkus***, 255; ***State ex rel Johns v. Kays***, 181 S.W.3d 565, 566 (Mo.banc 2006); ***Johnson v. State***, supra. In fact, it would be more telling if family members were not called upon to testify upon the issue of early onset of mental retardation. But more to the point, there is nothing in this Court's holdings generally, and nothing in ***State v. Johnson*** particularly, supporting Respondents' warped interpretation of the statute.

6. Respondents continue to make claims which are unsupported by the record regarding the testimony of Mr. Lyons' family members

Respondents claim that their fears about a Court's reliance upon family anecdotes are confirmed in this case (Respondents' Brief, p. 18). Respondents provide testimonial instances by family members at Mr. Lyons' trial, and then make the blanket claim that, in these proceedings, "the testimony changed 180

degrees" (Respondents' Brief, p. 18, 23). Unfortunately, Respondents do not support these bold words with citations to any contrary family testimony from these proceedings (Respondents' Brief, p. 18, 23). Dr. Fucetola, during his testimony before the Master, countered this notion, explaining that there were no inconsistencies in answers, but rather, during trial and state post-conviction proceedings, witnesses were simply not asked the sorts of questions which Dr. Fucetola posed regarding mental retardation, thereby explaining why those sorts of answers are not found in the records from earlier in the proceedings (Hearing Tr. 168, 184-186, 247). The Special Master, in turn found the answers of family members to be consistent for virtually the same reasons offered by Dr. Fucetola (Master's Report, p. 3, 5). Undersigned counsel for Mr. Lyons mentioned all of this in his brief (Petitioner's Brief, p. 103), and even went so far as to outline for the Court the pertinent testimony, over the years, by the family members (Petitioner's Brief, p. 14-19). Respondents can continue with their same, tired arguments only because they are willing to be oblivious to the records in this case.

7. Respondents continue to make claims which are unsupported by the record regarding the meaning of Mr. Lyons' remaining school records

In Mr. Lyons' brief, at page 125, undersigned counsel noted that Respondents had attempted before the Master to turn Mr. Lyons' school records into some sort of indictment of Lyons as a truant, and therefore, supposedly, as

antisocial (Respondents' Exceptions, p. 5). In their brief, Respondents take this all a step further, noting Mr. Lyons' absences from school in his high school years, leaping to the conclusion that the absences were non-health-related, a conclusion not necessarily supported by the meager records, and then, on those shaky bases, attempting to make their own, lay diagnoses of Mr. Lyons as supposedly suffering from conduct and antisocial personality disorders (Respondents' Brief, p. 17, 24). As undersigned counsel noted in his brief, also at page 125, these efforts to malign Mr. Lyons come from Respondents only after their own expert roundly rejected efforts to confirm these theories through him (Hearing Tr. 514-516). Dr. Fucetola similarly rejected Respondents' efforts to so misread the available records (Hearing Tr. 347). Unfortunately, Respondents do not use the opportunity afforded them in their brief to explain why this Court should accept their poppycock when the experts, and particularly Respondents' own expert, rejected it.

8. The sparse, existing records support the Master's conclusions regarding mental retardation, Respondents' arguments to the contrary notwithstanding

Respondents acknowledge the Master's reliance on the existing records as documentation for Mr. Lyons' pre-age-18 mental retardation (Respondents' Brief, p. 17). However, Respondents urge that the records should not be seen as supporting the mental retardation finding; Respondents suggest that their position is somehow supported by Dr. Fucetola's testimony that those who are mentally

retarded are generally considered to be in approximately the bottom two percent of the population in intelligence, and that the lone standardized test results in Mr. Lyons school records placed him in the 4th percentile (Hearing Tr. 277-278; Respondents' Brief, p. 17). In making this argument, Respondents fail to point this Court to Dr. Fucetola's testimony reconciling any differences in IQ and educational testing data perceived by Respondents (Hearing Tr. 348-350). Respondents also avoid mention of Dr. Fucetola's overarching conclusions that the educational problems for Mr. Lyons described in the existing records, when grouped with information provided by Mr. Lyons and his family members, and when further grouped with the illiteracy findings made by Dr. Warren Wheelock, were all consistent with the diagnosis of mental retardation with onset prior to age 18 (Hearing Tr. 131, 153-154, 156-157, 350). Clearly, the Master's conclusion, that the existing pre-age-18 records support the mental retardation diagnosis, is well-supported by the record.

9. Respondents fail to address the problems of Constitutional dimension inherent in their reading of the statute

In his brief on behalf of Mr. Lyons, undersigned counsel anticipated the arguments made by Respondents, and challenged that Respondents' interpretation of the statute would amount to a Constitutional rights violation particularly where, as here, any lack of documentation owed to Mr. Lyons' poverty coupled with a

governmental entity's unilateral decision to destroy pertinent records (Petitioner's Brief, p. 120-125). As the Pennsylvania Supreme Court majority has put it, when confronted with the accusation by dissents that it was upholding the very sorts of requirements urged by Respondents in this case, denied that accusation, agreeing with the contentions by their fellow jurists that such restrictions would have resulted in a "perversion" of the ***Atkins*** holding, which would have "erected an insurmountable barrier for defendants not fortunate enough to attend a school where objective IQ testing was performed." ***Commonwealth v. Vandivner***, 962 A.2d 1170, 1186-1187 (Pa. 2009). Respondents choose not to mention, much less address, the Constitutional problems inherent in the position which they espouse.

III. Short on any real support to battle against the Master's findings about Mr. Lyons' subaverage intelligence, Respondents resort to a series of platitudes, all of which are amply refuted by the record

1. Summary of the Master's findings regarding subaverage intelligence

As noted in Petitioner's Brief, the Special Master's process in coming to his conclusion regarding Mr. Lyons' subaverage intelligence was complicated by a number of factors, primarily that Mr. Lyons, in adulthood IQ testing, produced scores of 84, 81, 67 and 61 (Petitioner's Brief, p. 80). By noting the scientific strength underpinning the lower scores, and by noting the frailties suffered by the higher scores, the Master found that the lower scores more accurately accounted

for Mr. Lyons' actual intelligence level (Petitioner's Brief, p. 80-94). The Master also found that the surviving educational records, when coupled with testing conducted by Dr. Wheelock demonstrating Mr. Lyons' illiteracy, amply support the finding of subaverage intelligence (Petitioner's Brief, p. 94-95).

2. The problems with Respondents' insistence upon the primacy of the 84 IQ score

In their brief, Respondents continue to want resolution of this conflict through a singular focus on the IQ score of 84 on Mr. Lyons' 1992 IQ test (Respondents' Brief, p. 19-20). As Dr. Fucetola found, and as the Special Master concluded, that score cannot be relied upon as an accurate measure of Mr. Lyons IQ because of the weakness of that data (Hearing Tr. 197-198, 382; Master's Report, p. 7). That weakness owes in part to the anomaly that, in light of Mr. Lyons' age at the time the test was administered, and in light of the age corrections methods in the test scoring process, the test would have generated a much lower score had it been administered to Mr. Lyons a mere 30 days earlier (Hearing Tr. 197-198; Master's Report, p. 7).

Respondents attempt to marginalize questions against the viability of that test data by mischaracterizing that their opponents have "discounted the 1992 IQ score of 84 because, ironically, the test was correctly scored" (Respondents' Brief, p. 19). Respondents further mischaracterize the argument against them to be that "the 84 IQ score is too high because the test should have been misscored [*sic*]"

(Respondents' Brief, p. 19). In constructing these straw men, Respondents ignore what undersigned counsel has noted in his brief, that Dr. Fucetola has already directly addressed these mischaracterizations (Petitioner's Brief, p. 82). No one has urged that the 84 score should be rescored. The question instead is whether that 84 score should be relied upon as an accurate gauge of Mr. Lyons' actual intelligence in light of the frailties of that score. Dr. Fucetola answered that question with a resounding no, and the Master found Dr. Fucetola's reasoning compelling (Hearing Tr. 198-199, 382; Report of the Master, p. 7).

3. Respondents repeat, verbatim, dubious arguments made to the Master regarding the Flynn effect

In his brief on behalf of Mr. Lyons, undersigned counsel noted another frailty of the 1992 and 1998 IQ scores, the fact that the scores had not been corrected for IQ inflation, the Flynn effect (Petitioner's Brief, p. 83-85). Respondents accuse that the Master "discounts the 1992 and 1998 IQ scores of 84 and 81 because of the 'Flynn Effect'" (Respondents' Brief, p. 20). Actually, it would be more fair for Respondents to acknowledge that the Master voiced some degree of skepticism about the Flynn effect (Master's Report, p. 5).

In their brief, Respondents pose a host of questions over reliance upon the Flynn effect, all of which they also presented to the Master, verbatim, in their exceptions to his Report (Respondents' Brief, p. 20-21; Respondents' Exceptions,

p. 3-4). Since Respondents merely repeat these arguments in their brief, they have not taken beneficial consideration of the reply to those exceptions made by undersigned counsel, and as a result, Respondents continue with errors they made in their earlier pleading, right down to mis-citation of cases. Once, again, at the risk of being redundant, undersigned counsel will point up the errors of Respondents' ways with respect to their accounting for matters related to the Flynn effect.

Respondents first claim that "all experts agree, Dr. Fucetola and Dr. Kline that the test instrument scoring does not authorize an adjustment in an individual's score" (Respondents' Brief, p. 20). This claim is simply untrue. Dr. Kline, Respondents' own expert, had to acknowledge that the IQ test makers themselves, in their own materials, not only confirm the existence of the Flynn effect, but also provide the accepted rate of correction necessary in order to apply the effect to testing results (Exhibit 116; Hearing Tr. 467-468). Dr. Fucetola, for his part, testified that the Flynn effect correction factor is found in the test materials, and that use of the Flynn effect correction is scientifically valid and generally accepted in the scientific community (Hearing Tr. 200-203,207-208, 345-346, 380-381). The worst that can be said on this point is what Dr. Fucetola conceded, that the test makers can be seen as neutral on whether or not to apply the IQ inflation correction, which they have provided in their materials, to test scores (Hearing Tr.

379). However, as Dr. Fucetola explained, the Flynn correction must be made lest IQ test results, over the years, become warped, and consequently fail to accurately indicate a test taker's true potential (Hearing Tr. 380).

In what amounts to an effort by them to claim lack of acceptance of the Flynn effect by the Courts, Respondents cite to a host of cases (Respondents' Brief, p. 20-21). However, if one looks closer at each of those cited cases, one finds that Respondents have grossly misinterpreted each case by selectively teasing out desired language, while ignoring ultimate holdings which are almost universally contrary to Respondents' positions, and favoring acceptance of the Flynn effect. In fact, nearly all of the cited cases, as well as some others not cited by Respondents, clearly confirm the scientific validity and acceptance of the Flynn effect.

Respondents cite to two Fifth Circuit cases, and claim that, in those cases, the Flynn effect has been "accepted as scientifically invalid in the 5th Circuit". Respondents' Exceptions, p. 3. Nothing could be further from the truth. In ***In re Salazar***, 443 F.3d 430, 432-434 (5th Cir. 2006), the Fifth Circuit bypassed making a decision by assuming the validity of the Flynn effect correction, and finding that the correction made no difference upon the unique facts in that case, since petitioner's Flynn corrected score was still above the cutoff for mental retardation, and since no mental health professional had ever labeled him as retarded. The

Fifth Circuit again avoided the question in ***In re Mathis***, 483 F.3d 395, 397-398 (5th Cir. 2007), granting the Petitioner's request to file a mental-retardation-based successive Federal habeas petition based upon his 2005 IQ score of 64, and leaving for later determination the need for Flynn-correcting his 1991 IQ score of 79.

From the texts of ***Hall v. Quarterman***, 2009 WL 612559, *40 (N.D.Tex. 2009)[1] and ***Winston v. Kelly***, 2009 WL 577600, *6 (W.D.Va. 2009), respondents have extracted, respectively, the quotes that "(i)t is not standard practice in the scientific community to adjust an IQ score for the Flynn Effect…" and that, in accounting for the Flynn effect, one should "…not subtract IQ points that the individual has earned" (Respondents' Brief, p. 20). However, Respondents fail to mention that these quotes, respectively, merely repeat the testimony to these effects by expert witnesses for the respective states, do not account the contrary positions by experts for the petitioners which were also reported, and certainly do not account any holdings by the Courts themselves. ***Hall v. Quarterman***, supra; ***Winston v. Kelly***, supra. Respondents also fail to note that in each of these cases there is also reference made that each of these same expert witnesses who made the

[1] In their brief, like in their exceptions to the Master, Respondents mis-cite this case as "Hull" v. Quarterman (Respondents' Brief, p. 20; Respondents' Exceptions, p. 3). Respondents continue this mistake despite undersigned counsel highlighting the mistake in his response to the exceptions.

quoted statements also fully acknowledged the validity of the premise of the Flynn effect, that being that IQ inflation occurs at the rate of 0.3 points per year. ***Hall v. Quarterman***, supra; ***Winston v. Kelly***, supra.

It should be noted that four of the cases cited by Respondents originate in the Fourth Circuit, and particularly in the State of Virginia (Respondents' Brief, p. 20-21). In citing to those cases, Respondents fail to mention that the Fourth Circuit has for many years held that a Flynn effect correction to an IQ score must be made for a petitioner who raises the issue. ***Walker v. True***, 399 F.3d 315, 321-324 (4th Cir. 2005); ***Hedrick v. True***, 443 F.3d 342 (4th Cir. 2006)[2].

Respondents do correctly note that the Virginia Supreme Court, in ***Winston v. Warden of the Sussex I State Prison***, 2007 WL 267266, *15 (Va. 2007), failed to find mental retardation in a defendant whose IQ scores on 3 tests were 77, 76 and 73. That was so, at least in part, because the Virginia Supreme Court has taken the unyielding position that, under Virginia law, in order to qualify for a mental retardation designation, a petitioner must bring forth an IQ score of 70 or less. ***Winston v. Warden of the Sussex I State Prison***, supra. Respondents further correctly note that, in ***Winston v. Kelly***, *14, the United States District

[2] Hedrick was denied benefit of the Flynn effect only because he did not raise the issue in his petition, and even that limitation sparked a vigorous dissent in Hedrick's favor. ***Hedrick v. True***, 368.

Court for the Western District of Virginia, in considering a Federal habeas petition concerning the same case, held that, because of its limited statutory authority in considering habeas cases, it was unable to force the Virginia Supreme Court to correct those three IQ test results for things like the Flynn effect or the standard error of measurement[3], even if it independently believed such correction was appropriate. Finally, Respondents also correctly note that the Fourth Circuit has questioned its ability to force accounting for the standard error of measurement on a recalcitrant state Court (i.e. the Virginia Supreme Court). ***Hedrick v. True***, 368; ***Walton v. Johnson***, 440 F.3d 160, 178 (4th Cir. 2006)[4].

As interesting as all of the discussion over the standard error of measurement might be in Virginia in general, and in Mr. Winston's case in particular, it has no bearing on Mr. Lyons' case here in Missouri. In this case, both experts agreed that, per the dictates of the Diagnostic and Statistical Manual,

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[3] The term "standard error of measurement", abbreviated SEM, accounts for the statistical principle that, in testing, in light of possible error in the testing mechanism, a particular score should be considered, not as a set point, but as some number in a ten point range from 5 points higher to 5 points lower than the reported score. ***Goodwin v. State***, 191 S.W.3d 20, 31, fn. 7, 43 (Mo.banc 2006).

[4] Respondents mis-cite this case as "Walten v. Johnson" (Respondents' Brief, p. 21)

Fourth Edition, IQ scores up to 75 (five points above the 70 cutoff for mental retardation), should be considered as supportive of a diagnosis of mental retardation (Hearing Tr. 116, 122, 129, 130-131, 335-336, 419; Exhibit 111). More importantly, this Court has so found. ***Goodwin v. State***, supra. Therefore, it is arguable that, had the ***Winston*** case, cited above, occurred in this state, rather than in Virginia, his score of 73 would potentially place him into the range of the mentally retarded.

Before one rushes to judgment against the approach to the ***Winston*** case taken by the Virginia Supreme Court, it should be noted that the Federal District Court may have been too stark in its assessment about the intent of the Virginia Supreme Court. If one looks only to the judgment of the Virginia Supreme Court, and not the interpretation of that judgment by the Federal District Court for the Western District of Virginia, one finds that the Supreme Court of Virginia never directly addressed the question regarding the applicability of the Flynn effect, and made clear that its findings were premised, not on the basis of the IQ testing alone, but rather on the all-encompassing assessment that the defendant "…offers no objective data in support of his claim of mental retardation." ***Winston v. Warden of the Sussex I State Prison***, supra. Therefore, it is certainly arguable that, in a proper case, the Supreme Court of Virginia would permit consideration of the Flynn effect.

Once all of the cases cited by Respondents are properly considered, and combined with the other cases offered by undersigned counsel, that combination makes a compelling argument in favor of the of the point made by Dr. Fucetola, that the Flynn effect inflation of IQ scores is universally deemed as real and significant. Undersigned counsel, on behalf of Mr. Lyons, would hope that, in light of this further discussion about the law, this Court would not only reject Respondents' claims, but go further and fully embrace the significance of the Flynn effect in this case.

4. Based upon the testimony of the experts, the Master was right to conclude that the 84 score might have been inflated by sheer luck

Respondents continue to try to defend the 84 score with the maxim that one cannot score higher than his capabilities based upon the reasoning that "a test taker cannot fake smart" (Respondents' Brief, p. 21). Respondents do this without acknowledging, as their expert had to, that "smart" is an inapt descriptor of any of Mr. Lyons' low scores (Hearing Tr. 539). Respondents are also confronted with the Master's reliance upon the admission by Respondents' own expert, and the similar testimony from Dr. Fucetola and Dr. Bruce Harry, that one can artificially increase his IQ score, not by willful faking, but by sheer luck, with mere good guesses (Hearing Tr. 324, 558; Harry Deposition, p. 21; Master's Report, p. 7). Because the Master's conclusion in this regard is supported by the testimony of the

three experts, Respondents must be turning a blind eye to all of that evidence when Respondents call this conclusion by the Master "pure speculation" (Respondents' Brief, p. 21).

5. The 1992 IQ test is owed no deference because it occurred earlier in time

Respondents also insist on reprising their argument that the 1992 IQ test should be given some additional credence simply because, though given in adulthood, it was administered earlier in life than the other 3 tests (Respondents' Brief, p. 21). Undersigned counsel took great pains to detail why, for sound reasons of science, the Master rejected this notion (Petitioner's Brief, p. 87-90). Respondents make no mention of any of this, likely because now, as before, they have no answer to those points.

6. Respondents' contrived analogies

Respondents even grasp for support at the straws of home-spun analogies about how fast a car can go and how much liquid a container can hold (Respondents' Brief, p. 22). Unfortunately, Respondents have never bothered to test the validity of these oversimplifications with any expert, not even their own. Suffice it to say that, for all of the many reasons cited by the experts, Respondents' analogies are, to put it charitably, inapt.

7. There are no explanations for the scores of 67 and 61 save subaverage intelligence

As noted in Mr. Lyons' brief, the Master found his conclusions regarding Mr. Lyons' subaverage intelligence were strongly supported by the fact that, while there were substantial questions regarding the vitality of the 84 and 81 IQ scores, there were absolutely no questions regarding the lower scores of 67 and 61 (Petitioner's Brief, p. 90-94; Master's Report, p. 4-7). Undersigned counsel for Mr. Lyons meticulously briefed the evidence relied upon by the Master when he rejected the notions that the lower scores could owe to either Mr. Lyons' depression or to some intervening medical condition, like a head trauma (Petitioner's Brief, p. 91-94). Ignoring all of that, Respondents still ask that this Court find that the lower scores can be explained either by Mr. Lyons' depression or by some intervening medical condition, like head trauma (Respondents' Brief, p. 22).

In merely repeating their argument regarding depression as a supposed cause for the lowering of the scores, Respondents simply ignore all of the counterarguments detailed in Petitioner's Brief. Specifically, Respondents ignore the points made by Dr. Fucetola

- that, since Mr. Lyons suffered depression all of his life, any score impact of depression would have been had in all testing iterations, not just the low ones (Hearing Tr. 243),

- that, it is doubtful that depression had any impact on any of Mr. Lyons' IQ scores since overall IQ scores are "resilient" against the effects of depression (Hearing Tr. 242, 326-327), and
- that, while it is true that certain IQ subtests can be impacted by depression, Dr. Fucetola saw no such impact in those subtests for Mr. Lyons (Hearing Tr. 242, 326-327).

Obviously, Respondents still have no answer to these points.

Respondents do note the testimony of Dr. Phillip Johnson, which seems to support their position (Respondents' Brief p. 22, 25). However, in highlighting the points made by Dr. Johnson at Mr. Lyons' trial, Respondents choose to ignore the counterpoints about Dr. Johnson made by undersigned counsel his brief on behalf of Mr. Lyons (Petitioner's Brief, p. 127). At the risk of being redundant, undersigned counsel would again note that one of the areas of agreement between Dr. Kline, Respondents' expert, and Dr. Fucetola, Petitioner's expert, was that it would be inappropriate to rely upon the testing and conclusions offered by Dr. Johnson (Hearing Tr. 371-374, 550). The reasoning was that Dr. Johnson failed to conduct full IQ testing, relying instead only upon abbreviated tests (Exhibit GG, p. 867-868). Dr. Johnson simply ignored that one of his tests actually gave an estimated IQ of 64, well within the mentally retarded range (Exhibit F, p. 12; Exhibit GG, p. 868). Then Dr. Johnson failed to account that the other, higher

estimated score, had it been corrected for IQ inflation, would have been in the same mentally retarded range as the 64 (Hearing Tr. 373-374). Contrary to these facts, Dr. Johnson speculated that Mr. Lyons' IQ should be estimated in the range of 85-100 (Exhibit F, p. 12). Dr. Johnson's speculation, as cited by Respondents, was consequently unsupported, and unsupportable. Since even Respondents' own expert has disregarded Dr. Johnson's conclusions, it seems past time for Respondents to follow their expert's lead.

Respondents further contend that "petitioner does not show anything in the medical record to show that there has not been head trauma" (Respondent's Brief, p. 22). To the contrary, both Dr. Kline and Dr. Fucetola testified that they examined Mr. Lyons' prison records and found no reported medical condition which could have impacted upon the 2002 or 2007 IQ testing (Hearing Tr. 222-223, 358-359, 483-484, 554). Respondents also venture that "the fall in IQ scores, in and of itself, supports the notion that there has been head trauma" (Respondents' Brief, p. 22). Respondents advance this notion, not because they have any authority for it (they provide none), but because they refuse to acknowledge that there is another, more valid explanation for the difference in IQ scores. That explanation is the one the Master logically found from the evidence before him, the lower IQ scores were entitled to more weight as accurately reflecting Mr. Lyons' intelligence, and the higher scores, while they should not be disregarded, should

also not be taken at face value in light of discrepancies related to the 1992 and 1998 test iterations (Master's Report, p. 8).

IV. Respondents can find no legitimate arguments to counter the Special Master's conclusion that Mr. Lyons suffers from substantial, mental-retardation-related deficits in two or more of the statutorily-recognized areas

1. The vital descriptor "cloak of competence"

Respondents rightly note in their brief that undersigned counsel attempted to solidly make the point that mild mental retardation gives to the person who suffers from the condition a "cloak of competence" (Respondents' Brief, p. 23). However, Respondents incorrectly attribute to undersigned counsel coinage of such "cloak of competence" notions about mild mental retardation, and wrongly claim that, according to such notions, "any area of competence is either irrelevant or perhaps even proof that he is mentally retarded (Respondents' Brief, p. 23).

Actually, the ideas in this regard which have been advanced by undersigned counsel in Petitioner's brief have all been drawn from the professionals in the field and from the case law on the subject (Petitioner's Brief, p. 98-101). As Dr. Fucetola testified, the "cloak of competence" descriptor comes from the name of a well-known book on the subject of mild mental retardation (Hearing Tr. 117). See Edgerton, Robert B., *The Cloak of Competence*, University of California Press, 1967, updated 1994. After mentioning the term "cloak of competence", and the

book by the same name, Dr. Fucetola went on to describe what the concept means to the medical community, not that the mentally retarded person's capabilities amount to proof of his mental retardation, nor that such capabilities are irrelevant, but that those capabilities tend to mask from cursory public view the retarded person's profound incapabilities, which incapabilities can be found only upon closer examination (Hearing Tr. 117-118).

It was on the basis of these firm scientific principles that the Ohio Supreme Court found that, in deciding whether a person fits the legal definition of mental retardation, a Court must do as the medical professionals would do, and "…focus on those adaptive skills the person lacks, not on those he possesses." ***State v. White***, 885 N.E.2d 905, 914 (Ohio 2007). Unfortunately, in their brief, Respondents ignore the applicable medical and legal principles, take just the opposite approach, and give their laundry list of the capabilities which they perceive Mr. Lyons to have, paying not even lip service to the extensive evidence in the record about Mr. Lyons' profound incapabilities, incapabilities which are masked by the very capabilities which Respondents litany (Respondents' Brief, p. 24-28). Fortunately, the Special Master well-understood the applicable principles of science and law, and properly answered the questions before him on those bases (Master's Report, p. 16).

2. Respondents demonstrate that they have nothing of consequence to offer regarding the Master's findings about Mr. Lyons obvious deficiencies in communication and functional academics

Both sides in this case agree that, under applicable medical and legal principles, in order to prove that he is mentally retarded, Mr. Lyons must demonstrate, by a preponderance of the evidence, not only his significantly subaverage intellectual functioning, and the onset of his condition prior to age 18, but also continual extensive retardation-related deficits and limitations in two or more adaptive behaviors (Petitioner's Brief, p. 97-98; Respondents' Brief, p. 23). The Special Master found that, in the two adaptive behavior areas of communication and functional academics, the burden of proof has "clearly" been met (Master's Report, p. 9-10, 14-15). In his brief on behalf of Mr. Lyons, undersigned counsel listed all of the evidence which led the Master to his conclusion about the "extreme" nature of these deficits (Petitioner's Brief, p. 104-105; Master's Report, p. 15).

All Respondents can muster as responses are

- that "petitioner's anti-social personality caused truancy which caused poor grades"
- that "petitioner's trial theory was that he was underestimated and inappropriately placed in Special Education"

- that "petitioner…had a learning disability", and
- that "in his brief on appeal, petitioner acknowledges his ability to communicate" (Respondents' Brief, p. 17, fn. 1, p. 24).

Respondents' first two arguments have already been addressed earlier in this reply brief, at page 13-14 and 28-29. Simply put, Respondents' own expert debunks both of these arguments.

As to Respondents' point about a learning disability explaining Mr. Lyons' failure, undersigned counsel for Petitioner took great pains to address this issue in his brief (Petitioner's Brief, p. 105-106). To put all of that briefly, whatever learning disabilities which might be attributed to Mr. Lyons are related to, and not independent from, his mental retardation (Hearing Tr. 240-241; Exhibits 104 and 105; Exhibit L). In their brief, Respondents simply trumpet the term "learning disability" without addressing the expert opinions that whatever learning disability there is relates to Mr. Lyons' mental retardation (Respondents' Brief, p. 17, fn. 1, p. 24).

Finally, as concerns Respondents' claims about the concessions by undersigned counsel regarding Mr. Lyons' communications abilities, that portion of Petitioner's brief, at pages 104-105, was as follows:

> Dr. Fucetola has further detailed Mr. Lyons' communication weaknesses, that while Mr. Lyons can verbally communicate on a simple level, stringing

> sentences together, and following simple, verbal directions, he cannot verbally communicate on a higher level in which multiple issues are needing to be addressed at once, and therefore he cannot engage in discourse, and he cannot advocate for himself (Hearing Tr. 187-188).

Respondents obviously conceive of this as a concession, and add to it their perceptions about Mr. Lyons' minimal communications abilities, making telephone calls, exchanging rings with a woman, and asking a family member to pick up a paycheck (Respondents' Brief, p. 24). All this points up Respondents continued refusal to understand the "cloak of competency" concept essential to an intelligent discussion regarding mental retardation. As Dr. Fucetola testified, Mr. Lyons' minimal abilities to communicate on simplistic, primary-school-like levels mask his profound inability to engage in the sort of higher level communication essential to independent living (Hearing Tr. 187-188).

Consequently, the Master's findings stand firm regarding Mr. Lyons' retardation-related deficits in the statutorily-required number of two adaptive behaviors, those being communication and functional academics.

3. Respondents demonstrate they have nothing of consequence to offer regarding Mr. Lyons' deficiencies, found by the Master, as to community use, leisure and social skills

As noted in Mr. Lyons' brief, the Master also found that Mr. Lyons suffered extensive, retardation related deficits in the adaptive behaviors of community use, leisure and social skills (Master's Report, p. 12, 13, 15; Petitioner's Brief, p. 106-110). As to these issues, Respondents once again violate the applicable principles of science and law, choosing to ignore Mr. Lyons' incapabilities in these arenas, and touting their perceptions regarding Mr. Lyons supposed capabilities in these regards (Respondents' Brief, p. 25-26). Worse than that, carried away by the zeal of their argument, Respondents go further and misrepresent certain aspects of the record (Respondents' Brief, p. 25-26).

Thus, when Respondents endeavor to address the Master's findings regarding Mr. Lyons' failures at community use, they completely ignore the extensive standardized testing data generated by Dr. Fucetola, which data strongly supported the Master's conclusions (Respondents' Brief, 25; Master's Report, p. 12-13; Hearing Tr. 191; Exhibit 115, p. 3-6). As to the Master's finding that Mr. Lyons lacked community use in that he used the community only as much as his family helped him to do so (Master's Report, p. 12-13), Respondents ventured their personal beliefs that whether Mr. Lyons used his family for help "does not seem dispositive" (Respondents' Brief, p. 25). To the contrary, as the experts and the cases repeatedly proclaim, the retarded person's incapabilities are highlighted when he is unable to accomplish tasks independently, and must instead rely upon

family to make things happen (Hearing Tr. 117, Exhibit 111, p. 3). See also ***State v. White***, 908. But Respondents do not stop there, flagrantly attempting to leave the Court with the false impressions that Mr. Lyons may have used the computer or a travel agent to make travel plans, and "proceeded pro se" in an attempt to gain custody of his children (Respondents' Brief, p. 25). Respondents know good and well what the record demonstrates, that Mr. Lyons' family made his travel happen, and that Mr. Lyons' actions concerning the child custody matter consisted only of putting questions to a Judge who was unrelated to the case and of trying unsuccessfully to obtain housing for the children (Hearing Tr. 43, 69, 72, 250-251, 438, 524; Exhibit R, p. 72; Exhibit GG, p. 599, 758; Exhibit 101, p. 18-19, 22, 25-26; Exhibit 113, p. 16).

As to the Master's findings about leisure and social skills, Respondents again completely ignore the negative, instead raising such issues as Mr. Lyons' development of relationships with women and his other friendships as supposedly evinced by his having a nickname (Respondents Brief, p. 26). Actually, both of these facts strongly support the Master's conclusions. As the Master found, the only outcomes from Mr. Lyons' dysfunctional relationships with women were untoward ones, the births of multiple children, who eventually became wards of the state (Hearing Tr. 190; Master's Report, p. 12). And, the story about Mr. Lyons' "nickname" is nothing but heartbreaking. The nickname ascribed to Mr.

Lyons by his "friends" was "Malcolm after the Malcolm Bliss State Hospital (a crazy hospital) (Master's Report, p. 15).

Finally, Respondents urge that whatever Mr. Lyons lacked in terms of these skills "did not adversely affect his ability to live independently" (Respondents' Brief, p. 25-26). In making this argument, Respondents fail to acknowledge that Mr. Lyons spent almost all of his life living dependently with family and girlfriends, and that the only brief time Mr. Lyons lived on his own, he lived, as his sister put it, like an animal (Hearing Tr. 72; Exhibit 101, p. 25-26; Exhibit S, p. 14-15; Exhibit GG, p. 898-899). The evidence in the record is clear, that Mr. Lyons did not and could not live independently.

CONCLUSION

WHEREFORE, in light of the foregoing, and in light of the premises set forth in Petitioner's Brief on the subjects, Mr. Lyons prays that this Honorable Court follow the recommendation of the Special Master, and find that Mr. Lyons is mentally retarded per the dictates of Section 565.030.6 RSMO, and is therefore ineligible for the death penalty. Mr. Lyons further prays that this Court consequently set aside his sentence of death, and resentence Mr. Lyons to life imprisonment without possibility of probation, parole or release, except upon act of the Governor.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that paper and electronic copies of the foregoing were served upon opposing counsel by mailing and e-mailing same to him this 29th day of October, 2009.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is compliant with Supreme Court Rule 84.06 in that it has been prepared in Microsoft Word, Times New Roman 14 font format, containing 7,695 words. A separate disk, containing an electronic copy of the brief, has been supplied.

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FREDERICK A. DUCHARDT, JR.