No.88625

In the
Missouri Supreme Court

State ex rel. ANDRW LYONS,

Petitioner,

v.

LARRY CRAWFORD & JEREMIAH NIXON,

Respondents.

On Petition for Writ of Mandamus

RESPONDENTS' BRIEF

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JURISDICTIONAL STATEMENT

This case involves an original petition for writ of mandamus under Missouri Supreme Court Rules 84.22 to 84.24 and 94.01 et seq. This is an original proceeding for writ of mandamus that was filed with this court on June 29, 2007. Jurisdiction over this cause lies with the Missouri Supreme Court. Missouri Constitution, Article V, §III; In re Competency of Parkus, 219 S.W.3d 250 (Mo. banc 2007).

STATEMENT OF FACTS

Petitioner, Andrew Lyons, was convicted of two counts of murder in the first degree, §565.020.1, RSMo 1994, and one count of involuntary manslaughter, §565.024.1, RSMo 1994. State v. Lyons, 951 S.W.2d 584, 587 (Mo. banc 1997), cert. denied, 522 U.S. 1130 (1998). The facts were summarized by this Court on direct appeal as follows:

> As of September 1992, Andrew Lyons and Bridgette Harris had been living together for three years in Cape Girardeau, Missouri. Their eleven-month old son, Dontay, lived with them, as did Bridgette's two children from a previous relationship, seven-year-old Demetrius and four-year-old Deonandrea. Approximately one week before the murders, Lyons told a longtime friend that he was having problems with Bridgette. Lyons told the friend that "he just felt like killing" and that the "best thing for [Bridgette] to do . . . was to get killed . . . ." Around the same time, Bridgette moved out of the house she shared with Lyons. She and the three children moved in with Bridgette's mother, Evelyn Sparks.
>
> Two days before the murders, Lyons drove his truck alongside Bridgette and her older sister while they were walking on a sidewalk. He stopped the truck and pulled forward the passenger's seat, revealing a shotgun. The women ran away and reported the incident to the police.
>
> The day before the murders, Lyons told another friend that Evelyn was interfering with his relationship with Bridgette and that "she should leave them alone or he would kill her." That night, he told Bridgette's best friend that "I

am going to end up killing [Evelyn]." Around midnight, Lyons told yet another friend that he was going to shoot Evelyn with his shotgun and "catch a train out of here."

On the morning of Sunday, September 20, 1992, Lyons went to Evelyn's house, where Bridgette was staying. He and Bridgette argued. Lyons left, went back to his house, and grabbed his shotgun and a duffel bag packed with clothes and ammunition. Shortly after 10 a.m., Lyons returned to Evelyn's house. Evelyn was in the kitchen. Bridgette, Demetrius, Deonandrea, and Dontay were downstairs in the basement. Demetrius heard a loud noise from upstairs and went to see what had happened. On his way, he passed Lyons coming down the stairs carrying a shotgun. Demetrius saw his grandmother lying on the kitchen floor and ran to his room. In the basement, Lyons shot Dontay once and shot Bridgette once.

Lyons then drove to the house where his half-brother, Jerry DePree, was staying. Lyons asked DePree to follow him to the house of his friends John and Gail Carter so that he could drop off his truck. Upon arriving at the Carters's house, Lyons went in to talk to Gail. He told her that he had killed Bridgette and Evelyn and that he had shot Dontay by accident. Lyons went back outside and transferred the shotgun and duffel bag from his truck to DePree's car. Lyons got into DePree's car and told him to drive away. DePree asked him what was wrong, and Lyons told him that he had shot some people

and that the police would probably be looking for him. DePree dropped Lyons off at Trail of Tears State Park. Lyons left his shotgun in DePree's car.

Back at Evelyn Sparks's house, another of Evelyn's daughters arrived around 11 a.m. She found her mother on the kitchen floor and called the police. The police discovered Bridgette and Dontay in the basement. All three were dead. Evelyn died from massive hemorrhaging and tissue destruction caused by a gunshot wound above her left hip. Bridgette died from massive hemorrhaging and tissue destruction caused by a gunshot wound below her right shoulder. Dontay died from extensive brain tissue damage secondary to a contact gunshot wound to the left eye.

When DePree learned later in the day that Evelyn, Bridgette, and Dontay had been shot to death, he turned over Lyons's shotgun to the police. The shell casing found in the shotgun and the two shell casings found at Evelyn's house matched the shell casings of cartridges fired from the shotgun by the State's firearms examiner.

Lyons was arrested in the afternoon and confessed to shooting Evelyn, Bridgette, and Dontay that morning. At trial, the jury found Lyons guilty of murder in the first degree for the deaths of Evelyn Sparks and Bridgette Harris and guilty of involuntary manslaughter for the death of Dontay Harris. The jury could not agree on a punishment for the murder of Evelyn Sparks. The jury recommended a sentence of death for the murder of Bridgette Harris and seven years incarceration for the death of Dontay Harris. The trial court

sentenced Lyons to death for the murder of Evelyn Sparks and accepted the jury's recommendations as to the deaths of Bridgette and Dontay.

Id. at 587-588. This Court affirmed petitioner's convictions and sentences on August 19, 1997

On direct appeal, the primary mental health issue was whether petitioner's pre-trial statement was knowing. Petitioner's mental health theory at that time was "depression." Id. at 590 (Hearing Tr. 34). The court unanimously concluded that the statement was knowing and voluntary. Id. at 590-91.

Petitioner filed a motion for post-conviction relief under Missouri Supreme Court Rule 29.15. The circuit court denied post-conviction relief, and this court affirmed on January 31, 2001. Lyons v. State, 39 S.W.3d 32 (Mo. banc 2001). During that litigation, the issue of mental health arose in the context of ineffective assistance of counsel/whether petitioner could deliberate. The court concluded that trial counsel was effective because counsel hired a private mental health expert who conducted a comprehensive forensic evaluation of petitioner. Id. at 36-37. The court also found that petitioner suffered no prejudice because "overwhelming evidence supported the jury's finding of deliberation in this case." Id. at 37. Concerning the claim that counsel should have engaged experts to do neuropsychological testing, the court rejected the notion that counsel had a duty to do that because there was no hint of neuropsychological problems "Drs. Harry and Stacy's initial report concluded that appellant possessed 'features. . . consistent with [appellant's] severe depression substantially interfering with his cognitive functioning.'" Id. at 38. Drs. Harry

and Stacy found that appellant had various cognitive deficits, "despite [appellant] having no evidence of brain damage." Id. at 38.

Petitioner then filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Missouri. The district court denied relief and petitioner appealed. Lyons v. Luebbers, 403 F.3d 585 (8th Cir. 2005). One of the issues on that appeal concern petitioner's competency to stand trial. Id. at 592-93. Petitioner's mental health theory at that time was "severe depression," id. at 590 or "depression and other psychotic features," id. at 591. Similarly, the court of appeals rejected the contention that petitioner received ineffective assistance of counsel because counsel did not assert a mental disease or defect defense based on "the proposition that a major depression would mitigate Mr. Lyons' ability to deliberate." Id. at 594.

Meanwhile, back in state court, petitioner sought to relitigate the mental incompetency issue. State v. Lyons, 129 S.W.3d 873 (Mo. banc 2004). Because the legal issues asserted by petitioner were not cognizable in the vehicle he chose, the court affirmed the denial of relief. Id.

Petitioner filed the present petition for writ of mandamus on June 29, 2007. The court referred the matter to a Special Master, the Honorable Michael D. Burton, who heard evidence on July 1 and 2, 2008. The Master recommended this court's finding that petitioner "is mentally retarded as defined in §565.030.6, R.S.Mo." (App. 17). After exceptions by respondent, the Master reiterated that conclusion (App. A-21).

POINT RELIED ON

I.

The court should not issue a writ of mandamus because petitioner is not mentally retarded in that he does not have significantly subaverage intellectual functioning or continual extensive deficits and limitations in two or more adaptive behaviors.

Atkins v. Virginia, 536 U.S. 304 (2002);

§565.030. RSMo. Cum. Supp. 2008;

Goodwin v. State, 191 S.W.3d 20 (Mo. banc); and

State v. Johnson, 244 S.W.3d 144 (Mo. banc 2008).

STANDARD OF REVIEW

In cases involving an extraordinary writ and the court's use of a Master to assist the court's resolution of the writ, the court has described the following as the standard of review:

> The habeas corpus petitioner has the burden of proof to show that he is entitled to habeas corpus relief. State ex rel. Nixon v. Jaynes, 73 S.W.3d 623, 624 (Mo. banc 2002). Where the Master has the opportunity to view and judge the credibility of witnesses, the findings and conclusions of the Master are accorded the weight and deference given to trial courts in court tried cases. State ex rel. Busch Whitson v. Busch, 776 S.W.2d 374, 377 (Mo. banc 1989).

State ex rel. Winfield v. Roper, 2009 WL 2762454, slip op. at 1 (Mo. banc Sept. 1, 2009).

ARGUMENT

I.

The court should not issue a writ of mandamus because petitioner is not mentally retarded in that he does not have significantly subaverage intellectual functioning or continual extensive deficits and limitations in two or more adaptive behaviors.

Petitioner is not "mentally retarded" because he does not have a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age. Section 565.030.6, RSMo. Cum. Supp. 2008; Atkins v. Virginia, 536 U.S. 304 (2002).

In 2002, the United States Supreme Court held that the Eighth Amendment's prohibition against cruel and unusual punishment prohibited capital punishment for offenders who are mentally retarded. Atkins v. Virginia, 536 U.S. at 311-17. Citing §565.030.6, RSMo. in support of its ultimate legal conclusion, the Supreme Court made clear that it remained the state's responsibility to define mental retardation.

> Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the

constitutional restriction upon [their] execution of sentences." Id. at 405, 416-17, 106 S.Ct. 2595.

Atkins v. Virginia, 536 U.S. at 317 (footnote omitted).

Section 565.030.6, RSMo. Cum. Supp. 2008, to which the Supreme Court referred contained Missouri's prohibition on capital punishment for those who are "mentally retarded." That statute provides:

> As used in this section, the terms "mental retardation" or "mentally retarded" refer to a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

Section 565.030.6, RSMo. Cum. Supp. 2008.

Documentation Before Age Eighteen

The history associated with the definition of "mentally retarded" reveals that it was a product of compromise. In 2000, the legislature considered language like that in §565.030.6, RSMo. Cum. Supp. 2008. The compromise was designed to obtain support of prosecutors and it required that a person's mental retardation "would have to be 'manifested and documented' before the age of eighteen." Bell, Mentally Retarded May Be Exempted from Death Penalty – Under Proposal, St. Louis Post Dispatch, (February 27, 2000) (located at

http://infoweb.newsbank.com\iw-search/we/InfoWeb?p_product=NewsBank&p_theme=aggregated5&p_action=doc&p_docid=OEB052294516DC488&p_docnum=16&p_queryname=1 (last visited September 28, 2009)). Subsequent review of the 2000 bill discussed that mental retardation would have to be "manifested and documented" before age eighteen. See Bell, House Will Debate Bill to Exempt Mentally Retarded From Execution, St. Louis Post Dispatch (May 3, 2000) (located at http://infoweb7.newsbank.com/iw-search/we/InfoWeb?p_product=NewsBank&p_theme=aggregated5&p_action=doc&p_docid=OEBO5255A67FDO68&p_docnum=19&p_queryname =1 (last visited September 28, 2009)). The wording of the 2000 bill was important because "a 'fragile coalition' of prosecutors and defense attorneys had come up with the wording." Bell, House Debates Bill to Exempt Mentally Retarded People From Execution, St. Louis Post Dispatch (May 11, 2000) (located at http://infoweb7.newsbank.com/iw-search/we/InfoWeb?p_product=NewsBank&p_theme=aggregated5&p_action=doc&p_docid=OEBO5259C33D69BC&p_docnum=20&p_queryname=1 (last visited September 29, 2009). The legislation failed to pass in 2000.

But the legislation succeeded in 2001. That legislation which eventually became §565.030 was essentially unopposed due to the compromise language that was hammered out in 2000. See Bell, Bill to Spare The Retarded From Death Penalty is Unopposed – But Condition Would Have to be Documented Before Age Eighteen, St. Louis Post Dispatch (January 31, 2001) (located at http://infoweb7.newsbank.com/iw-search/we/InfoWeb?p_product=NewsBank&p_theme=aggregated5&p_action=doc&p_docid=OEBO52FCCD6524AF&p_docnum=27&p_queryname=1 (last visited September 29, 2009)).

> Prosecutors had opposed the exemption since the early 1990's because they did not want to establish another mental disease defense, Callahan said. The compromise, however, requires that for the law to be applicable, the defendant must have had a mentally retarded condition documented before age 18.

Id. The legislation passed in 2001 with the compromise that the conditions be documented before age 18. Bell, Legislation Sent to Holden Would Ban Death Penalty From Mentally Retarded, St. Louis Post Dispatch (May 12, 2001) (located at http://infoweb7.newsbank.com/iw-search/we/InfoWeb?p_product=NewsBank&p_theme =aggregated5&p_action=doc&p_docid=OEC00F9813776A54&p_docnum=35&p_ query name=1 (last visited September 28, 2009)).

Since 2001, the court's review of offenders under the statute is consistent with the legislative intent. For example, in Johnson v. State, 102 S.W.3d 535 (Mo. banc 2003), the court noted Johnson's records showing an IQ score of 77 when Johnson was in the third grade and a score of 63 when Johnson was in the sixth grade.

In Taylor v. State, 126 S.W.3d 755 (Mo. banc 2004), the court found that Taylor failed to present any credible evidence to support his claim that he was mentally retarded at the time of the crime. Id. at 763. There appears to have been no documentation that Mr. Taylor had deficits and limitations in two or more adaptive behaviors before the age of eighteen. Moreover, there appears to be no documentation of Mr. Taylor's IQ before the age of eighteen. Id. at 762-63.

Similarly, in Goodwin v. State, 191 S.W.3d 20 (Mo. banc 2006), the court looked at the six IQ scores the offender received before the age of eighteen. Id. In discussing the requirement of documentation, the court stated, "[a]ll of Goodwin's testing, before age eighteen and as discussed above, indicates that he was not retarded." Id. at 32.

In In re Competency of Parkus, 219 S.W.3d 250 (Mo. banc 2007), the court found that Parkus was mentally retarded as defined by the statute. Id. at 252. The court noted Parkus' "numerous examinations from age eight to age seventeen." Id. at 255.

Lastly, in State v. Johnson, 244 S.W.3d 144 (Mo. banc 2008), the court looked at documentation from that offender's youth suggesting low IQ test scores before the age of eighteen. Id. at 152. All the cases since the statute's enactment in 2001 have appropriately focused on the documentary evidence concerning the onset of mental retardation before the age of eighteen.

After respondent filed suggestions in oppositions to the petition for writ of mandamus, petitioner refiled a reply. Appendix B to the reply contained ten pages of record concerning petitioner's education. Those records showed poor grades and poorer attendance. So the court referred the matter to the Master for development of the record as well as a recommendation. While both parties used the Cape Girardeau School records (Petitioner's Exhibit 102; Respondent's Exhibit EE), petitioner presented no other documentary evidence from before the age of eighteen in support of his claim that he was mentally retarded.

In the Master's report, the Master does not identify intelligence testing from before the age of eighteen (Add. 3-8). There is none. Concerning adaptive behavior, there was no documentation before the age of eighteen for any behavior other than the school records

(Report, pages 9-14, 15-16). There is none. In the area of functional academics, the Master refers only to the Cape Girardeau School District (Report, pages 14-15). The Master notes that petitioner dropped his classes due to truancy, a symptom of a conduct disorder in adolescents. Diagnostic and Statistical Manual of Mental Disorders, page 99 (4th-TR ed. 2002). Such anti-social behavior came to full flower when petitioner killed Bridgette Harris, their eleven month old son, Donte and Bridgette's mother, Evelyn Sparks.[1] The sole standardized test recorded in the records is not an IQ test. But on it, petitioner scored on the fourth percentile (Hearing Tr., page 278), where on an IQ test, mentally retarded people would score on the second percentile and lower (Hearing Tr., page 277).

After respondent's exceptions pointed out the lack of documentation before the age of eighteen, the Master responded, "his family and his school records support this finding" (App. A20). Review of the record before the Master, however, reveals no documentation from the family from before the age of eighteen. Indeed, there is no documentation from the family after the age of eighteen, only anecdotes related in deposition testimony. This is the type of case that the "fragile coalition" did not intend to result in a finding of mental retardation. The nature of such family testimony was discussed in State v. Johnson, 244 S.W.3d 144 (Mo. banc 2008). In discussing the conclusions of that defense expert, the court stated, "to test Johnson's adaptive behaviors, Dr. Keyes relied on anecdotes and stories about Johnson that he learned from Johnson's siblings, who knew that Johnson would not be

[1] In 1999, before Atkins, petitioner painted his poor academic performance as being caused by a learning disability (Respondent's Exhibit L, page 52).

sentenced to death if he were found to be mentally retarded. Thus, relying on Johnson's siblings for this information presented a concern about bias." Id. at 156. That concern is highlighted in the present case, when the relatives felt it was to his benefit, they expounded upon his abilities. Petitioner could "fix the car, mow the yard, come by and see if I needed anything" (Respondent's Exhibit GG – herein after Trial Tr. - Trial Tr. 924). "If you ask him to do something for you, he would come by and do it" (Trial Tr. 928). He would "hold down the job and be a really responsible hard working person" (Trial Tr. 934). A brother testified at trial that petitioner nursed his father during his last two years of illness from pancreatic cancer (Trial Tr. 946). Another brother noted that petitioner was a perfectionist (Trial Tr. 955). For a sister, he babysat her children (Trial Tr. 967). After Atkins, the testimony changed 180 degrees.

This case illustrates the rationale the Missouri legislature had for documentation before the age of eighteen. Without documentation, the tenor of witnesses changes depending on whether the defendant is asserting a depression as the mental disease or defect as was the case at the time of petitioner's trial or mental retardation as is the topic of the current litigation. The documentation requirement also allows the court to determine reliably whether the offender had a low IQ before the age of eighteen. And in petitioner's case, there is no documentation from school records, family service records, youth service records, medical records, social service records, juvenile authority records, military records or the like documenting either low IQ or poor adaptive functioning in two areas before the age of eighteen. The dearth of documentation stands in stark contrast with the record discussed by

the court in Parkus. The court should conclude that petitioner failed to demonstrate that mental retardation was manifested and documented before the age of eighteen.

The Master Incorrectly Determined That Petitioner Has Significantly Subaverage Intellectual Functioning

Intellectual functioning was measured by the experts by reference to petitioner's intelligence quotient (IQ) score. Petitioner's IQ score has degraded over time. The IQ score was 84 and 81 when tested in 1992 and 1998 (App. 5). After passage of §565.030.6, petitioner's IQ score fell dramatically to 67 in 2002 and 61 in 2007 (App. 4). The diagnostic criteria for a medical finding of mental retardation requires an IQ score of below 70, with an IQ score between 70 and 75 raising concern about possible mental retardation. See State v. Johnson, 244 S.W.3d at 152. That is because the number 75 is within the five point margin of error attributable to the measurement of error in assessing IQ. See Goodwin v. State, 191 S.W.2d 20, 31 n.7 (Mo. banc 2006).

The Master discounted the 1992 IQ score of 84 because, ironically, the test was correctly scored. Petitioner was over thirty-five years of age when he took that IQ test and it was scored as though he was over thirty-five years of age. If the scorer had treated petitioner as thirty-four instead of his actual thirty-five, petitioner would have scored lower, a 78. Thus, according to the Master, the 84 IQ score is too high because the test should have been misscored (Report, page 5).

To state the Master's analysis is to refute it. Because petitioner was thirty-five when he took the 1992 IQ test, it was appropriate to treat him as a thirty-five year old. Petitioner's

expert testified generally about the importance of following the test's instruction in the giving and grading in order for the results to be valid (Hearing Tr. 256).

The Master also discounts the 1992 and 1998 IQ scores of 84 and 81 because of the "Flynn Effect." The "Flynn Effect" concerns inflation of IQ scores as the testing instrument grows older (Report, page 6). Adjusting the 1992 and 1998 IQ scores for the "Flynn Effect," petitioner's IQ scores would still be well above 70, 74.7 and 75.9 respectively (Report, page 6). The Master also noted that when the 2007 IQ score of 61 was adjusted for the Flynn Effect, the different between the 2007 score of 55.7 and the 1990 scores of about 75 is very large, about 20 IQ points. The state's expert, Dr. Kline agreed that there was research in the area of "Flynn Effect." And the test instrument technical manual addresses the Flynn Effect. But all experts agree, Dr. Fucetola and Dr. Kline that the test instrument scoring does not authorize an adjustment in an individual's score. The "Flynn Effect" is a phenomena that applies to a group of test takers and may or may not apply to an individual test taker. The manual does not tell practioners to undercut performance scores. For example, in Winston v. Warden, 2007 WL 678266 at *15 (Vir. 2007), the court did not readjust IQ scores of 77, 76 and 73 on differing IQ tests. See also In re Mathis, 483 F.3d 395, 398 n.1 (5th Cir. 2007) (Flynn Effect accepted as scientifically invalid in 5th Circuit) (citing In re Salazar, 443 F.3d 430, 443 n.1 (5th Cir. 2006)). "It is not standard practice in the scientific community to adjust an IQ score for the Flynn effect . . . ." Hull v. Quarterman, 2009 WL 612559, slip op. at 40 (N.D. Tex. 2009); Winston v. Kelly, 2009 WL 577600 (W.D. Vir. 2009), at *6 (generally accepted practice is not to subtract IQ points that the individual has earned); id. at *14 (Atkins did not incorporate Flynn effect and standard of error measurement (SEM) into

federal constitution). See Hedrick v. True, 443 F.3d 342 (4th Cir. 2006) (SEM can either raise or lower IQ scores, SEM cannot be used to show mental retardation); Walten v. Johnson, 440 F.3d 160, 178 (4th Cir. 2006) (en banc) (same). Petitioner's expert testified about the margin of error. While it is possible that a score will be at the outer range, there is an increasing likelihood that the score is close to the number actually measured (Hearing Tr. 258). And in the context of socio-economic factors, scores are not to be adjusted (Hearing Tr. 280).

Lastly, the Master suggests that petitioner guessed a few answers correctly on the 1992 and 1998 tests and scored higher because of luck (App. 7). Dr. Kline, the state's expert, testified that a test taker "cannot fake smart" (Hearing Tr. 537-38). There is no testimony in the record on the probability of a person guessing correct answers on IQ tests given six years apart. This aspect of the Master's report is pure speculation (App. 7).

In his brief, petitioner discounts the IQ scores from when petitioner was relatively young, the scores from 1992 and 1998 (Petitioner's Brief, pages 87-90). But the focus of §565.030.6, RSMo. Cum. Supp. 2008 concerns petitioner's intellectual functioning before the age of eighteen because that is a prerequisite for a person to be labeled mentally retarded.

During the hearing, there was testimony that petitioner's lower scores could have been the product of another mental disease such as depression or a medical condition. Ironically, petitioner's theory at trial was that petitioner's depression affected his everyday performance, including IQ testing. Petitioner's expert testified,

> In my clinical experience, it was my conclusion that Mr. Lyons probably wasn't scoring as well on those tests as he could under optimal

> circumstances. The reason, I think he tried as hard as he could, but the level of depression that he experienced was or was experiencing was very high, and that suppresses IQ scores. It will suppress an IQ score for a child or adult under any circumstances, so that's one of the reasons I gave him a short form IQ as opposed to a full Whechsler Test which takes a couple hours to do, and it wasn't going to give us in my opinion a terribly accurate score, so I elected with a shorter test.

(Trial Tr. 869). Petitioner's criminal trial theory supports the conclusion that all IQ test scores of petitioner's are depressed due to depression. Concerning a medical condition such as stroke or head injury that could cause petitioner's IQ score to plummet twenty points, petitioner asserts that there is nothing in the medical record to support a finding of stroke or head injury (Petitioner's Brief, page 93). Of course, the fall in IQ scores, in and of itself, supports the notion that there has been head trauma, and petitioner does not show anything in the medical record to show that there has not been head trauma.

Petitioner complains that Dr. Kline's approach to petitioner's IQ is scientifically invalid (Petitioner's Brief, page 94). Recalling that IQ is a measure of intellectual functioning, it is appropriate to focus on the score's measuring of capacity. If the question were how fast can a car go, and the various measurements were 84, 81, 67 and 61 miles per hour, the number 84 best answers the question of how fast can that car go. Similarly, if a container is measured as containing different amount of liquid, the highest amount of that liquid, while not answering the question of how big is the container, at least tells you that it will hold at least that much. Petitioner's score of 84 in 1992 sets the benchmark for his

intellectual functioning. That subsequent scores have not reached that benchmark does not indicate that petitioner did not set the benchmark in 1992.

Petitioner did not demonstrate significantly subaverage intellectual functions as measured by IQ tests.

Adaptive Behavior

Not only must petitioner show significantly subaverage intellectual functioning, but he must also show "continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work . . . ." Section 565.030.6, RSMo. Cum. Supp. 2008. Petitioner acknowledges that he is not "totally incapable" (Petitioner's Brief, page 98). And, to the extent that petitioner appears independent, petitioner contends that that is part of his coping with mental retardation by presenting a "cloak of competence" (Petitioner's Brief, page 101). So, according to petitioner's reading of the statute, any area of competence is either irrelevant or perhaps even proof that he is mentally retarded. There is no support for that analysis in §565.030.6, RSMo. Cum. Supp. 2008 or the cases interpreting it.

Petitioner suggests that it is appropriate to consider information from his family members on the topic of his adaptive behaviors. Of course, such information should be tempered with the knowledge that the family members want to help petitioner overturn his capital sentence, see State v. Johnson, 244 S.W.3d at 156, and have testified previously about petitioner's capability in a variety of areas. Petitioner suggests that information about his capabilities is irrelevant (Petitioner's Brief, pages 98-101). But capability is relevant. If

petitioner were so profoundly impaired, so that he did not know how to take a bath, that is one thing. But if petitioner knows how to bath and simply chooses not to, that's a separate issue. Again, in terms of capacity, petitioner would know how. So the anecdotes of capacity relayed by petitioner's family is significant information about petitioner's adaptive behaviors.

Petitioner contends that the Cape Girardeau School records show limitations in functional academics (Petitioner's Brief, page 104). Of course, those records show petitioner's anti-social personality caused truancy which caused poor grades. None of those school records show that petitioner was in special education due to mental retardation as compared to truancy or other misbehaviors. In petitioner's brief, he emphasizes the importance of personal independence as the key component in assessing adaptive skills (Petitioner's Brief, page 100). But petitioner does not suggest he lacked independence due to an inability to understand information on a fourth grade level (Petitioner's Brief, page 104). Interestingly, petitioner's trial theory was that he was underestimated and inappropriately placed in Special Education and that this was a blow to his self-esteem (Trial Tr. 875).

Similarly, in his brief on appeal, petitioner acknowledges his ability to communicate (Petitioner's Brief, pages 104-05). There was no testimony that petitioner could not write a note, use a telephone or otherwise make his needs and wants known to others (Tr. Tr. 931) (collect calls), 934 (exchange rings with new woman in his life), 682 (asked brother to pick up paycheck)); (Hearing Tr. 44 (phone calls)).

Not only did petitioner suffer from truancy, he also had a learning disability. Petitioner contends that Dr. Cowan made "no mention of a 'learning disability.'" In his

deposition, Dr. Cowan found that petitioner scores were indicative "of a gentleman who probably did have a learning disability. . . ." (Respondent's Exhibit L, page 52). Petitioner suggests that the scores on the subtest of his IQ test did not indicate a learning disability (Petitioner's Brief, page 106). Dr. Cowan disagreed (Respondent's Exhibit L, page 52).

Petitioner contends that he had deficits in "community use" (Petitioner's Brief, page 106). Petitioner presents no argument that his community use or lack of community use adversely affected his everyday independent living, the criteria he asserts is the criteria for analyzing adaptive behavior (Petition, page 100). Petitioner asserts that evidence that petitioner's community use is scant. Petitioner used the community resources of roads by traveling across the country (Petitioner's Brief, page 108). Petitioner suggests that he received help from his family in making the travel arrangements (Petitioner's Brief, page 108). Whether petitioner used Expedia, a travel agent, a clerk at the bus station or his family to make travel arrangements does not seem dispositive. Likewise, whether petitioner used family, an employment service, the want ads or networking to find employment does not seem dispositive (Petitioner's Brief, page 108). Petitioner used the judicial system in an attempt to gain custody of his children also shows use of community resource. Petitioner asserts, however, that he was ham-handed in his effort (Petitioner's Brief, page 108). The fact that petitioner proceeded pro se does not demonstrate that he lacks the mental ability to use a community resource. Petitioner's ability to interact with the community is also shown by his ownership of vehicles (Trial Tr. 753), possession of driver's license (Trial Tr. 474, 476) and the purchase of personal property, such as a shotgun (Trial Tr. 438, 474, 476, 887)

and the social entanglement of the ownership of such items entails. Petitioner did not show a lack of community use that affected his independent living.

Similarly, petitioner did not show a lack of leisure that affected his independence (Petitioner's Brief, pages 100, 109). The record reflects that petitioner took his children to the park. He would play (Trial Tr. 937, 957) and tell jokes (Trial Tr. 937-38). The record also reflects that petitioner developed relationships with women. He hunted squirrels (Trial Tr. 438, 475). These evidence petitioner's capability to engage in leisure. Moreover, the lack of leisure did not adversely affect petitioner's ability to live independently.

Next, petitioner contends that he had limitations with social skills (Petitioner's Brief, page 109). First, petitioner contends that he was shy and thus, had difficulty making friends (Petitioner's Brief, page 109). But the record reflects that petitioner had three relationships with women that resulted in children, an indication of some social skills (Hearing Tr. 446). Petitioner acknowledges that he made friends (Hearing Tr. 82; Trial Tr. 637, 646). He had a nickname (Trial Tr. 417). Petitioner contends that the lack of social skills is manifested by his "failed relationships with his girlfriend" (Petitioner's Brief, page 110). In contrast, the testimony of petitioner's family over the course of sixteen years, at trial, and depositions and at the hearing below amply demonstrate petitioner's social skills with his family (Tr. Tr. 454, 464, 472, 475, 485, 635, 640, 641, 641-44, 682). He was reliable and jovial at work (Trial Tr. 660).

Next, petitioner contends that he has deficits in the category of home living (Petitioner's Brief, page 110). Petitioner acknowledges his strengths of cooking and cleaning for himself and his children (Petitioner's Brief, pages 110-11). His "penchant for

cleaning" is juxtaposed by the contention that he "lived in squalor in a vacate house." The penchant aspect of petitioner's claim shows his ability to live independently. He was a perfectionist (Trial Tr. 955). He was a good father (Trial Tr. 932). That he chose to live in squalor (assuming that is true) does not show that he was incapable of living independently. Of course, petitioner actually did not live alone due to costs (Hearing Tr. 81).

Petitioner suggests that he had difficulty with money management (Petitioner's Brief, page 111). Petitioner did not show that his job as a custodian created an abundance of money to manage (Trial Tr. 753 – 3 years at Service Master). More importantly, before the Master, petitioner did not show ill effects from poor money management such as the loss of utilities or the loss of a home (Hearing Tr. 77). At trial, petitioner's theory was that he was never in debt, never in bankruptcy, had no credit card balances and earned sufficient money (Trial Tr. 879, 886). He asked brother to pick up paycheck (Tr. 682). He could pump and pay for gas (Trial Tr. 497).

The Master found that petitioner had no deficit in obtaining employment (App. 16). That conclusion is well supported by the record (Exhibit 101, pages 18-19, 25-26; Trial Tr. 599; Hearing Tr. 70-72; Exhibit R, page 72). Petitioner complained that the jobs were low skill jobs. From respondent's perspective, that shows that he was seeking appropriate employment, not inappropriate employment. Petitioner complained that he had help in finding jobs (Petitioner's Brief, page 112). Sometimes that is called networking. Even assuming that were true, it was petitioner that had to do the work and maintain the employment, not the "kin." Petitioner suffers no deficit here.

Concerning self-direction, petitioner had the goals of being employed, being self-sufficient and providing for his children (Hearing Tr. 439-40, 525-26). Being a good worker was a source of pride (Trial Tr. 876). His children were the pride of his life (Hearing Tr. 79). The Master agreed that the goal showed self-direction. Petitioner contends that he should have more grandiose goals (Petitioner's Brief, page 113). Petitioner's having appropriate goals shows petitioner has no limitations in self-direction.

The Master found no deficit in the areas of health and safety (App. 13-14). This finding is supported by the record (Hearing Tr. 441). Petitioner moved to Detroit to help his father during the father's declining years (Trial Tr. 946; Hearing Tr. 84) and concerning safety, the record reflects that petitioner had employment making pallets (Hearing Tr. 441-42, 526-27; Trial Tr. 876) without report of injury. The record also reflects that petitioner discontinued drug use at an early age (Hearing Tr. 441-42; Trial Tr. 891), and this indicates an ability to prevent future medical and safety problems.

Finally, not only must petitioner show "deficits and limitations in two or more adaptive behaviors," those deficits must be caused by the "significantly subaverage intellectual functioning." Phrased another way, if the lack of adaptive behaviors is caused by depression, like petitioner suggested at his trial, that a finding of mental retardation is inappropriate. For example, at petitioner's trial, there was testimony that petitioner was shy and did not interact with children as a youth. It was suggested that petitioner was sad and suffered from depression at this time (Trial Tr. 491-92). So if petitioner's lack of social skills is due to depression, then the intellectual functioning is not with continual extensive related deficits in limitations in social skills.

The Master found that the deficits stemmed from petitioner's intellectual functioning (App. A20). But of course, that is the opposite of petitioner's theory at the time of trial, an event that occurred before the passage of §565.030.6 and the Supreme Court decision in Atkins. This finding by the Master illustrates why the legislature crafted the statute so that not only intellectual functioning but also the deficits were documented before petitioner turned eighteen years of age. Section 565.030.6, RSMo. Cum. Supp. 2008. The purpose of the legislature language was to avoid the chameleon like nature of mental evidence with a constellation of symptoms being attributed to the diagnosis of the day.

CONCLUSION

WHEREFORE, for the foregoing reasons, respondent prays the court deny the petition for writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains _____ words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this _____ day of October, 2009, to:

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