

LEGAL UPDATE

OHIO DEPT. of MENTAL HEALTH

2011 FORENSIC CONFERENCE

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COMPETENCE TO STAND TRIAL

State of Ohio v. Williams

Supreme Court of Ohio, 2010

*126 Ohio St. 3d 65; 2010 Ohio 2453; 930 N.E.2d 770; 2010
Ohio LEXIS 1379*

Question:

Do the provisions of O.R.C. § 2945.39 violate a defendant's right to Equal Protection and Due Process?

Facts:

Thonex Williams was indicted for Rape in 2005 in Montgomery County. Williams was adjudicated Incompetent to Stand Trial-Restorable and committed to Twin Valley Behavioral Healthcare for competency restoration. After one year of efforts to restore Williams to trial competency were unsuccessful, Williams was adjudicated Incompetent to Stand Trial-Unrestorable. The prosecutor requested that the trial court retain jurisdiction over Williams via *R.C. 2945.39(A)(2)* – Incompetent to Stand Trial-Unrestorable, Court Jurisdiction.

The defense objected on the grounds that *R.C. 2945.39* violated Williams' rights to due process and equal protection. The trial court ruled that *R.C. 2945.39* was constitutional, and found by clear and convincing evidence that (in light of *2945.39*) Williams committed the rape; was a mentally ill person subject to hospitalization by court order; was not competent to stand trial; and the statutory time limit for restoration to competency had expired. Thus, the trial court committed Williams to Twin Valley for further hospitalization under the legal status of Incompetent to Stand Trial-Unrestorable, Court Jurisdiction.

Upon Williams' appeal, in a 2-1 ruling the Second District Court of Appeals held that *R.C. 2945.39* was unconstitutional on three grounds:

1. Involuntary commitment under *R.C. 2945.39* is criminal, not civil, in nature and Williams had not received all the procedural safeguards a criminal defendant would be afforded;
2. Williams' right to equal protection was violated because the state's commitment procedures for persons under indictment do not also apply to those convicted of a crime, and because the procedures for terminating the commitment are more onerous for a person committed under *R.C. 2945.39* than under *R.C. 5122*;
3. Williams' due process rights were violated because the trial court's jurisdiction over Williams and the length of the commitment (the maximum sentence he could

have received) were not reasonably related to the purpose of the commitment (to protect society from dangerous persons who are mentally ill).

Holding:

In a 4-2 decision, the Supreme Court of Ohio ruled that the judgment of the Ohio Court of Appeals was reversed. *R.C. 2945.39* is constitutional.

Rationale:

The court held that *R.C. 2945.39* was civil, not criminal. The primary purpose of *R.C. 2945.39* is to protect the public, not to punish or deter the defendant. The statute does not require a finding of scienter (intent or knowledge of wrongdoing) and the defendant may be released when he no longer meets commitment criteria.

The court found that *R.C. 2945.39* did not violate equal protection. The court distinguished this case from *Jackson v. Indiana* by pointing out that the standards for commitment under *R.C. 2945.39* are stricter than under *R.C. 5122* because the state must prove that the defendant committed a violent act by clear and convincing evidence. In contrast, the Indiana statute at issue in *Jackson* allowed for indefinite commitment of incompetent defendants using a less stringent standard than ordinary civil commitment. The court conceded that there were differences in the release procedures between ordinary civil commitment and *R.C. 2945.39*, but held that the differences were rationally related to the important governmental interest of protecting the public from individuals who have been deemed particularly dangerous.

The court determined that the statute did not violate due process for three reasons. First, the statute is distinguished from *Jackson* because it did not commit the defendant solely for the purpose of restoring competence. Second, the clear and convincing evidence standard was constitutionally permissible because the finding that the defendant had committed the act was only used to prove dangerousness, not to punish. Third, although the maximum term of commitment was equal to the maximum sentence the defendant could have received, the defendant could be released earlier if he no longer met criteria for civil commitment.

Discussion:

Ohio S.B. 285 was passed in 1997 as part of a get-tough-on-crime law and was codified, in part, as *R.C. 2945.39*. Various portions of S.B. 285 have been overturned, such as S.B. 285's requirement that all defendants found Incompetent to Stand Trial must undergo competency restoration for the full length of time allowed by law, and that they may not be declared Unrestorable until all efforts at competency restoration have failed, regardless of their diagnosis and the likelihood of competency restoration.

The status of Incompetent to Stand Trial – Unrestorable, Court Jurisdiction was created in Ohio S.B. 285 and is unique to Ohio. Under *R.C. 2945.39* (A)(2) a defendant found

Incompetent to Stand Trial-Unrestorable for a violent first or second degree felony may, on the prosecutor's motion, be adjudicated as under Court Jurisdiction (ISTU-CJ). Upon such motion the trial court determines whether there is clear and convincing evidence that the defendant committed the offense – not to ascertain guilt, but to determine whether the status of ISTU-CJ will attach. Defendants adjudicated ISTU-CJ will remain under the jurisdiction of the Court of Common Pleas, who may commit them to the Ohio Dept. of Mental Health. Their commitment is not through the Probate Court. In addition, defendants adjudicated as ISTU-CJ receive the same court oversight as insanity acquittees – that is, movement levels beyond Level 2 are subject to objection by the prosecutor and consideration by the trial court, and when released, the defendant does not receive an outright discharge but a Conditional Release.

As states have adopted increasingly stringent standards for civil commitment and increasingly liberal standards for release of civilly committed patients, legislatures and courts have sought new ways of protecting the public from the most dangerous mentally ill individuals. *In Jones v. U.S.* (1983), the U.S. Supreme Court held that insanity acquittees represented a special class of civil committees and could be committed indefinitely with stricter release procedures. In *Kansas v. Hendricks* (1997), the U.S. Supreme Court created a second special class of civil committees, sexually violent predators. It held that civil commitment of sexually violent predators who had completed their prison terms was constitutional. In *U.S. v. Comstock* (2010), the Supreme Court extended this holding by allowing sexually violent predators in federal custody to be civilly committed under federal rather than state jurisdiction. The *Williams* case held that, to the extent that the treatment of persons committed under *R.C. 2945.39* differs from ordinary civil commitment, pretrial detainees who are accused of violent felonies also represent a special class of civil committees.

Dissent:

Justice Lanzinger articulated the dissent, arguing that *R.C. 2945.39* was not civil in nature, on the basis that:

1. Ohio already has a civil commitment process pursuant to *R.C. 5122* regarding those who are mentally ill and *R.C. Chapter 5123* regarding those who are developmentally disabled;
2. Tying the length of a criminal defendant's commitment to the maximum possible prison term for the most serious offense also indicates that the commitment is criminal in nature.
3. Unlike a person committed under the civil process, a defendant who is committed under *R.C. 2945.39* remains under a pending indictment. The proceeding occurs as part of the defendant's criminal case and, therefore, the defendant should be afforded all the rights of a criminal defendant.

Summary prepared by Stephen Noffsinger, M.D. and Sherif Soliman, M.D.

CHILD CUSTODY

IN RE D.A.

Supreme Court of Ohio, 2008

*113 Ohio St. 3d 88; 2007 Ohio 1105; 862 N.E.2d 829; 2007
Ohio LEXIS 674*

Question:

May parental rights be permanently revoked solely due to the parent's limited intellectual functioning?

Facts:

DA was a ten-year old boy who exhibited behavioral problems. DA's parents voluntarily temporarily relinquished custody of DA to Tuscarawas County Job and Family Services (TCJFS).

Upon the motion of TCJFS, the trial court found DA to be a dependent child and awarded custody of DA to TCJFS. A parenting case plan was developed which required both parents to attend parenting classes and the mother to attend counseling. The parents were required to undergo psychological evaluations, which indicated the father had an IQ of 62 and the mother an IQ of 59. Both parents were found to not qualify for MRDD services due to their ability to meet their basic needs without help from MRDD. DA was of normal intelligence. The parents attended both group and individual parenting classes and counseling. Parenting classes were eventually suspended by the teacher until a home visit could be made.

Despite these steps toward reunification, the trial court granted permanent custody of DA to TCJFS because returning DA to his parents was not in his best interests due to his parents' "very low cognitive skills that hinder their day to day functioning" and the parents demonstrated "no ability to engage in the type of complex thinking necessary to parent a child." The trial court found that "despite diligent, reasonable efforts...both parents have failed continually and repeatedly for a period of six months or more to substantially remedy the conditions causing removal."

The Fifth District Court of Appeals upheld the trial court's findings.

Holding:

Judgment reversed.

Rationale:

Reliance solely on the parents' limited cognitive abilities in making the child's best interests determination under *R.C. 2151.414(D)* was an error. The parents complied with every aspect of their case plan with the exception of completing parenting classes due to the suspension of the classes by the agency. *R.C. 2151.414(D)* does not allow for the termination of parental rights based solely on the parent's cognitive abilities.

Discussion:

The Court referenced many citations that noted parents' interest in the care, custody and control of their children is one of the oldest of the fundamental liberty interests recognized by the United States Supreme Court. The fundamental interest of the parents, however, is not absolute. The termination of parental rights should be an alternative of last resort. Once a case reaches the disposition phase, the best interests of the child controls.

Before parental rights are terminated and permanent custody is granted to an agency, *R.C. 2151.414(B)(1)* requires a court to determine by clear and convincing evidence that it is in the best interests of the child for permanent custody to be awarded. *R.C. 2151.414* does not allow for the termination of parental rights based solely on the parents' cognitive abilities, but requires additional findings under *R.C. 2151.414(E)(1)* that the parents have failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home.

It was undisputed that DA's parents had complied with every aspect of their case plan. What was disputed was the parents' ability to parent DA due to their mental retardation. The trial court did not find that DA's family was uncaring, dangerous, or irresponsible. He was provided adequate clothing, food, shelter and care, and performed well in school. It was clear that DA's parents loved him and were willing to do anything to return him to the family home, which was DA's wish as well. The trial court did not make a finding under *R.C. 2151.414(E)(2)* that DA's parents were unable to provide an adequate home for DA due to their mental retardation.

Due to the emphasis placed on DA's parents' mental retardation and the lack of clear and convincing evidence that their limited abilities have caused or threatened to cause harm to him, the trial court failed to comply with *R.C. 2151.414* and that the termination of parental rights was not in DA's best interest.

CONFIDENTIALITY

Hageman v. Southwest General Health Center

Supreme Court of Ohio, 2008

119 Ohio St. 3d 185; 2008 Ohio 3343; 893 N.E.2d 153; 2008 Ohio LEXIS 1773

Question:

Is secondary disclosure of medical records permissible?

Facts:

Kenneth Hageman initiated psychiatric treatment. In his first treatment session Hageman disclosed homicidal thoughts about his wife. A month later Hageman's wife filed for divorce. Barbara Belovich served as Mrs. Hageman's attorney. Hageman filed a counterclaim, seeking custody of their child. While the divorce case and Hageman's psychiatric treatment were ongoing, Hageman allegedly assaulted his wife in their home, resulting in criminal charges. Mrs. Hageman received a civil protection order, giving her temporary custody of their child until a full hearing could be held.

In preparation for the hearing, Attorney Belovich issued a subpoena to Hageman's treating psychiatrist, seeking Hageman's medical records. Belovich believed Hageman had waived his privilege for those records when he filed a counterclaim in the divorce action, pursuant to *Gill v. Gill*, 8th Dist. No.81463, 2003 Ohio 180. (In *Gill* the Court of Appeals held that a parent who seeks custody of a minor child in a divorce action makes his/her mental condition an issue in the case and thus the physician/patient privilege does not apply.) Although Hageman did not sign a release, the psychiatrist provided Hageman's medical records to Attorney Belovich.

On the date of the civil protection order hearing Belovich met with the prosecutor in the criminal case against Hageman and gave the prosecutor a copy of Hageman's medical records that she had received from Hageman's psychiatrist. Before the hearing, Hageman and his wife reached a separation agreement that was ultimately incorporated into a divorce decree. Hageman's medical records were never admitted into evidence in the divorce//protection order case. Likewise, they were not admitted in the criminal matter, and Hageman was ultimately acquitted.

Hageman brought suit against Belovich, his ex-wife, his psychiatrist and Southwest General Health Center (his psychiatrist's employer), alleging that his medical records had been improperly disclosed without his authorization. The trial court granted summary judgment for all defendants. The court of appeals upheld the summary judgment for all defendants except Attorney Belovich, stating that Belovich had "overstepped her bounds

as the [ex-wife's] divorce attorney when she disseminated information regarding [Hageman's] psychiatric condition to the prosecution.”

Holding:

Judgment affirmed and remanded for further proceedings.

Rationale:

When the cloak of confidentiality that applies to medical records is waived for the purposes of litigation, the waiver is limited to that case. An attorney can use medical records obtained lawfully through the discovery process for the purposes of the case at hand – e.g., submitting them to expert witnesses for analysis or introducing them at trial. However, an attorney may be liable to an opposing party for the unauthorized disclosure of that party's medical information that was obtained through the litigation. An independent tort exists to provide an individual with a remedy for such an action.

Discussion:

Clinicians, attorneys and forensic mental health evaluators should be careful to not disclose medical records or clinical data to persons not involved in the instant litigation.

Summary prepared by Stephen Noffsinger, M.D.

**EXPERT WITNESS, BATTERED-WOMAN SYNDROME, FORENSIC
EVALUATIONS**

State of Ohio v. Goff

Supreme Court of Ohio, 2010

128 Ohio St. 3d 169; 2010 Ohio 6317; 942 N.E.2d 1075; 2010 Ohio LEXIS 3291

Questions:

1. Is it a violation of a defendant's right against self-incrimination for a trial court to compel the defendant to submit to a psychiatric evaluation by a prosecution expert in response to the defense of Battered-Woman Syndrome?
2. If not, what limits should be placed on the psychiatric evaluation and expert testimony by the prosecution expert?

Facts:

Megan Goff was charged with Aggravated Murder for the March 2006 shooting death of her husband. Prior to trial Goff presented evidence of Battered-Woman Syndrome to bolster her claim of self-defense. The trial court granted, over Goff's objection, the prosecution's motion for Goff to submit to a psychiatric examination to investigate her claim of Battered-Woman Syndrome. The state psychiatrist interviewed Goff for almost eight hours in the presence of her attorney and prepared a written report.

At a bench trial Goff testified on her own behalf. A defense psychiatrist testified that Goff had symptoms of Battered-Woman Syndrome and had shot her husband in perceived self-defense.

Goff objected to the state's psychiatric expert testimony on the basis that the state's psychiatric examination of Goff violated her right against self-incrimination. Goff's counsel had objected during the state psychiatric examination when Goff was questioned about the shooting. The trial court allowed the state psychiatric expert to testify, who testified not only about Battered-Woman Syndrome, but also about multiple inconsistencies in what Goff told him compared to data in the investigatory record.

The state psychiatrist testified that he could not form an opinion whether symptoms of Battered-Woman Syndrome had caused Goff to legitimately fear harm from her husband, partly because the psychiatrist could not determine Goff's credibility, which he believed was better determined by the Court. Instead, the state psychiatrist offered several possible reasons why Goff had shot her husband, such as anger, a preemptive strike, or fear of her husband due to legitimate Battered-Woman Syndrome. Goff was convicted.

The Fourth Circuit Court of Appeals upheld her conviction. The Court of Appeals held that the trial court's order compelling Goff to submit to a state psychiatric examination was proper, because Goff initially retained a defense psychiatrist to evaluate her for Battered-Woman Syndrome before the trial court granted the prosecution's examination to rebut Goff's claim, and that Goff's use of her own psychiatric testimony at trial waived her privilege against self-incrimination.

Holding:

Reversed and remanded to trial court.

1. The trial court's order compelling the defendant to submit to a psychiatric examination by a prosecution expert in response to the defendant's claim of self-defense supported by expert testimony on Battered-Woman Syndrome did not violate the defendant's right against self-incrimination.
2. However, to preserve the defendant's right against self-incrimination, the examination of the defendant and the subsequent testimony from the state's expert should be limited to information related to Battered-Woman Syndrome and whether the defendant's actions were influenced by Battered-Woman Syndrome. Because the examination and testimony of the expert were not so limited, the defendant's right against self-incrimination were violated.

Rationale:

The Supreme Court of Ohio outlined the issues of self-defense, Battered-Woman's Syndrome and the use of psychiatric expert testimony:

- A. Self-defense is an affirmative defense that requires a defendant to prove three elements by a preponderance of the evidence: 1) the defendant was not at fault in creating the violent situation; 2) the defendant had a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape was the use of force; and 3) the defendant did not violate any duty to retreat or avoid the danger.
- B. Battered-Woman syndrome is relevant to the second element of self-defense. Testimony on Battered-Woman Syndrome is appropriate to assist the trier of fact to determine whether the defendant acted out of an honest belief that she was in imminent danger of death or great bodily harm and that the use of such force was her only means of escape. Since Ohio has a subjective test for self-defense, the defendant's state of mind is crucial to this defense.
- C. Expert testimony on Battered-Woman Syndrome may help triers of fact to understand the syndrome in general; to understand a defendant's state of mind they might not otherwise comprehend; and to dispel the lay public's perception that a woman in a battering relationship is free to leave at any time.
- D. *R.C. 2901.06* recognizes that Battered-Woman Syndrome is a matter of commonly accepted scientific knowledge and that the details of Battered-Woman

Syndrome are not within the knowledge of the average person. Expert witness testimony is available for defendants to establish that they suffered from Battered-Woman Syndrome in furtherance of self-defense.

- E. *R.C. 2901.06* describes the type of testimony appropriate in cases involving Battered-Woman Syndrome: 1) Testimony about the syndrome in general; 2) Testimony whether the defendant experienced Battered-Woman Syndrome; and 3) Testimony whether Battered-Woman Syndrome accounts for the requisite belief of imminent danger of death or great bodily harm to justify the use of force in question.

The Supreme Court of Ohio outlined the issues involving self-incrimination and psychiatric evaluations:

- A. Both the Ohio Constitution and United States Constitution provide that no person shall be compelled, in any criminal case, to be a witness against himself.
- B. A criminal defendant who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence may not be compelled to respond to a psychiatrist.
- C. When a defendant introduces psychiatric evidence and places her state of mind directly at issue, she can be compelled to submit to an independent examination by a state psychiatrist. *State v. Manning (1991), 74 Ohio App.3d 19, 598 N.E.2d 25.*
- D. When a defendant demonstrates an intention to use expert psychiatric testimony to establish that Battered-Woman Syndrome caused her to have a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape was the use of force (second element of self-defense), a court may compel the defendant to submit to another examination without violating her right against self-incrimination. By putting her mental state directly at issue and introducing expert testimony, the defendant opens the door to a limited examination by the state's expert concerning Battered-Woman Syndrome and its effect on the defendant's behavior.
- E. However, limitations on the defendant's right against self-incrimination must be carefully tailored to avoid any more infringement than is necessary to ensure a fair trial. Fairness requires only that the state be given the same opportunity to present testimony on Battered-Woman's Syndrome as the defendant.

In *Goff*, the Supreme Court of Ohio found that the state psychiatrist's role changed in this case. "Psychiatric testimony is one thing – testifying about discrepancies regarding the defendant's recitation of facts and questioning the truth of her representations regarding her own level of fear are more akin to 'recounting unwarned statements made in a post-arrest custodial setting.'" *Estelle v. Smith (1991) 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359.*

The Supreme Court of Ohio found that, since the state psychiatrist was unable to form an opinion whether *Goff* was symptomatic of Battered-Woman's Syndrome, he did not have much to offer as expert testimony on the issue he was called to testify. Instead, he testified at length about inconsistencies in statements *Goff* made to him compared to

information in the police reports. Armed with over 40 items of evidence provided by the state, he essentially became another cross-examiner of Goff and reported to the court the areas where he found her testimony wanting.... “Instead of comparing her level of fear to a person with Battered-Woman Syndrome, or discussing whether her actions in response to that fear were consistent with those with someone with Battered-Woman Syndrome, he questioned whether she was truly as fearful as she had told him....her veracity was at issue....[the state’s psychiatric] testimony was that Goff’s credibility meant everything in the case. He set forth inconsistencies in her story and questioned whether she was truthful to him, but stated that after eight hours of interviews, he had no opinion on whether she was truthful or not. This non-opinion actually functioned as an opinion on her credibility. That was not his role....”

Follow-up – Goff was convicted of the lesser offense of Murder with Firearm Specifications at retrial in August 2011 and sentenced to fifteen years to life in prison.

Discussion:

This case presents a narrow interpretation of the role of a forensic mental health evaluator. One of the fundamental differences between forensic and clinical psychiatry is that forensic mental health evaluators do not accept the subject’s self-report as accurate, but instead seek corroboration from other sources of information (collateral interviews, medical and other records, objective testing, etc.) and assess for the consistency of that information.

Forensic evaluators routinely form opinions about the credibility of the sources of information, and the weight to place on various sources of information, in conducting evaluations and forming expert opinions. This is especially so in the assessment of Battered-Woman Syndrome, since the Ohio standard for Battered Woman Syndrome is a subjective standard and therefore requires an assessment of the veracity of the defendant’s claim of imminent fear at the time of the act. Comparing the consistency of accounts of the act that the defendant gave to various investigators and mental health evaluators is a critical element in determining whether the defendant qualifies for the Battered-Woman Syndrome to further a claim of self-defense.

While this case centered on Battered-Woman Syndrome, it is unclear if this case will set precedent regarding other forensic mental health evaluations and subsequent testimony on issues such as competency, sanity, disability, emotional harm, and other types of assessments.

Summary prepared by Stephen Noffsinger, M.D.

DIMINISHED CAPACITY

State of Ohio v. Fulmer

Supreme Court of Ohio, 2008

117 Ohio St. 3d 319; 2008 Ohio 936; 883 N.E.2d 1052; 2008 Ohio LEXIS 549

Question:

Should the jury be permitted to consider medical testimony relating to a diminished capacity defense?

Facts:

In January 2005 Andrew Fulmer was charged with Felonious Assault and Assault after a physical altercation with police officers. At trial in Lake County a medical witness for the state testified regarding a possible “metabolic derangement” Fulmer may have had from a possible aspirin overdose. (Forensic pathologist William Bligh MD was called to testify about the potential lethality of the flashlight blow to the head Fulmer inflicted on the police officer. On cross he testified about the potential effects of an aspirin overdose, although the evidence was that Fulmer had taken, at most, three aspirin.) The trial court instructed the jury not to consider the medical evidence in determining whether Fulmer acted “knowingly”, as Fulmer had asserted a diminished capacity defense.

Fulmer was convicted. On appeal the Court of Appeals for Lake County reversed Fulmer’s conviction, finding that the trial court had overstepped its role when it removed evidence of the defendant’s medical condition from the jury’s consideration.

Holding:

Reversed and remanded.

Diminished capacity is not recognized in Ohio. *State v. Jackson (1972)* and *State v. Wilcox (1982)*. The trial court properly instructed the jury to disregard medical testimony relating to diminished capacity.

Rationale:

The partial defense of diminished capacity is not recognized in Ohio. The diminished capacity theory forcefully challenges conventional concepts of culpability and involves a fundamental change in the common law theory of responsibility. Thus, when a defendant does not assert an insanity defense, he may not offer expert testimony in an effort to show

that he lacked the mental capacity to form the specific mental state required for a particular crime.

Discussion:

Diminished capacity is a concept originating in a series of cases from California from the 1930s to the 1980s. Diminished capacity centers on the defendant's assertion that they were suffering from a mental condition that impaired their ability to form the requisite mens rea for a criminal offense. Diminished capacity was eliminated in California in the mid-1980s, and has not been embraced by most jurisdictions, including Ohio.

Summary prepared by Stephen Noffsinger, M.D.

DEATH PENALTY/EXPERT TESTIMONY

State of Ohio v. White

Supreme Court of Ohio, 2008

118 Ohio St. 3d 12; 2008 Ohio 1623; 885 N.E.2d 905; 2008 Ohio LEXIS 867

Question:

Did the trial court abuse its discretion in rejecting uncontradicted expert witness testimony about mental retardation, in favor of laypersons' observations?

Facts:

Clifton White III was sentenced to death for Murder committed in 1995 after killing the mother of his ex-girlfriend and the mother of his ex-girlfriend's new boyfriend. While White was awaiting execution, in June 2002 the US Supreme Court held in *Atkins v. Virginia* that the Eighth Amendment prohibits sentencing to death persons who are mentally retarded. White filed for post-conviction relief, asserting that he was mentally retarded and could not be executed.

In *Atkins*, the US Supreme Court adopted the definitions of mental retardation promulgated by the American Association on Mental Retardation and the American Psychiatric Association, both of which required subaverage intellectual functioning with onset before age 18, accompanied by limitations in adaptive skill areas such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and/or work. In Ohio, the provisions of *Atkins* were adopted in *State v. Lott*, *97 Ohio St. 3d 303, 2002 Ohio 6625, 779 N.E.2d 1011*, which held that the definition of mental retardation required 1) significantly subaverage intellectual functioning, 2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and 3) onset before the age of 18.

A defense psychologist and prosecution psychologist jointly conducted testing to determine whether White was mentally retarded. The WAIS-III revealed an IQ of 52 and the WRAT-III indicated very poor academic abilities. Both experts concluded that, although not formally tested before age 18, White's school records were consistent with mental retardation.

Finally, to measure White's adaptive skills limitations, both psychologists administered the Scales of Independent Behavior-Revised (SIB-R). The SIB-R was scored based on the psychologists' interview of White, and of White's mother, brother and two sisters.

Both psychologists agreed that White demonstrated limitations in adaptive skills areas and, combined with the other test results, that White was mentally retarded.

The trial court held a hearing to consider White's motion. Both psychologists testified that White was mentally retarded. At the trial court's request Bradley Hill, a co-author of the SIB-R, testified to explain how the SIB-R was developed and how it was used to diagnose mental retardation. The prosecution did not present expert testimony, but White's former girlfriend (and daughter of one of his victims) testified that White was popular in school, worked, rented an apartment, bought a truck, cooked, drove and played games that required coordination.

The trial court found that White had established by a preponderance of the evidence the first of Lotts' three criteria – significantly subaverage intellectual functioning. However, the trial court found that White had failed to establish the other two Lott criteria and upheld his capital sentence. The trial court questioned the method in which the psychologists had scored the SIB-R; the reliability of the information used to score the SIB-R (data from White and his family); and, in conjunction with the testimony of White's former girlfriend, found that White had failed to demonstrate limitations in adaptive skills and the onset of subaverage intelligence prior to age 18.

The court of appeals affirmed the trial court's judgment.

Holding:

Judgment reversed.

Rationale:

The Supreme Court of Ohio held that the trial court abused its discretion in rejecting the Scales of Independent Behavior-Revised (SIB-R) because undisputed evidence showed the SIB-R was based on extensive empirical research. No rational basis grounded in the evidence was given to reject uncontradicted expert testimony. Anecdotal evidence the court focused on was largely irrelevant, and to the extent it was relevant, was considered in scoring the SIB-R. Disregarding credible and uncontradicted expert testimony in favor of lay perceptions or the court expectations of how the mentally retarded behave abused discretion.

Likewise, the defendant's academic records support that the defendant's intellectual and adaptive deficits began before age 18. Nothing explained the onset of his current impairments after 18. It was abuse of discretion to reject well-supported expert opinion, without contrary evidence, that the defendant's intellectual deficits began before age 18.

Summary prepared by Stephen Noffsinger, M.D.