

The Supreme Court of Ohio

CASE ANNOUNCEMENTS AND ADMINISTRATIVE ACTIONS

August 14, 2002

MOTION AND PROCEDURAL RULINGS

1989-0846. State v. Lott.

Cuyahoga App. No. 54537. Upon consideration of appellant's motion to vacate death sentence pursuant to *Atkins v. Virginia* (2002), 536 U.S. ____, 122 S.Ct. 2242, 153 L.Ed.2d 335, or, in the alternative, motion to stay execution date and motion for assistance of psychiatric experts and evidentiary hearing, and appellant's second motion for stay of execution,

IT IS ORDERED by the court that the motion for stay be, and hereby is, granted until further order of this court.

Moyer, C.J., Douglas, Resnick, F.E. Sweeney and Pfeifer, JJ., concur.

Cook, J., concurs in part and dissents in part.

Lundberg Stratton, J., dissents.

Cook, J., concurring in part and dissenting in part.

I agree with the court's decision to grant the motion for stay. I would, however, remand this cause to the trial court for consideration of Lott's claim as a petition for postconviction relief.

Lundberg Stratton, J., dissenting.

I dissent from the majority's decision to grant a stay of execution. I would deny the stay of execution and find that the evidence does not come close to the threshold set in *Atkins v. Virginia* (2002), 536 U.S. ____ 122 S.Ct. 2242, 153 L.Ed.2d 335. Defendant submits a test result of 72 on an IQ test he took while he was in custody in August 1986. He claims that an IQ of 72 places him squarely within the mentally retarded range of intellectual functioning, since there is a five-point margin of error on any IQ score. Moreover, defendant submits five affidavits from family and friends attesting to personality and behavioral indicators of early-

life trauma (i.e., limited social skills, isolating himself, and difficulty in controlling his anger).

However, this court's opinion in *State v. Lott*, (1990) 51 Ohio St.3d 160, 172, 555 N.E.2d 293, noted: "The sentencing panel could also have addressed evidence of Lott's intelligence as a possible mitigating factor under R.C. 2929.04(B)(3). Tests indicated Lott's intelligence quotient ranged in the low average categories, with 'I.Q.' tests yielding results of 77-81, 83-91, and 87-97."

Moreover, the state has other evidence refuting defendant's claims that he is mentally retarded. Trial testimony indicated that defendant's IQ was tested in sixth grade with a reported range of 87-97. In March 1984, two years before McGrath's murder, defendant's IQ tested as verbal, 91, performance, 83, and full scale, 86. These scores placed defendant's IQ in the low average range.

Furthermore, at his July 1987 trial, an expert who had examined Lott testified that Lott's intelligence and psychological well-being had improved since 1986. He "seemed brighter." He "appeared more literate. He was able to do mathematical problems last week that he wasn't able to do in November of '86." This testimony is significant because the test reflecting an IQ of 72 was administered in August 1986. The state also points to trial testimony from defendant's GED teacher that he was progressing on his way to a GED as well as a variety of more recent prison records tending to negate claims of mental retardation.

For these reasons, I would find that there is strong evidence that defendant is not mentally retarded, e.g., IQ tests all above 70. Therefore, I would find that defendant does not even come close to meeting the threshold set by the United States Supreme Court recently in *Atkins v. Virginia*, supra. Accordingly, I respectfully dissent and would deny the stay of execution.

APPEALS NOT ACCEPTED FOR REVIEW

2002-1033. State v. Lott.

Cuyahoga App. Nos. 79790, 79791 and 79792.

Moyer, C.J., dissents and would allow on Propositions of Law Nos. I, II, and IV.

Pfeifer, J., dissents and would allow.