SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

In re DONALD GRIFFIN, Petitioner, On Habeas Corpus	Superior Court No. 08 CRWR 679178 Supreme Court No. S 118650 JUDGMENT ON PETITIONER'S WRIT OF HABEAS CORPUS FOLLOWING AN EVIDENTIARY HEARING

This Court has now heard, read and considered all the evidence and arguments presented by the parties on the claim made by Donald Griffin in his petition for writ of habeas corpus filed with the California Supreme Court in Case No. S 118650 in September of 2003. The court makes the following ruling and judgment on the issue presented in that writ petition, with findings of fact and conclusions of law in support of that judgment:

Brief History of Case 08 CRWR 679178

In September of 2008, in a unanimous ruling, the California Supreme Court ordered the Director of the Department of

Corrections and Rehabilitation to show cause why the judgment of death entered against the petitioner in the case of the People v. Donald Griffin, Fresno Superior Court No. F80252758-8 (formerly 252758-8) should not be vacated and petitioner sentenced to life without the possibility of parole, on the grounds that he is mentally retarded within the meaning of Atkins v. Virginia (2002) 536 U.S. 403.

In October of 2008 this court was assigned to hear and decide petitioner's claim that he is mentally retarded (now referred to "intellectually disabled"). In July of 2015, the evidentiary hearing on that claim began in Department 21 of the Fresno Superior Court and was completed the following month. On November 12, 2015, following written and oral argument from both sides, the merits of petitioner's claimed intellectual disability was submitted for this court's ruling and judgment.

Burden of Proof and Standards for Weighing Evidence

The parties agree that the petitioner has the burden to prove his claim that he is intellectually disabled. In order to prove that claim, petitioner must show, by a preponderance of the evidence presented at the evidentiary hearing, that:

1) His general intellectual functioning is significantly below average;

2) He also has deficits in two or more areas of adaptive behavior; AND

3) These conditions were observable before petitioner reached the age of 18 years.

To meet the burden of proof by a preponderance of the evidence, petitioner must prove that it is more likely than not that he is intellectually disabled. CALCRIM 775 and In re Hawthorne (2005) 35 Cal.4th 40

The preponderance of the evidence standard is essentially a comparative analysis, requiring the trier of fact to weigh the evidence presented by both sides and to judge whether the evidence presented by petitioner in support of his claim has "more convincing force" than the evidence opposed to it.

Weighing the Evidence presented by the Parties

The parties have no disagreement concerning petitioner's burden to prove his claim and the preponderance of evidence standard. The Attorney General contends that this court, in weighing the evidence on petitioner's claim, must focus on, and give greater attention to, the circumstances of the capital crime, petitioner's behavior in the commission of that crime, and the results of intelligence tests administered closer in time to that crime. The Attorney General cites pages 306 and 307 of the court's opinion in Atkins v. Virginia in support of that contention. Having reviewed that case, this court finds nothing in Atkins, either within those pages or otherwise, supporting that contention.

The Chief Justice, writing for the dissent in Atkins, points out that both the trial judge and the jury, after hearing evidence of his mental retardation, concluded that Atkins

retardation did not reduce his culpability for the crime and that he deserved the death penalty. He argued that these findings should be sufficient to reflect the "standard of decency" required by the 8th Amendment. Concurring in that dissent, Justice Scalia decried the majority conclusion that someone "who is even slightly mentally retarded" cannot have sufficient moral responsibility to be subjected to the death penalty. Despite the language of that dissent, the import of the majority opinion in Atkins is clear. Persons who are mentally retarded are categorically exempt from the imposition of the death penalty, without regard to the circumstances of the capital offense.

In Hall v. Florida (2014) 134 S.Ct. 1986, the U.S. Supreme Court addressed the scope of evidence required to be considered in an Atkins hearing. Setting aside Florida's practice of precluding evidence of intellectual disability where a defendant's IQ was above 70, the majority held that Atkins demanded consideration of a capital defendant's entire life, his "environment, past performance and upbringing." Relying on the DSM-5 criteria for assessing and diagnosing intellectual disability, the Supreme Court concluded that an Atkins hearing must include consideration of a wide range of skills and deficits over the course of a defendant's life, including his school, work, family, social and community interactions. Nothing in Hall supports the Attorney General's contention that this court must focus on the circumstances of the capital offense or petitioner's IQ scores from that time.

In addition to those federal cases, California law is at odds with the Attorney General's contention that this court must give greater weight to the circumstances of the capital crime. Penal Code Section 1376(b)(2) states that the sole question in an Atkins hearing is whether the petitioner is intellectually disabled. The California Supreme Court in Hawthorne clarified the focus of an Atkins hearing, holding that evidence relating to the underlying crime is admissible only to the extent it is relevant to that intellectual disability.

Subsequent decisions of the California courts are likewise inconsistent with the contention that the focus should be on the capital crime and petitioner's condition at the time of that crime. In Campbell v. Superior Court (2008) 159 Cal.App.4th 635, the Appellate Court held that the focus of an Atkins hearing is on a petitioner's present retardation, not his mental capacity at the time of the crime. Indeed, the California Supreme Court has found that an Atkins hearing is required even when the alleged disability played no role whatever in the commission of the capital crime. People v. Boyce (2014) 59 Cal.4th 672

This court declines the Attorney General's invitation to focus its attention on the events of the crime or petitioner's behavior or mental condition at that time. Consistent with its duty under the law, this court will consider and weigh the convincing force of all the evidence presented at the evidentiary hearing, to the extent it is relevant to petitioner's claim of intellectual disability.

Qualifications of Expert Witnesses

The U.S. Supreme Court notes, in Hall, that the determination of intellectual disability required by Atkins is a matter to be decided primarily on the testimony of expert witnesses. That observation is a practical one. Proof of a claim of intellectual disability requires a judge or jury to answer questions such as: what is "general intellectual functioning", and whether such functioning is or is not "significantly below average", and what behavior may or may not indicate a "deficit in adaptive behavior".

While California's Supreme Court notes that a trier of fact in an Atkins hearing is not bound by the opinions of those experts, the elements of a petitioner's claim demand reliance on expert opinions to either prove or refute that claim. In evaluating expert testimony and expert opinions, a trier of fact is instructed to consider the qualifications of the expert witness and his individual training and experience. A judge or jury must also consider the reasons given for the opinion, the strengths and weaknesses of those reasons and the facts on which they are based. CALCRIM 352 and CALJIC 2.80 AND 2.83

In weighing the convincing force of the evidence presented at this hearing, the court is guided by those standards. In particular, in resolving conflicts between expert witnesses, the court is mindful of the law instructing the court to consider the relative qualifications of those experts and the facts and matters on which those opinions are based, weighing those reasons

and underlying facts one against the other. The court will begin by reviewing the relative qualifications of the expert witnesses. The court will reserve until later its consideration of the opinions of those experts and the strengths and weaknesses of the reasons given for those opinions.

Petitioner offered the testimony of three expert witnesses, each of whom testified to his opinion that petitioner is intellectually disabled within the meaning of P.C. 1376 and Atkins. Respondent offered a single expert who testified that petitioner is not intellectually disabled. Of course, like any reasonable trier of fact, this court would not conclude that the burden of proof has been met by the simple process of counting the number of witnesses.

Petitioner's Experts

Petitioner offered three expert witnesses, all psychologists, each of whom has spent a lifetime assessing, testing, diagnosing and treating intellectually disabled persons, and in particular individuals with mild intellectual disabilities.

Dr. Daniel Reschly obtained his graduate degree from the University of Oregon and has been a professor of psychology at three nationally known universities, supervising graduate students in the assessment and treatment of individuals suffering from intellectual and learning disabilities for fifty years. He has published extensively on those subjects, including peer-reviewed articles concerning the assessment of intellectual disability in Atkins cases.

Dr. Gregory Olley obtained his graduate degrees from Wake Forest and Vanderbilt Universities and is a professor of psychology at the University of North Carolina. He is also a clinician with more than forty years of experience in the clinical assessment, diagnosis and treatment of intellectually disabled adults and children. During his professional career, he has evaluated hundreds of adults and children for intellectual disabilities, lectured on the assessment and diagnosis of those disabilities in Atkins cases and has testified as an expert on such cases in both state and federal courts throughout the country. Dr. Olley is a fellow and past president of Division 33 of the American Psychological Association, devoted to the study of developmental disabilities.

Dr. Kenneth Benedict obtained his graduate degrees at the University of North Carolina and Harvard Medical School. He is the founder of the Center for Psychology and Education at Chapel Hill, North Carolina, a facility devoted to the assessment of cognitive functioning in intellectually disabled children and adults and the clinical treatment of those individuals. His professional career has been primarily as a clinician, focused on the assessment of individuals with intellectual disabilities through the use of intelligence testing and other measures, and the treatment of those individuals in the community.

Respondent's Expert

Respondent offered a single expert witness, also a psychologist, who worked directly with the mentally retarded for

fifteen years while employed at the Developmental Center, a state institution located in Porterville, California.

Dr. Andrew Cavagnaro obtained his graduate degrees from Fresno State and the California School of Professional Psychology and has been licensed to practice for more than twenty years. He was employed as a staff psychologist at the Porterville Developmental Center from 1991 until 2006. Since then, he has been employed as a consultant with the California Department of Developmental Services, a state agency providing support and services to the developmentally disabled, including persons with intellectual disabilities.

During his fifteen years at the Developmental Center, his duties included assessing and diagnosing patients confined at that facility, participating in group counseling with those patients and testifying in court when those patients were believed a danger to themselves or others. Since 2006, his duties as a consultant have focused on reviewing legislative and regulatory proposals affecting the state agency. His duties as a consultant with that agency have not involved assessing, diagnosing or treating intellectually disabled individuals. He is a member of the American Psychological Association, and a fellow of Division 41 relating to psychology and the law.

Evidence of Significant Subaverage Intellectual Functioning

To support a finding that petitioner is intellectually disabled, he must begin by proving that his general intellectual

functioning is significantly below average. For purposes of Atkins and Penal Code 1376, significant subaverage intelligence is generally characterized as intellectual performance that is two or more standard deviations below the mean score on a standardized intelligence test. This standard is the equivalent of a score of 70 or less on a standardized intelligence test.

Petitioner offered evidence of his scores on several intelligence tests administered to him at different times over a period of nearly 30 years, beginning in 1980. Petitioner achieved a full-scale IQ score of 74 on the first test and a full-scale IQ score of 63 on the last. Based on the standard error of measurement (SEM) applicable to those test scores, petitioner's 1980 test would reflect a full-scale IQ in the range of 69 to 79 and his last test would reflect a full-scale IQ in a range 58 to 68.

The expert witnesses testified to their opinions as to the purpose of each test and the proper procedure for its administration and scoring, whether proper procedure had been followed in petitioner's case, and the meaning of each score in evaluating his intellectual functioning. Each offered opinions as to petitioner's intellectual functioning based on his performance on those tests, correlating his scores over 30 years. They debated at length whether petitioner's scores on IQ tests administered prior to 2009 need to be adjusted downward to account for the "Flynn effect." They argued about the effect of "regression to the mean" on the range within the standard error of measurement as

it applied to these scores. Dr. Cavagnaro discounted petitioner's poor performance on the verbal subset of those tests, suggesting that his higher scores on the performance subset (testing his ability to put together things, like puzzles) better reflected his general intellectual functioning.

Based on those scores, petitioner's experts all concluded that his intellectual functioning is in the range of the mildly mentally retarded, representing between 1% and 3% of the population. Dr. Cavagnaro disagreed, concluding that petitioner's intellectual functioning is in a range characterized as "borderline intellectual functioning", representing 13.5% of the population.

The California Supreme Court in People v. Superior Court (Vidal) 40 Cal.4th 999 states that a finding of significant subaverage intellectual functioning does not incorporate a fixed requirement of a particular IQ test score. That court held that IQ test scores above the range considered to show mental retardation do not dictate a finding of non-retardation. The court stated that the question of mental retardation is not measured according to a fixed intelligence test score, but rather should be based on an assessment of an individual's overall capacity. In that same case, the Supreme Court implicitly rejected the notion that a court can or should focus on petitioner's performance IQ scores in determining general intellectual functioning, as Dr. Cavagnaro proposed.

In Hall, the U.S. Supreme Court noted that Mr. Hall had

received nine IQ evaluations, over a period of 40 years, with scores ranging from 60 to 80. That court concluded that the use of IQ scores alone to determine intellectual functioning was insufficient. The court held that scores within the range of intellectual disability (70 to 75)) demanded consideration of a capital defendant's intellectual functioning over his lifetime. In petitioner's case, with one exception, all of his scores on tests administered since 1980 are in the range consistent with significant subaverage general intellectual functioning.

Guided by those principles, this court considers the other evidence presented relating to petitioner's overall intellectual functioning. The parties offered evidence concerning petitioner's school history from the time he first attended school at age nine. The court heard evidence of his work history after dropping out of school in the 10th grade and his efforts at adult learning and his work history at San Quentin over the past 35 years. The court also heard from his ex-wife concerning his ability to drive a car and his skills in making repairs and performing similar complex tasks in the home.

Petitioner's experts testified that all of this evidence is consistent with the results of his IQ testing and consistent with their opinions that he is intellectually disabled. Those experts pointed to several aspects of petitioner's personal history demonstrating his subaverage intellectual functioning. Among those were: 1) petitioner's placement in special ed classes on being enrolled in elementary school for the first time at age

nine, 2) his being identified as mentally retarded by school personnel and continuing in special classes throughout his school years, with the exception of one brief period in the ninth grade, 3) his failing grades in every academic subject when he was briefly placed in a regular classroom in the ninth grade, and 4) his high school instructor's comment that he was "the slowest of the slow" in her special ed class and "the slowest she had seen" in her four years teaching that class. They pointed to his history of manual labor jobs after leaving high school and his difficulties in maintaining that employment. They also pointed to his inability to progress beyond the second grade level in either verbal or math skills, despite thirty years of persistent, "enthusiastic" effort in basic adult education classes. Acknowledging the testimony of petitioner's ex-wife concerning his ability to perform seemingly complex repairs and other tasks, they explained that persons with significant subaverage intellectual functioning often possess performance skills which allow them to perform such tasks. They pointed to petitioner's higher scores in the performance subset of the IQ tests as consistent with those strengths.

Dr. Cavagnaro concluded, from that same history, that petitioner's general intellectual functioning is not significantly subaverage. He opined that petitioner suffers from a learning disability. He based his opinion on a variety of facts, including petitioner's motivation to better himself and obtain an education, his ability to obtain a job and perform manual labor tasks without

supervision, and his observations of petitioner during a personal interview at San Quentin Prison.

He made particular mention of the following: 1) petitioner's concerted efforts to improve his education during his incarceration, 2) his ability to perform tasks such as lawn mowing and sweeping without supervision, 3) his ability to play chess, which petitioner claimed to be able to do during his interview, 4) his social interactions during that interview, as well as with others both before and after the crime, 5) his conduct during the commission of the crime and efforts to avoid detection and 6) his demonstrated ability to perform complex tasks such as those described by his ex-wife.

He concluded from petitioner's family history and school records that he was given little opportunity to learn while growing up, and opined that his inability to read or write at more than a second or third grade level reflects an impoverished learning environment and possibility a learning disability, but not subaverage general intellectual functioning.

In addition to the foregoing, Dr. Cavagnaro testified that his ultimate opinions about the petitioner were significantly influenced by comments made by the trial judge in 1980, which he quoted at some length in his report. Dr. Cavagnaro described that court's findings as having "a lot of significance" because they came from a court following an objective weighing of the evidence. Among the comments noted in his report, are Judge Meyers' finding that petitioner suffered from no mental disease or disorder and

that the circumstances of the crime did not evidence any impaired mental ability. Dr. Cavagnaro concluded from those comments that the trial judge had determined that petitioner was not mentally retarded or intellectually impaired.

As the Attorney General concedes at page 38, footnote 27 of respondent's brief, no evidence whatever concerning petitioner's retardation or intellectual impairment was presented at the trial in 1980. The transcript of Judge Meyers' comments clearly reflects that the only evidence presented in that trial, relevant to petitioner's intellectual impairment, was that he had low intelligence, was in special classes in school and did not start school until age 9. In response to that evidence, the judge commented, at page 20 of the transcript, "I don't know whether that's true or not." He then goes on to find that if it were true, it would not reduce petitioner's culpability for the crime or affect his ability to appreciate the criminality of his conduct.

Comparing the opinions of petitioner's experts with those of Dr. Cavagnaro, the Attorney General characterizes petitioner's experts as academics, lacking practical experience with the mentally retarded. The Attorney General argues that Dr. Cavagnaro's practical approach, comparing and contrasting the abilities and behaviors of petitioner with those of patients at the Porterville Developmental Center, provides a more reliable assessment of petitioner's intellectual functioning.

Some examples of Dr. Cavagnaro's approach to assessing

petitioner's intellectual functioning in that fashion are as follows:

1) He noted during his interview at San Quentin, that petitioner was friendly, appropriate, made eye contact, and readily answered questions. He testified that mentally retarded persons, in his experience, were often aggressive and impulsive, that they try to avoid eye contact, and that they frequently act inappropriately;

2) He made note of petitioner's ability to care for himself at San Quentin, citing examples such as showering when instructed to do so and performing simple tasks such as sweeping and picking up garbage without supervision. He testified that, from his experience, mentally retarded persons could not generally perform such tasks without assistance and/or supervision.

3) He pointed to petitioner's efforts to conceal his involvement in the capital crime, including lying to the police and others, and testified that mentally retarded persons, in his experience, were not capable of such goal-oriented deception.

Contrasting those behaviors with his experience at the Porterville Developmental Center, Dr. Cavagnaro concludes that petitioner's intellectual functioning is in the borderline range and that he is not intellectually disabled. The Attorney General argues, at page 53, that these opinions, based on Dr. Cavagnaro's experiences at Porterville, are uncontroverted.

Petitioner recalled Dr. Reschley to testify in response to Dr. Cavagnaro's testimony. He began by referencing his 50 years of experience in working with the intellectually disabled, particularly individuals, like petitioner, whose intellectual disability is at the mild end of the spectrum ranging from mild to profound. He rejected Dr. Cavagnaro's conclusions that mentally retarded individuals are often aggressive and impulsive, that they try to avoid eye contact, that they frequently act inappropriately, and that they do not engage in goal-oriented behaviors, such as deliberate lying. He noted, based on his own personal experience, that individuals with mild intellectual disabilities are often friendly and appropriate in response to social situations, and that they are generally motivated to learn and improve themselves, although often with little success. He testified that they are often able to hold a job, although usually jobs involving simple tasks like sweeping and lawn mowing, that most are able to get a license and drive a car, although perhaps taking longer to learn the skills necessary for both, and that all (like young children) are able to tell lies for their own benefit, although those lies are frequently ineffective and childish. He noted, as an example, petitioner's particularly ineffective lies to the police in an unsophisticated effort to conceal the crime and avoid responsibility.

Dr. Reschley opined that the characteristics of the mentally retarded described by Dr. Cavagnaro from his experience at Porterville are consistent with an individual whose

intellectual disability is much more profound than petitioner's, or who has some other disorder. He noted, in his experience, that individuals with mild intellectual disabilities are not generally confined in state institutions for the mentally retarded, unless their condition is accompanied by some mental or physical disorder.

Dr. Reschley disagreed with Dr. Cavagnaro's assessment that petitioner has a learning disability. He described a person with a learning disability as someone with a relatively normal learning ability, but has a severe and specific deficit in a particular academic area. Noting petitioner's failure to improve in any academic area during his eight years in school as a child, and his failure to improve beyond the second grade in both math and verbal skills despite thirty years of effort, he concluded that petitioner does not have a normal learning ability and that his deficits are not limited to a particular academic area.

The Attorney General, in respondent's brief, makes reference to other expert opinions testified to during the retrial of the penalty phase in petitioner's criminal case, citing the opinion of Dr. Michael Thackery that petitioner likely had a learning disability. At that retrial, the defense called Dr. Harry Kormos, a psychiatrist, who testified that petitioner was "borderline mentally retarded." The prosecution called Dr. Thackery, a psychologist, who testified, based on IQ tests given petitioner near the time of that retrial, that there was no justification for concluding petitioner was mentally retarded.

Dr. Thackery did not personally administer an IQ test.

None of the witnesses from that retrial were called to testify at the evidentiary hearing and none were asked to determine whether petitioner is or is not intellectually disabled within the meaning of Atkins. Neither the jury nor the judge in that 1992 trial was required to decide whether the opinions of Drs. Kormos and Thackery were right or wrong. Moreover, none of those witnesses was able to take into account the results of more recent testing of petitioner (particularly the WAIS IV given to petitioner in 2009 in which his cumulative IQ was scored at 63) and none could consider petitioner's performance on Tests of Adult Basic Education (TABE) given him in 2003 and 2010 demonstrating his failure to improve beyond the first or second grade level in literacy and numeracy, despite 30 years of classes at San Quentin.

This court finds the expert testimony from the 1992 retrial unpersuasive on the issues presented by this writ.

Evidence of Concurrent Adaptive Deficits

The U.S.Supreme Court, in Hall, stated, "The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework." supra, p. 2000 Citing the DSM-5, that court concludes that a determination of intellectual disability must include not only an individual's intellectual functioning, but also that individual's "ability or lack of ability to adapt or adjust to the requirements of daily life and his success or lack

of success in doing so."

California has adopted that approach to the proof of intellectual disability. Penal Code 1376 requires proof not only of subaverage intellectual functioning, but also a showing of deficits in adaptive behavior. In order to establish that he is intellectually disabled, a petitioner must prove that he has deficits in two or more areas of adaptive behavior. "Adaptive behavior" is defined as a set of learned skills that people generally need to function in their everyday lives. Those skill areas include communication, self-care, home-living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. CALCRIM 775 Petitioner must, therefore, prove deficits in two or more of those skill areas. The word "deficit" is defined as a deficiency or inadequacy, or the amount by which something is less than expected, or an impairment in functioning. CALJIC 8.84.02

Petitioner's experts testified that the diagnosis of intellectual disability requires a clinician to assess deficits in adaptive behavior in three domains, conceptual, social, and practical. They described those domains as follows: conceptual, involving abstract reasoning and applied learning; social, involving social interactions and responsibilities; and practical, involving things like self-care and job performance. They noted that patterns of adaptive behavior are best assessed in the community (such as at home and, at school for a child or at work

for an adult), rather than in an "assisted" environment such as a prison or similar institution.

Those experts reviewed all the evidence: petitioner's history at home and school and work, both as a child and as an adult, the testimony and declarations of teachers, family, neighbors, and others. They concluded from that review that petitioner had adaptive deficits in all three domains, conceptual, social and practical, both during his childhood and as an adult.

Dr. Olley pointed to several aspects of petitioner's childhood demonstrating those deficits: petitioner's difficulties as a child in learning to dress himself and in learning table manners, his difficulties in school, being identified as mentally retarded on entering school at age 9 and continuing in special ed classes throughout his childhood, his difficulty in making friends in school, his dropping out of school in the 10th grade and his difficulties in learning to drive. Dr. Olley noted examples from petitioner's adult history demonstrating similar deficits: his difficulties in obtaining work, requiring assistance to fill out a job application, his history of employment in simple manual labor jobs, his difficulty learning those jobs and his problems in keeping those jobs. He noted that petitioner had never lived by himself, moving from his parents' home into the home of his ex-wife and her children.

In addition to that, Dr. Olley noted from his interview at San Quentin, petitioner's poor "fund of knowledge" about basic subjects like geography, but more importantly, his inability to

apply what little knowledge he did have to a practical problem. Dr. Olley pointed to this part of the interview as an example of petitioner's deficits in the conceptual domain, reflecting his inability to apply learning and engage in abstract reasoning.

Dr. Benedict, having reviewed the same history, concluded that petitioner had impairments in all areas of adaptive functioning beyond the level he would describe as mild.

Respondent's expert, Dr. Cavagnaro, concluded from that same history as well as his own interview with petitioner at San Quentin, that petitioner did not have deficits in adaptive functioning, either as an adult or as a child. He questioned Dr. Olley's use of the ABAS II to retrospectively assess petitioner's adaptive deficits as a child. He pointed to petitioner's conduct in the commission of the capital crime, particularly what he described as petitioner's "planning" of the crime and "purposeful" efforts to cover it up, and concluded that petitioner was able to engage in abstract reasoning. He considered as significant the comments of Judge Meyers', discussed previously, concluding that those lent support to his conclusions. He relied on testimony and declarations from corrections staff on death row, including the opinions of Officer Simons that petitioner was able to play "Scrabble." He relied on his own interview of the petitioner in which petitioner claimed to be able to play chess, concluding from that claim that petitioner was able to engage in complex problem solving and "intellectual processing."

Dr. Cavagnaro and the Attorney General criticize the use

of the ABAS II, for the purpose of retroactively assessing adaptive functioning in an Atkins case. They argue that its use when given to relatives of petitioner, who may have a motive to fabricate, is inappropriate, inherently biased and unreliable. The appellate court in Campbell, supra, p.599 to 605, implicitly recognized the propriety and necessity of using the ABAS II and similar tests to retroactively assess adaptive functioning in Atkins cases, particularly for the purpose of assessing adaptive functioning during childhood. Moreover, Dr. Olley testified that his opinion as to petitioner's deficits was unaffected by the results of those tests.

The testimony of Officer Simons that petitioner was, in his opinion, able to play "Scrabble", based on his observation of petitioner and other inmates from outside the yard, is wholly inconsistent with all the other evidence in the case, including petitioner's performance on literacy tests at San Quentin and the testimony of his ex-wife, Marvene Nordin. Likewise, petitioner's claim in his videotaped interview with Dr. Cavagnaro, that he is able to play chess, is inconsistent with his descriptions of the game from that same videotape and all the other evidence in this case.

Petitioner's ex-wife testified to his ability to repair things around the home and to put things together, characterizing him as "good with his hands". Her testimony is not inconsistent with the opinions of petitioner's experts that he does have "strengths", particularly in the area of manual skills, all of

which is consistent with his scores on the performance subset of the intelligence tests and consistent with a diagnosis of mild intellectual disability. Her testimony that she had to send the kids to the store with him to buy groceries and her description of his obsessive efforts to avoid making change at a restaurant or store, is all consistent with the deficits described by petitioner's expert witnesses.

Conditions Manifested before Age 18

This court will not undertake to repeat or review all the evidence from petitioner's school records, the declarations of family, teachers and neighbors, evidence of petitioner's exclusion from the military draft during the Vietnam War era because of his impaired intelligence, and all the other essentially unrefuted evidence which conclusively demonstrates that the conditions testified to by the experts in this case manifested themselves before he was 18 years old.

The Attorney General argues that the only reliable evidence of petitioner's adaptive functioning and intelligence during his childhood is the 1992 testimony of his mother, Lola, to the effect that "he was just a regular.....common kid." That testimony, in this court's judgment, may truthfully reflect his mother's opinion, but that opinion is not supported by any credible evidence.

Court's Findings on the Expert Opinion Testimony

Weighing the opinions of each of these experts, one against the other, and considering the reasons given for those opinions and the strengths and weaknesses of the facts supporting those reasons, this court finds that the convincing force of the evidence supports the conclusion that petitioner does have a condition of significant subaverage general intellectual functioning and does also have deficits in two or more areas of adaptive functioning within the meaning of Atkins and Penal Code 1376. The court further finds that those conditions were manifested before petitioner's 18th birthday.

This court finds that Dr. Cavagnaro's opinions, particularly those based on comparisons with patients at the Porterville Developmental Center, have little convincing force and do not provide a sound basis for concluding that petitioner is not intellectually disabled. Petitioner's experts, their qualifications, their opinions, and the reasons given for their opinions, together with all the other evidence presented in support of petitioner's claim that he is intellectually disabled, outweigh the evidence offered in opposition to that claim. The court therefore finds that petitioner has met his burden to prove that it is more likely than not that he is intellectually disabled.

Ruling of the Court and Judgment

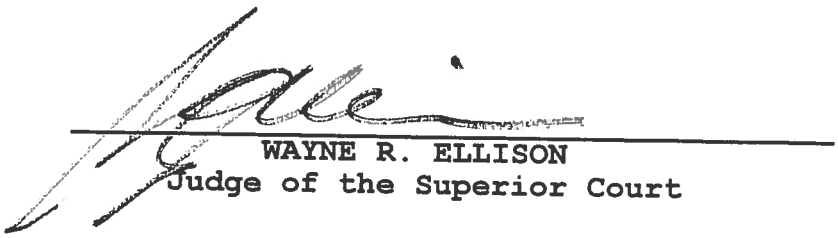
Based on the foregoing findings of fact and conclusions of law, this Court rules that petitioner is ineligible for

imposition of the death penalty under Penal Code Section 1376 and Atkins. The court has received and accepted a written, notarized waiver, signed by petitioner, waiving his right to be present for resentencing in the case of People v. Donald Griffin, and allowing counsel to appear on his behalf to be sentenced, forthwith, to the Department of Corrections and Rehabilitation for the term of life without the possibility of parole.

Based on all the foregoing, the court orders that the petitioner's writ of habeas corpus be granted. Good cause appearing, IT IS FURTHER ORDERED THAT:

The presiding judge of the court having assigned this court for all purposes in the case of People of the State of California v. Donald Griffin, Fresno Superior Court Case No. F80252758-, said defendant, Donald Griffin, is hereby sentenced in that case, on Count One, for the crime of murder in the first degree with special circumstances, to a term of life in prison without the possibility of parole.

Dated this 12th day of November, 2015



WAYNE R. ELLISON
Judge of the Superior Court

COUNTY OF FRESNO
Fresno, CA