APPENDIX A

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
04/05/2007 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1989-005726

04/04/2007

HONORABLE THOMAS W. O'TOOLE

CLERK OF THE COURT
J. BOWER
Deputy

STATE OF ARIZONA

JOHN P TODD

v.

DAVID MARTINEZ RAMIREZ (A)

PAULA KAY HARMS

COURT ADMIN-CRIMINAL-PCR
VICTIM WITNESS DIV-AG-CCC

RULING[1]

The following matter has been under advisement following evidentiary hearing and argument.

No good cause appearing,

IT IS ORDERED denying the **Defendant's Petition for Post-Conviction Relief** claim that he is mentally retarded and therefore constitutionally excluded from being executed pursuant *Atkins v. Virginia*, 536 U.S. 304(2002). The Defendant has failed to prove by clear and convincing evidence or by a preponderance of the evidence that he is mentally retarded, as defined by A.R.S §13-703.02(G) and (K)(2). See *State v. Grell*, 212 Ariz. 516(2006), where the

[1] This ruling clarifies and corrects findings and conclusions and replaces in all respects the September 22, 2006 ruling that denied the **Defendant's Petition for Post-Conviction Relief.** In a separate ruling filed today, the court has denied the defendant's **Motion for Rehearing and Renewed Request for Jury Trial.**

court held that the Arizona clear and convincing evidence burden of proof standard is constitutional. [2]

FULL SCALE I.Q. TESTING:

The Defendant has failed to establish by clear and convincing evidence or by a preponderance of the evidence that he has "significantly sub-average general intellectual functioning" which means "a full scale intelligence quotient [IQ] of seventy or lower." A.R.S. §13-703.02(G) & (K)(2) & (4).

Beginning in February of 1967, when he was 9 years of age, through January of 2006, when he was 38 years of age, the Defendant has been given six full-scale IQ tests, as well as several less thorough IQ tests. The six tests included two WISC tests, a Woodcock-Johnson, 3rd edition test (W-J III) and three WAIS-III tests. In each test, except for the WAIS-III test administered by Dr. Martinez on January 11, 2006, where the practice effect skewed and raised the score to 87, the Defendant's IQ was determined to be 70, 77, 70, 71 and 77. See Exhibits 210, 211 and 223, which portray these test results. Applying the accepted "margin of error for the tests administered," it is 95 percent certain that the Defendant's full scale IQ is within the range of 63 to 82. This consistency in IQ test scores over a 38+ years period of time, especially on the "gold standard" WISC and WAIS-III tests,[3] compels the conclusion that the Defendant has failed to establish by clear and convincing evidence or by a preponderance of the evidence that his IQ is 70 or lower.

[2] The court confirms in all respects it's April 17, 2006 ruling that the defendant, who was sentenced to death by this court in 1990, is not entitled to a jury trial on his claim that he is mentally retarded. Ring II gives only limited retroactivity to the right to a jury trial in a capital case. Unlike the defendants in *Grell* and *State v. Canez*, 205 Ariz. 620(2003), who were given a jury trial on their mental retardation claims due to Ring II, such does not apply to the defendant's 1990 sentencing.

[3] The court agrees with Dr. Marc Tasse that these tests were properly administered and scored.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1989-005726 04/04/2007

FLYNN EFFECT:

Though it has considered the "Flynn Effect" in determining the defendant's IQ, the Court is not persuaded that it is required to apply it to adjust downward each of the six full scale test IQ scores for alleged test obsolescence. See exhibits 223 and 210, where the Flynn Effect is and is not applied to the various IQ test scores. As shown by Exhibit 223, the defendant's expert, Dr. Marc Tasse, applies the Flynn Effect in finding that the Defendant's IQ is 70 or lower (these Flynn Effect adjusted scores are 64, 70, 67, 69, 74 and 78 respectively). Although the 2005 AAMR User's Guide, Exhibit 59, directs that the Flynn Effect, standard error of measurement and practice effect, all be used when scoring the WAIS-III test to determine a person's IQ, use of the Flynn effect is not mandated by the statute and is not part of the "current community, nationally, and culturally accepted...psychological and intelligence testing procedures" that must be used when scoring all full scale IQ tests. A.R.S §13-703.02(E).[4] In fact, Dr. Weinstein, a defense expert, did not adjust the full-scale IQ scores for the Flynn Effect in his 2004 Declaration and in his 2006 report to the court. In addition, Dr. Toma, the court-appointed expert, did not use the Flynn Effect in scoring his testing of the defendant and testified that such was not required for those tests.

In addition, the Flynn Effect is not part of the "margin of error..." calculation that A.R.S. 13-703.02(K)(4) and the current WAIS Scoring Manual require to be used in scoring the WAIS-III tests administered in 2004, 2005 and 2006, and was not used when the WISC tests were given to the Defendant as a child in 1967 and 1969. Instead, the manual merely directs that a standard error of measurement of ± 7 be applied in scoring the 1967 and 1969 WISC tests, and that

[4] Although the Flynn Effect was widely known when A.R.S. 13-703.02 was enacted in 2001, and when *Atkins* was decided in 2002, it was not adopted or discussed by either. Recently, some appellate courts have directed that the trial court consider it when determining a person's IQ, *Green v. Johnson, ___F. Supp. 2d. ____(E. D. Va. 2006); Walton v. Johnson, 440 F.3d 160, 176-178(4th Cir. 2006)* and *Walker v. True*, 399 F.3d 15, 322-328 (4th Cir. 2005), while other courts have rejected its application absent statutory authorization. See *Bowling v. Kentucky*, 163 S.W. 3d. 361, 375(2005) and cases cited therein.

a standard error of measurement of ± 5 be applied for WISC-III tests given in 2004, 2005 and 2006.

In sum, the defendant has failed to show by clear and convincing evidence or a preponderance of evidence that he possesses "significant sub average general intellectual functioning," as defined and required by A.R.S. 13-703.02(G) & (K)(2) & (4).[5]

ADAPTIVE BEHAVIOR:

The court further finds that the Defendant has proved by a preponderance of the evidence, but not by clear and convincing evidence, that throughout his childhood and adult life he has suffered from significant impairment in adaptive behavior in meeting the standards of personal independence and social responsibility expected of a person of his age and cultural group. A.R.S. 13-703.02(K)(1). All experts agreed that the *AAMR Users Guide, 2002 edition*, provides the "current community, nationally, and culturally accepted...procedure" for evaluating a person's adaptive behavior, as required by A.R.S. 13-703.02(E). In essence, this requires that the experts investigate and determine a defendant's conceptual, social and practical adaptive behavior and skills in the context of his or her behavior in the community. However, the court can also consider a defendant's institutional behavior in determining whether he has significant adaptive behavior deficits. See *State v. Arellano (Appelt)*, 213 Ariz. 474, ___ ¶¶ 14-23 (2006), where the court held that, pursuant to A.R.S. 13-703.02(K), the trial court has the discretion to consider defendant's adult institutional behavior, including his communication, social and interpersonal skills, and work, leisure and health habits, in determining the existence of adaptive behavior deficits. This behavior is especially relevant in this case, where the defendant has spent nearly his entire his adult life in prison before and after he committed these murders in 1989. Finally, the experts agree that the *Adaptive Behavior Assessment System, 2d edition*, (ABAS-II) test is the most appropriate and accepted formal assessment

[5] If the Flynn Effect was required to be used in scoring these tests, the court finds that the defendant has proved by a preponderance of the evidence that his full scale IQ is 70 or lower.

tool for determining whether the Defendant has significant adaptive behavior deficits.

Viewed in this context, the Court agrees in part with the findings of Drs. Weinstein and Tasse, that the Defendant has significant adaptive behavior deficits as defined by A.R.S. 13-703.02(K)(1), particularly in the area of conceptual, social, and practical skills. As detailed in their reports and testimony, both experts investigated all aspects of the defendant's life before and after turning 18 years of age, including his institutional behavior. In addition to reviewing the testimony of the mitigation witnesses at the 1990 aggravation and mitigation hearing, they also interviewed several family members who were close to the Defendant in his formative years when he grew up in Phoenix and in southern California. They also considered sworn declarations from individuals who were familiar with the Defendant's behavior in non-institutional and institutional settings. The defendant also presented the testimony of Eloise Arce, an aunt who cared for him for about 18 months until age three and who also observed him in his youth, about his maladaptive conduct during his childhood years in Phoenix. This information confirmed, as detailed in the testimony and reports of Drs. Weinstein and Tasse, that although the Defendant as a young boy was a good caregiver to his younger siblings in the absence of their alcoholic mother, he showed many symptoms of very slow and delayed development of conceptual, social and practical skills. Finally, Dr. Tasse, unlike Drs. Toma and Martinez, correctly administered the ABAS-II test, the most appropriate adaptive behavior test, to the Defendant and Richard Garcia, his stepfather from approximately 1966 to 1973. This test, together with the independent evidence of the defendant's non-institutional behavior, establishes probable cause to believe that since childhood the Defendant has displayed significant adaptive behavior impairments in conceptual, social and practical skills.

The Court is unable to conclude, however, that there is clear and convincing evidence that the defendant has significant adaptive behavior deficits. A more complete picture of his conduct in his formative years as a child and teenager, as well as his conduct in prison over nearly all of the last twenty-six years, shows that the defendant has regularly shown adequate personal independence and social

responsibility expected of a person of his age and cultural group, including proper conceptual, social and practical skills. In contrast to numerous hearsay declarations of Richard Garcia and others,[6] and the somewhat conflicting and unreliable testimony of Eloise Arce about certain adaptive behavior deficits of the defendant, the testimony at the October 19, 1990 and November 30, 1990 sentencing mitigation hearing of Erlinda Martinez, his aunt and the sister of the defendant's mother, and of two of the defendant's immediately younger sisters, shows that when the defendant grew up in Phoenix he exercised personal independence and proper conceptual, social and practical skills for a person of his age and cultural group.[7] Before he became a teenager, and in the frequent absence of his alcoholic mother, he was described as the "man of the family," who did most of the cooking, cleaning and caring for his younger siblings. In addition, they attributed his poor school performance and being "kept back" in school to his frequently missing school and constantly changing schools due to his mother being regularly on the move around Phoenix. This nomadic existence is corroborated by the school records and Joint Chronology timeline submitted by the parties, which shows that over a seven-year time frame from September of 1963 to September of 1970, the defendant attended at least ten different schools, was regularly absent and was twice held back.

In 1971, at approximately the age 14, the defendant moved to El Monte, California with his mother and her husband, Richard Garcia. Three years later the defendant and his mother returned to Arizona without Richard. The defendant then married and fathered two sons, and was gainfully employed as a cook and dishwasher at various locations before being sent to prison for the first time in April of 1979.

---

[6] Most of the critical fact witnesses relied on by the defendant's experts were not called to testify and thus not subjected to cross-examination.

[7] The court confirms its July 18, 2006 minute entry ruling denying the defendant's **Motion to Prevent Consideration of Aggravation/Mitigation Hearing Transcripts on the Issue of Mr. Ramirez's Mental Retardation.** Consideration of this testimony at this Rule 32 hearing, which is part of the original criminal action, did not violate any of the defendant's Constitutional rights. Rule 32.3, Rules of Criminal Procedure.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1989-005726 04/04/2007

The defendant's conduct in prison, where he has been since April of 1979 except for only two short periods of release, further compels the conclusion that the defendant has failed to show by clearing and convincing evidence that he has significant adaptive behavior deficits. Department of Corrections officers who supervised the defendant from 1987 to 1989 at Florence, testified that the defendant worked as a porter in the officers dining room and prepared and served food to DOC officers. His supervisors described him as a self-starter, who was polite, acted with responsibility, and was trusted and skilled. At one point, he was promoted and put in charge of running the morning shift at the dining room.

In concluding that the defendant has failed to show by clear and convincing evidence that he has significant adaptive behavior deficits, the court agrees with Dr. Toma's opinion that the defendant does not suffer from significant adaptive behavior deficits and that as an adult the defendant has consistently displayed the ability to engage in independent and self-directed thinking, planning and conduct. Although Dr. Toma did not fully administer the ABAS-II test to formally determine if the defendant had significant impairment in adaptive behavior, his opinion is credible because it is based on numerous contacts with the defendant during interviews and I.Q. testing, and his evaluation of the defendant's well documented conduct during nearly 26 years in prison from 1979 to 1989 and then from 1991 to 2006.[8]

In sum, although the conflicting evidence shows by a preponderance of the evidence that the defendant has significant adaptive behavior deficits, the court is unable to conclude that the evidence of these deficits is clear and convincing.

ONSET BEFORE AGE OF 18:

THE COURT FINDS by a preponderance of the evidence that the onset of the Defendant's adaptive behavior deficits occurred before he reached the age of 18. A.R.S. §13-703.02(K)(2).

[8] This conduct is portrayed in the voluminous prison and inmate records he reviewed, exhibits 138-209 not in evidence.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1989-005726 04/04/2007

CONCLUSION:

IT IS ORDERED denying the defendant's Rule 32 Petition. He has failed to show by clear and convincing evidence that he is mentally retarded.

APPENDIX B

9/10287
Tolac

Supreme Court

STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3231
TELEPHONE: (602) 452-3396

RACHELLE M. RESNICK
CLERK OF THE COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

November 30, 2007

RE: STATE OF ARIZONA v DAVID MARTINEZ RAMIREZ
Arizona Supreme Court No. CR-07-0177-PC
Maricopa County Superior Court No. CR89-005726

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 29, 2007, in regard to the above-referenced cause:

ORDERED: Renewed Motion for Preparation of Corrected Transcripts = GRANTED.

This matter is remanded to the superior court to order appropriate corrections to the transcripts.

FURTHER ORDERED: Petition for Review of Denial of Petition for Post-Conviction Relief = DENIED.

FURTHER ORDERED: The State of Arizona's Cross-Petition for Review = DENIED.

Rachelle M Resnick, Clerk

TO:
John Pressley Todd, Arizona Attorney General's Office
David Martinez Ramirez, ADOC #39656, Arizona State Prison, Florence - Eyman Complex-SMU #2 Unit
Paula Harms, Federal Public Defender's Office, Phoenix Office
Jennifer Bedier, Arizona Capital Representation Project [Information copy]
Diane Alessi, Arizona Death Penalty Judicial Assistance Program [Information copy]
Hon Barbara R Mundell, Presiding Judge, Maricopa County Superior Court
Hon Anna M Baca, Criminal Presiding Judge, Maricopa County Superior Court
Hon Thomas W O'Toole, Judge, Maricopa County Superior Court
Michael K Jeanes, Clerk, Maricopa County Superior Court
bjd

APPENDIX C

 91-0287 Todd

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

May 19, 2008

Mr. Kent E. Cattani
Office of the Attorney General
Capital Litigation Section
1275 West Washington
Phoenix, AZ 85007-2997

Re: David Martinez Ramirez
v. Arizona
No. 07-9858

Dear Mr. Cattani:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk