

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-100448
Plaintiff-Appellee,	:	TRIAL NO. B-9200826
vs.	:	<i>JUDGMENT ENTRY.</i>
WILLIAM GARNER,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

This is an expedited appeal from the trial court’s denial of defendant-appellant William Garner’s “motion for appropriate relief” in which he requested that the court vacate the five death sentences imposed on him. In six assignments of error, Garner contends that the trial court erred in denying his Eighth Amendment *Simmons*² claim; in denying his *Simmons*³ claim under R.C. 2929.02(A); in converting his motion for appropriate relief into a successive postconviction petition; in concluding that his motion did not satisfy the statutory requirements for a successive postconviction petition set forth in R.C. 2953.23(A); in refusing to reach the merits of his motion; and in refusing to conduct a hearing to address his motion.

We first address Garner’s third and fourth assignments of error, which contend that the court erred in converting his motion for appropriate relief into a successive postconviction petition and in concluding that his motion did not satisfy

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² *Roper v. Simmons* (2005), 543 U.S. 551, 125 S.Ct. 1183.

³ *Id.*

the statutory requirements in R.C. 2953.23(A), because the issues raised in those assignments are dispositive of this appeal.

Garner's motion, designated as one for "appropriate relief," did not specify a statute or rule under which he was entitled to relief. As we have noted, a court confronted with an irregular or nameless motion—a motion that does not designate a statute or rule under which relief may be granted—may recast the motion "in whatever category necessary to identify and establish the criteria by which the motion should be judged."⁴

Garner's former postconviction petitions have been well documented by this court,⁵ and we adopt those recitations of the procedural history. Garner asserts that if his motion is recast it should be recast as a new-trial motion under Crim.R. 33 based on newly discovered evidence. The newly discovered evidence, according to Garner, is that psychologists recently have recognized that intelligence-quotient scores are artificially inflated, and that the previous trial court had relied on scores that were inaccurate. This is not the type of newly-discovered evidence contemplated by Crim.R. 33. As the Ohio Supreme Court has stated, "the defense offered evidence that Garner possessed lower than average intelligence and was raised in a deplorable home environment, devoid of love, support, consistency and stability. Evidence existed from which the jury could conclude that Garner suffered sexual abuse as a child by an older brother, and physical abuse from his mother and others. The defense offered considerable mitigating evidence which is entitled to significant weight."⁶ The jury considered the evidence of Garner's below-average intelligence and recommended death. In this respect, Garner's contention is not new, and the merits of his low-intelligence claim have been fully litigated at trial.

⁴ *State v. Black*, 1st Dist. No. C-070546, 2008-Ohio-3790, at ¶14, quoting *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, at ¶12.

⁵ See *State v. Garner* (Dec. 19, 1997), 1st Dist. No. C-960995 and *State v. Garner* (Apr. 28, 2000), 1st Dist. No. C-990659.

⁶ *State v. Garner*, 74 Ohio St.3d 49, 65, 1995-Ohio-168, 656 N.E.2d 623.

In *State v. Reynolds*,⁷ the Ohio Supreme Court defined a petition as one for postconviction relief if it (1) was filed after the defendant's direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for vacation of the judgment and sentence. Applying the *Reynolds* criteria, Garner's petition is unquestionably one for postconviction relief, and because this petition is not his first postconviction petition requesting similar relief,⁸ we recast his motion as one for successive postconviction relief.

"R.C. 2953.23 closely circumscribes the jurisdiction of a common pleas court to entertain a successive postconviction petition: The petitioner must show either that he was unavoidably prevented from discovering the facts upon which his petition depends, or that his claim is predicated upon a new or retrospectively applicable federal or state right recognized by the United States Supreme Court since the filing of his previous petition; and he must show 'by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact finder would have found [him] guilty of the offense of which [he] was convicted'."⁹

The essence of Garner's argument on appeal is that the imposed death sentences ran afoul of the United States Supreme Court's subsequent holding in *Roper v. Simmons*,¹⁰ which stated that "the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." Garner argues that the *Simmons* holding extends to him because at the time he committed the offenses he was the mental equivalent of a person under the age of 18. Garner was 19 when he committed the offenses, and he is not mentally retarded.

We hold that *Simmons* does not apply to an adult offender who had the mental capacity of a person below the age of 18 when he committed his crimes. The

⁷ 79 Ohio St.3d 158, 1997-Ohio-304, 679 N.E.2d 1131; see, also, *Black*, supra, at fn. 4.

⁸ See R.C. 2953.23.

⁹ *State v. Bies*, 1st Dist. No. C-020306, 2003-Ohio-442; R.C. 2953.23.

¹⁰ *Supra*, at fn. 2.

Ohio Supreme Court has recognized that the R.C. 2929.02 statutory prohibition against imposition of the death penalty on juveniles refers to chronological age and not mental age.¹¹ For the same reasons, the *Simmons* case did not establish a new standard for adults of limited mental capacity that might warrant first-petition review under *State v. Lott*.¹² Because *Simmons* does not apply to Garner, he has failed to make the requisite showing under R.C. 2953.23(A), that his claim is predicated on a new or retrospectively applicable federal or state right recognized by the United States Supreme Court since the filing of his previous petition.

We hold that the trial court lacked jurisdiction to entertain Garner's successive postconviction petition. Therefore, the trial court did not err in overruling it. The third and fourth assignments of error are overruled. Our holding renders Garner's other assignments of error moot.

In summary, Garner's third and fourth assignments of error are overruled, the remaining assignments of error are moot, and the judgment of the trial court is accordingly affirmed.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., HILDEBRANDT AND MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on July 9, 2010

per order of the Court _____
Presiding Judge

¹¹ *State v. Rogers* (1985), 17 Ohio St.3d 174, 183, 478 N.E.2d 984, vacated on other grounds in *Rogers v. Ohio* (1985), 474 U.S. 1002, 106 S.Ct. 518.

¹² 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011.