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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Sumter County

Honorable William P. Keesley, Circuit Court Judge

Appellate Case Number: 2026-000115

BOBBY WAYNE STONE,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER.

SUPPLEMENTAL APPENDIX

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THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	)	
	)	Case No. 2018-CP-43-01025
	)	
	)	
BOBBY WAYNE STONE,	)	
Applicant,	)	
vs.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	
	)	

APPLICANT'S POST-HEARING REPLY BRIEF

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Applicant, Bobby Wayne Stone, by and through undersigned counsel, respectfully submits the following in reply to Respondent's Post-Hearing Brief ("Resp. Brief"). As discussed thoroughly in Applicant's Opening Brief, Applicant has satisfied his burden of proof and demonstrated he is a person with intellectual disability, exempt from the death penalty pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002). This Reply does not rehash the evidence discussed in the prior briefing. Rather, it focuses primarily on Respondent's misrepresentations and erroneous characterizations of the record evidence and appropriate considerations in assessing the merit of an *Atkins* claim.

I. Respondent's Complaints About This Claim Not Being Raised Previously are Barred by the Law of the Case.

Respondent requests that this Court not consider Stone's claim because it was not raised in prior post-conviction proceedings. Resp. Brief at 3–4, 29, 33. This argument has been rejected by the Supreme Court of South Carolina as it allowed this PCR action to proceed and designated this Court to resolve its merits and in this Court's prior ruling on Respondent's motion to dismiss. Order, *Stone v. State*, No. 2018-001260 (S.C. Nov. 28, 2018); Order Granting In Part and Denying In Part Respondent's Motion to Dismiss, *Stone v. State*, 2018-CP-43-001025 (S.C. Ct. Comm. Pleas Feb. 20, 2019). Thus, the law of the case doctrine resolves this issue conclusively. *Lifschultz Fast Freight, Inc. v. Haynsworth, Mation, McKay & Guerard*, 334 S.C. 244, 245, 513 S.E.2d 96, 96–97 (1999).

The South Carolina Supreme Court has done the exact same thing in other cases. *E.g.*, Order, *Terry v. State*, No. 1997-006197 (S.C. Apr. 6, 2022); *Woods v. State*, No. 2019-001713, 2019 WL 6898088 (S.C. Dec. 18, 2019) (reversing the PCR court's order dismissing an *Atkins* claim and remanding for an evidentiary hearing on the merits of the claim). Furthermore, four other Circuit Court judges in South Carolina have found PCR applications raising freestanding *Atkins*

claims in capital cases cognizable, granted the applicants evidentiary hearings, and reached the merits on the matter, even where the issue of intellectual disability could have been litigated at trial or during initial PCR proceedings. *See* Order Denying Motion to Dismiss, *Elmore v. State*, No. 2005-CP-24-1205 (S.C. Ct. Comm. Pleas June 18, 2007); Third 120 Day Status Report, *Aleksey v. State*, No. 2015-CP-38-00764 (S.C. Ct. Comm. Pleas June 7, 2017); Order, *Bryant v. South Carolina*, 2016-CP-43-828 (S.C. Ct. Comm. Pleas July 13, 2016); Order Denying Respondent's Motion to Dismiss, *Terry v. State*, 2022-CP-32-00924 (S.C. Ct. Comm. Pleas Dec. 8, 2022).[1] In those cases, as in Stone's, the Supreme Court of South Carolina has permitted consideration of the claims, including in several cases where the claims were discovered significantly later in the proceedings than in Stone's case. For example, in *Terry*, the Supreme Court of South Carolina stayed Mr. Terry's execution to allow consideration of his *Atkins* claim even though Mr. Terry had otherwise completed the course of his ordinary state and federal post-conviction review proceedings at the time the claim arose. Order, *Terry v. State*, No. 1997-006197 (S.C. Apr. 6, 2022).

II. Respondent's Arguments Addressing the Merits of Stone's Claim Have Been Rejected by the United States Supreme Court and are at odds with the Clinical Consensus of the Medical Community.

Respondent's main arguments are based on fundamental misunderstandings of what is required when assessing intellectual disability and on misrepresentations of the information and evidence before the Court. Both Dr. Hall and Dr. Boyd, the only two experts who evaluated Stone, conducted clinically proper and thorough evaluations, and determined Stone is a person with intellectual disability. Hrg. at 21, 107, 203, 207; Court Ex. 1 at 13.

[1] Copies of these orders are attached to this Reply as Attachment A.

a. Dr. Boyd and Dr. Hall both properly assessed Stone's adaptive functioning.

Respondent asks this Court to reject the conclusions of both Dr. Boyd and Dr. Hall because the doctors "jointly interviewed" some of the collateral witnesses, which Respondent maintains resulted in faulty information being passed to Dr. Hall and ultimate opinions that were "hopelessly intertwined." Resp. Brief at 22, 26. This is simply a misrepresentation of what happened during the course of Dr. Boyd's and Dr. Hall's evaluations.

Dr. Boyd testified that she conducted collateral interviews for her evaluation several times between 2019 and 2022. Hrg. at 19, 72, 101–102, 111. For these interviews, Dr. Boyd explained that she did some of them "on my own, and then there was a series of them in 2022 that Dr. Hall and I did in parallel." Hrg. at 111. Dr. Hall also conducted some of her collateral witness interviews on her own. Hrg. at 167, Court Ex. 1 at 3. Dr. Boyd went on to clarify that for the parallel interviews, she and Dr. Hall "were meeting with the same person at the same time, but we each had our own list of questions, and then each one of us would ask our questions, the other one would go next." *Id.* While they were present and heard the answers in these parallel interviews, neither doctor shared information, notes, research, diagnostic opinions, or their reports with one another at any point in their evaluations. *Id.* Further, each expert was able to receive the information directly from the witnesses, ask their own clarifying questions, and make independent observations of the witness. Respondent provides no support for its allegation that this process was improper because there is none.

Respondent creates additional fictitious problems with the collateral interviews considered in Dr. Hall's evaluation. Respondent claims that Dr. Hall only interviewed "the limited individuals identified by Applicant's team." Resp. Brief at 22. This is wrong for several reasons. Dr. Hall explicitly testified that she herself identified the collateral witnesses she hoped to interview in

Stone's case. As she explained, she begins her evaluative process by sending DDSN's general counsel "a list of records and individuals I would like to interview to begin the process," so that general counsel can communicate with the parties to help obtain those sources of information. Hrg. at 159–160. This is exactly what happened here, and Stone's counsel helped coordinate the interviews with DDSN at the agency's request. Dr. Hall further testified that when conducting an evaluation, she considers any information available and is willing to review information from any party. Hrg. at 213–214. Respondent could have identified and provided additional collateral witnesses or information to Dr. Hall for her consideration at any point prior to the July 2024 evidentiary hearing in this case but chose not to.[2] Thus Respondent is in no position to complain about who the experts did and did not interview.

Respondent attempts to further undermine the information obtained by Dr. Hall in these collateral interviews by providing several hypothetical alternative meanings to statements made by the witnesses to Dr. Hall. Resp. Brief at 25–31. The State does so without any support. Respondent was aware of who the collateral witnesses were well in advance of the evidentiary hearing. Dr. Hall submitted her report to the Court and the parties in December 2022, nearly two years before the evidentiary hearing in this matter. Court's Ex. 1. Respondent could have (and did

[2] In a similar vein, Respondent suggests Dr. Hall had inadequate background information about Stone because she did not review the transcripts from Stone's prior legal proceedings in this case, specifically the testimony from a single social worker at one of Stone's prior proceedings who discussed information about Stone's upbringing. Resp. Brief at 27–28. Again, had they thought this information was necessary as a part of an intellectual disability evaluation, Respondent could have provided any of these transcripts to Dr. Hall for her consideration. Hrg. at 213–214. They chose not to. Moreover, this suggestion ignores that as part of her evaluation, Dr. Hall reviewed the testimony of Dr. Arlene Andrews, a social historian and licensed social worker who conducted an extensive social history of Stone in advance of his 2012 PCR proceedings, and who pointed out the obvious defects in the trial social worker's opinions including, of special relevance here, that she did not review the school records finding Stone to be educably mentally handicapped. Court Ex. 1 at 3.

in fact) talk to some of these witnesses as well as several other collateral witnesses before the evidentiary hearing. Respondent was well within its right to either request Dr. Hall talk to specific collateral witnesses to ascertain if they would have answered in line with Respondent's hypotheticals prior to the hearing or to call any of these witnesses at the evidentiary hearing to ask what they meant by the specific responses Dr. Hall reported. They chose not to do so.[3]

b. Respondent attempts to convince this Court to run afoul of Moore v. Texas.

The bulk of Respondent's submissions to this Court as to why Stone's intellectual disability claim fails are attempts to attribute Stone's academic functioning deficits to other experiences in his upbringing are based on stereotypes about people with intellectual disability, and are in clear contravention of legal precedent and clinical practice. *E.g.*, Resp. Brief at 27–30, 34. Following Respondent's suggestions would run afoul of *Moore v. Texas*, 581 U.S. 1 (2017) ("*Moore I*"); *Moore v. Texas*, 586 U.S. 133 (2019) ("*Moore II*").

Respondent maintains that Dr. Boyd's and Dr. Hall's determinations that Stone has adaptive deficits are incorrect because some of the behaviors were "better" explained as being caused by Stone's childhood "disadvantages," poverty, and a "difficult family structure." Resp. Brief at 2, 24–26. This is precisely what the Texas court tried to do in *Moore I*. 581 U.S. at 16. But, as the Supreme Court recognized, poverty, improper parental supervision, and childhood abuse all "count in the medical community as '*risk factors*' for intellectual disability." *Id.* (citing AAIDD-11); *see also* AAIDD-12 at 77, 92; Hrg. at 106–107. The medical community relies "on such factors as

[3] This Court also granted Respondent's motion to compel production of Stone's mitigation investigator's file for the specific purpose of discovering potential collateral witnesses with information about Stone's functioning should Respondent desire to talk with them before the evidentiary hearing in this matter. Order on Respondent's Motion to Compel, *Stone v. South Carolina*, 2018-CP-43-001025 (S.C. Ct. Comm. Pleas Sept. 26, 2023).

cause to explore the prospect of intellectual disability further, not to counter the case for a disability determination." *Moore I*, 581 U.S. at 16. Accordingly, it is improper for a court to rely on these kinds of causal explanations—which are in actuality known risk factors for intellectual disability—to undermine the case for an intellectual disability determination. This Court should not do so.

Respondent also asks this Court to rely on stereotypes to find Stone is not a person with intellectual disability. Respondent suggests that people with intellectual disability cannot obtain employment, be hardworking,[4] obtain drivers licenses, cook, have friendships, or have meaningful romantic relationships. Resp. Brief at 27–30, 34. As the testimony at the hearing established, and research confirms, these are all things that people with mild intellectual disability can do. Hrg. at 56, 64–65, 95–97, 234–238, 267–268; CHRISTOPHER SANFORD ET AL., INTERNATIONAL CENTER FOR SPECIAL EDUCATION RESEARCH, THE POST-HIGH SCHOOL OUTCOMES OF YOUNG ADULTS WITH DISABILITIES UP TO 6 YEARS AFTER HIGH SCHOOL: KEY FINDINGS FROM THE NATIONAL LONGITUDINAL TRANSITION STUDY-2 (NLTS2) (2011). Moreover, in *Moore I*, the Texas court had, in part, rejected Moore's *Atkins* claim through the application of factors from a pre-*Atkins* case which were all grounded in "lay perceptions of intellectual disability." 581 U.S. at 18 (discussing the *Briseno* factors). The United States Supreme Court made clear that reliance on stereotypes is improper and "should spark skepticism." *Id.*[5]

Finally, Respondent represents to this Court that any adaptive deficits "must be directly related to the intellectual impairments," citing the DSM-5. Resp. Brief at 25. To do so would be

[4] For example, Respondent represents that because Stone could "maintain[] work to provide financially . . . a point he was proud of," he cannot have adaptive deficits. Resp. Brief at 28.

[5] In revisiting Moore's case in *Moore II*, the United States specifically identified relying on Moore having a girlfriend and having a job as inappropriate stereotypes the CCA relied on in discrediting the presence of adaptive deficits. *Moore II*, 586 U.S. at 142.

contrary to the clinical guidance. The DSM-5 is the only version of the DSM to ever contain this kind of nexus language about adaptive deficits in its guidance on intellectual disability. More importantly, the language was specifically removed from DSM-5-TR, the most current clinical guidance on diagnosing intellectual disability, because it led to exactly the type of erroneous assertions made by Respondent in this case. DSM-5-TR at 37–46. In *Moore I*, the Texas court had applied a 1992 clinical definition for intellectual disability to Moore's case. 581 U.S. at 9, 20. The United States Supreme Court made clear that states (and accordingly the courts) cannot disregard current clinical standards in favor of their "desire to define intellectual disability as they wish[]." *Id.* at 20. As the Supreme Court recognized, the most current editions of the DSM and AAIDD's clinical manual provide "the best available description of how mental disorders are expressed and can be recognized by trained clinicians." *Id.* (citing DSM-5; *Hall v. Florida*, 572 U.S. 701, 704–705 (2014); *Atkins*, 536 U.S. at 308 n. 3). There is no question after *Moore I* that Respondent's arguments have been authoritatively rejected by the United States Supreme Court.

c. Neither of Respondent's experts can offer a diagnostic opinion about whether Stone is a person with intellectual disability.

Respondent presented two forensic psychologists at the evidentiary hearing, Dr. Michael Vitacco and Dr. Kimberly Kruse. Neither expert had relevant prior experience in *Atkins* cases nor were they asked to conduct an evaluation in this case. Hrg. at 289, 296, 298–299, 306. Rather, they were called to offer criticisms about aspects of Dr. Boyd's and Dr. Hall's evaluations based on limited information about the evaluations. In doing so, they also provided this Court with testimony that is contrary to the clinical guidance on diagnosing intellectual disability. This Court should give little weight to their testimony in considering Stone's *Atkins* claim.

Dr. Vitacco testified "I have not done Atkins evaluations," and that he "was not asked" to give an opinion regarding intellectual disability in Stone's case. Hrg. at 289, 296, 298–299. The

only work Dr. Vitacco did in this case was read the reports produced by Dr. Boyd and Dr. Hall. Hrg. at 298. He was not provided with any other records or the underlying data from Stone's psychological testing. Hrg. at 298–299. He never met Stone or conducted any interviews with him or any collateral witnesses. Hrg. at 298. His opinions consisted entirely of distinct criticisms of some of the protocols used by Dr. Boyd and Dr. Hall.[6] Despite these criticisms, he acknowledged that the "overall protocol" used by both Dr. Boyd and Dr. Hall "was appropriate." Hrg. at 297.

Dr. Kruse was similarly asked by Respondent "[t]o review records," not to provide a diagnostic opinion. Hrg. at 306. As Dr. Kruse acknowledged, she has never done an *Atkins* case before. Hrg. at 316. She never met Stone or conducted any testing of him. Hrg. at 306, 317. She also never conducted collateral witness interviews. Hrg. at 320. Rather, Dr. Kruse testified that based on her record reviews, she believed he had a learning disability instead of intellectual disability because of a part-score variance in some of Stone's IQ testing. Hrg. at 311–312. As discussed in Stone's post-hearing brief at length, this opinion directly contradicts the clinical

[6] Dr. Vitacco's main concerns were Dr. Boyd's and Dr. Hall's use of the Flynn effect and parallel collateral witness interviews, Hrg. at 289, 296, which are discussed elsewhere in this brief. He raised one additional "concern" which was Dr. Boyd administering the Test of Memory Malingering (TOMM) to Stone in 2020, instead of at the time she administered Stone's IQ testing. *E.g.*, Hrg. at 290–292. The TOMM is an instrument designed to measure "memory malingering," and was administered because many effort measures are inappropriate to administer to people with intellectual disability and there is not a malingering assessment specifically designed to test for malingered intellectual disability. Hrg. at 35–36, 121. This is a non-issue because no expert has opined that Stone was malingering at any time and no expert has raised any issues with how Dr. Boyd's conducted the IQ testing to undermine its validity. Hrg. at 36–38, 184–185, 271–272, 320; Court Ex. 1 at 12. Both Dr. Boyd and Dr. Hall testified that they did not have any concerns that Stone was malingering because there was historical information from Stone's childhood to confirm the diagnosis and it was evident from their interactions with him that Stone was putting in effort as "he did not want to be thought of as someone who wasn't, you know, as he put it smart," and Hrg. at 36–38, 271–272; Court Ex. 1 at 11–12. Dr. Boyd explained that she administered the malingering test after being retained to do an entire evaluation of whether Stone is intellectually disabled because "[she] wanted to make sure that [she] did give him some kind of an effort assessment at some point in the process." Hrg. at 38, 119–121.

guidelines. App. Brief at 10–12. Moreover, Dr. Kruse acknowledged that these diagnoses are not necessarily mutually exclusive, and someone "can have learning disorder and intellectual developmental disorder." Hrg. at 312.[7]

Dr. Boyd and Dr. Hall, the only two doctors who evaluated Stone, opined that he meets the diagnostic criteria and is a person with intellectual disability. Hrg. at 21, 107, 203, 207; Court Ex. 1 at 13. They did so based on thorough assessments conducted in accordance with the best practices as set forth in the clinical guidelines. This Court should reach the same conclusion.[8]

III. This Court Can and Should Apply the Flynn Effect in Stone's Case.

Respondent submits that this Court should not apply the Flynn effect in Stone's case. Resp. Brief at 39–40. Ignoring the Flynn effect would be contrary to both the clinical consensus practice and the manner in which the majority of courts have assessed IQ scores in the *Atkins* context.

Courts considering *Atkins* claims are required to be "informed by the views of medical experts," when assessing if a person is intellectually disabled. *Moore I*, 581 U.S. at 13 (quoting *Hall*, 572 U.S. at 721). In doing so, courts should rely on "the most recent (and still current) versions of the leading diagnostic manuals." *Id.* The current leading diagnostic manuals are the

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[7] *See also* DSM-5-TR at 45 (explaining specific learning disorders "may co-occur with intellectual developmental disorder. Both diagnoses are made if full criteria are met for intellectual developmental disorder and a communication disorder or specific learning disorder."). The United States Supreme Court has recognized that "many intellectually disabled people also have other mental or physical impairments," and the existence of a coexisting condition "is not evidence that a person does not also have intellectual disability." *Moore I*, 581 U.S. at 17.

[8] No South Carolina court has ever rejected an *Atkins* claim when the court appointed DDSN examiner found the inmate to be a person with intellectual disability. *See*, *e.g.*, Order Granting Post-Conviction Relief in *Franklin v. South Carolina*, 96-CP-45-117 (S.C. Ct. Comm. Pleas Jan. 26, 2011); Order: Finding of Mental Retardation in *George v. State*, 99-CP-26-1715 (S.C. Ct. Comm. Pleas Jan. 9, 2007); Order Granting Post-Conviction Relief in *Elmore v. South Carolina*, 05-CP-24-1205 (S.C. Ct. Comm. Pleas Feb. 1, 2010); Order Finding Defendant Intellectually Disabled in *State v. Brown*, 2011-GS-30-152 (S.C. Ct. Gen. Sess. Apr. 14, 2016).

Diagnostic and Statistical Manual of Mental Disorders, 5th edition text revision ("DSM-5-TR"), which is published by the American Psychological Association, and *Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Support*, 12th edition ("AAIDD-12"), which is published by the American Association on Intellectual and Developmental Disabilities.[9] Hrg. at 16–17, 187, 319. Since *Atkins* was decided, every court in South Carolina to address an *Atkins* issue has relied on the clinical definitions, instructions, and guidelines of the APA and the AAIDD to inform the court's analysis in compliance with the Supreme Court's instruction in *Hall* and *Moore*.[10]

Both the DSM-5-TR and the AAIDD-12 explicitly recognize the legitimacy of the Flynn effect and the practice of accounting for norm obsolescence. DSM-5-TR at 38; AAIDD-12 at 42. The clinical consensus is clear that "[c]urrent best practice guidelines recommend that in cases in which an IQ test with aged norms is used as part of a diagnosis of ID, a correction of the full-scale IQ score of 0.3 points per year since the test []norms were corrected is warranted." AAIDD-12 at

[9] The United States Supreme Court has repeatedly recognized the AAIDD's clinical manual and the DSM as the best sources for the current medical guidance for how to properly evaluate intellectual disability. *See, e.g.*, *Atkins*, 536 U.S. at 308, 353; *Hall*, 572 U.S. at 704–05, 722; *Moore*, 581 U.S. at 7.

[10] *See, e.g.*, Order Finding Defendant Mentally Retarded in *South Carolina v. Pearson*, 96-GS-32-3338 (S.C. Ct. Gen. Sess. Dec. 14, 2005); Order Granting Post-Conviction Relief in *Franklin v. South Carolina*, 96-CP-45-117 (S.C. Ct. Comm. Pleas Jan. 26, 2011), Order Granting Post-Conviction Relief in *Elmore v. South Carolina*, 05-CP-24-1205 (S.C. Ct. Comm. Pleas Feb. 1, 2010); Order Granting Post-Conviction Relief in *Simmons v. South Carolina*, 05-CP-18-1368 (S.C. Ct. Comm. Pleas Oct. 15, 2013); Order Granting Post-Conviction Relief in *Bell v. State*, 03-CP-04-1857 (S.C. Ct. Comm. Pleas Nov. 16, 2016); Order Finding Defendant Intellectually Disabled in *State v. Brown*, 2011-GS-30-1523 (S.C. Ct. Gen. Sess. Apr. 14, 2016). Applicant has previously provided copies of these orders to the Court but will happily furnish additional copies for the Court's convenience upon request.

42. In line with this clinical guidance, both experts who evaluated whether Stone is intellectually disabled applied the Flynn effect as part of their evaluation. Hrg. at 31–32, 40–42, 176–177.[11]

Additionally, courts in South Carolina have routinely accepted the Flynn effect in *Atkins* cases. *See* Order Finding Defendant Mentally Retarded, *South Carolina v. Pearson*, 96-GS-32-3338 (S.C. Cir. Ct. Gen. Sess. Dec. 14, 2005); Order Granting Post-Conviction Relief Pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), Vacating Death Sentence, *Bell v. South Carolina*, 03-CP-04-1857 (S.C. Ct. Comm. Pleas Nov. 16, 2016); Order, *South Carolina v. Brown*, 2011-GS-30-1523 (S.C. Ct. Gen. Sess. Apr. 14, 2016). No South Carolina court considering an *Atkins* issue has ever found it was inappropriate to apply the Flynn effect. Similarly, courts across the country have also acknowledged it is appropriate to consider norm obsolescence when considering IQ scores as part of an *Atkins* claim.[12] In line with the medical community's best practices and how other courts

[11] Both of Respondent's expert witnesses acknowledged that it is not inappropriate to apply the Flynn effect and there was nothing wrong with either Dr. Boyd or Dr. Hall applying the Flynn effect in their evaluations of Stone. Hrg. at 299–300 (Dr. Vitacco acknowledging that he "personally wouldn't use the Flynn effect, but it's a judgement call," agreeing he "didn't have any criticism of either of the experts for using it," and acknowledging the Flynn effect is mentioned and encouraged by the clinical standards), 314–315 (Dr. Kruse stating that applying the Flynn effect "is not mandatory," but acknowledging "there's a place for the Flynn effect" when evaluating someone's IQ scores) .

[12] *State v. Williams*, No. 2023-T-008, 2023 WL 8440882, at *4, 23–24 (Ohio Ct. App. Dec. 4, 2023); *State ex rel. Johnson v. Blair*, 628 S.W.3d 375, 382–83 (Mo. 2021); *Jackson v. Payne*, 9 F.4th 646, 654–55 (8th Cir. 2021); *United States v. Roland*, 281 F.Supp.3d 470, 501–03 (D.N.J. 2017); Order Granting Habeas Corpus Relief, *In re Noel Jackson*, RIC475367/CR23480 (Cal. Sup. Ct. July 29, 2016), at 30; *Smith v. Schiro*, 813 F.2d 1175, 1184–85 (9th Cir. 2016); Decision Barring the Death Penalty, *State of Ohio v. Willie L. Dumas*, No. 14CR-2806 (Ohio Ct. Comm. Pleas Dec. 2, 2015); Order Granting Post Conviction Relief, *Russell v. Mississippi*, No. 10,130 (Miss. Cir. Ct. Dec. 31, 2014); Court's Partially Adopted Findings of Fact and Conclusions of Law, *Maldonado v. State*, No 51,612-02 (Tx. Dist. Ct. Dec 13, 2012); *Brumfield v. Cain*, 854 F.Supp.2d 366, 390–92 (M.D.La. 2012); *United States v. Smith*, 790 F. Supp. 2d 482, 491 (E.D.La. 2011); *United States v. Lewis*, 2010 WL 5418901, 2010 U.S. Dist. LEXIS 138375, at *14–17, 29–30 (N.D. Ohio Dec. 23, 2010); *Wiley v. Epps*, 668 F.Supp.2d 848, 894 (N.D.Miss. 2009); *Thomas v. Allen*, 614 F.Supp.2d 1257, 1280–81 (N.D.Ala. 2009), *affirmed* in *Thomas v. Allen*, 607 F.3d 749 (11th Cir.

have considered this issue, the Court should accept Dr. Hall's and Dr. Boyd's clinical judgment to apply the Flynn effect to their assessments of Stone's IQ scores.

IV. Respondent Makes Several Inaccurate or Misleading Representations to the Court.

Respondent's brief contains several inaccuracies about Stone, his family, and what is required under the clinical guidelines. While it is not worth rehashing every single inaccuracy, several warrant identifying for the Court, as they are pertinent to the Court's consideration of whether Stone is a person with intellectual disability.[13]

a. Educable mentally handicapped is a classification used by schools that is congruent with intellectual disability.

Respondent misleads this Court regarding what the term educable mentally handicapped meant at the time Stone was in school and the function it plays in the school system. Resp. Brief at 35, 37–38. In doing so, Respondent represents that for such a classification, the individual "could not learn," and attempts to get this Court to understand the term under the definition of the term as Dr. Harris understood it at the time of her retirement from the school system in 2015. Resp. Brief at 37–38. This is the improper analysis of the term and the information before the Court indicates that Stone's classification as educable mentally handicapped is supportive of finding he is a person with intellectual disability.

2010); *United States v. Davis*, 611 F.Supp.2d 472, 478, 485–89 (D.Md. 2009). Copies of all unreported orders cited within this footnote are attached to this Reply as Attachment B.

[13] In an attempt to avoid reversal of Stone's death sentence due to his intellectual disability, Respondent suggests this Court should instead "revisit" *Atkins*. *See* Resp. Brief at 40-42. *Atkins* and its progeny are well-established federal law. "The Supremacy Clause provides that the Constitution, federal statutes, and treaties constitute "the supreme Law of the Land."" *Kansas v. Garcia*, 589 U.S. 191, 202 (2020) (quoting U.S. Const. Art. VI, Cl. 2). Respondent provides no authority for its position that this Court has the ability to override the United States Supreme Court and this Court should disregard its suggestion to do so.

It is clear that at the time of Stone's schooling, the classification of educable mentally handicapped was essentially parallel with the diagnostic criteria for intellectual disability. As Dr. Hall testified, in order to qualify for the educable mentally handicapped classification at school, a student would need to "have below average or sub-average intellectual functioning in conjunction with deficits of adaptive behavior." Hrg. at 169. She explained that "schools actually call it 'intellectual disability' right now." Hrg. at 173, 196. The regulations governing special education in effect around when Stone was in school confirm understanding the classification as essentially parallel to diagnosing someone with intellectual disability. *See* Attachment C, South Carolina Department of Education, Special Education Regulations, Introduction and R43-243.1.1, 23 S.C. Reg. 72–73 (1999) (merging several classifications including educable mentally handicapped into "one category of Mental Disability," to align with federal definitions of the term and explaining that "[m]ental disability means mental retardation, which is defined as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a student's educational performance").

It was well-established at the hearing that "educable mentally handicapped" was a designation used by the Sumter County school system to classify students as needing special education supports and services parallel to the kinds of supports and services needed by individuals with mild intellectual disability. Hrg. at 55–56, 169, 173, 180, 196, 217. As Dr. Hall explained, based on her expertise at DDSN, this term is a school classification because "schools do not diagnose" and instead classify students to allow them to "get access to school services." Hrg. at 217–218.

As established at the hearing and discussed more thoroughly in Applicant's post-hearing brief, Stone's special education placement was adjusted to be educable mentally handicapped when he was in the seventh grade. Hrg. at 76, 85–86, 173, 180. This is highly indicative, in fact conclusive, of Stone's functioning deficits being present during the developmental period. This information, considered alongside the wealth of other information considered by Dr. Boyd and Dr. Hall in their assessments of Stone, led both doctors to opine Stone meets the diagnostic criteria for intellectual disability. Hrg. at 21, 107, 203, 207; Court Ex. 1 at 13.

b. Stone has a family history of intellectual disability.

Respondent represents that no one in Stone's family had a history of intellectual disability. Resp. Brief at 27. Even if true this would be irrelevant, as many families have a single child with intellectual disability, but the record establishes it is not true. Stone and all his siblings were identified as having difficulties in school requiring special education early on in their educational history. Both of his sisters and his brother were all classified as educable mentally handicapped, i.e., persons with intellectual disability, by the Sumter County school system. Hrg. at 101, 106–107, 117, 166–170, 223–224. While not determinative of whether Stone is intellectually disabled, the clinical guidance recognizes that intellectual disability can often be seen across families and recognizes that a comprehensive evaluation requires identifying "genetic and nongenetic etiologies." DSM-5-TR at 42, 44; AAIDD-12 at 33, 39-40.

CONCLUSION

For the reasons stated in this reply and in Stone's Post-Hearing Brief, this Court should find Stone intellectually disabled and ineligible for the death penalty.

Respectfully submitted,

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Counsel for Bobby Wayne Stone

May 2, 2025.

Attachment A: Orders Regarding Freestanding *Atkins* Claims

The Supreme Court of South Carolina

The State, Respondent,

v.

Gary Dubose Terry, Appellant.

Appellate Case No. 1997-006197

ORDER

Appellant was convicted of murder, first degree burglary, first degree criminal sexual conduct, and malicious injury to a telephone system and was sentenced to death. This Court affirmed appellant's convictions and sentences on direct appeal, and the United States Supreme Court denied Appellant's request for a writ of certiorari. *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274, *cert. denied*, 531 U.S. 882 (2000). Appellant's application for post-conviction relief (PCR) was denied, and this Court affirmed the order of the PCR court. *Terry v. State*, 394 S.C. 62, 714 S.E.2d 326 (2011). Appellant's request for federal habeas corpus relief was denied, and the United States Supreme Court denied Appellant's petition for a writ of certiorari. *Terry v. Stirling*, 854 Fed. App'x 475 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 745 (2022).

Appellant asks the Court to stay the setting of an execution date, as it has in two other cases[1] where stays were issued until the South Carolina Department of Corrections developed and implemented appropriate protocols and policies to carry out executions by firing squad under the recent amendments to S.C. Code Ann. § 24-3-250 (Supp. 2021). Because the State has advised the Court these protocols and procedures have been developed, we deny the request for a stay on that ground.

While we recognize the duty of the Clerk of this Court to issue an execution notice

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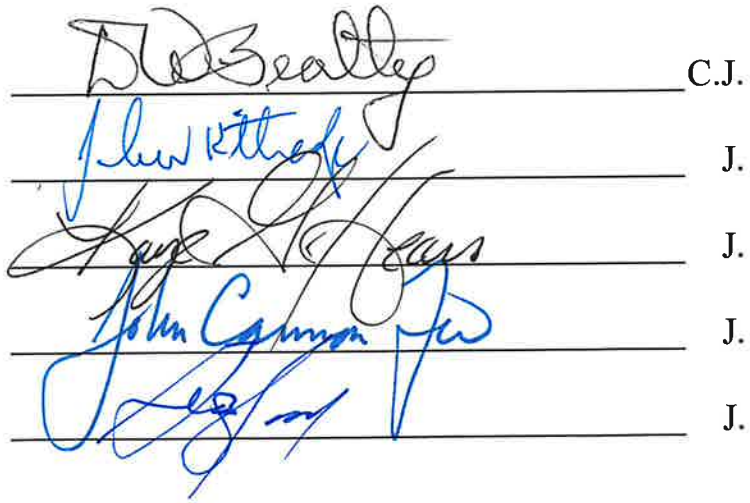
[1] *State v. Sigmon*, Appellate Case No. 2002-024388, and *State v. Owens*, Appellate Case No. 2006-038802. Today, we denied the appellants' requests to stay the setting of an execution date. The Clerk of Court has now issued notices of execution in those cases.

is ministerial,[2] Appellant has filed a second PCR application in the circuit court alleging he has an intellectual disability that renders him ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding the Eighth Amendment bars the execution of a person with an intellectual disability). Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 546, 471 S.E.2d 140, 141 (1996), Appellant would be entitled to a stay of execution while he pursues this PCR action. Accordingly, we direct the Clerk of Court not to issue a notice of execution and allow the PCR matter to proceed as set forth in *In re Stays of Execution in Capital Cases*.

The Honorable Robert E. Hood is hereby assigned to the PCR action Appellant has filed. Judge Hood shall retain jurisdiction over this case regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard to whether there is a term of court scheduled. Judge Hood shall conduct a hearing on Appellant's desires regarding counsel within thirty days of the date of this order. Within sixty days of the date of this order, Judge Hood shall issue a scheduling order setting forth the schedule that shall be followed in this matter, including the date of the hearing on the merits. The scheduling order may be amended as necessary. A copy of the scheduling order and any amended scheduling order shall be provided to counsel, this Court, and Court Administration. In addition to Appellant's obligation to notify the Clerk of this Court of the status of this matter every sixty days under *In re Stays of Execution in Capital Cases*, Judge Hood is requested to provide the Clerk of this Court and Court Administration with an update on the status of this matter every one hundred and twenty days.



C.J.

J.

J.

J.

J.

[2] *See Roberts v. Moore*, 332 S.C. 488, 488, 505 S.E.2d 593, 593 (1998) (holding it is a ministerial duty of the Clerk of the Supreme Court to issue an execution notice pursuant to S.C. Code Ann. § 17-25-370 (2014)).

Columbia, South Carolina
April 6, 2022

cc:
Donald J. Zelenka, Esquire
W. Edgar Salter, III, Esquire
Melody J. Brown, Esquire
Hannah Lyon Freedman, Esquire
Brendan Mathew Van Winkle, Esquire
John H. Blume, III, Esquire
Elizabeth Anne Franklin-Best, Esquire
The Honorable Robert E. Hood

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENWOOD	)	**C.A. No. 2005-CP-24-1205**
	)	
	)	
Edward Lee Elmore, #4293	)	
	)	
Applicant,	)	ORDER
	)	
vs.	)	
	)	
State of South Carolina,	)	
	)	
Defendant.	)	
	)	

FILED COMMON PLEAS
2007 JAN 18 PM 12:06

This case involves a PCR application of a death penalty inmate. In his application, he claims that he is not eligible for the death penalty due to his mental retardation. His present PCR was filed after the United States Supreme Court decision in *Atkins* and the SC Supreme Court decision in *Franklin v. Maynard*. These two decisions established that a mentally retarded inmate is not eligible for the death penalty, and also articulated the procedure for an inmate claiming mental retardation, who was sentenced to the death penalty prior to the *Atkins* decision, to challenge his death sentence by means of a PCR application, even if successive, in state court, as previously proscribed by the legislature.

The State seeks to have the present PCR dismissed due to it being beyond the statute of limitation, and thus, untimely. The State presents reasonable and rational arguments to support its position and buttresses its stance with references to factual testimony previously presented, concerning the mental state of the defendant.

ATTEST A TRUE COPY
ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S. C.

The defense offers the theory of equitable tolling and then argued facts and inferences that they suggest will show the defendant is mentally retarded and not death penalty eligible.

After a review of the information provided by the attorneys, the Court is denying the State's motion to dismiss at this time. In deciding this motion, the court has viewed the record in a light most favorable to the non-moving party and has drawn all reasonable inferences in a manner most favorable to the non-moving party. The court is aware of some appellate precedents that provide verbiage to support a more relax standard in ruling on a motion to dismiss in a PCR action such as the present one. However, this court declines to apply a relaxed standard to the issues presently before it. Applying the announced standard, the court cannot rule, as a matter of law, that the applicant's PCR application should be dismissed. Both the United States Supreme Court and the South Carolina Supreme Court desire a substantive review of the mental status of pre-*Atkins* death penalty sentenced inmate claiming mental retardation. The South Carolina Supreme Court in *Franklin* made clear that the legislative mandated process of filing a post conviction relief application was the proper means to address the inmate's mental issues, even though the PCR application filed to address the mental retardation issue may be successive.

In ruling on motions to dismiss, a court must deny the motion if additional facts need to be developed and/or the law applicable to the facts needs to be developed. Here, defense counsel made statements during the hearing that placed the timing of the defense's awareness or knowledge of the mental retardation as a factual matter for the court to decide. In a non-PCR case, the Court of Appeals has indicated that when counsel makes such factual assertions during

a hearing involving dispositive motions, a lower court should act cautiously before granting the dispositive motion. In ruling on motions as the one presently before the court, the court does not look to the weight or credibility of the non-moving party's evidence.

This decision should be not read to preclude the State or the applicant from subsequently presenting the statute of limitation (including the collateral issue related to the timing of the assertion of the mental retardation issue) arguments and defenses once the case is developed factually.

Based on the above, the State's present motion to dismiss is denied without prejudice.

Additionally, at the hearing representatives from the agency responsibility for performing the evaluation were present and made statements to the court indicating the evaluation process may take several months. The court wishes the parties to update the court on the evaluation issue and also wishes to be updated on the status of the case. The court requests that the attorneys contact the Court within 10 days of receipt of this order to schedule a mutually convenient time for a status conference. The parties may wish to contact the evaluating agency to receive and update from them and/or ask that they participate in the status conference.

Dated at Spartanburg, South Carolina,
this 13th day of June, 2007.

J. Mark Hayes
Presiding Judge

STATE OF SOUTH CAROLINA	)	IN THE FIRST JUDICIAL CIRCUIT
	)	
COUNTY OF ORANGEBURG	)	IN THE COURT OF COMMON PLEAS
	)	
BAYAN ALEKSEY, Applicant,	)	2015-CP-38-00764
vs.	)	Third 120 Day Status Report
	)	
STATE OF SOUTH CAROLINA, Respondent.	)	

Please refer to prior status reports for previous activity in this case. Subsequent to the last report, attorney Laura Wood Young was substituted for attorney Teresa Norris. Robertson v. State of South Carolina was decided by the South Carolina Supreme Court, which gives guidance on many of the issues involved in this matter. A telephone conference was conducted with all attorneys regarding how to properly proceed in light of the Robertson decision. This court has granted the state's motion for an evaluation for mental retardation/intellectual disability of the applicant. The court will continue to hold the state's motion to dismiss in abeyance until the evaluation has been completed.

The Honorable Doyet A. Early, III

June 6, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	)	
	)	Case No. 2016-CP-43-828
Stephen Cory Bryant,	)	
Applicant	)	
	)	
vs.	)	**Order Denying State's Motion to Dismiss**
	)	
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

This matter came before this Court on June 21, 2016 on the State's motion to dismiss the applicant, Stephen Cory Bryant's, application for post-conviction relief.[1] After considering the pleadings, supporting documentation, and argument of counsel, the Court finds that the State's motion to dismiss should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

On August 18, 2008, Mr. Bryant pled guilty to three counts of murder, armed robbery, two counts of first-degree burglary, second-degree burglary, second-degree arson, assault and battery with intent to kill, possession of a stolen handgun, and threatening the life of a public official. On September 11, 2008, the Honorable Thomas A. Russo found the murder of Willard Tietjen was committed during the commission of an armed robbery and sentenced Bryant to death. The Court imposed additional sentences, including several concurrent life sentences without the possibility of parole. The South Carolina Supreme Court affirmed the convictions and sentences on January 7, 2011. *State v. Bryant*, 390 S.C. 638, 704 S.E.2d 344 (2011).

[1] Mr. Bryant also filed an application for post-conviction relief in Case Number 2016-CP-43-829, and the State's Motion to dismiss that case is addressed by separate order. Additionally, the Court appointed Diana Holt and Charles Grose to represent Mr. Bryant regarding the current state court proceedings.

Mr. Bryant's initial application for post-conviction relief was filed on May 10, 2011. The Honorable R. Ferrell Cothran, Jr. denied post-conviction relief, and the Supreme Court of South Carolina denied Bryant's petition for a writ of *certiorari* to review the lower court's denial on March 4, 2015. The Supreme Court denied the petition for rehearing and issued the remittitur on May 6, 2015. The Supreme Court of the United States subsequently denied Mr. Bryant's petition for a writ of *certiorari* on November 30, 2015. *Bryant v. South Carolina*, 136 S. Ct. 545 (2015).

On June 19, 2015, Mr. Bryant filed motion for stay of execution and for appointment of counsel in the United States District Court for the District of South Carolina so that he could pursue a petition for writ of *habeas corpus*.[2] On June 24, 2015, the Honorable David C. Norton granted the stay of execution for ninety days. Also on June 24, 2015, the Honorable Bristow Marchant appointed Charles Grose and Jon Sheldon[3] to represent Mr. Bryant. By order dated September 18, 2015, Judge Norton extended the stay of execution until January 14, 2016. Pursuant to Judge Norton's order dated January 13, 2016, Mr. Bryant filed his "place holder" petition for writ of *habeas corpus* on January 14, 2016. Also on January 14, 2016, Judge Norton extended the stay of execution until "resolution of Petitioner's *habeas corpus* petition." On April 28, 2016, Mr. Bryant amended his *habeas* petition.

Also on April 28, 2016, Mr. Bryant served two applications for post-conviction relief. The first application alleges his Intellectual Disabilities makes him ineligible for the death penalty. *See Hall v. Florida*, 134 S. Ct. 1986 (2014); *Atkins v. Virginia*, 536

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[2] *Bryant v. Stirling et. al.*, Civil Action Case Number 9:16-cv-01423-DCN-BM.

[3] Mr. Sheldon is admitted to the practice of law in Virginia. The District Court admitted him *pro hac vice* to represent Mr. Bryant.

U.S. 304 (2002); and *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). The second application alleges several claims for post-conviction relief that have not been exhausted in state court because of ineffective assistance of prior post-conviction counsel. Contemporaneously with serving these applications for post-conviction relief, Mr. Bryant moved to stay the District Court proceedings pending exhaustion of state remedies.

On May 24, 2016, the State served its motions to dismiss these actions. By written order dated May 31, 2016, the Honorable Costa M. Pleicones, Chief Justice of the South Carolina Supreme Court, assigned this Court for the sole "purpose of hearing and ruling on the motions to dismiss filed by the State." On June 10, 2016, Mr. Bryant filed his memorandums on opposition to the State's motions to dismiss.[4] On June 21, 2016, this Court convened a hearing.

CONCLUSIONS OF LAW

The Supreme Court of the United States observed:

> Our independent evaluation of the issue reveals no reason to disagree with the judgment of the legislatures that have recently addressed the matter and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our evolving standards of decency, we therefore conclude that such punishment is excessive and that the Constitution places a substantive restriction on the State's power to take the life" of a mentally retarded offender.

[4] Mr. Bryant's memorandum in this case incorporated by reference his memorandum in Case Number 2016-CP-43-829.

Atkins v. Virginia, 536 U.S. 304, 321, 122 S. Ct. 2242, 2252, 153 L. Ed. 2d 335 (2002) (internal quotations and citations omitted). *Atkins*, accordingly, held that offenders suffering from Intellectual Disabilities[5] are not eligible for capital punishment.

S.C. Code Ann. § 17-27-20(A)(1) provides:

> Any person who has been convicted of, or sentenced for, a crime and who claims that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State may institute, without paying a filing fee, a proceeding under this chapter to secure relief.

This Court concludes that § 17-27-20(A)(1) authorizes this action. *Atkins's* and *Hall's* prohibition against executing people with Intellectual Disabilities is rooted in prohibition against cruel and unusual punishment found in the Eighth Amendment of the United States Constitution. The constitutional prohibition against executing people with Intellectual Disabilities presents special considerations, first addressed by our Supreme Court in *Franklin*.[6] For post-*Atkins* trial cases, *Franklin* established a procedure where the trial judge first considers whether Intellectual Disabilities has been for determining Intellectual Disabilities in future capital trial cases. *Franklin* declined to adopt a definition of Intellectual Disabilities "different from the one already established by the legislature in S.C. Code Ann. § 16-3-20(C)(b)(10)" or "establish procedures for cases where the defendant was sentenced to death prior to *Atkins,* [because] such procedures already exist" under the Uniform Post-Conviction Relief Act. 356 S.C. at 278-81, 588

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[5] The terms "Mental Retardation" and "Intellectual Disabilities" are interchangeable. Previous opinions of this Court have employed the term "mental retardation." *See Hall*, 134 S. Ct. at 1990 ("This opinion uses the term "intellectual disability" to describe the identical phenomenon" of mental retardation).

[6] *And see State v. Laney*, 367 S.C. 639, 627 S.E.2d 726 (2006) (reaffirming procedures established in *Franklin*). *Laney* involved a direct appeal of a capital sentence and not a post-conviction relief procedure.

S.E.2d at 606.

Franklin, therefore, did not expressly address the situation where a defendant is sentenced to death after *Atkins* but does not discover he suffers from Intellectual Disabilities until after the conclusion of his post-conviction relief action. The natural extension of *Franklin*, however, allows this action to proceed, and if Mr. Bryant Intellectual Disabilities "is proven, the PCR court will vacate the death sentence and impose a life sentence." *Id.* Because of the unique considerations involved, Mr. Bryant cannot be precluded from raising Intellectual Disabilities at this time in this manner. This procedure is authorized under *Franklin v. Maynard* and the Uniform Post-Conviction Relief Act and has previously been utilized by other courts in our state in *Edward Lee Elmore v. State*, Greenwood County Case Number 2005-CP-24-1205

Relying on *Drayton v.* Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993), the State contends Mr. Bryant "freestanding claim of error cannot be reached" because "[i]ssues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel." Motion to Dismiss, pp. 12-13. Respondent is mistaken. *Atkins* sets forth a categorical ban under the Eighth Amendment, which is qualitatively different from other kinds of constitutional violations at trial that may be subject to procedural default. The United States Supreme Court has held that the states are *prohibited* by the constraints of the Eighth Amendment from executing persons with mental retardation. *Atkins*, 536 U.S. at 320 (holding that executing the mentally retarded is "excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender'"). Mental retardation is "a condition, the existence of which disqualifies a

person from capital punishment." *Davis*, 611 F.Supp.2d at 474. As such, Mr. Bryant's *Atkins* claim cannot be waived on the basis that his trial counsel failed to raise it. Respondent's argument advances a result whereby the state may circumvent the clear confines of the Eighth Amendment simply because a PCR applicant was further denied the protections of the Sixth Amendment right to the effective assistance of counsel.[7]

Post-conviction relief, moreover, is not limited to claims of ineffective assistance of counsel, but rather extends to any constitutional violation. *See e.g. Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006) (post-conviction relief granted based on solicitor's failure to disclose impeachment evidence constituted *Brady* violation, and State's failure to correct co-defendant's false testimony at trial). In deciding this motion, the Court took judicial notice of a number of court filings in *Edward Lee Elmore v. State*, *supra*,[8] where a successor post-conviction relief action was utilized to adjudicate Mr. Elmore's

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[7] An analogy demonstrates the error of respondent's argument. In *Roper v. Simmons*, 543 U.S. 551 (2005), the United States Supreme Court held that the Eighth Amendment bans the execution of individuals who were under age of 18 at the time of the crime. The Court based its holding in *Roper* on much of the same reasoning as in *Atkins*. Going forward, if trial counsel were to fail to discover and raise the argument that a criminal defendant is categorically exempt from the death penalty under *Roper*, respondent would apparently argue that the State could nonetheless execute that defendant, despite the clear Eighth Amendment ban, absent a showing of ineffective assistance of counsel. Such a result would be legally incorrect. And for the same reason, executing a mentally retarded offender absent a showing of ineffective assistance of counsel would likewise be the wrong result.

[8] These court documents are (1) Mr. Elmore's Application for post-conviction relief alleging Intellectual Disabilities pursuant to *Atkins v. Virginia*; (2) the State's return and motion to dismiss as barred and untimely and alternatively barred as issue preclusion; (3) Mr. Elmore's return to State's motion to dismiss; (4) the State's reply to return to motion to dismiss; (5) the Honorable J. Mark Hayes, II's order denying State's motion to dismiss; and (6) Judge Hayes' order granting post-conviction relief pursuant to *Atkins v Virginia*, vacating death sentence and remanding to Court of General Sessions for entry of life sentence.

Intellectual Disabilities. Additionally, holding that an *Atkins* claim is subject to procedural default would result in an unnecessary waste of judicial time and resources and, based on a incorrectly applied technicality, the wrongful execution of a person who is Constitutionally ineligible for the death penalty.

This Court, therefore, finds it appropriate for the post-conviction court to address Mr. Brant's *Atkins* claim, and, if appropriate, grant relief by entering an order vacating the death sentence and imposing a life sentence in accordance with *Franklin v. Maynard.*

Therefore, it is ordered that the State's motion to dismiss this action is denied.

IT IS SO ORDERED.

Thomas W. Cooper, Jr.
Presiding Judge by Special Assignment of the South Carolina Supreme Court

July 13, 2016
Manning, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anthony Woods, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2019-001713

Appeal from Clarendon County
The Honorable Benjamin H. Culbertson, Circuit Court Judge

Memorandum Opinion No. 2019-MO-044
Submitted November 22, 2019 – Filed December 18, 2019

REVERSED AND REMANDED

Emily C. Paavola and Lindsey Sterling Vann, both of Justice 360, of Columbia, for Petitioner.

Attorney General Alan Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody J. Brown and Senior Assistant Attorney General William Edgar Salter, III, all of Columbia for Respondent.

PER CURIAM: This matter is before the Court on a petition for a writ of certiorari. We grant the petition for a writ of certiorari, dispense with further briefing, reverse the decision of the post-conviction relief (PCR) court, and remand for an evidentiary hearing.

Petitioner's second PCR application was dismissed as untimely and successive. Petitioner alleges he should be allowed to maintain a successive PCR application because his trial and first PCR counsel failed to argue he was intellectually disabled and, thus, cannot be executed. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding the Eighth Amendment bars the execution of a person with an intellectual disability). We agree.

Because there is a possibility the Constitution categorically bars Petitioner's execution, we hold the successive PCR application in this case is permissible because of extraordinary circumstances. *See e.g.*, *Robertson v. State*, 418 S.C. 505, 516, 795 S.E.2d 29, 35 (2016) (allowing a successive PCR application where PCR counsel was not statutorily qualified to represent the applicant); *Washington v. State*, 324 S.C. 232, 236, 478 S.E.2d 833, 835 (1996) (permitting a successive PCR application where multiple procedural irregularities, including the denial of a direct appeal, denied applicant the benefit of due process); *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989) (allowing a successive PCR application where the applicant unknowingly withdrew his first PCR application with prejudice); *Carter v. State*, 293 S.C. 528, 530, 362 S.E.2d 20, 21–22 (1987) (authorizing a successive PCR application where the applicant did not have PCR counsel that differed from his trial counsel); *Case v. State*, 277 S.C. 474, 475, 289 S.E.2d 413, 414 (1982) (allowing a successive PCR application where the applicant's first PCR application was dismissed without the assistance of legal counsel and without a hearing). Accordingly, we reverse the order of the PCR court and remand this matter for a hearing on Petitioner's PCR application dated June 3, 2019.

REVERSED AND REMANDED.

BEATTY, C.J., KITTREDGE and HEARN, JJ., concur. FEW and JAMES, JJ., not participating.

FILED

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LISA M. COMER
CLERK OF COURT
LEXINGTON SC

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH CIRCUIT
	)	
Gary Dubose Terry, *Applicant,*	)	Case No. 2022-CP-3200924
	)	
v.	)	**ORDER DENYING RESPONDENT'S MOTION TO DISMISS**
	)	
State of South Carolina, *Respondent.*	)	
	)	

This matter comes before this Court by way of Applicant's post-conviction relief (PCR) application filed on March 21, 2022. The State made its return on April 28, 2022, requesting that this Application be dismissed. The Court heard oral arguments on Respondent's Motion to Dismiss in a hearing held on November 30, 2022, at the Fairfield County Courthouse. Hannah Freedman and Charles Grose represented the Applicant. Senior Assistant Attorneys General William Edgar Salter III and Melody J. Brown represented The State (Respondent).

In its Return and Motion to Dismiss, Respondent asserted that Applicant's PCR Application should be dismissed because it is successive to both his original PCR Application (2000-CP-32-3470) that Mr. Terry filed on November 30, 2000, and to his June 29, 2012 Application (2012-CP-32-02718). Further, Respondent asserted that the present Application is untimely and barred by the statute of limitations, S.C. Code Ann. § 17-27-45(A) (Supp. 2022). Respondent asserts Terry cannot meet his burden of proof due to prior evidence presented during Terry's trial indicating that he was not intellectually disabled, which he now disputes in his present Application. Respondent also claims that the doctrine of laches bars the present Application, and the need for finality demands that the present action be dismissed since there is no basis for the exercise of a "rare exception" of allowing a successive application.

In his present Application, Applicant claims that because he has an intellectual disability,

he cannot be executed, using *Atkins v. Virginia* to support his claim that his execution would be unconstitutional. *Atkins*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). In *Atkins*, the Supreme Court of the United States held that executions of convicted individuals with an intellectual disability was excessive in violation of the Eighth Amendment and therefore unconstitutional. *See Id.*

Because of this categorical bar and Mr. Terry's claim that he has an intellectual disability, the Court finds that the successive PCR application in this case is permissible due to extraordinary circumstances. Accordingly, this Court denies Respondent's Motion to Dismiss, finding that circumstances exist to allow Applicant's current application to move forward.

CONCLUSION

IT APPEARS THAT upon careful consideration of the oral arguments made by Counsel, as well as the aforementioned filings, the Court has determined that the Respondent's Motion to Dismiss is denied.

IT IS THEREFORE ORDERED that the Respondent's Motion to Dismiss is now and hereby **DENIED.**

AND IT IS SO ORDERED THIS 8 **DAY OF** December**, 2022.**

RHood

The Honorable Robert E. Hood
Presiding Judge
Eleventh Judicial Circuit

Columbia, South Carolina

Attachment B: Unreported Court Orders Applying the Flynn Effect

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

IN RE NOEL JACKSON

Petitioner,

On Habeas Corpus.

Supreme Court: S129989
Sup. Ct.: RIC475367 / CR23480

DEATH PENALTY CASE

FINAL RULING

Habeas corpus relief is hereby GRANTED.

James S. Thomson, under appointment by the Supreme Court, for Petitioner.

Michael A. Hestrin, District Attorney, Ivy B. Fitzpatrick, Senior Deputy District Attorney, and Christopher Cook, Deputy District Attorney, for Respondent.

PROCEDURAL HISTORY

Petitioner Noel Jackson was sentenced to death after a 1989 conviction for a willful, deliberate, and premeditated first-degree murder. The jury also found true the special circumstance that the murder was committed for financial gain. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1186–87.) On February 7, 2007, the California Supreme Court ordered cause be shown in this court why "petitioner's death sentence should not be vacated and petitioner sentenced to life imprisonment without the possibility of parole on the ground that he is mentally retarded within the meaning of *Atkins v. Virginia* (2002) 536 U.S. 304 [*(Atkins)*], as alleged in the petition" for writ of habeas corpus filed December 18, 2004. (See also *In re Hawthorne* (2005) 35 Cal.4th 40 *(Hawthorne)*.)

After receipt of a myriad of pleadings and numerous motions and proceedings, this court conducted an evidentiary hearing and received evidence from both parties relevant to the

question of whether petitioner is intellectually disabled within the meaning of *Atkins* and its progeny.[1] The parties provided their closing arguments in writing, and the matter was submitted for decision on June 8, 2016, upon the filing of petitioner's reply argument. This court has reviewed and considered all the evidence received, as well as the applicable law and the parties' arguments.[2] For the reasons articulated below, this court finds by a preponderance of the evidence that petitioner is intellectually disabled, grants habeas relief, and orders that petitioner's sentence of death be vacated and that his case be set for resentencing at which time he shall be resentenced to life without the possibility of parole.

FACTS

Petitioner's Case-in-Chief

Dr. Woods

At the evidentiary hearing, petitioner first presented the testimony of George Washington Woods, Jr., a physician specializing in neuropsychiatry.[3] Dr. Woods first became involved in petitioner's case in the mid-1990s, and in that year conducted a psychiatric evaluation of him. He saw petitioner a total of four times, and reviewed petitioner's family history, school records, social history, prior neuropsychological tests, et cetera. While he was not specifically evaluating for intellectual disability, he was subsequently able to make findings and conclusions on that question. Dr. Woods explained that petitioner's intellectual functioning was very clearly impaired, and that he "had real problems in the world" in the realm of adaptive functioning, both manifesting before the age of 18, such that petitioner was intellectually disabled within the

[1] The terms "mentally retarded" and "intellectually disabled," along with their nominal forms, will be used interchangeably, with a preference for the latter. (See *People v. Boyce* (2014) 59 Cal.4th 672, fn. 24.)

[2] However, the court has not and will not consider the declarations appended to petitioner's reply argument since the matter had previously been closed to evidence. Because these declarations form no part of the court's analysis or decision, respondent's motion to strike is denied as moot.

[3] This order will dispense with a recitation of the experts' copious qualifications. All the experts who testified were extremely well qualified and experienced.

meaning of *Atkins*, Penal Code section 1376 (§ 1376), and the standards of the American Association for Intellectual and Developmental Disabilities (AAIDD), though his intellectual disability was mild. In fact, in Dr. Woods' mind there is "no question that" petitioner is intellectually disabled.

Dr. Woods explained that intellectual disability can have a genetic component, and that in petitioner's family "[y]ou see at least three generations of people that have been identified as being slow," including petitioner's parents, his siblings, and his children. His family also has a history of migraines, and while they are not themselves a sign of intellectual disability, they "are a sign of something not working probably in your brain." Similarly, petitioner's family has "generations of language problems," with petitioner's being extreme even within his family. Likewise, petitioner's sense of smell was impaired. These are all neurological clues that point to problems in brain function. Petitioner has "[p]roblems with his frontal lobe being able to weigh and deliberate, effectively sequence his behavior, effectively sequence his thinking, problems with his temporal lobe in terms of academics and language acquisition. And we see these problems occurring in his family, as well as in his children."

He also explained that in utero exposure to toxins can relate to intellectual disability, and noted that petitioner bears "the stigmata of fetal alcohol" syndrome in the physical features of his face even as an adult, which is significant because such signs are usually gone before the age of two, as well as in other parts of his body. He commented that "a significant number of people . . . on the fetal alcohol spectrum do have intellectual disabilities." Dr. Woods also testified that exposure to lead can impact the developing brain, and that petitioner was exposed to lead paint, leaded home remedies, and emissions from chemical plants as a child, which were compounded by a lack of nutrition. Along the same lines, emotional and physical trauma of the type petitioner

suffered in childhood is co-morbid with intellectual disability in that they "interact together and make each one of them worse than it would have been if it just had been that disorder alone. . . . [¶] What happens with people that have intellectual disability and trauma is that they have a hard time developing coping mechanisms." Furthermore, Dr. Woods affirmed that one does not recover from intellectual disability; while the person may be able to grow and learn, he or she will still be intellectually disabled for life.

As to petitioner's intellectual functioning, Dr. Woods testified that it was consistent with intellectual disability in light of "standardized testing, as well as academic testing, as well as information from teachers, principals, students, other people that knew him . . . ." He also reviewed reports and statements from other doctors, and testified that Dr. Frumkin's examination "reinforced [his] opinion . . . ." Petitioner had been held back in the first grade twice, and in the fifth grade, and was often in special education. When he was promoted it was often simply due to his effort. At the age of eight "he took two tests of intellectual functioning"; on the California Mental Maturities test he scored 60, and on the Stanford-Binet he scored 74. At the age of 13 he scored 65 on the intelligence portion of the Stanford Research Association (SRA) Primary Mental Abilities test. Three years later he received a score of 76 on the Wechsler Adult Intelligence test (WAIS), and on the Wide Range Achievement test he tested at the second and third grade level for reading, math, and spelling, even though he was in eighth grade and by age should have been in the eleventh. Even at the age of 23, testing revealed petitioner's reading level to be second or third grade. Dr. Woods opined that these scores reveal that petitioner's impairment began early in his life, meaning that "these are most probably neurodevelopmental impairments. He was probably born with a brain that could not do certain types of academic functioning for sure," with particular defects in the left hemisphere of his brain and the right

parietal lobe. In his own testing, Dr. Woods observed signs of impairment in the corpus callosum and the communication between the two hemispheres of the brain. With regard to the WAIS-IV test administered by Dr. Frumkin, on which petitioner scored 63, Dr. Woods testified that he found those results to be valid, and that it reinforced his opinion that petitioner is intellectually disabled. Indeed, the "testing showed internal consistency" in that petitioner specifically demonstrated frontal lobe impairment in both cognitive and physical (i.e. sense of smell) areas across multiple tests. This "kind of internal consistency . . . really speaks to malingering more than an artificial test of effort of malingering," such as the test of memory malingering (TOMM) which has been subject to strong criticism. Even so, one study recommends that TOMM scores be analyzed differently when dealing with an intellectually disabled person, and under such constraints petitioner would have passed that test when administered by Dr. Frumkin, as well.

Dr. Woods also explained the Flynn effect, which is the phenomenon that a particular I.Q. test's observed scores increase by 0.3 annually from the date the test was normed. He stated that when considering I.Q. tests for the purpose of assessing intellectual disability, multiple authorities advise taking the Flynn effect into account. Indeed, "the Flynn effect is always applicable to I.Q. testing, standardized I.Q. testing . . . ." Taking the phenomenon into account with regard to petitioner's scores drops his WAIS score to 71, his WAIS-IV score to 61, and his WAIS-R score (on which he had scored 80) to 75. The spread of the I.Q. scores was not surprising, since "on the low end of I.Q. scoring" there is "variability of ten or 15 points" with a significant percentage of people. Indeed, Dr. Woods responded in the affirmative to a question asking whether all of petitioner's various I.Q. test results were "solidly within the range of mild intellectual disability." Moreover, under the current understanding of intellectual disability in at

least some academic or professional quarters, "the straightforward [I.Q.] numbers, 70 above, 70 below, with the standard of error of measurement of three to five is not really appropriate when you're looking at intellectual disability. The numbers are not as important as the adaptive functioning and the developmental stage."

Regarding adaptive functioning, Dr. Woods explained that the proper inquiry was "adaptive functioning within the community in which they live during that developmental period. It's not like looking at them outside of their social circumstances." For this reason, AAIDD standards and other authorities "do not recommend[] trying to determine adaptive functioning within a prison setting. Because a prison setting has supports built into it that [do] not allow a person to function independently." Indeed, one looks at what the person can do independently, not what that person can do with supports. Furthermore, it is not the case that people with intellectual disability cannot do anything – they can often do a number of things such basic reading, driving, holding jobs, and forming friendships. There are three domains of adaptive functioning, though a person only needs significant impairment in one in order to be intellectually disabled. The conceptual domain deals with abstraction and understanding. The social domain deals with interaction with others. The practical domain involves the ordinary tasks of daily life.

Petitioner has significant deficits in the conceptual domain as revealed by his academic performance – his problems with basic math, reading, and spelling – and by his difficulty in conceptualization, which became apparent in testing where his processing speed, working memory, and ability to "get the big picture" were measured, as well as by his anecdotal difficulties in problem solving. Dr. Woods rejected as "not within the realm of possibility" the idea that petitioner simply has a learning disability, because of the wide range of impairment. He

also has demonstrated deficits in the social domain, though there he demonstrates the least impairment among the three domains, such as his inability to understand family conversations and his inability to understand much of what was happening in school. Additionally, petitioner has significant deficits in the practical domain. As a child he had difficulty keeping himself groomed, buttoning his clothes, and following directions; however, he was able to do some tasks if given sufficient support. There is no indication that he ever lived independently. Significantly, the types of impairment petitioner suffers, such as in math and language, is a clue that the impairment has been present from a young age, since such deficits are not found in those who have later in life suffered an injury, or who have dementia.

Dr. Froming

Petitioner next presented the testimony of Karen Bronk Froming, a clinical neuropsychologist. She reviewed records and declarations related to petitioner's time in school and childhood, as well as expert declarations and reports. She also conducted interviews herself. From these sources it is her opinion that petitioner is intellectually disabled, "on the basis of multiple test scores, consistent test scores over time," combined with "adaptive behavior deficits" and "incontrovertible manifestations before the age of 18."

Dr. Froming explained that a person's family history is relevant to the analysis of intellectual disability, because it may reveal risk factors and because "the interaction between [nature and nurture] . . . are highly critical to the development of the brain." In petitioner's case, the potential for in utero alcohol exposure, poor prenatal and postnatal care, exposure to toxins, and having other intellectually disabled family members was significant.

As for petitioner's intellectual functioning, Dr. Froming found it "striking" that petitioner's test results while in school were "pretty highly consistent" even though they were

"from different types of tests," which "is independent data that says something is wrong with this person's functioning." Specifically, I.Q. results during childhood of 60, 74, 65, and 76 are all "in or around the subaverage intellectual level," meaning two standard deviations below average, which was traditionally the dividing line "for borderline or subaverage or mild mental retardation." Dr. Froming noted that school officials during petitioner's childhood had "suspected that he had mental retardation" and that "the achievement testing reflected . . . how far behind he was." Furthermore, at the age of 23 petitioner tested at a reading level of between second and third grade, and at a math level of almost third grade. Reading and math testing at the ages of 38 to 39 showed little improvement, placing him in the first-to-second percentile. Later testing showed an increase in sight reading ability to a "3.7 grade equivalent with a standard score of 67, which is kind of an I.Q. equivalent," and in math performance to a "3.7 grade equivalent with a 74 standard score," along with spelling ability "at a 2.8 grade equivalent, which is a standard score of 64, also an I.Q. equivalent," and reading comprehension at a "6.2 grade equivalent which is the standard score of 76." Dr. Froming described petitioner's "scores on the testing through those school years [to be] remarkably consistent . . . so it's all within the ballpark of subaverage performance, either I.Q. or severely lagging academic capabilities." She also found that "an embedded effort measure" in the I.Q. testing conducted on petitioner as an adult demonstrated that petitioner "demonstrate[d] acceptable levels of effort." Furthermore, while an intellectually disabled person will always be intellectually disabled, over the years "their capability may somewhat improve a little bit," and so test results from prior to the age of 18 are more probative than those from adulthood when making a diagnosis of intellectual disability, which must manifest before the age of 18.

Dr. Froming buttressed Dr. Woods opinion of petitioner's adaptive behavior, explaining his deficits in detail based on the accounts given by those who knew and interacted with petitioner throughout his life. She discussed the tendency of intellectually disabled people to mask their disability through silence and by not asking for help, because to do otherwise would reveal their deficiencies, and also confirmed that one can have particular strengths and nevertheless still be intellectually disabled. Dr. Froming also discussed neuropsychological testing performed in 1994 by Dr. Dale Watson, which revealed that petitioner suffered "moderate impairment with 99 percent probability that the person is brain impaired," with particular impairments in left-brain functions.

Dr. Froming further testified that petitioner's conduct in committing crimes and his various escape attempts was "not behavior that an intellectually disabled person couldn't accomplish." She also was certain that the Flynn effect can be validly used to correct individual I.Q. scores by reducing them by the specific and appropriate amount, rather than by more vaguely simply opening up a potential range of corrected scores. And she stated her disagreement with Dr. Frumkin that defendant was malingering, in part because of the high false positive rate for malingering in intellectually disabled people, and in part because his testing profile "indicates that he gave full effort on the easy items, and that he was inconsistent in his responding" on "the hard items" – which is "where someone who is intellectually disabled would have a problem" – "but that does not equate to malingering" because the inconsistency could have been for a variety of reasons including guessing or not knowing the answers.

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Aside from the testimony of the two doctors, petitioner also offered numerous exhibits, and the parties stipulated to the admission in lieu of live testimony of a number of declarations

from various people, such as those who knew petitioner as a child and on which much of the expert opinion regarding petitioner's mental condition was based.

Respondent's Case-in-Chief

Dr. Frumkin

Respondent's first witness was Bruce Frumkin, a forensic psychologist, who testified that "there's no objective evidence that supports [petitioner] meeting [the] criteria" for intellectual disability. Dr. Frumkin examined petitioner at San Quentin State Prison in July 2014, in the course of which he conducted a clinical interview and administered several tests. He explained that "one wants to try to as objectively as possible measure adaptive functioning," and so while "one could try to look to historical data . . . sometimes historical data has problems with it" such as a lack of standardization. Accordingly, he put little weight on the accounts given by petitioner's childhood teachers, family, and friends. *Nevertheless, he still agreed that petitioner "has deficits in adaptive functioning, particularly in the areas of functional academic skills and also work history," and thus met one criterion for intellectual disability.* However, Dr. Frumkin attributed these deficits to a learning disability, not intellectual disability, and differed with petitioner's experts as to the extent of petitioner's adaptive functioning deficits. Dr. Frumkin observed that petitioner's criminal behavior and escapes are "not consistent with someone who has those intellectual disabilities, adaptive functioning deficiencies as described before," and stated that "someone with an I.Q. in the high 60s, low 70s, mid-70s can't engage in all of those behaviors."

With regard to a number of the tests petitioner took as a child, Dr. Frumkin expressed significant skepticism as to their utility. He did not give the California Mental Maturities test "very much weight," because "[i]t's an achievement test. It's certainly not an I.Q. test. It

measures abilities that are needed for successful work and school," and has also been subject to "a lot of negative reviews," such as with regard to its validity and reliability for "'use with the intellectual extremes, i.e. mentally deficient and superior.'" Similarly, the SRA Primary Mental Abilities test has been negatively reviewed. And since those tests are achievement tests rather than intelligence tests, it is "not surprising they would be so low if he has a learning disability in reading, spelling, and math." Finally, with regard to the Peabody Picture Vocabulary test (which petitioner had offered as showing an I.Q. result of 62), Dr. Frumkin explained that it only tested a very narrow category of intelligence, receptive vocabulary, and for that reason, as well as the lack of data to assess whether petitioner was giving full effort, was of limited use.

Dr. Frumkin also discussed the Flynn effect but testified that, in regard to using a specific numerical correction factor, it can only be validly applied to populations, not individuals. "It can't apply to an individual because there's so many different variables out there," and no I.Q. testing manual "says . . . to obtain an I.Q. score based upon a Flynn calculation." That said, the Flynn effect should be taken into consideration by a psychologist, as one of a number of factors that contribute to the understanding that a specific "I.Q. score isn't etched in stone. It can vary," but "[w]ho knows how much." Particularly with regard to petitioner, cultural bias was likely a significant factor causing an underestimation of his I.Q. in the tests he took as a child, as was his stuttering which could have caused him difficulty in giving full and correct answers, though Dr. Frumkin noted that he did not have the necessary reports in order to be certain and so "[m]aybe" petitioner's stuttering "had no impact." Cultural bias would be a particular problem for the Stanford-Binet test petitioner took in 1963 or 1964 at the age of 8, and which measured his I.Q. at 74.

With regard to the WAIS-R administered in 1994 by Dr. Watson, on which petitioner scored 80, Dr. Frumkin pointed to data from an embedded test as possible evidence that petitioner was not giving his best effort, though the data was borderline. Similarly, in reviewing another malingering test given by Dr. Watson, "you cannot say [petitioner is] malingering or giving poor effort . . . but you can't say based upon those results that he's giving his best effort," due both to petitioner's scores as well as Dr. Watson's failure to administer the full test.

As for the WAIS-IV I.Q. test administered by Dr. Frumkin himself, the result was "a full scale I.Q. score of 63, which is lower first percentile range," and a "general ability index [of] 69, which is lower two percentile range," which would place petitioner "within the range of significantly subaverage intellectual functioning." But Dr. Frumkin did not believe that this was a valid score. He discussed how petitioner's I.Q. score of 80 on the testing administered by Dr. Watson was inconsistent with his score of 63 on the testing administered by Dr. Frumkin himself, since "I.Q. scores are supposed to . . . remain relatively stable over the course of one's lifetime," and "are not supposed to deviate by that much . . . ." Such deviation could indicate that the test-taker "wasn't giving their best effort or was purposely trying to do poorly . . . ." He disagreed with Dr. Woods that such deviation can be expected among the intellectually disabled. Dr. Frumkin further explained the concepts of effort and malingering, the former referring to the test-taker's failure to perform to the best of their ability, and the latter referring to active attempts "to exaggerate deficiencies or deceive." He disagreed with Dr. Froming's analysis of an embedded measure in the I.Q. tests to measure effort and detect malingering, testifying that even were one to give the measure weight – which he would not, not being "a big fan of the test" – petitioner's result would still be insufficient to show that he gave proper effort, even taking into account the possibility of poor performance due to intellectual disability.

Dr. Frumkin further pointed out that petitioner "got some higher level arithmetic problems correct with Dr. Watson, but missed substantially easier items with" Dr. Frumkin, which alone did not "automatically mean poor effort, but it raise[d his] degree of suspicion." Somewhat similarly, a screening test for effort showed nothing to indicate "that he was trying to exaggerate impairment," but was not conclusive as to whether petitioner "was giving his best performance." Dr. Frumkin disagreed with Dr. Woods as to the appropriateness of using malingering tests with the intellectually disabled. On one such test which Dr. Frumkin administered, the Validity Indicator Profile (VIP), the results showed an "invalid inconsistent" profile, which he did not interpret as meaning that petitioner was "malingering or on purpose giving poor effort," though "you can't say that that was his best performance . . . ." Dr. Frumkin explained another, the TOMM, which he described as a visual recognition test that is "very easy," though people "think it's difficult"; in fact, "research has shown . . . that normals get 49 out of 50 correct on this test" or even all 50, and "[p]eople with documented brain damage or dementia, they almost all get at least 45 out of 50 correct," with these scores referring to those on the second trial of the assessment and on the third, retention, trial. Petitioner, however, only scored 23 on the first trial, 33 on the second trial, and 34 on the retention trial, and it took him far, far, longer to complete the test than expected. "[T]hese scores were substantially lower than what would normally be considered the cutoffs," although "the cutoffs were not developed for people with mental retardation or intellectual disability[, (¶) s]o there's some concern about using the cutoff of 45 . . . because maybe people with mental retardation for whatever reason do worse than people with brain damage or dementia." Even so, Dr. Frumkin explained that a study examining the TOMM in the context of intellectual disability showed that the average score for the intellectually disabled – indeed, for those so disabled that "they can only function in a

residential facility" – was 43.6 on the second trial, which is significantly higher than petitioner's score. Another study of people with an average I.Q. of 63 showed an average TOMM second trial score of 47, and an average retention trial score of 48; another study of people who had an average I.Q. of 60 along with psychotic disorders showed an average second trial score of 48.7, and an average retention score of 49.4; and yet another study of people with an average I.Q. of 60 averaged a second trial score of 46 and a retention score of 47. Petitioner's score on the TOMM led Dr. Frumkin to conclude that he was malingering or not giving his best effort.

Furthermore, based on his experience with intellectually disabled people, Dr. Frumkin testified that in his direct observations of petitioner "[h]e came across behaviorally as someone who was functioning in the low 80s, low average intelligence. Nowhere[] close to 60. Nowhere[] even close to the high 60s, you know, low 70s. . . . [¶] But that's why we give IQ tests." Taking into account all available information, Dr. Frumkin testified that he did not "have any objective evidence to show he meets the criteria for intellectual disability as defined in the California Penal Code."

On cross-examination, Dr. Frumkin agreed that under two professional standards for assessing intellectual disability, family members, teachers, et cetera are considered the best sources for adaptive functioning data, and that adaptive functioning may be difficult to determine in a custodial setting. He also stated that in largely rejecting the usefulness of such evidence, he did not use any objective criteria but rather his "clinical judgment, based" in part "upon the way the declarations were written [i.e., in a similar tone], the time period from when they last had contact with Mr. Jackson," and the fact that they were obtained by petitioner himself, meaning that they were selected with a view to assisting his legal claims. Dr. Frumkin also partially justified his failure to do the legwork in personally contacting the declarants by reiterating his

opinion that petitioner "has deficits in adaptive functioning . . . in work and in academic functions, like spelling and reading and math," and so – like onset before the age of 18 – that prong of the definition of intellectual disability was not in dispute. He further confirmed that a person with an I.Q. of 65 to 75 can still perform tasks such as talking on the telephone, working at a job, keeping their clothes and house clean, making simple financial decisions, participating in some community activities and sporting events, having long-term relationships, and sometimes mastering independent living skills.

Dr. Frumkin further agreed that there was some professional literature justifying a cutoff of 30 on the TOMM for people with intellectual disability, though he made the distinction that that was for the purposes of research, not clinical practice. Likewise, he agreed that some literature supports accounting for the Flynn effect by making a specific numerical correction to the measured I.Q. score. But he also explained that conclusions by other researches in the professional literature are not necessarily determinative; "[i]t's not the conclusion by itself, it's the science on which it is based," so "I have to look at the science behind it. It's just not the statements people make." Dr. Frumkin further testified that an I.Q. score as measured typically establishes that the subject's true I.Q. is within five points of that score, either higher or lower.

San Quentin Guards

Respondent presented testimony from a number of officers who had worked at San Quentin State Prison and became involved with petitioner during his imprisonment:

Jack Guthrie testified that petitioner appeared to understand him, was "very articulate," could have conversations, kept his cell clean, and "knew the program very well." However, he also explained that the programs were strict and that petitioner is escorted everywhere he goes.

Robert Haug also testified that petitioner's cell was neat and that he was able to communicate intelligibly.

Michael Chastain testified that petitioner was able to follow orders, kept his cell clean, and did not need assistance in filling out the written form to request items from the canteen.

Creig Simons testified that petitioner takes showers, keeps himself and his cell clean, uses the canteen, interacts with others, and has responsibilities such as keeping the mail order catalog and purchase forms for inmates in his area.

Josenilo Del Rosario testified that on July 18, 2000, petitioner participated in a security breach involving an attempted escape with four other inmates. Petitioner and all but one other made it through a break in an interior fence and outside the perimeter of the yard in their subsection of the prison.

Marcie Mann testified regarding the security breach, and stated that petitioner was the third inmate to come through the fence, following behind two others.

Kent McLean testified that petitioner appeared to understand, and spoke with him about, state prison regulations, that petitioner was able to file grievance forms, that he was able to understand and comply with orders, and that he kept his person and his cell clean. McLean also testified regarding the security breach, said that it was a unique occurrence he had not seen happen at any other time over the years, and described how the inmates "first . . . ran to the wall, because that took them out of the line of fire . . . ."

Petitioner's Rebuttal Case

Dr. Watson

Petitioner's first witness in rebuttal was Dale Watson, a psychologist specializing in clinical and forensic neuropsychology who examined petitioner in 1994. He administered the

WAIS-R on which petitioner scored 80 before any adjustments, which "fell within the borderline range" for intellectual ability. Dr. Watson was of the opinion that petitioner is indeed intellectually disabled within the meaning of *Atkins*, *Hawthorne*, and section 1376. He explained that more recent psychiatric definitions of intellectual disability emphasize the adaptive functioning prong, and how petitioner's adaptive functioning deficits are so significant as to render him intellectually disabled even with an I.Q. of 80. Moreover, that score of 80 is properly adjusted downward to 75 to take into account the Flynn effect. Dr. Watson gave his opinion that petitioner had deficits in all three domains of adaptive functioning: moderate impairment in the conceptual domain, mild impairment in the social domain, and mild-to-moderate impairment in the practical domain. He also testified that the fluctuation in petitioner's I.Q. scores is consistent with research into the variability of I.Q. test scores, and "research that suggests that there is greater variability at kind of the low end of the IQ distribution." Indeed, it is almost to be expected, particularly also due to "differences in age, in age cohorts" and "differences across the instruments." For example, Dr. Watson explained how the WAIS-IV excluded components from the WAIS-R that were strengths for petitioner, and added another component that was a weakness for him, meaning that his I.Q. would be measured lower on the former than on the latter. He also explained that petitioner's score of 63 on the WAIS-IV could properly be recalculated as 69 if one omits "measures of working memory or processing speed" and focuses on "core intellectual abilities," which is a corrective measure to account for the fact that processing speed, a weakness for petitioner, was weighted significantly more heavily on the WAIS-IV as compared to the WAIS-R.

Dr. Watson testified that he would "be very cautious about" using petitioner's childhood I.Q. scores alone to diagnose intellectual disability, but while "they are probably not

determinative in this instance . . . they are certainly confirmatory" and should be taken into account. He was not concerned with petitioner's stuttering, and testified that petitioner's deficits are more consistent with intellectual disability than a learning disability because they "are really pervasive, and they are kind of generalized." He also confirmed Dr. Woods' testimony regarding fetal alcohol syndrome and environmental issues as factors in intellectual disability. Regarding the Flynn effect, Dr. Watson took the view that it was appropriate to mathematically subtract the applicable factor from an obtained score, rather than taking it into account in a more amorphous way, and that this is widely supported by the professional literature.

Dr. Watson further found that, across petitioner's WAIS, WAIS-R, and WAIS-IV tests, that there existed both internal consistency in his performances as well as consistency across the tests. Strengths and weaknesses were similar across the tests, and weaknesses were more pronounced in left-brain functions which is also consistent with petitioner's achievement testing, such as on the Wide Range Achievement Test, third edition (WRAT-III). Petitioner's score on the WRAT-III was additionally consistent with professional literature observing that intellectually disabled people tend to score lower on achievement tests than their I.Q. scores would predict. Regarding tests of petitioner's effort, Dr. Watson noted that the VIP manual indicates that 65 percent of intellectually disabled people will score an inconsistent or invalid profile, and testified that petitioner's performance on the VIP administered Dr. Frumkin was consistent with a person who is intellectually disabled. As for the TOMM, Dr. Watson testified that the professional literature was "very mixed" as to whether it was appropriate for use with the intellectually disabled, and that if given the proper cutoff score under such circumstances "[i]s generally 30." Accordingly, he opined that petitioner's score on the TOMM administered by Dr. Frumkin did not indicate that he was giving poor effort. Furthermore, he testified that Dr.

Frumkin misadministered the TOMM by failing to display each card to petitioner for his memorization for the appropriate length of time; that is, he flipped through the cards too fast, contrary to the directions in the TOMM manual. This error "turn[ed] a test of one's intention to . . . perform well . . . [in]to a test of ability." Dr. Watson saw nothing else in the WAIS-IV administered by Dr. Frumkin that would suggest petitioner was giving poor effort; but even if one were to disregard his score on the WAIS-IV, Dr. Watson was of the view that the remainder of the evidence was a sufficient basis on which to conclude that petitioner is intellectually disabled.

On cross-examination, Dr. Watson testified that adaptive functioning cannot really be measured "in the structured setting of the prison or jail," though criminal behavior outside of a custodial setting "would be of interest." Nevertheless, petitioner's conduct involving his escapes from custody did not change his view that petitioner was intellectually disabled, since "[m]ost people with intellectual disability can do some things," even "criminal behavior and . . . goal-directed behavior . . . ." Dr. Watson also testified that it was possible that petitioner was not giving his best effort with Dr. Frumkin, partially due to petitioner's own claim that he had not done so. With regard to a recent letter petitioner had written, any ability to reason that he demonstrated would not outweigh his other history, though he also commented that, "given appropriate supports people can kind of move out of a strict definition of being intellectually disabled," which is a subject "of controversy in the field." Dr. Watson also explained that "it's generally accepted that" the I.Q. ceiling for intellectual disability "could go up to 75," taking into account that "[t]he definition really involves approximately two standard deviations below the mean" of the population, with a five-point standard error of measurement; that said, when the person "has significant adaptive functioning deficits, it can go higher than 75," and a person can

have an I.Q. below 75 without being intellectually disabled, since it is "all dependent upon the level of adaptive functioning deficits."

On redirect, Dr. Watson testified that an intellectually disabled person might be able to commit crimes and communicate his wishes regarding his case, give a false name, use a gun, fabricate a story, and lie. Dr. Watson was "absolutely convinced he has brain damage," and "think[s] he has" intellectual disability.

On re-cross, discussing petitioner's assertion that he is not intellectually disabled, Dr. Watson explained that "[i]t's extremely common that people who are, in fact, intellectually disabled say 'I'm not intellectually disabled,'" since "there's tremendous shame to be diagnosed with . . . an intellectual disability." He has even "seen this before where people would rather . . . face the consequences of the death penalty than acknowledge being intellectually disabled."

Investigators

Private investigators Joseph Parisi and Eric Mason explained their process for generating declarations from the people who they interviewed in connection with this case, including the steps they took to make sure that the declarations accurately reflected what the declarants wished to say.

Dr. Froming

Petitioner called Dr. Froming again in rebuttal. She testified that psychological authorities support the view that a person can have an I.Q. above 70 and still be intellectually disabled if he or she has significant deficits in adaptive functioning, and that petitioner's deficits in adaptive functioning are indeed severe enough to warrant such a diagnosis even with an I.Q. above 70. She clarified that the categorization of an intellectual disability as "mild is simply a gradation of the adaptive functioning. Certainly, the level mild does not mean they don't have

ID. So there's a cutoff. And below that there are gradations of severity based on adaptive functioning." Moderate means "[t]hat there are more requirements for support. The person may have problems living independently." Dr. Froming also confirmed Dr. Woods' testimony that one need only have deficits in one domain of adaptive functioning in order to be intellectually disabled, but that petitioner has deficits in all three domains. She testified that petitioner has moderate impairment in the conceptual domain, "partly [as] just a straight psychologist in reviewing the records and the scores, but also as a neuropsychologist"; specifically, petitioner "has difficulty with abstract thinking, that he has problems with cognitive flexibility, that he has problems with functional use of academic skills." Petitioner's deficits in the social domain are mild; for example, "[h]is social judgment . . . is sometimes immature. And he was easily manipulated by others . . . ." Finally, his deficits in the practical domain are moderate, looking at his "day-to-day living skills," though "it's not that he doesn't have any skills at all. . . . [¶] So he couldn't go shopping on his own," for example, but with supports he did eventually learn "very basic skills like self-care."

Dr. Froming also confirmed some of Dr. Watson's testimony regarding I.Q. variability, as well as how differences in how the WAIS-R and the WAIS-IV handle various test components help explain defendant's variation in scores, in light of his personal strengths and weaknesses. In the course of discussing the utility of petitioner's scores on the California Mental Maturities test, the SRA Primary Mental Abilities test, and the Peabody Picture Vocabulary test, and in direct response to a question about the latter, Dr. Froming testified:

> I also kind of look at the test data from a slightly different slant as Dr. Frumkin in that I'm also looking at neuropsychological functioning. [¶] So one of the things about doing psychological testing and neuropsychological tests is that you can hypothesis generate on the WAISes, for example, on what kind of brain functions are either strong or weak. . . . And then you look for disconfirmation or confirmation based on other tests that have some of those same components. [¶]

> So what you see on the Peabody Picture Vocabulary Test is, again, a language component that is present across tests. So he has relatively greater weaknesses with language-related material than he does with visual-spatial material. So that pattern also is consistent across time.

It is also consistent with the other tests that petitioner took as a child. Dr. Froming also agreed with Dr. Watson's criticism of Dr. Frumkin's administration of the TOMM – in fact, she demonstrated the appropriate length of time to display each card, which was noticeably longer than in Dr. Frumkin's administration as recorded in the video played in court – and added from her own review of the video-recorded examination that petitioner did not appear to understand the instructions. The timing error, she testified, invalidated the results of the test. And in somewhat the same vein as petitioner's apparent failure to understand the instructions, Dr. Froming explained that Dr. Frumkin failed to note "so many" "behavioral observations . . . that are indicative of" petitioner's impairment. She further interpreted petitioner's inconsistent profile on the VIP to mean that "[h]e's not malingering. He's trying."

Dr. Froming further disagreed with Dr. Frumkin that petitioner has a learning disability, because "[t]he diagnostic criteria for learning disability requires that it stand alone and not be accounted for by intellectual disability," meaning that learning disability cannot exist simultaneously "with deficits in intellectual function, confirmed by clinical assessment and intelligence testing, and deficits in adaptive functioning with onset during the developmental period." She testified that even if one does not consider petitioner's performance on the WAIS-IV, he should still be diagnosed as intellectually disabled.

On cross-examination, Dr. Froming explained how even if there were some indications of poor effort on petitioner's part on the testing administered by Dr. Frumkin, that would not necessarily mean that one ought to disregard all the results obtained by that testing; one must look at many factors, such as petitioner's history, "consistency in the entire test performance,"

"consistency across tests," and "consistency in the regions of the brain that continually seem to be impacted[.]" Looking at all the factors, Dr. Froming took the view that the ultimate results of Dr. Frumkin's testing were valid.

Dr. Woods

Petitioner's final witness in rebuttal was Dr. Woods. He testified that petitioner does not have a learning disability since those "are really islands of impairment in a sea of normality," whereas petitioner "has multiple impairments that are both academic and nonacademic." With regard to the evidence regarding petitioner's self-care while in prison (e.g., his cleanliness), Dr. Woods testified:

> it's very difficult to come to conclusions about adaptive functioning within the context of . . . such extraordinary support. Mr. Jackson is given all of his cleaning materials. He's in a very highly structured environment. And it's important to keep in mind that an intellectual disability has to be found independent of supports.

He further explained that professional guidelines "strongly recommend[] against using criminal behavior" to assess adaptive functioning,

> [b]ecause so often, criminal behavior cannot be quantified in any meaningful way. You not only don't know motivations, you don't know if . . . other people are involved. You don't know the thinking process. It requires understanding the difference between goal-directed behavior and intentional behavior, which is often very confusing when trying to look at criminal behavior.

Dr. Woods also confirmed that the variation between petitioner's WAIS-R and WAIS-IV scores was not "an issue," due to changes in the tests and petitioner's specific strengths and weaknesses. He also found petitioner's childhood test scores to be important, because they are "very, very consistent with what we know about Mr. Jackson" and his history. Likewise, the Peabody Picture Vocabulary Test was "consistent with someone that's having a problem with receptive aphasia, which is a left brain function" and which "is when you hear something, but you don't

quite understand it." Like Drs. Watson and Froming, Dr. Woods testified that he would be of the opinion that petitioner is intellectually disabled even disregarding the WAIS-IV administered by Dr. Frumkin.

On cross-examination, Dr. Woods was hesitant to say that learning disabilities were mutually exclusive with intellectual disability, and instead said that "a learning disability could, if it's severe enough, impact your adaptive functioning."

Respondent's Surrebuttal Case

Petitioner Noel Jackson

In surrebuttal, respondent called petitioner as a witness. Petitioner testified that he did not do his best on the test administered by Dr. Frumkin; in his words, he "dumbed down," and "did not answer the questions truthfully." He also said that "I dragged my answers out, taking longer than it would have taken to do it." In response to the question whether he was "pretending to be incompetent," petitioner answered: "Yes, I was." He also testified that he did not want the hearing to go forward, and that he would rather stay on death row to fight his case, stating that "I am not guilty of the crime, so why should I be punished for something I didn't do?"

DISCUSSION

I. Standard of Proof

"The petitioner 'must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus.'" (*In re Price* (2011) 51 Cal.4th 547, 559 *(Price)*; *Hawthorne*, *supra*, 35 Cal.4th at p. 50.) Though this burden has been called "'heavy'" (*Price*, at p. 559), there is no reason to believe that it is to be defined differently here than in other contexts; that is,

> [p]reponderance of the evidence means "evidence that has more convincing force than that opposed to it." [Citation.] That standard is met when "evidence on one

> side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed." [Citation.] In light of this standard, the burden of proof becomes relevant to the determination only if the evidence is evenly balanced in the mind of the fact finder.

(*People v. Esparza* (2015) 242 Cal.App.4th 726, 743, abrogated on another ground in *People v. Cordova* (Jun. 24, 2016, H041050) __ Cal.App.4th __ [2016 WL 3513920, at p. 4 & fn. 8].) It is also appropriate to note here that this court is "'not bound by the opinion testimony of expert witnesses or test results, but may weigh and consider all evidence bearing on the issue of mental retardation.'" (*Hawthorne*, at p. 50.)

II. Substantive Legal Principles

A. Decisions of the United States Supreme Court

In the seminal case of *Atkins*, the United States Supreme Court held that the Eighth Amendment prohibits the execution of mentally retarded persons. After discussing how "a national consensus has developed against" the practice, the court went on to explain that while mentally retarded persons' "deficiencies do not warrant an exemption from criminal sanctions . . . they do diminish their personal culpability" due to reduced ability "to engage in logical reasoning, to control impulses," et cetera. (*Atkins*, *supra*, 536 U.S. at pp. 313–18.) Likewise, "the penological purposes served by the death penalty" are less compelling; retribution is less applicable because of just that reduced culpability, and deterrence is less applicable due to "the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses . . . ." (*Id.* at pp. 317–20.) Furthermore, in light of "the possibility of false confessions" and "the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation" – since, for example, they "may be less able to give meaningful assistance to their counsel and are typically poor witnesses" – "[m]entally retarded

defendants in the aggregate face a special risk of wrongful execution," thus providing another "justification for a categorical rule making such offenders ineligible for the death penalty." (*Id.* at pp. 320–21.)

While the *Atkins* court was more focused on the basic legal question of whether there is a constitutional prohibition on imposing the death penalty on mentally retarded persons, it did discuss the question of who qualifies as mentally retarded. The court noted that "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." (*Atkins*, *supra*, 536 U.S. at pp. 308, fn. 3, 318.) Additionally, "an IQ between 70 and 75 or lower . . . is typically considered the IQ cutoff score for the intellectual function prong of the mental retardation definition," and "'[m]ild' mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70." (*Id.* at pp. 308, fn. 3, 309, fn. 5.) Nevertheless, the court observed that "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded"; but while it left "'to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences,'" it also commented that existing "statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions . . . ." (*Id.* at p. 317 & fn. 22 [brackets in original].)

Subsequently, in *Hall v. Florida* (2014) __ U.S. __ [134 S.Ct. 1986] *(Hall)*, the court considered the case of a defendant who had I.Q. results ranging from 71 to 80, but whose death sentence had been upheld below in light of state law which deemed any defendant with an I.Q. above 70 to be per se not mentally retarded. (*Id.* at p. 1992.) The court highlighted the propriety of using clinical definitions and psychiatric standards to determine the role of I.Q. scores in an

Atkins analysis. (*Id.* at p. 1993.) It then explained that "established medical practice" recognizes that an I.Q. score, standing alone, is not "final and conclusive evidence of a defendant's intellectual capacity," and that and I.Q. "score is, on its own terms, imprecise." (*Id.* at p. 1995.) Indeed, "[t]he professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number," but rather "understood as a range of scores on either side of the recorded score" to account for the standard error of measurement, which "is a statistical fact, a reflection of the inherent imprecision of the test itself." (*Ibid.*) Accordingly, the court rejected the constitutionality of a strict I.Q. cutoff of 70, and reaffirmed its observations in *Atkins* "that an individual with an IQ test score 'between 70 and 75 or lower,' . . . may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning," and "that intellectual[] disability is characterized by an IQ of '*approximately* 70.'" (*Id.* at pp. 2000–01 [emphasis added].) That is, while "[i]t is of considerable significance," "[a]n IQ score in an approximation, not a final and infallible assessment of intellectual functioning," and "'[a] person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score' . . . ." (*Ibid.* [first ellipsis in original].)

And even more recently, the court has observed that a "reported IQ test result of 75 [is] squarely in the range of potential intellectual disability." (*Brumfield v. Cain* (2015) __ U.S. __ [135 S.Ct. 2269, 2277–78].)

B. California authority

After the decision in *Atkins* the Legislature enacted section 1376, which sets forth procedures for determining in the trial court the question of a capital defendant's intellectual disability. (Stats. 2003, ch. 700, § 1.) Subdivision (a) of that section further defines intellectual

disability as "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before 18 years of age."

Thereafter, in *Hawthorne*, the California Supreme Court addressed the issue of how to apply *Atkins* and section 1376 in habeas corpus cases where, as here, the petitioner's judgment of death had become final prior to the decision in *Atkins*. The court advised that "tracking section 1376 as closely as logic and practicality permit . . . is warranted here, both to maintain consistency with our own legislation and the judicial frameworks adopted in other jurisdictions and to avoid due process and equal protection implications."[4] (*Hawthorne*, *supra*, 35 Cal.4th at pp. 45–47.) Indeed, the court adopted for use in the habeas corpus context the statute's definition of mental retardation: "'Mentally retarded' means 'the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18.'"[5] (*Id.* at p. 47.) Consistent with the United States Supreme Court's focus on clinical definitions of mental retardation, the *Hawthorne* Court explained that "[t]he Legislature derived this standard from the two clinical definitions referenced by the high court in *Atkins* . . . ." (*Ibid.*) In a similar vein, the court rejected the Attorney General's argument that it ought "to adopt an IQ of 70 as the upper limit for making a prima facie showing" of mental retardation; the statute itself does not contain such a ceiling, "a fixed cutoff is inconsistent with established clinical definitions [citation] and fails to recognize that significantly subaverage intellectual functioning may be established by means other than IQ testing," and "IQ scores are insufficiently precise to utilize a fixed cutoff in this context." (*Id.* at

[4] Perhaps the main exception is that *Atkins-Hawthorne* habeas corpus petitioners are not entitled to a jury trial on the question of their intellectual disability. (*Hawthorne*, *supra*, 35 Cal.4th at pp. 49–50.)

[5] Several years after the decision in *Hawthorne* the Legislature amended section 1376, replacing "mentally retarded" with "intellectual disability," and "the age of 18" with "18 years of age." (Stats. 2012, ch. 448, § 42; Stats. 2012, ch. 457, § 42.)

pp. 48–49.) The court thus made it clear that intellectual disability "is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence." (*Id.* at p. 49.)

Another decision of the California Supreme Court is significant here. In *People v. Superior Court (Vidal)* (2007) 40 Cal.4th 999 *(Vidal)*, defendant's multiple I.Q. tests over a span of 23 years had resulted in full scale I.Q. scores ranging from 77 to 92, performance I.Q. scores (i.e., "'putting puzzles together and doing so quickly'") from 96 to 126, but verbal I.Q. scores only from 59 to 77. (*Id.* at pp. 1004–05.) Experts were in conflict on what these scores indicated, the trial court found the defendant mentally retarded, and the People sought relief. The Supreme Court disagreed with the People that the trial court was bound to rely on the full scale scores, reiterating that section 1376 included no such requirement and to impose it "would be inconsistent with the principle that a factual finding of retardation must be based on all the relevant evidence." (*Id.* at p. 1012.) The court explained that "the best scientific measure of intellectual functioning" is a factual question, not a legal question. (*Id.* at pp. 1012–13.) It concluded:

> The Legislature has mandated that trial court, in determining mental retardation for *Atkins* purposes [citation], find whether the individual's "general intellectual functioning" is significantly impaired [citation], but has not defined that phrase or mandated primacy for any particular measure of intellectual functioning. The question of how best to measure intellectual functioning in a given case is thus one of fact to be resolved in each case on the evidence, not by appellate promulgation of a new legal rule.

(*Id.* at p. 1014.)

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III. Application of the Legal Standard to the Facts of the Present Case

A. Significantly subaverage general intellectual functioning

The first factual disagreement between the experts as to petitioner's general intellectual functioning concerns the extent to which it is appropriate to consider testing other than full, standardized I.Q. tests. The California Supreme Court has stated "that significantly subaverage intellectual functioning may be established by means other than IQ testing" (*Hawthorne*, *supra*, 35 Cal.4th at p. 48), and that "[t]he question of how best to measure intellectual functioning in a given case is . . . one of fact to be resolved in each case on the evidence" (*Vidal*, *supra*, 40 Cal.4th at p. 1014). Accordingly, this court is persuaded that it is appropriate to take into account all evidence related to intellectual functioning – including, in part, achievement testing and limited-scope testing – not merely petitioner's results on select, full I.Q. tests.

The next factual disagreement is to what extent it is appropriate to take into account the Flynn effect in adjusting petitioner's I.Q. scores obtained from the various tests. On this point the court is not sufficiently persuaded by petitioner's evidence that a Flynn factor should be mathematically deducted from an individual I.Q. result in order to arrive at a specific, more accurate result. However, the court accepts Dr. Frumkin's testimony that the Flynn effect can nevertheless be taken into account as part of an understanding that I.Q. scores are not perfectly precise measurements, which is consistent with the *Hall* court's observations regarding the inherent imprecision of I.Q. scores; indeed, "[i]ntellectual disability is a condition, not a number." (*Hall*, *supra*, 134 S.Ct. at pp. 1995, 2000–01.)

Another factual disagreement between the experts concerns the validity of Dr. Frumkin's administration of the WAIS-IV. The court is persuaded by testimony from Drs. Froming and Watson, along with the video of the test, that Dr. Frumkin erred in his administration of the

TOMM, thus effectively converting it from a test of effort into a test of ability. But this does not mean that the WAIS-IV results were valid, in light of Dr. Frumkin's observations of inconsistencies in petitioner's performance, which are of particular value because he was the administrator of the test. Even so, Dr. Woods gave contrary testimony supporting the internal consistency of the test results. But, as will become clear in light of the analysis below, it is unnecessary for the court to make an ultimate finding on the validity of this test, and so for the purposes of argument the court will assume the invalidity of petitioner's low score on the WAIS-IV administered by Dr. Frumkin.

Petitioner's remaining full I.Q scores – 74 on the Stanford-Binet, 76 on the WAIS, and 80 on the WAIS-R – are facially either borderline or exceed the range for intellectual disability. However, those numbers are properly discounted by all the other evidence of petitioner's poor intellectual functioning: this includes the Flynn effect broadly speaking, petitioner's long and pronounced history of academic problems and cognitive deficits, and his scores on such tests as the California Mental Maturities test, the SRA Primary Mental Abilities test, and the Peabody Picture Vocabulary test, which showed I.Q. equivalents of 60, 65, and 62, respectively.[6] Indeed, as was the case with the defendant in *Vidal*, and as explained by Dr. Froming, petitioner "has relatively greater weaknesses with language-related material than he does with visual-spatial material," and this "pattern is also consistent across time." In the court's view this evidence, considered together and with due regard for the various expert views as to its psychological import, establishes that petitioner's general intellectual functioning is likely in the borderline range. However, this is without yet considering Dr. Woods' neuropsychiatric expert testimony;

[6] With regard to the Stanford-Binet, the possibility of cultural bias cuts the other way, but on this record there is no reason to conclude that it is of sufficient magnitude to push petitioner's true I.Q. outside the range of intellectual disability.

once that highly compelling testimony is considered, it becomes solidly more likely than not that petitioner's general intellectual functioning is substantially subaverage.

First is Dr. Woods' testimony regarding petitioner's family history of mental issues and language problems, which are significant because intellectual disability can have a genetic component. Next is his testimony regarding petitioner's physical cues that suggest associated problems in brain function: an impaired sense of smell and persistent "stigmata of fetal alcohol" syndrome. Similarly, Dr. Woods explained how the sort of toxic exposure, lack of nutrition, and trauma petitioner suffered as a child is co-morbid with intellectual disability. Finally, Dr. Woods convincingly explained how petitioner's symptoms point to problems in specific areas of his brain: the left hemisphere, the frontal lobe, the right parietal lobe, and the corpus callosum. Dr. Woods testimony is highly persuasive because it makes explicit and clear the physiology of petitioner's condition, and presents his impairment more directly and tangibly. It places petitioner's history and test results in a coherent context. It justifies his opinion that there is "no question that" petitioner is mildly intellectually disabled. Dr. Woods' testimony is thus extremely helpful to the court in its task of considering the import of petitioner's I.Q. test results, and is persuasive on the ultimate question of intellectual disability.

Moreover, although the persuasiveness of Dr. Woods' testimony could stand alone, it also happens to be supported by Dr. Watson's testimony that petitioner's test results consistently revealed more pronounced weaknesses in left-brain functions, and Dr. Watson's and Dr. Froming's testimony regarding the relationship of toxins and other environmental factors to intellectual disability. While Dr. Frumkin articulated the view that petitioner's adaptive functioning deficits (see *post*, at pp. 33–35) occurred in the absence of sufficiently impaired intellectual functioning, as so were more consistent with a learning disability than with

intellectual disability, Dr. Woods rejected as "not within the realm of possibility" the idea that petitioner simply has a learning disability, because of the wide range of impairment. He explained that learning disabilities are "islands of impairment in a sea of normality," a description that does not fit petitioner's "multiple impairments that are both academic and nonacademic." Similarly, Dr. Watson testified that petitioner's deficits are more consistent with intellectual disability than a learning disability because they "are really pervasive, and they are kind of generalized," and gave his opinion that he was "absolutely convinced [petitioner] has brain damage," and "think[s] he has" intellectual disability. On this point the court finds the testimony of Dr. Woods and Dr. Watson more persuasive.

It is true that, in what would initially appear to be a somewhat bizarre turn of events, petitioner testified as a witness on respondent's behalf and stated that he had intentionally given poor effort on the testing administered by Dr. Frumkin and feigned incompetency. Even assuming the possible implication that petitioner behaved similarly at other times in his life, thus giving it a broader relevance, the court finds his testimony neither believable nor credible. The attempts by petitioner to fire his attorney, to waive the evidentiary hearing required by the California Supreme Court's order to show cause (see *Hawthorne*, *supra*, 35 Cal.4th at pp. 49–52), to cooperate with respondent instead of with his own counsel, and to thwart these proceedings appear to result from ulterior motives. In particular, petitioner is pursuing a federal habeas corpus petition in which he seeks to have his conviction and death sentence overturned. His posture in this court is also potentially explained by the testimony of Dr. Froming and Dr. Watson regarding the tendency of those with intellectual disability to attempt to hide their mental condition out of a sense of shame.

The court therefore finds that petitioner has met his burden to establish the first prong of

the statutory test for intellectual disability, namely that he exhibits significantly subaverage general intellectual functioning.

B. Deficits in adaptive behavior

The court finds it extremely significant that *every* expert witness, including the People's own expert, Dr. Frumkin, was of the view that petitioner exhibited deficits in adaptive functioning. The persuasive force of this basic unanimity is amplified by the fact that the experts took generally consistent views regarding petitioner's relative deficits across the three domains of adaptive functioning, except as discussed below. As explained by petitioner's experts, substantially based on accounts of his functioning throughout his early life – accounts which the court considers to be believable and illuminating – petitioner is moderately impaired in the conceptual domain, which involves abstraction, understanding, conceptualization, problem solving, processing speed, and working memory, and which manifested in his poor academic history and his problems performing basic academic tasks such as reading, spelling, and math. He is moderately or mildly-to-moderately impaired in the practical domain, which involves ordinary, daily tasks such as grooming oneself, following directions, etc. He is least impaired in the social domain, which involves interacting with others.

It is true that Dr. Frumkin was of the opinion that petitioner's criminal behavior and escapes were not consistent with the level of severity of adaptive functioning impairment attributed to petitioner by the other experts. But the court finds more persuasive the testimony of Drs. Froming and Watson that intellectually disabled persons may still be able to commit crimes; Dr. Watson in particular explained that such a person can engage in goal-oriented behavior, use a

weapon, and fabricate a story.[7] Dr. Watson further explained that the clinical definition of intellectual disability has come to emphasize deficits in adaptive functioning, and that petitioner's were so severe that he would be considered intellectually disabled even with an I.Q. of 80.

Respondent presented evidence that, in prison, petitioner is able to understand and obey instructions, keep his cell clean, groom himself, interact with others, and undertake basic responsibilities. He also participated in an attempted prison escape with four other inmates. Additionally, respondent questioned the expert witnesses regarding petitioner's escape from jail and flight out of state. But this evidence is not enough to overcome, or even cast significant doubt upon, the ample evidence of petitioner's impairment. Regarding petitioner's ability to function in prison, Dr. Woods persuasively explained why a person's function in the highly structured, dependent context of incarceration reveals little about that person's adaptive functioning, which deals with what that person can do independently without supports. Dr. Watson's testimony was roughly in accord. Dr. Woods also testified that it is error to expect a person with intellectual disability to be unable to do anything, and that such persons may be able to do various tasks such as basic reading, holding jobs, and the like. As to the botched attempted escape from San Quentin, there is nothing in the record to suggest that petitioner had any substantial role in leading, organizing, or planning it, such as would show non-impaired cognitive, practical, or social capabilities. Finally, with regard to his successful escape from Riverside County jail and subsequent events, the court is not convinced that the event is

[7] Expert opinion conflicted as to whether it is even appropriate at all to take into account criminal behavior when assessing adaptive functioning, a question which in the *Atkins* context bears directly on the lawfulness of imposing capital punishment. It may be observed that in the context of determinate sentencing, the circumstances of the offense are relevant to setting punishment. (Cal. Rules of Court, rules 4.420, 4.421, 4.423.) Any conceptual conflict here is moot in light of the fact that this court is unpersuaded that petitioner's criminal conduct is beyond the capabilities of a person with intellectual disability.

inconsistent with petitioner's experts' credible explanations of what it means to have adaptive functioning deficits; that is, it is a misunderstanding of the relevant clinical definitions to expect all intellectually disabled persons to be completely feeble and incapacitated, and respondent's evidence is of insufficient weight to overcome petitioner's ample evidence of his deficits in adaptive functioning.

The court therefore finds that petitioner has met his burden to establish the second prong of the statutory test for intellectual disability, namely that he exhibits deficits in adaptive behavior.

C. Manifestation prior to 18 years of age

The weight of the evidence establishes that petitioner's intellectual and adaptive behavior deficits manifested prior to the age of 18. Drs. Woods and Froming so testified, with the latter opining that this point was incontrovertible, and Dr. Frumkin did not dispute this prong of the test. In particular, Dr. Woods explained that petitioner's test results and cognitive problems indicated neurodevelopmental impairment that was likely present at birth or a young age, and how exposure to toxins and trauma of the sort to which petitioner was exposed prior to adulthood can negatively impact the developing brain. Dr. Froming echoed the latter point. The expert testimony is consistent with, and supported by, petitioner's pre-majority test results and the ample evidence of his problems as a child with conceptual and practical tasks (and, to a lesser extent, social tasks), as described above.

The court therefore finds that petitioner has met his burden to establish the third prong of the statutory test for intellectual disability, namely that the first two prongs manifested prior to 18 years of age.

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IV. Conclusion

This case is one in which the standard of proof plays an important role. As discussed above, petitioner need only prove his intellectual disability by a preponderance of the evidence. This burden was easily carried as to the adaptive functioning prong and the manifestation-prior-to-age-18 prong, which were never seriously in contention from an evidentiary perspective; even respondent's expert agreed that petitioner had adaptive functioning deficits, and there is no suggestion that any impairments petitioner may have had arose only in his adulthood, for example, due to a later-in-life trauma. The real issue in this case is whether petitioner satisfied the first prong by showing significantly subaverage intellectual functioning. While the evidence is not overwhelming, for the reasons discussed above the court concludes that it is more likely than not that petitioner's intellectual functioning is, in fact, significantly subaverage as that requirement is defined clinically and by case law. The court therefore finds that petitioner has carried his burden to show that he is intellectually disabled within the meaning of *Atkins*, Penal Code section 1376, and their progeny. Accordingly, his death sentence contravenes the Eighth Amendment and he is entitled to habeas corpus relief.

DISPOSITION

Relief on habeas corpus is granted. Petitioner's sentence of death in case CR23480 is vacated, and the matter will be calendared for resentencing upon the expiration of the period for seeking review of this ruling. At that time, petitioner shall be resentenced to a term of life without the possibility of parole. (Pen. Code, §§ 190, subd. (a); 190.2, subd. (a)(1).)

Date: July 29, 2016

Ronald L. Taylor (Ret.)
Judge, sitting on assignment

Superior Court Case No. RIC475367 (Related Case No. CR23480)

(California Supreme Court Case No. S129989)

Case Name: In Re Noel Jackson

CERTIFICATE OF MAILING - Final Ruling

I certify that I am currently employed by the Superior Court of California, County of Riverside, and that I am not a party to this action or proceeding. In my capacity, I am familiar with the practice and procedures used in connection with the mailing of correspondence. Such correspondence is deposited in that outgoing mail of the Superior Court. Outgoing mail is delivered to and mailed by the United States Postal Service, postage prepaid, the same day in the ordinary course of business. I certify that I served a copy of the foregoing on this date, by depositing said copy as stated above.

NAME & ADDRESS OF ATTORNEY	Date Served
Supreme Court of California 350 McAllister Street San Francisco, CA 94102-4797	7/29/16
Ivy Fitzpatrick Christopher Cook Deputy District Attorney 3960 Orange Street Riverside, CA 92501	7/29/16
James S. Thomson, SBN 79658 Attorney at Law 819 Delaware Street Berkeley, CA 94710	7/29/16

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 29th day of July, 2016

S. Johnson, Sr. Courtroom Assistant

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,	:	
	:	
Plaintiff,	:	Case No. 14CR-2806
	:	
v.	:	JUDGE K. BROWN
	:	
WILLIE L. DUMAS,	:	
	:	CAPITAL CASE
Defendant.	:	

DECISION AND ENTRY

Rendered this 2nd day of December, 2015

This matter is before the Court upon the Motion of Defendant Willie L. Dumas (hereinafter "Defendant") for a Pretrial Determination that Imposition and Execution of the Death Penalty is Barred Based on Defendant's Mental Retardation[1], filed on May 1, 2015. On May 12, 2015, the State of Ohio filed its Memorandum in Opposition. Defendant filed a Reply on June 11, 2015.

The Court held a hearing on October 5, 2015, at which time both parties had the opportunity to present evidence. Defendant called Dr. John Fabian, a board-certified forensic neuropsychologist to testify in support of his motion. Defendant also submitted the following exhibits for the Court's review:

Exhibit A – Dr. John Fabian's Report

Exhibit B – Dr. John Fabian's Curriculum Vitae

Exhibit C1 – Defendant's Criminal History

Exhibit C2 – Defendant's Medical Records from Dr. Wassim Saikali

Exhibit C3 – Defendant's Records from Columbus Public Schools

Exhibit C4 – Defendant's Records from the Social Security Administration

[1] In recent years, the terms "intellectual disability" and "intellectually disabled" have become more widely accepted. Accordingly, the Court will use that terminology except when quoting authority.

Exhibit C5 – Defendant's Records from The Ohio State University Medical Center

Exhibit C6 – Defendant's Records from Riverside Hospital

Exhibit C7 – Defendant's Records from Grant Medical Center

Exhibit C8 –Defendant's Prior Franklin County Common Pleas Court Cases

Exhibit C9 – Defendant's ODRC Records

Exhibit C10 – Defendant's Medical Records from Dr. Ronald Whisler

Exhibit C11 – Defendant's Records from the Department of Youth Services

Exhibit C12 – Defendant's Records from Raleigh General Hospital

The State did not call any witnesses, relying instead on its cross-examination of Dr. Fabian. The State also submitted the following exhibits:

Exhibit 1 – Defendant's ODRC Intake Records

Exhibit 2 – Defendant's Social Security Administration Application

Exhibits 3, 4 – Defendant's Inter-Office Prison Letters

Exhibit 5 – Defendant's ODRC Inmate Evaluation Reports, Acknowledgement of Safety Practices, Chemical Safety and Ladder Safety Quizzes

The Court ordered the parties to file post-hearing briefs. On October 16, 2015, Defendant filed his brief, and the State filed its Response on October 30, 2015.

The Court has reviewed and considered the testimony of Dr. Fabian, all of the admitted exhibits in their entirety, the arguments of counsel, and the parties' post-hearing briefs. The Court must now determine whether Defendant suffers from an intellectual disability so as to render him ineligible for the death penalty.

LAW AND ANALYSIS

In 2002, the United States Supreme Court held that executing individuals suffering from an intellectual disability is cruel and unusual in violation of the Eighth Amendment of the United States Constitution. *Atkins v. Virginia*, 536 U.S. 304 (2002). The Court relied

on the definition of mental retardation set forth by the American Association on Mental Retardation.[2] *Id.* at 308, fn. 3.

> Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

Id. The Court also relied on the American Psychiatric Association's definition of "mild mental retardation" which is "typically used to describe people with an IQ level of 50 to 55 to approximately 70." *Id.* The Court reasoned that individuals with all levels of intellectual disability "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions." *Id.* at 318. Accordingly, the Court held that executing those with intellectual disabilities would serve to frustrate the capital punishment goals of retribution and deterrence. *Id.* at 319.

In *Lott v. Ohio*, 97 Ohio St. 3d 303, 305, 779 N.E.2d 1011 (2002), the Ohio Supreme Court provided substantive standards and procedural guidelines to apply the holding in *Atkins* to capital defendants in the State of Ohio. The Court found that IQ tests alone are insufficient to make a final determination on the issue of whether an individual suffers from an intellectual disability, holding that a capital defendant must demonstrate by clear and convincing evidence that: (1) he suffers from "significantly subaverage intellectual functioning"; (2) he has experienced "significant limitations in two or more adaptive skills"; and (3) the onset occurred prior to age 18. *Id.* at 305. The Court noted, however, that trial courts must consider IQ tests and that "there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70." *Id.*

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[2] The organization is now known as the American Association for Intellectual and Developmental Disabilities.

Intellectual Functioning

At the hearing on October 5, 2015, Dr. Fabian presented significant evidence regarding Defendant's intellectual functioning. Prior to meeting with Defendant, Dr. Fabian reviewed Defendant's psychosocial history, prison records, criminal history, school records, and other collateral sources of information. Tr. p. 24. Defendant's school records revealed two prior assessments of his intellectual functioning. *Id.* p. 30. In the fifth grade, Defendant was administered the Binet IQ test on two separate occasions, yielding Full Scale IQ scores of 68 and 70, respectively. *Id.*

In March 2015, Dr. Fabian met with Defendant for approximately twelve hours over the course of two days and conducted various testing. *Id.* p. 27. Dr. Fabian administered the Wechsler Adult Intelligence Scale, Fourth Edition (hereinafter "WAIS-IV") to assess Defendant's current level of intellectual functioning. *Id.* Dr. Fabian measured Defendant's verbal comprehension at 66, his perceptual reasoning at 81, his working memory in excess of 71, and processing speed at 89. *Id.* p. 33. The test yielded a Full Scale IQ of 72. *Id.*; see also Ex. A, p. 8. A Full Scale IQ of 72 would place Defendant in the 3rd percentile and in the borderline range to intellectually disabled range. *Id.* Dr. Fabian considered these results consistent with Defendant's childhood scores on the Binet IQ test. *Id.* p. 30.

Dr. Fabian further explained that certain adjustments must be made to his findings in order to calculate the range of Defendant's Full Scale IQ.[3] Tr. p. 34-36. First, the standard error of measurement for the WAIS-IV must be taken into consideration. *Id.* p. 34-36. This adjustment of 2-3 points suggests that Defendant's IQ could be as low 69 or as high as 75. *Id.* Dr. Fabian further explained the impact of the Flynn Effect. *Id.* The Flynn Effect is a psychological phenomenon based on the premise that society becomes smarter

[3] In 2014, the United States Supreme Court recognized that "[t]he professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range." *Hall v. Florida*, 134 S. Ct. 1986, 1995 (citing D. Wechsler, The Measurement of Adult Intelligence 133 (3d ed. 1944)).

and better informed over time. *Id.* The formula for calculating the Flynn Effect considers the year in which the test was first normed and the year in which the test is administered. *Id.* For each year of difference, the test results are adjusted down .333 points. *Id.* As the WAIS-IV was normed in 2005 and the test was not administered to Defendant until 2015, Defendant's true Full Scale IQ is actually most likely between 66 and 72. *Id.* The State counters that the Court is not bound to conclude that the Flynn Effect factors into Defendant's IQ score. See *State v. Burke*, 10th Dist. No. 04AP-1234, 2005-Ohio-7020, ¶ 51. However, the State has provided no evidence challenging the basis of the Flynn Effect or its application in this case.

The State cross-examined Dr. Fabian regarding Defendant's ODRC intake records which list Defendant's IQ as average – between 90 and 109. Tr. p. 65. Although Dr. Fabian initially admitted that the records "muddy the waters a bit," he went on to explain that the results are based on an Otis Lennon test which is not a true indicator of intellectual functioning. *Id.* Dr. Fabian explained that the Otis Lennon test is a group administered test and is not as commonly accepted as the WAIS or the Binet. *Id.* p. 93. Further, the Otis Lennon test only measures a fraction of what is measured by the WAIS and is not administered by a qualified psychologist. *Id.* The Court further finds it troubling that Defendant's results on the Otis Lennon test indicate average intellectual functioning despite ODRC considering Defendant "functionally illiterate." *Id.*; see also Ex. A. p. 7.

The State challenged Dr. Fabian's repeated use of the word "potentially" when discussing Defendant's test results. Tr. p. 81-83. Dr. Fabian explained that he used the word "potentially", because Defendant's rheumatoid arthritis could have caused lower scores on certain motor skills portions of the testing. *Id.* As there is no definitive way to determine whether Defendant's impaired motor skills are the result of his rheumatoid arthritis or an intellectual disability, the Court finds Dr. Fabian's use of "potentially" to be

reasonable. The Court further notes that Dr. Fabian's ultimate findings are clear: "It is my opinion with a reasonable degree of psychological and neuropsychological certainty that Mr. Willie Dumas has significant evidence of an intellectual disability, both developmentally and currently." Ex. A, p. 23.

The State counters that Defendant has not personally claimed to be intellectually disabled. The Court finds this argument unpersuasive. Dr. Fabian testified that individuals who have intellectual disabilities may actually overestimate or overstate their abilities for a variety of reasons. Tr. p. 89-90; see also *White*, 118 Ohio St.3d at 21.

In conclusion, based on the Court's calculation of a Full Scale IQ range between 66 and 72, the Court disagrees with the State's position that Defendant must rebut a presumption that he is not intellectually disabled. However, even assuming that a rebuttable presumption exists, the record contains significant evidence to overcome that presumption. The Court finds that Defendant presently suffers from significantly subaverage intellectual functioning and has satisfied the first prong of the *Atkins-Lott* test.

Adaptive Skills

To satisfy the second prong of the *Atkins-Lott* test, Defendant must demonstrate that he suffers from significant limitations in two or more adaptive skills. *Lott,* 97 Ohio St. 3d at 305. "Adaptive skills are those skills that one applies to the everyday demands of independent living, such as taking care of oneself and interacting with others." *State v. White*, 118 Ohio St.3d 12, 15, 885 N.E.2d 905, 2008-Ohio-1623. Adaptive skills include communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. *Atkins*, 536 U.S. at 308, fn. 3; *Lott,* 97 Ohio St. 3d at 305.

Defendant's sister, Fidelma Dumas was able to participate in the Survey Interview of the Vineland-II, an instrument which measures Defendant's levels of adaptive functioning.

Ex. A, p. 14-15. Defendant received a Total Adaptive Behavioral Composite score of 75, placing Defendant in the 5th percentile overall and in the moderately low range of adaptive functioning. *Id.* Of particular note was Defendant's communication score, which at 66 indicates a moderate level of impairment. *Id.* Dr. Fabian also administered the Woodcock-Johnson Tests of Academic Achievement, Third Edition, which placed Defendant's academic functioning at the fifth grade level. Ex. A, p. 8-9.

The State challenges Dr. Fabian's opinion that Defendant has significant adaptive skill limitations, citing Defendant's ability to make decisions, maintain employment, cook, clean, pay bills, and navigate the bus system. Tr. p. 67-74. In *State v. White*, 118 Ohio St.3d 12, 21-22, 885 N.E.2d 905, 2008-Ohio-1623, the Ohio Supreme Court rejected the State's argument that abilities such as these were inconsistent with mild intellectual disabilities. In *White*, there was evidence that the defendant had engaged in a romantic relationship, attended school dances and sporting events, helped his girlfriend purchase a used car, obeyed traffic rules, signed a lease, cooked meals, and played video games. *Id.* The Court remarked that individuals with intellectual disabilities "are not devoid of all adaptive skills." *Id.* Rather, in order to determine whether an individual is intellectually disabled, "one must focus on those adaptive skills the person lacks, not on those he possesses." *Id.*

The Court finds that Defendant has presented sufficient evidence demonstrating that he suffers from significant limitations in both communication and functional academics. As such, Defendant has satisfied the second prong of the *Atkins-Lott* test.

Onset Before Age 18

The third and final prong of the *Atkins-Lott* test requires Defendant to demonstrate an onset prior to age 18. *Lott,* 97 Ohio St. 3d at 305. It is not uncommon in capital cases for there to be little or no record of a defendant's intellectual functioning prior to age 18. Tr. p.

94-95. However, Defendant has presented records demonstrating that he has suffered from significantly subaverage intellectual functioning since at least the fifth grade.

Dr. Fabian's report states:

> [Defendant] had a Binet Test when he was in grade 5, and he would have been about 13 years of age at the time of testing and he had a Full Scale IQ of 68. His chronological age was about 13 years 3 months; mentally he was 9 years. It is my understanding there was another IQ test (Binet) assessed when he was 13 years 4 months chronological age and an IQ score of 70. These scores would be consistent with an intellectual disability.

p. 24. Dr. Fabian's report further notes that, while Defendant was incarcerated in DYS, he was administered a Nelson Form A reading test. *Id.* Although Defendant was 17 years old, the test indicated that Defendant possessed a second grade reading level. Ex. A, p. 24.

In its post-hearing brief, the State cites *State v. Were*, 118 Ohio St.3d 448, in support of its argument that Defendant's Binet test results are invalid because the Binet test was culturally biased in the 1960s. In *Were*, the Court upheld a trial court's decision to rely on expert testimony presented by the State which challenged the Binet test on the basis that there were no minorities in the standardization sample. *Id.* at 476-477. The issue of cultural bias is not presently before the Court as the State presented no relevant evidence on that topic.

The State also notes that Defendant was not placed in special education classes as a child. However, Dr. Fabian testified that he was not surprised that Defendant was not properly assessed for special education, as the evidence suggests that Defendant was enrolled in a large intercity school district in the 1960s and was constantly moving between schools. Tr. p. 50-51, 94; see also Ex. A, p. 3-4.

Having found that the onset of Defendant's disabilities occurred prior to age 18, the Court finds that Defendant has met the third and final prong of the *Atkins-Lott* test.

CONCLUSION

The State did not present any expert testimony challenging Dr. Fabian's opinion that Defendant is mildly intellectually disabled. In *State v. White*, 118 Ohio St.3d at 20, the Supreme Court found that a trial court abused its discretion by refusing to find that a defendant met his burden to prove that he was intellectually disabled despite the lack of any expert testimony to the contrary. "[E]xpert opinion may not be arbitrarily ignored, and some reason must be objectively present for ignoring expert opinion testimony." *Id.* at 23. No such reason is present in this case.

In accordance with *Atkins v. Virginia*, the Court finds that to execute Willie Dumas would violate the Eighth Amendment's ban on cruel and unusual punishment. Accordingly, the Court finds Defendant's Motion for a Pretrial Determination that Imposition and Execution of the Death Penalty is Barred Based on Defendant's Mental Retardation, filed May 1, 2015, well taken and it is hereby **GRANTED**.

IT IS SO ORDERED.

KIM BROWN, JUDGE

Franklin County Court of Common Pleas

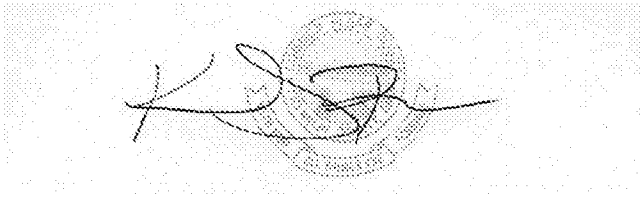
Date: 12-02-2015

Case Title: STATE OF OHIO -VS- WILLIE L DUMAS

Case Number: 14CR002806

Type: ENTRY/ORDER

It Is So Ordered.



/s/ Judge Kim Brown

IN THE CIRCUIT COURT OF SUNFLOWER COUNTY, MISSISSIPPI

WILLIE RUSSELL **PETITIONER**

v. **Cause No. 10,130**

STATE OF MISSISSIPPI **RESPONDENT**

ORDER GRANTING POST CONVICTION RELIEF

This matter is before this Court on the Petition filed by Willie Russell to vacate his death sentence pursuant to Mississippi Code Ann. § 99-39-1 et seq. Mr. Russell's petition alleges that he is mentally retarded and that his death sentence violates the Eighth and Fourteenth amendments under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002). The Mississippi Supreme Court remanded this matter in *Russell v. State*, 849 So.2d 95, 102-103 (Miss. 2003) for this Court to determine whether Petitioner is mentally retarded within the meaning of *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Chase v. State*, 873 So.2d 1013, 1027-28 (Miss. 2004).

Pursuant to the Mississippi Supreme Court's decision, this Court held an evidentiary hearing on September 8-9, 2014, and December 17, 2014, in the Circuit Courts of Sunflower County in Indianola, MS and Leflore County in Greenwood, MS respectively.

I. FACTS AND PROCEDURAL HISTORY

Petitioner was sentenced to death in March 1993. Petitioner appealed and the Supreme Court of Mississippi affirmed his sentence. *See Russell v. State*, 670 So.2d 816 (Miss. 1996), *rehearing denied* 1996 Miss. LEXIS 235 (Miss. Apr. 11, 1996). Petitioner

sought a writ of certiorari from the United States Supreme Court, which was denied on November 12, 1996. *See Russell v. Mississippi*, 519 U.S. 982 (1996).

On January 21, 1997, Petitioner filed a motion for state post-conviction relief. On June 29, 2001, Petitioner filed an Amended Petition for Post-Conviction Relief in the Mississippi Supreme Court. On July 17, 2002, Petitioner filed a Second Amendment and Reply to Response to Amended Petition for Post-Conviction Relief.

On June 19, 2003, the Mississippi Supreme Court granted Petitioner "leave to file in the Sunflower County Circuit Court a motion seeking post-conviction relief vacating his death sentence based upon his alleged mental retardation." *Russell v. State*, 849 So. 2d 95, 102-103 (Miss. 2003). The Court otherwise denied post-conviction relief.

At the time of this remand order Mr. Russell was subject to prosecution in a separate aggravated battery case under docket number 2001-80 in Sunflower County. Issues of Mr. Russell's mental retardation and mental health more generally were raised in those proceedings as they related to possible suppression of statements and sanity at the time of the offense. The litigation of that case was prioritized by the State ahead of the *Atkins* proceeding but the need for an examination of Mr. Russell for the purpose of both proceedings was explicitly canvassed in those proceedings. Mr. Russell was taken to the Mississippi State Hospital for two days of testing by Dr. Gilbert Macvaugh III, Dr. Reb McMichael and Dr. Criss Lott. Those mental health professionals conducted IQ testing, malingering testing, and achievement testing, and also conducted a lengthy clinical interview. The aggravated assault case ultimately proceeded to trial and resulted in an acquittal.

On March 23, 2010, this Court conducted a status hearing in respect of the post-conviction proceedings under *Atkins v. Virginia.* At that status hearing, the state raised its desire to gain access to the full file of the Mississippi State Hospital in relation to its previous examination of Mr. Russell.

On April 8, 2010, the State filed a letter with the circuit court enclosing a proposed order to allow the state access to the reports, records and mental health professionals at the State Hospital "concerning their evaluation and testing of Willie Russell with regards to whether he is mentally retarded within the meaning of *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002)." In the proposed order provided by the State and signed by the Court on May 18, 2010, the following was said:

> Pending before this Court is petitioner's claim that he is mentally retarded within the meaning of *Atkins* v. *Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Petitioner was examined and evaluated on a prior occasion in connection with a then pending aggravated assault case in this Court by the forensic staff at the State Hospital. During that evaluation petitioner was examined to determine whether petitioner was mentally retarded. The State now request that it be furnished any and all reports generated as a result of this evaluation and to further have access to the records and mental health professionals that conducted this evaluation.

Consent Order, May 18, 2010.

On October 2, 2012, this Court granted an enlargement of time within which the State should file its motion for additional testing and evaluation of the petitioner to October 11, 2012.

On October 11, 2012 the state filed its *Motion for Examination of Petitioner Pursuant to Mississippi Supreme Court Decision.*

A hearing on the State's motion was held on December 10, 2012 and May 16, 2013. This Court heard testimony from Dr. Macvaugh, reviewed extensive pleadings and

transcripts from the aggravated assault proceedings, and records from the 2006 testing, including a transcript of the clinical interview. On September 5, 2013, this Court denied the State's motion for a further examination of Mr. Russell. *See* Order Denying Respondent's Motion for Examination of Petitioner Pursuant to Mississippi Supreme Court Decision, *Russell v. State,* No. 10,130 (Cir. Ct. Sunflower Cty. Sept. 5, 2013). After carefully analyzing the evidence, this Court concluded:

> The Court is satisfied that it was the intention of the parties and the court at the time of Mr. Russell's examination by the doctors at the Mississippi State Hospital that the examination then conducted would serve the purposes of the State both in the aggravated assault case and in the post-conviction proceeding. The Court is satisfied that Mr. Russell only consented to that examination with the understanding that as far as possible there would be no duplication of that examination and that Mr. Russell's understanding in this regard stemmed from the statements of the state and the circuit court to this effect.

Order Denying Respondent's Motion for Examination at p.6.

Examining the request for further IQ testing by Dr. Macvaugh III, this Court noted Dr. Macvaugh III's testimony that he had previously assessed Mr. Russell with a WAIS-III and malingering instrument producing a valid IQ score of 75 with no malingering present. *Order Denying Respondent's Motion for Examination* at p.7-8. Additionally, this Court noted that a previous valid IQ score using the WAIS-R with an associated MMPI test had been performed producing a score of 68 with no malingering.

The State also contended that further achievement testing was necessary. However, the Court noted that in 2006 Dr. Macvaugh III had obtained a valid score with the WRAT IV which was consistent with the three previous rounds of achievement testing Mr. Russell had undergone.

Examining the request for a further clinical interview, the Court reviewed the transcript of the three hour interview conducted by Dr. Macvaugh III and his colleagues. The court also heard Dr. Macvaugh's testimony and his description of the areas he would like to cover in a clinical interview for the purpose of assessing mental retardation.

This Court concluded that one of the purposes of the clinical interview in 2006 was to assess Mr. Russell's adaptive functioning in light of the definition of mental retardation. *Order Denying Respondent's Motion for Examination* at p. 11. Further, it found that when Dr. Macvaugh III was questioned about areas he would like to cover in a further interview, "he could identify no significant areas that had not been covered in the earlier interview." *Id.*

Although this Court denied the State's request for a second clinical interview with Mr. Russell, it noted that the State had not investigated other sources of information bearing on Mr. Russell's adaptive functioning, including his functioning before age 18. As the Mississippi Supreme Court has observed, evidence of adaptive functioning is available from a wide range of potential sources, including, but not limited to, school records and work history, as well as interviews with family members, educators, employers, or others in the community familiar with the petitioner. *See Doss v. State,* 19 So. 3d 690, 714 (Miss. 2009); *Goodin v. State,* 102 So. 3d 1102, 1115 (Miss. 2012).

The State filed a petition for interlocutory appeal of this Court's denial of the motion for a second evaluation. After considering the State's petition and Mr. Russell's response, the Mississippi Supreme Court denied the State's motion. Order, *Russell v. State*, No. 2013-M-01618-SCT (December 5, 2013).

On December 11, 2013, this Court directed the parties to submit a scheduling order indicating the discovery deadline and a final hearing date. The Court further directed the parties that "[i]n agreeing upon this deadline, counsel should consider the time necessary to complete all mental assessments and field investigations." Order, *Russell v. State,* No. 10,130 (Cir. Ct. Sunflower Cty. Dec. 11, 2013).

On January 9, 2014, the Court signed the agreed proposed scheduling order, which provided for a hearing to resolve any discovery disputes or other pre-hearing matters by July 23, 2014. The order also provided for a hearing on the merits of the *Atkins* claim for September 8-9, 2014.

On July 23, 2014, the parties submitted an agreed discovery order providing that discovery, including expert reports and other materials, would be provided by August 22, 2014.

Mr. Russell provided discovery on August 22, 2014, listing twenty-three potential witnesses, including two expert witnesses, and attaching affidavits, unsworn statements or reports for each. On August 27, 2014, the State filed a Motion to Continue *Atkins* Hearing, noting that it wished to depose most if not all of the witnesses. On September 3, 2014, the State filed a Motion for Leave to Conduct Oral Depositions.

On September 4, 2014, this Court initiated a telephonic conference to address the pending motions. The State had taken no steps to set a hearing to address these motions. The Court found that the State had not shown good cause for a continuance and that it had been dilatory. Specifically, the Court noted that the State did not seek discovery or file any other motions even though it had agreed in January to the deadlines set.

After counsel for the State learned that Mr. Russell did not intend to call most of the witnesses listed in his discovery notice at the evidentiary hearing, he withdrew his request to depose those witnesses. The Court granted the State leave to conduct depositions of Anne Preziosi and Clementine Harrison from 9:00 a.m. until noon on September 8, 2014.

The evidentiary hearing began on September 8, 2014, after the State had the opportunity to take the depositions. The Court heard testimony from Ms. Preziosi, Ms. Harrison, and Dr. John Goff, a psychologist who met the qualifications set forth in *Chase* for providing expert testimony at an *Atkins* hearing.

At the conclusion of the first day of the hearing, the parties discussed the likelihood of requiring a third day for the hearing. Both parties indicated that they were prepared to extend the hearing to Wednesday, September 10, 2014. Counsel for the State even indicated that he brought an extra shirt in anticipation of having to spend a third day for the hearing.

By the end of September 9, 2014, Mr. Russell had not completed his case. The Court inquired if the parties were available on September 10th, but was informed that the State's proposed witness, Dr. Gilbert Macvaugh, III, had a scheduling conflict. The Court then asked the parties to submit available dates to continue the hearing.

On September 10, 2014, Petitioner filed a Motion to Set Date for Resumption of Hearing. He attached emails from counsel for the State, who stated that "Dr. Macvaugh has unavoidable conflicts through and until May of 2015." The State also asserted in an email that "it is the State's position that my availability is irrelevant if

Dr. Macvaugh is not available." Mr. Russell complained that he would be unfairly prejudiced if the hearing could not be completed promptly because he was aware that the Court was retiring and did not want to have to redo the hearing before a new judge. Mr. Russell urged that a hearing date be set and that if the state's witness was not available on that day, the state could move for a continuance after making the required showing of necessity and unavailability.

Following other emails trying to find an agreeable date, the Court requested a telephonic hearing on Mr. Russell's motion on October 1, 2014. The Court noted that it could attempt to be available on October 10 or 13, and even offered to hold portion of the hearing on Saturday, October 11, 2014, if necessary. The State said that it would attempt to contact Dr. Macvaugh to see if those dates were feasible for him.

On November 18, 2014, having been unable to identify a date agreed to by the parties, the Court entered its "Order Setting Date for Resumption of Hearing" and set aside December 17-18, 2014, for the hearing.

On December 17th, the hearing resumed with Petitioner moving to introduce a number of exhibits. After the Petitioner rested its case, the State moved to introduce several exhibits that it had identified during its cross-examination of Dr. Goff. After the Court ruled on these evidentiary matters, the State rested without calling any witnesses on its behalf.

II. LEGAL STANDARD FOR A DETERMINATION OF MENTAL RETARDATION

The Mississippi Supreme Court set forth the definition and mechanisms to be followed in making a determination as to whether Willie Russell suffers from mental

retardation. In *Chase v. State,* 873 So.2d 1013 (Miss. 2004), the Court set forth the definitions to be utilized in assessing whether a petitioner suffers from mental retardation. There, the Court held:

> ¶ 68. In order to fulfill this requirement, we must provide a definition of mental retardation to be used in our courts.
>
> ¶ 69. The *Atkins* majority cited, with approval, two specific, almost identical, definitions of "mental retardation." The first was provided by the American Association on Mental Retardation (AAMR):
>
> > Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, community use, self-direction, health and safety, functional academics, leisure, and work, Mental retardation manifests before age 18.
>
> *Atkins*, 536 U.S. at 308 n. 3, 122 S.Ct. 2242, citing Mental Retardation: Definition, Classification, and Systems of Support 5 (9th ed.1992). The second was provided by The American Psychiatric Association:
>
> > "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." Diagnostic and Statistical Manual of Mental Disorders 39 (4th ed.2000).
>
> *Id.*
>
> ¶ 70. The Diagnostic and Statistical Manual of Mental Disorders, from which the American Psychiatric Association definition is quoted, further states that "mild" mental retardation is typically used to describe persons with an IQ level of 50-55 to approximately 70. *Id.* at 42-43. The Manual further provides, however, that mental retardation may, under certain conditions, be present in an individual with an IQ of up to 75. *Id.* at 40.

According to the *Atkins* majority, "[i]t is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, *which is typically considered the cutoff IQ score* for the intellectual function prong of the mental retardation definition." *Id. citing* 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 2952 (B. Sadock & V. Sadock eds 7th ed.2000) (emphasis added).

¶ 71. These definitions were previously adopted and approved by this Court in *Foster v. State*, 848 So.2d 172 (Miss.2003). This Court further held in *Foster* that

> the Minnesota Multiphasic Personality Inventory-II (MMPI-II) is to be administered since its associated validity scales make the test best suited to detect malingering. . . . Foster must prove that he meets the applicable standard by a preponderance of the evidence. . . . This issue will be considered and decided by the circuit court without a jury.

Id. at 175.

¶ 72. These definitions, approved in *Atkins*, and adopted in *Foster*, together with the MMPI-II, provide a clear standard to be used in this State by our trial courts in determining whether, for Eighth Amendment purposes, a criminal defendant is mentally retarded. The trial judge will make such determination, by a preponderance of the evidence, after receiving evidence presented by the defendant and the State.

Chase v. State, 873 So.2d at 1027-28.

Later in *Lynch v. State*, 951 So.2d 549 (Miss. 2007), the Court clarified footnote 19 of *Chase*, holding:

¶ 23. Accordingly, in Mississippi it is acceptable to utilize the MMPI-II and/or other similar tests. *Id.* at 1029. This Court did not intend by its holding to declare the MMPI-II or any one test as exclusively sufficient. Having a variety of tests at their disposal, courts are provided with a safeguard from possible manipulation of results and diminished accuracy which might result if courts are limited to one test. The United States Supreme Court mentioned the Wechsler Adult Intelligence Scales Test. *See Atkins*, 536 U.S. at 309 n. 5, 122 S.Ct. 2242. Other tests, as suggested by mental health experts, include the Structured Interview of Reported Symptoms (SIRS), the Validity Indicator Profile (VIP), and the Test of Memory Malingering (TOMM). *See* Douglass Mossman, *Atkins v. Virginia: A Psychiatric Can of Worms*, 33 N.M.L.Rev. 255, 277-78

(Spring 2003).

> ¶ 24. The Court's interpretation in this case as to the proper test to be administered with regard to an *Atkins* hearing supercedes any contrary decisions. This Court neither endorses the MMPI-II as the best test nor declares that it is a required test, and decisions that state otherwise are expressly overruled. *See, e.g. Scott v. State*, 938 So.2d 1233, 1238 (Miss.2006) (holding that despite the doctor's use of a battery of other tests, administration of the MMPI-II is required prior to an adjudication of a claim of mental retardation); *Goodin v. State*, 856 So.2d 267, 277 (Miss.2003) (declaring that the MMPI-II is to be administered for a determination of mental retardation since it is the best test to detect malingering). Our trial courts are free to use any of the above listed and approved tests or other approved tests not listed to determine mental retardation and/or malingering by a defendant.

Lynch, 951 So.2d at 556-57.

Thus, tests other than the MMPI-II can be used to determine malingering. All three of the following prongs must be established by a preponderance of the evidence in order for a petitioner to be adjudicated as being mentally retarded pursuant to *Atkins*: (1) subaverage intellectual functioning (2) accompanied by significant limitations in at least two adaptive skills (3) that manifest before age eighteen. *See Goodin v. State*, 102 So.3d 1102, 1104 (Miss. 2012).

III. EVIDENCE PRESENTED

At the merits hearing of Petitioner's *Atkins* claim, Mr. Russell called three witnesses to testify including Clementine Harrison, Anne Preziosi, and one expert witness, Dr. John Goff. In addition, Mr. Russell moved into evidence over thirty exhibits, though several of those were admitted for only limited purposes.

Each of the witnesses is addressed in the order of their testimony at the hearing.

A. CLEMENTINE HARRISON

Ms. Harrison testified that she was currently employed as a solicitor in Britain but that in 2007 she had worked for Mr. Russell's attorneys as a volunteer. Harrison testified as to various interviews of some twenty (20) individuals she either conducted or attended from which she obtained statements. She also testified regarding educational records of the petitioner she obtained from Reuben Elementary School and Davis Elementary School.

Ms. Harrison described identifying the prospective witnesses initially through the educational records that had been obtained and then, as witnesses were interviewed, those interviews would identify additional witnesses who could be visited. Ms. Harrison testified that Mr. Russell did not provide information relevant to identifying any of the witnesses she interviewed.

Ms. Harrison described the process she undertook to interview each witness and the way in which she prepared a witness statement attempting to use language as close to the verbatim words of the witness as possible. Ms. Harrison described reviewing the drafted statement with each witness and encouraging the witness to make any corrections or edits, which were then initialed.

Many of the statements obtained by Ms. Harrison were later adopted in sworn affidavits by the witnesses. The statements and affidavits were provided to Dr. John Goff. Dr. Goff testified that he personally interviewed a number of the witnesses from whom Ms. Harrison obtained statements and found their accounts to be very consistent with those reflected in the statements. The State offered no evidence to suggest that any of the statements misrepresented the account of the witnesses.

B. ANNE PREZIOSI

Petitioner next called Anne Preziosi. Ms. Preziosi testified that she was currently employed as a response to intervention counselor at Langston Hughes Academy in New Orleans, having previously been trained and served as a special education teacher. Ms. Preziosi testified that beginning in 2007 she was employed as a mitigation specialist at the law offices of Mr. Russell's lead counsel. She testified that she had no formal training as a mitigation specialist with regard to mental retardation. Ms. Preziosi was initially offered as an expert witness, but upon the showing made the Court declined to qualify her as an expert witness, and she testified as a lay witness.

Ms. Preziosi testified that as a part of her duties as a mitigation specialist she assumed responsibility for the investigation of Mr. Russell's adaptive functioning from Ms. Harrison after a period during which they co-worked the investigation.

Ms. Preziosi testified to her involvement in identifying and obtaining statements from witnesses. Ms. Preziosi described identifying the prospective witnesses through the educational records that had been obtained and by obtaining a staff list from Hinds County Schools. She also testified that witnesses were identified by reviewing those who had testified at trial, including family members. She testified that when witnesses were interviewed she would ask if they knew of other people who knew Mr. Russell and in that way would identify additional witnesses. Ms. Preziosi testified that Mr. Russell did not provide information relevant to identifying any of the witnesses she interviewed.

Ms. Preziosi described meeting and interviewing many of the witnesses who had already been interviewed by Ms. Harrison and stated that the content of those statements was consistent with the statements taken by Ms. Harrison.

Like Ms. Harrison, Ms. Preziosi described the process she undertook to interview each witness and the way in which she prepared a witness statement attempting to use language as close to the verbatim words of the witness as possible. Ms. Preziosi also described reviewing the drafted statement with each witness and encouraging the witness to make any corrections or edits, which were then initialed.

Many of the statements obtained by Ms. Preziosi were later adopted in sworn affidavits by the witnesses. The statements and affidavits were provided to Dr. Goff. Dr. Goff testified that he personally interviewed a number of the witnesses from whom Ms. Preziosi obtained statements and found their accounts to be very consistent with those reflected in the statements. The State offered no evidence to suggest that any of the statements misrepresented the account of the witnesses.

C. DR. JOHN GOFF

i. Qualifications

Petitioner concluded by calling Dr. John Goff, a clinical psychologist and neuropsychologist based in Tuscaloosa, Alabama who is licensed in the state of Mississippi.

Dr. Goff has practiced as a psychologist for 37 years and has been actively involved in the diagnosis and treatment of persons with mental retardation throughout his entire career. He currently operates a private practice, including consulting in forensic cases. Dr. Goff has been approved as an expert consultant by the Office of the Social

Security Administration and works as a panel consultant assessing people for mental retardation, among other things, at the request of the Disability Determination Service. He also serves as a hearing consultant retained by administrative judges to assist them in their review of disability determinations.

Dr. Goff is a life member of Division 33, the division of the American Psychological Association dealing with issues of mental retardation as well as being a member of Divisions 40 (neuropsychology) and 41 (psychology and the law). Dr. Goff has undertaken training in forensic psychology as well as the application of *Atkins v. Virginia,* 536 U.S. 304 (2002).

Dr. Goff has been trained in and administered several different tests of intelligence, in particular, the WAIS, WAIS-R, WAIS-III and WAIS-IV. He has extensive experience in the administration and interpretation of these tests. Dr. Goff has also been trained in and has extensive experience in administering and interpreting tests of adaptive functioning including the Vineland, ABAS and WRAT series of tests.

Dr. Goff has extensive experience as an expert witness in courts, including criminal courts and has been qualified as an expert in courts in Mississippi, Alabama, Florida, North Carolina, Tennessee and federal courts. Dr. Goff has been involved in a forensic context in the evaluation of over one hundred capital defendants and has testified or provided expert services in a number of cases both pre-trial and post-conviction in which the application of *Atkins v. Virginia,* 536 U.S. 304 (2002), was at issue.

Dr. Goff testified that he had applied reliable principles and methods for assessing mental retardation to the case of Mr. Russell and found that there were sufficient facts or data upon which to form an opinion.

The Court qualified Dr. Goff as an expert and found that his testimony was based on sufficient facts or data and that it was the product of reliable principles and methods. In particular, pursuant to *Chase,* the Court received Dr. Goff as an expert in the field of assessing mental retardation, the administration and interpretation of tests, and the evaluation of persons for the purposes of determining mental retardation.

ii. Sources of Information

Dr. Goff testified that he received numerous records for review in assessing Mr. Russell. Dr. Goff testified that he received a packet of materials from the Mississippi State Hospital including a case report prepared by Dr. McMichael along with the 537 items of information referred to in that report.

Dr. Goff received and reviewed education records relating to Mr. Russell and his time at Reuben Elementary, Davis Elementary, Sumner Hill High School, Lovett Elementary and Hinds Community College. In addition to educational grades and related information, these records contained the results of multiple administrations of achievement tests.

Dr. Goff received and reviewed educational or health records in relation to family members of Mr. Russell, his sisters Rosie Russell and Mary Russell and his nephew Phillip Russell.

Dr. Goff received and reviewed raw data relating to the administration of a WAIS by Dr. Stanley in 1990, raw data and a report relating to the administration of a WAIS-R by Dr. Macvaugh, Jr., in 1990; and, raw data and a report relating to the administration of a WAIS-III by Dr. Macvaugh III in 2006. Dr. Goff also received the raw data from the

Symptom Validity Test, Green Word Memory Test and Wide Range Achievement Test (WRAT) IV, administered in the 2006 evaluation by Dr. Macvaugh, III and Dr. Lott.

Dr. Goff personally interviewed eleven witnesses about Mr. Russell's adaptive functioning during his developmental period: Rosie Russell (Mr. Russell's older sister with whom he lived for part of his childhood); Ms. Louise Robinson (Mr. Russell's aunt with whom he lived for his first two years); Helen Robinson (Mr. Russell's aunt with whom he lived along with Louise Robinson); Mr. Walter Kelly (a childhood neighbor of Mr. Russell); Mr. Sidney Kelly (a neighbor and football teammate of Mr. Russell); David Perkins (a cousin of Mr. Russell with whom he lived for a period); Mr. James Paul Luby (a retired teacher who taught Mr. Russell 10th grade English); Mr. Sherman Matthews (a retired teacher who had coached Mr. Russell in football and taught him drivers education); Ms. Linda Fay Bowie (a former girlfriend of Mr. Russell); Mr. Robert Frith (a retired teacher and basketball coach of Mr. Russell); and Mr. Gerald Jenkins (a former employer of Mr. Russell at Southern Beverage). With the exception of Helen Robinson and Gerald Jenkins, Dr. Goff also received sworn affidavits from each of these witnesses. Dr. Goff administered a test of adaptive functioning, the ABAS-II, to Linda Bowie but was unable to identify another witness with sufficient knowledge of the defendant across different spheres of behavior coupled with sufficient cognitive ability to produce a valid test result.

Dr. Goff also received sworn affidavits from an additional ten witnesses: Charles Carter (retired teacher who had taught industrial arts to Mr. Russell); Alfanette Gibson (high school classmate of Mr. Russell); Clementine Harrison (identified and took statements from other witnesses); Cheyenne Hughes (former Sumner Hill teacher who

confirmed inaccuracies in Mr. Russell's school records and that his grades appear to have been padded); Lee Horton James (schoolmate of Mr. Russell who worked with him on a road crew for two summers); Richard Jordan (fellow death row inmate of Mr. Russell who claimed authorship of some of Mr. Russell's correspondence); Anne Preziosi (identified and took statements from other witnesses); Mynetta Mace Smith (Mr. Russell's second grade teacher); Ginger Turner (former director of Admissions and Records at Hinds Community College); and Alphonso White (former neighborhood and school mate of Mr. Russell).

Dr. Goff also received unsworn statements from a further eight witnesses: Hughes Clayton (former school counselor at Sumner Hill); Rebecca Harper (former special education teacher at Sumner Hill High School (deceased)); Lillian Hodge (former teacher at Sumner Hill High School); Vanya Kelly (neighbor and mother of school mates of Mr. Russell); Linda Palmer (childhood neighbor of Mr. Russell); Wesley Quinn (former workmate of Mr. Russell at Southern Beverage); Doris Smith (sixth and seventh grade teacher of Mr. Russell (deceased)); and Cynthia Span Tyner (former girlfriend of Mr. Russell).

Dr. Goff personally interviewed Mr. Russell on August 1, 2014, at Mississippi State Penitentiary for slightly more than an hour. During the interview he administered the Reitan-Indiana Aphasia Screening Test and the 21-Item Memory Test, but testified he could not administer an academic achievement assessment due to the environment.

Dr. Goff prepared a report based upon his assessment which was admitted into evidence at the hearing.

The Court has carefully reviewed the testimony at the hearing and the exhibits admitted into evidence. The Court is satisfied that Dr. Goff applied reliable principles and methods in forming his opinion that Mr. Russell suffers from mental retardation. Further, the Court is satisfied that Dr. Goff relied upon sufficient, reliable facts and data as the basis for his opinion and that he appropriately placed different weight upon different sources of information.

iii. Results of Prior Intelligence Testing

Dr. Goff advised that one of the criteria for an assessment of mental retardation is whether a person has significantly subaverage intellectual functioning. A finding for that criteria is generally based on the administration of an appropriate IQ test. A person may be found to meet this prong of the test for determining mental retardation if the score on an IQ test is at or around two standard deviations below the mean. This typically requires a score of seventy with a standard error of measurement of 5. That is, a full scale IQ score of 75 or below would satisfy the first prong of the test.

Dr. Goff described a phenomena generally accepted in the psychological and psychiatric community known as the Flynn Effect, whereby there is an inflation of IQ scores as the norms for those test instruments' age. Dr. Goff explained that to account for this effect, IQ scores should be adjusted at a rate of .3 points per year from the date the tests were normed until the date the test was administered.

In the present case, the only two valid IQ scores fall within the range of 75 or below without applying a Flynn correction and so the use of a Flynn correction is not critical to this Court's findings. Nevertheless, the Court accepts Dr. Goff's description of

the Flynn Effect and the need to make a Flynn adjustment in order to accurately interpret IQ scores and the extent to which they demonstrate that the test subject is performing at or around two standard deviations below the mean. The Court notes that Dr. Macvaugh provided similar testimony in a motions hearing in this proceeding.

Dr. Goff testified that Mr. Russell was administered the WAIS in 1990 by Dr. Stanley and received a full scale IQ score of 76. However, the WAIS was normed in 1955 and was obsolete by the time of its administration in 1990, having been replaced by the WAIS-R. Dr. Goff testified that the results of the WAIS should not be regarded as valid but if they were to be considered they would have to be corrected for the Flynn Effect, resulting in a full scale IQ score of 66. In addition, Dr. Goff testified that there were scoring errors in the WAIS that had inflated the score. The Court is satisfied that the WAIS testing by Dr. Stanley should not be regarded as valid though, in any event, considering scoring errors and the Flynn Effect, the results are consistent with a finding of mental retardation.

Dr. Goff testified that Mr. Russell was administered the WAIS-R in 1990 and received a full scale IQ score of 68. Applying a correction for the Flynn Effect, the full scale IQ score would be 65.

Dr. Goff testified that Mr. Russell was administered the WAIS-III in 2006 and received a full scale IQ score of 75. Applying a correction for the Flynn Effect, the full scale IQ score would be 72. Dr. Goff testified that this was a valid test, producing a valid test score including the use of a malingering instrument which disclosed no indications of malingering. Dr. Goff testified that this test and score satisfied the first prong of the test for mental retardation.

Dr. Goff did not administer his own IQ test under the belief that the court had directed that no further IQ testing would be conducted. While acknowledging that the WAIS-IV was a more up to date and scientifically advanced test of intelligence, Dr. Goff opined that the prior WAIS-III and WAIS-R test results provided sufficient data to make a determination that Mr. Russell has significantly subaverage intellectual functioning. In expressing this opinion, Dr. Goff pointed out that the results of the prior IQ testing were not only valid but were supported by the previous childhood assessments and other information available in the case.

iv. Academic Progress and Achievement Testing

Dr. Goff's testimony, report, and the school records reflected Mr. Russell's academic progress as follows.

Mr. Russell achieved only failing grades in his first attempt at first grade at Reuben Elementary in 1966-67 and was recorded as dropping out. The next year, he repeated first grade at Reuben Elementary but "moved away" part way through the year. That same year he was enrolled directly into second grade at Lovett Elementary School where he achieved F's and D's in the second semester and was referred to special education. Dr. Goff testified that at that time a finding of mental retardation would likely have been necessary for placement in special education. This opinion was corroborated by the sworn statement of former teacher, Ms. Mynetta Mace Smith. Unsworn statements reviewed by Dr. Goff were consistent with this opinion.

Placed in special education in 1968-69, Mr. Russell still managed to achieve only C's and D's. Mr. Russell was administered an achievement test, the Stanford

Achievement Test, during this year and achieved scores resulting in a grade equivalence of 1.1 when chronologically he should have been in the third grade.

There were no clear records available for the following year, but in 1970-71 he was enrolled in the fourth grade at Davis Elementary and received scores of Very Low and Low. The record shows him as being transferred rather than promoted.

In 1971-72, Mr. Russell began fifth grade at Lovett Elementary receiving mainly C's and D's. In February of 1972, Mr. Russell took the California Achievement Test and received a nationally normed score for total math in the first percentile, meaning 99% of the population would do better than Mr. Russell. This is the lowest score available. Mr. Russell achieved a score in the third percentile for his total language score.

In 1972-73, Mr. Russell was in the sixth grade at Lovett Elementary and was awarded D's and C's. Mr. Russell was administered the California Test of Mental Maturity in November of 1972 when he was 12 years and 2 months old. His results showed a mental age of eight years and four months, an intellectual status index of 70 and a total score of 75. However, Dr. Goff testified that this score was inflated because the test giver had incorrectly identified Mr. Russell's age as 11 years and 2 months. This meant that Mr. Russell's performance was being considered against the norms for children a year younger than him, thus allowing him to receive scores higher than he should have. Dr. Goff pointed out that this test was not to be regarded as a reliable intelligence test such as the WAIS series of tests and was, in any event, incorrectly scored. For this reason, Dr. Goff did not place weight on these test results which were, in any event, consistent with the other evidence of Mr. Russell's mental retardation.

While in sixth grade, Mr. Russell was also administered the Slosson Intelligence Test, though results were not available for that test. Dr. Goff had available to him the unsworn statements of Mr. Russell's sixth grade teacher, Doris Smith, and the then special education teacher, Rebecca Harper, both of whom are now deceased. The content of those statements was consistent with the other available evidence of mental retardation, indicating that Mr. Russell had tested in the educable mentally retarded range and then been socially promoted to the seventh grade.

In 1973-74, Mr. Russell was in the seventh grade at Sumner Hill High School and achieved only F's and D's. He was not promoted and repeated the seventh grade in the following year. California Achievement Test results from that year place Mr. Russell at a grade equivalence of 3.3. While Mr. Russell performed better on some sub-tests than others, his scores were very low and his total score placed him in the third percentile.

In 1974-75, Mr. Russell appears to have repeated the seventh grade and the scant academic record shows him receiving F's in arithmetic, science and social studies but nevertheless being promoted to the eighth grade.

In 1975-76, Mr. Russell should have been commencing the eighth grade for the first time but instead show him as being enrolled in the ninth grade where he is recorded as receiving mainly D's, an F and a C. California Achievement Test results from that year place Mr. Russell at a grade equivalence of 4.7. Once again, Mr. Russell's scores were very low and his total score placed him in the fourth percentile.

In 1976-77, Mr. Russell undertook the tenth grade and his academic record shows D's and C's. In 1977-78, Mr. Russell undertook the eleventh grade, taking only three subjects and failing English III but nevertheless being promoted to twelfth grade.

Mr. Russell's records for the twelfth grade show him graduating, including achieving a D in English III and a B in English IV. Dr. Goff described these results as broadly inconsistent with Mr. Russell's results on achievement testing through that period.

Dr. Goff testified that in his opinion the high school educational records were not a correct and accurate accounting of Mr. Russell's functioning. Dr. Goff interviewed a number of teachers who described a tradition of social promotion at Sumner Hill High school at that time and who highlighted numerous inconsistencies and apparent errors in the academic record in Mr. Russell's later years of school. These former teachers confirmed Dr. Goff's opinion that the academic record was not accurate and overstated Mr. Russell's abilities. These interviews were corroborated by the sworn affidavits of the teachers interviewed by Dr. Goff as well as others he did not interview and were also consistent with the unsworn statements of other teachers.

One of the teachers interviewed by Dr. Goff was Mr. James Luby, Mr. Russell's tenth grade English teacher. Notably, Mr. Luby had been named by the legislature as Mississippi's 1990 Teacher of the Year and appointed to represent the State in the National Teacher of the Year Program. Mr. Luby pointed out to Dr. Goff and in his affidavit the impossibility of Mr. Russell achieving the scores he was given in twelfth grade in English III and English IV and that it would not, in any event, have been permissible for Mr. Russell to take the two subjects in the same year. Mr. Luby confirmed the practice of social promotion at the school and advised Dr. Goff that Mr. Russell was clearly socially promoted, rather than promoted on merit.

Records from Hinds County Community College indicate that Mr. Russell was enrolled following graduation but Dr. Goff testified that all that was required for enrollment was a high school diploma and that it appeared that Mr. Russell did not attend the courses.

In 1990, following his incarceration, Mr. Russell was also screened for academic achievement by Dr. Macvaugh, Jr., who found him to be performing at a third grade level. As a part of the assessment by Dr. Macvaugh, III and Dr. Lott in 2006, Mr. Russell was administered the WRAT-IV and achieved a grade level equivalency of 4.3 for word reading, 3.8 for math, and 6.0 for sentence comprehension. Dr. Goff testified that these results were consistent with Mr. Russell's tested IQ.

v. ***Social History and Adaptive Functioning***

Dr. Goff testified that the second prong of the test for mental retardation related to the ability of the individual to function adequately in the environment in a number of different areas. Dr. Goff testified that the definitions adopted by the *Atkins* and *Chase* courts describe the need to identify deficits in two out of ten listed areas of adaptive functioning. Dr. Goff explained that since that time the ten categories have been condensed into three categories and a deficit need only be found in one area. In deference to the Mississippi Supreme Court's holding, Dr. Goff addressed the definition as adopted in *Chase*.

Dr. Goff testified that the records he reviewed showed that Mr. Russell's sisters, Rosie and Mary, had been diagnosed with mental retardation. Mr. Russell's nephew, Phillip, had also been diagnosed with mental retardation. Witnesses described Mr.

Russell's father, Willie Russell Sr., as being slow and stated that his whole side of the family was slow. Dr. Goff testified that there is a relationship between the presence of mental retardation in families and the status of other individuals in the family such that those individuals have a higher probability of being mentally retarded.

In addition to reviewing a large volume of records, Dr. Goff personally interviewed three teachers, a former employer, four family members, two neighbors and a former girlfriend. He also reviewed affidavits from three additional teachers, a school administrator, three class mates and a prisoner who writes letters for Mr. Russell. Dr. Goff also had available to him unsworn statements from another four teachers, two neighbors, a co-worker and a former girlfriend.

In Dr. Goff's opinion, these sources of information provided a consistent picture of Mr. Russell suffering from significant impairments across a wide range of adaptive areas throughout his life.

Dr. Goff identified evidence of developmental delay, with Mr. Russell being slow in sitting up, learning to reach for objects, learning to walk and learning to talk. Even as he grew older, Mr. Russell was described as needing extra assistance throughout his childhood.

Mr. Russell's academic progress has been detailed above and describes a young man who failed the first grade, the second grade and the seventh grade, spent time in special education due to his cognitive limitations and, ultimately, was socially promoted through high school, including graduation. Mr. Russell's achievement scores as a child and into adulthood consistently describe him as performing at a very low level and never performing above an elementary school level.

In addition to his poor academic progress, Mr. Russell's teachers consistently observed and described his significant adaptive limitations. Dr. Goff testified that Mr. Russell's physical education teacher when he was thirteen (13) to fifteen (15) years old, Robert Frith, said the petitioner was not "cognitively capable of playing high school basketball because he couldn't learn the plays" and that the petitioner "wasn't able to tie his shoes." Other high school teachers also commented on Petitioner's inappropriate behavior in social situations and his gullibility.

While it is true that Mr. Russell served as quarterback in his high school football team for a period, his coach advised that this was principally due to his unusual size and that he could only learn one play. When the team needed any other plays run, they would substitute in another player. Mr. Russell's basketball coach provided similar information, that despite the advantage of his imposing size, Mr. Russell could not learn the basketball plays and failed every physical education test he was given. Similar information was provided by Mr. Russell's peers from that period.

As an adult, Mr. Russell lived in the care of his aunt and with his cousin, David Perkins. Mr. Perkins described Mr. Russell as being unable to perform all but the most basic household chores without assistance and not being able to cook any more than an egg. Even as an adult Mr. Russell needed assistance in caring for himself, such as remembering to bathe and have his hair cut. Mr. Russell was employed but on each occasion in jobs that were consistent with his low intellectual functioning. Witness accounts suggested that Mr. Russell could not manage money either as a child or an adult. He did not have a bank account and needed assistance to ensure that he received the correct amount of money when he cashed his check or made purchases in stores.

A number of people from different areas in Mr. Russell's life described his poor social skills and inability to communicate or interact appropriately.

Dr. Goff testified that he personally interviewed Mr. Russell for shortly over an hour at Mississippi State Penitentiary. Dr. Goff administered the Reitan-Indiana Aphasia Screening Test and the 21-Item Memory Test in order to get a feel for Mr. Russell and assess his response style. He found Mr. Russell to be straightforward and honest in his response style with no signs of malingering. His impression of Mr. Russell was consistent with his ultimate diagnosis of mental retardation.

vi. Dr. Goff's Opinion

Dr. Goff expressed his opinion to a reasonable degree of psychological certainty that Mr. Russell suffered from mental retardation.

Dr. Goff opined that there was valid IQ testing with associated malingering measures in the form of a 2006 WAIS-III full scale IQ score of 75 (Flynn adjusted to 72). Dr. Goff also noted a 1990 WAIS-R full scale IQ score of 68 (Flynn adjusted to 65).

Dr. Goff also opined that there was clear evidence of significant adaptive deficits in two or more areas of adaptive functioning, in particular: functional academics, home living; health and safety; and social skills. Dr. Goff also opined that there were numerous other indications of significant adaptive deficits but that these findings were more than adequate to make the diagnosis.

Dr. Goff opined that there was ample evidence of onset prior to the age of 18. Based on these findings, Dr. Goff concluded that Mr. Russell met the criteria for a finding of mental retardation to a reasonable degree of scientific certainty.

D. STATE'S WITNESSES

At the close of Petitioner's case, the State of Mississippi announced for the first time that it did not intend to call Dr. Macvaugh III or present any other evidence. The State announced that it was presenting no evidence as a result of the Court's earlier order preventing Dr. Macvaugh III from re-testing Mr. Russell.

This Court denied the State's application to re-test Mr. Russell on September 5, 2013, and the Mississippi Supreme Court declined the State's application for interlocutory appeal on December 5, 2013. In January of 2014, the merits hearing in this case was scheduled for September 8, 2014, which is approximately seven months later. On August 22, 2014, pursuant to an agreed order, the State received in discovery Dr. Goff's report along with the records and the statements of the witnesses relied upon by Petitioner in the hearing. The State had the benefit of hearing all of the testimony from Petitioner's witnesses on September 8th and 9th and was not called upon to begin its case until December 17, 2014.

The Court notes that Dr. Macvaugh III was present in court throughout the presentation of the Petitioner's case and actively consulted with counsel for the State. Indeed, after the hearing was continued, the Court expended considerable effort to secure a date upon which Dr. Macvaugh III could attend and testify.

There was no motion filed seeking the continuance of the hearing set for December 17-18, 2014.

In short, the State had ample time and information upon which to conduct an investigation of Mr. Russell's adaptive functioning and to investigate and seek to rebut Petitioner's case.

To the extent that it could have done so without needing to re-test or re-interview Mr. Russell, the choice not to present any evidence in its case is the choice of the State alone and not dictated by any ruling of this court.

There is no evidence before the court as to Dr. Macvaugh III's opinion in light of the evidence developed through Dr. Goff, the additional records, the affidavits, the other witness interviews and the live testimony of the hearing. The State did not make any offer of proof or provide a report from Dr. Macvaugh III indicating his view on Mr. Russell's mental retardation.

IV. FINDINGS AND CONCLUSIONS OF LAW

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that the execution of mentally retarded individuals violates the Eighth Amendment, but left to the states the task of defining mental retardation and "developing appropriate ways to enforce thi[s] constitutional restriction." *Id.* at 317.

The Mississippi Supreme Court set forth the definition and mechanisms to be followed in making a determination as to whether Willie Russell suffers from mental retardation. In *Chase v. State*, 873 So.2d 1013 (Miss. 2004), the Court set forth the definitions to be utilized in assessing whether a petitioner suffers from mental retardation.

All three of the following prongs must be established by a preponderance of the evidence in order for a petitioner to be adjudicated as being mentally retarded pursuant to *Atkins*: (1) subaverage intellectual functioning (2) accompanied by significant limitations in at least two adaptive skills (3) that manifest before age eighteen. *See Goodin v. State*, 102 So.3d 1102, 1104 (Miss. 2012).

In *Chase*, the Supreme Court held that the circuit court, sitting without a jury, would be responsible for considering and deciding whether the petitioner is mentally retarded. *Chase*, 873 So. 2d at 1028. The court further established these guidelines for determining mental retardation.

> We hold that no defendant may be adjudged mentally retarded for purposes of the Eighth Amendment, unless such defendant produces, at a minimum, an expert who expresses an opinion, to a reasonable degree of certainty, that: 1. The defendant is mentally retarded, as that term is defined by the American Association on Mental Retardation and/or The American Psychiatric Association; 2. The defendant has completed the Minnesota Multiphasic Personality Inventory-II (MMPI-II) and/or other similar tests, and the defendant is not malingering.

Id. at 1029.

These holdings were reflected in the Court's remand order in Mr. Russell's case:

After careful consideration we find that Russell should be granted leave to proceed in the trial court on the sole issue of whether he is mentally retarded such that he may not be executed under *Atkins v. Virginia*. To that end the standard or definition of mental retardation shall be that enunciated by the Supreme Court in Atkins, especially the American Psychiatric Association's definition of mental retardation. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders IV 39-46 (4th ed. 1994).

One important modification of the court's jurisprudence must be observed. Since the remand order in Mr. Russell's case, the Mississippi Supreme Court has revised its rule requiring the use of the MMPI as a test of malingering and now permits trial courts to rely upon any appropriate test of malingering:

> The Court's interpretation in this case as to the proper test to be administered with regard to an Atkins hearing supercedes any contrary

> decisions. This Court neither endorses the MMPI-II as the best test nor declares that it is a required test, and decisions that state otherwise are expressly overruled. See, e.g. *Scott v. State*, 938 So.2d 1233, 1238 (Miss. 2006) (holding that despite the doctor's use of a battery of other tests, administration of the MMPI-II is required prior to an adjudication of a claim of mental retardation); *Goodin v. State*, 856 So.2d 267, 277 (Miss. 2003) (declaring that the MMPI-II is to be administered for a determination of mental retardation since it is the best test to detect malingering). Our trial courts are free to use any of the above listed and approved tests or other approved tests not listed to determine mental retardation and/or malingering by a defendant.

Lynch v. State, 951 So. 2d 549, 557 (Miss. 2007)(emphasis added).

Pursuant to *Lynch*, this Court understands the order remanding Mr. Russell's case to be modified to the extent that it no longer requires that the MMPI-II be administered but instead requires that valid testing of intellectual functioning be accompanied by appropriate testing designed to determine the presence or absence of malingering.

A second modification to the original order in *Chase* was recently announced in that same case:

> In our remand order, we set forth certain requirements for a finding of mental retardation, but we did not directly address whether a psychologist or psychiatrist could render opinions based upon tests administered by other professionals. We take this opportunity to further clarify our previous remand order by stating that – subject to the requirements of Mississippi Rule of Evidence 702, n3 – psychologists and psychiatrists rendering opinions on mental retardation in death penalty cases may rely on the testing administered by others.

Chase v. State, 112 So. 3d 421 (Miss. 2013)

The Mississippi Supreme Court has provided guidance in assessing the first prong of the test, relating to significantly sub-average intellectual functioning. The first prong may be satisfied by proof of a full scale IQ score of 75 or below:

> The Diagnostic and Statistical Manual of Mental Disorders, from which the American Psychiatric Association definition is quoted, further states

> that "mild" mental retardation is typically used to describe persons with an IQ level of 50-55 to approximately 70. *Id.* at 42-43. The Manual further provides, however, that mental retardation may, under certain conditions, be present in an individual with an IQ of up to75. n18
>
> > 18 This point is conceded by the State. However, IQ, alone, does not determine mental retardation. According to the DSM-IV, "it is possible to diagnose Mental Retardation in individuals with IQ's between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning."

Chase, 873 So. 2d at 1028 (quoting DSM-IV at 40). The court in *Goodin* recently confirmed this point:

> Persons with an IQ of 50-55 to 70 typically are described as having "mild mental retardation," but "mental retardation may, under certain conditions, be present in an individual with an IQ of up to 75." Chase, 873 So. 2d at 1028 (quoting Atkins, 536 U.S. at 308 n.3).

Goodin v. State, 102 So. 3d 1102 (Miss. 2012); *Chase* (*supra*)("Thus, it is possible to diagnose Mental Retardation in individuals with IQ's between 70 and 75 who exhibit significant deficits in adaptive behavior.")

Addressing the need for a retrospective assessment of adaptive functioning to satisfy the second prong of the test, the Mississippi Supreme Court recently stated:

> We have held that courts and experts are free to use any approved test to determine mental retardation, including adaptive functioning. *Id.* at 712-13 (quoting *Lynch*, 951 So. 2d at 556-57). However, because the definitions of mental retardation require onset before age eighteen, when evaluating anyone over the age of eighteen — incarcerated or not — some type of retrospective analysis must be employed. See *Thorson v. State*, 76 So. 3d 667, 672 n.8 (Miss. 2011) ("The onset of mental retardation for Atkins has to be before the defendant is older than eighteen years of age. Accordingly, Dr. Swanson had to apply her Vineland tests retrospectively on Thorson, now a middle-aged man."). We adopt the reasoning of a

Louisiana federal district court, which endorsed the use of retrospective analysis in *Atkins* hearings:

> Unlike in a medical, educational, or social services context, the law is concerned with what was rather than what is. The point of an Atkins hearing is to determine whether a person was mentally retarded at the time of the crime and therefore ineligible for the death penalty, not whether a person is currently mentally retarded and therefore in need of special services. Because of this, the diagnosis of mental retardation in the Atkins context will always be complicated by the problems associated with retrospective diagnosis. These problems are only compounded by the fact that both the APA and AAMR define mental retardation as a developmental disability and limit the diagnosis to those persons who exhibited the required characteristics prior to age 18. As those under the age of 18 are already constitutionally ineligible for the death penalty, *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), no clinician evaluating a person for purposes of an Atkins hearing will ever be evaluating the person prior to age 18. Mental retardation in the *Atkins* context must therefore be diagnosed, if it is to be diagnosed at all, retrospectively in every sense of the word.
>
> *United States v. Hardy*, 762 F. Supp. 2d 849, 881-82 (E.D. La. 2010). This Court has noted the importance of interviewing family and friends knowledgeable about the defendant's past. See *Doss*, 19 So. 3d at 714. Interviews with educators or others in the community familiar with the defendant's behavior before age eighteen also would provide valuable information. Adaptive-functioning tests may be administered to these individuals as well. A retrospective evaluation also could include a thorough review of school records, social history, and work history, among other things.

Goodin v. State, 102 So. 3d 1102, 1114-1115 (Miss. 2012).

As to the third prong, the mental retardation must manifest before the age of 18. *Chase*, 873 So. 2d at 1023.

The Court is satisfied that Petitioner has demonstrated by a preponderance of the evidence that he suffers from mental retardation as defined in *Atkins* and *Chase* and that he is ineligible to receive the death penalty under the Eighth Amendment.

The Court accepts the testimony of expert psychologist, Dr. John Goff. Dr. Goff is a psychologist licensed in the state of Mississippi who is an expert in the field of assessing mental retardation, the administration and interpretation of tests, and the evaluation of persons for the purposes of determining mental retardation.

Dr. Goff's testimony was based upon sufficient facts and data and was the product of reliable principles and methods in assessing mental retardation. Dr. Goff conducted the type of retrospective assessment of adaptive functioning described by the court in *Goodin* and by Drs. Macvaugh III and Cunningham in their article, which was admitted as a State's exhibit in the hearing. Gilbert S. Macvaugh, III and Mark D. Cunningham, "*Atkins v. Virginia*: Implications and Recommendations for Forensic Practice, 37 Journal of Psychiatry & Law 131, 164 (Fall 2009).

This Court finds Dr. Goff to be a credible and reliable expert who was forthright in his evidence and made appropriate determinations as to the reliability and weight of the facts and data upon which he relied.

This Court is satisfied that the evidence of IQ testing discussed during the hearing satisfies the first prong of the test for mental retardation and that it has been accompanied by appropriate testing which has excluded the presence of malingering. While the Court acknowledges that a more recent IQ test has been developed which has not been administered to Mr. Russell, the Court accepts and agrees with Dr. Goff's testimony that the available data is sufficient to conclude that Mr. Russell has significantly subaverage intellectual functioning and satisfies the first criteria for mental retardation. The WAIS-III was an appropriate instrument to be given in 2006. Mr. Russell scored within the range for finding a person to have significant subaverage intellectual functioning

(whether or not the Flynn effect is accounted for), and Mr. Russell did not malinger on the 2006 test. The results of prior testing are consistent with the results of the 2006 WAIS-III.

This Court accepts Dr. Goff's opinion and agrees that there is ample evidence of significant adaptive deficits in functional academics, home living, health and safety and social skills. The Court accepts and agrees with Dr. Goff's opinion that there is substantial evidence of significant adaptive deficits in other areas but that the present findings are more than sufficient to satisfy the second criteria for a finding of mental retardation.

While it is true that Mr. Russell graduated from high school, it is equally clear that his reported performance is inconsistent with all previous and subsequent measures of achievement or intelligence. As Dr. Macvaugh and Dr. Cunningham point out in their article, "[i]t is often useful to request the assistance of a school official from the local school system who can help to interpret the meaning of school records, particularly when they appear inconsistent or contradictory." Macvaugh and Cunningham, *supra*, at 163. The practice of social promotion is well known and Dr. Goff identified direct evidence that social promotion had been practiced at Mr. Russell's school and in Mr. Russell's specific case. The need to interpret academic records in light of the phenomena of social promotion is explicitly acknowledged in the Macvaugh III and Cunningham article offered into evidence by the state: "[c]are must also be taken in interpreting grades reports for children who were in special classes or subject to social promotion." *Id.* This court accepts the opinion of Dr. Goff that Mr. Russell was socially promoted and that this, rather than any academic ability, explains his graduation from high school.

This court accepts and agrees with Dr. Goff's opinion that there is ample evidence that the disorder manifested before the age of 18.

Based on the above findings, this Court finds by a preponderance of the evidence that Willie Russell is mentally retarded as defined in *Chase* and *Atkins*. Consequently, this Court finds that Mr. Russell is entitled to post-conviction relief, and his death sentence should be vacated.

IT IS THEREBY ORDERED AND ADJUDGED, the death sentence is VACATED.

SO ORDERED AND ADJUDGED, this the 30th day of December, 2014.

Bobby W. Sanders
CIRCUIT COURT JUDGE

FILED

DEC 31 2014

SHARON McFADDEN
BY _____ D.C.

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STATE OF MISSISSIPPI, COUNTY OF SUNFLOWER

I, Sharon McFadden, Clerk of the Circuit Court in and for said County and State hereby certify that the foregoing contains a whole, true and correct copy of Order Granting Post Conviction Relief as the same appears on file in my office, at Indianola, Miss.

Witness my hand and official seal, this the 31st day of December A.D., 2014

CLERK OF THE CIRCUIT COURT SUNFLOWER COUNTY, MS

Sharon McFadden

Clerk of the Circuit Court of Sunflower County, Miss.

By Y. Foss D.C.

IN THE
338TH CRIMINAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS

EX PARTE	§	CCA Writ No. 51,612-02
VIRGILIO MALDONADO,	§	CAUSE NO. 721568-B
Applicant.	§	

COURT'S PARTIALLY ADOPTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 25, 2012, the Texas Court of Criminal Appeals ("CCA") exercised its authority to reconsider this case on its own initiative, and remanded this cause to this Court "to allow it the opportunity to re-evaluate its initial findings, conclusions, and recommendation in light of the Denkowski Settlement Agreement." *Ex parte Maldonado*, No. WR-51,612-02, (Tex. Crim. App. April 25, 2012). These proceedings arise from Mr. Maldonado's assertion that he is a person with mental retardation[1] and thus ineligible for execution under *Atkins v. Virginia*.

On October 25 and 26, 2012, this Court received evidence and testimony from the parties. After reviewing the evidence and testimony presented, the trial record, the transcripts of the state habeas proceedings, and the materials submitted by Applicant to the CCA in support of his motion requesting reconsideration, the Court hereby withdraws the findings of fact, conclusions of law, and recommendations entered on January 31, 2007, and enters these findings and conclusions.

[1] The term mental retardation is replaced by the term intellectual disability in the American Association on Intellectual and Developmental Disability Manual, Intellectual Disability: Definitions, Classification, and Systems of Support (11th ed. 2010) ("AAIDD Manual"). For ease of reference, however, the term mental retardation will be used.

FINDINGS OF FACT

I. Procedural History

1. The Court finds that Mr. Maldonado was convicted of capital murder and sentenced to death on October 6, 1997, in Harris County, Texas. His conviction and sentence were affirmed on direct appeal. *Maldonado v. State*, 998 S.W.2d 239 (Tex. Crim. App. 1999). Appointed counsel filed in the state trial court an Application for Post-Conviction Writ of Habeas Corpus by a Person Sentenced to Death on February 4, 2000. The Court of Criminal Appeals adopted the trial court's recommendations and denied relief on March 6, 2002.

2. The Court finds that on June 7, 2001, Judge Nancy Atlas appointed the undersigned counsel to represent Mr. Maldonado in his federal habeas proceedings. On June 20, 2002, the Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), holding that individuals with mental retardation are constitutionally ineligible for the death penalty under the Eighth Amendment. Mr. Maldonado raised an unexhausted "*Atkins* claim" in his federal petition, and then returned to the state courts to exhaust that claim, filing a second Petition for a Writ of Habeas Corpus on June 17, 2003, in which he raised a claim asserting that his execution was barred because he was a person with mental retardation. On July 2, 2003, the CCA found that Mr. Maldonado's *Atkins* claim had met the requirements of Article 11.071 s.5, and remanded it to this Court for consideration.

3. The Court finds that on September 11, 13-15, and November 16, 17, and 27, 2006, the Honorable Brock Thomas conducted an evidentiary hearing (the "2006 Hearing") to determine whether Mr. Maldonado is a person with mental retardation.

4. The Court finds that during the aforementioned hearing, Dr. Denkowski was the State's sole expert witness and the only expert to testify that Mr. Maldonado is not a person with mental retardation.

5. The Court finds that on January 31, 2007, the Honorable Brock Thomas adopted the State's proposed findings and conclusions, and recommended denying relief, and on September 12, 2007, the Court of Criminal Appeals adopted that recommendation and denied relief on Mr. Maldonado's *Atkins* claim.

6. The Court finds that following the 2006 Hearing, the State Board instituted proceedings against Dr. Denkowski based on the flawed methodologies he employed in evaluating whether death row inmates are persons with mental retardation.

7. The Court finds that in December 2007, the State Board filed a complaint with the State Office of Administrative Hearings (SOAH), asserting that Dr. Denkowski's methods were unscientific, unethical, and in violation of numerous Board rules.

8. The Court finds that Mr. Maldonado also filed a complaint with the State Board in November 2009, and that the original complaint was amended to include Mr. Maldonado's case and the methods employed by Dr. Denkowski in his examination. [DX[2] 44R, First Amended Complaint With the State Office of Administrative Hearings].

9. The Court finds that on April 14, 2011, Dr. Denkowski entered into a Settlement Agreement with the State Board which contained a "Finding" that Dr. Denkowski did not admit to a violation of any law or specific board rule, and which contained a "Conclusion of Law" that

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[2] "DX" refers to exhibits admitted by the Applicant at the evidentiary hearings. Exhibit numbers followed by an "R" indicate that the exhibits were entered at the Reconsideration Hearing. "SX" refers to the exhibits admitted by the State at the evidentiary hearing. "2006 H.T." refers to the transcript taken at the 2006 Hearing. "2012 H.T." refers to the transcript taken at the Reconsideration Hearing.

Dr. Denkowski violated Board Rule 465.18(a)(4) -- a "catchall" rule. [DX 45R, Settlement Agreement Between Texas State Board of Examiners of Psychologists and George Denkowski, Ph.D. (April 14, 2011)].

10. The Court finds that Board Rule 465.18(a)(4) provides the following: "A licensee who provides forensic services must comply with all other applicable Board rules and state and federal law relating to the underlying areas of psychology relating to those services." 22 Tex. Admin Code § 465.18(a)(4) (Tex. Bd. of Examiners of Psychologists).

11. The Court finds that under the terms of the Settlement Agreement, Dr. Denkowski agreed to receive a "Reprimand" of his professional license; that Dr. Denkowski agreed to desist from performing forensic psychological services in the evaluation of individuals for mental retardation or an intellectual disability in criminal proceedings; that Dr. Denkowski agreed to pay an administrative penalty; that the State Board's first amended complaint with SOAH would be dismissed with prejudice; and, that the Board would close and not prosecute Dr. Denkowski for any pending complaints. [DX 45R].

12. The Court finds that as aforementioned, on April 25, 2012, the Texas Court of Criminal Appeals ("CCA") exercised its authority to reconsider this case on its own initiative, and remanded this cause to this Court "to allow it the opportunity to re-evaluate its initial findings, conclusions, and recommendation in light of the Denkowski Settlement Agreement.

13. The Court finds that in its order, the CCA gave this Court discretion to "hold a live hearing" and "and make new or additional findings and conclusions and a new recommendation to this Court."

II. Reconsideration Hearing

14. The Court finds that after the case was remanded, Mr. Maldonado set the matter for an evidentiary hearing, which took place on October 25 and 26, 2012 (the "Reconsideration Hearing") at which time, Mr. Maldonado waived his appearance.

15. The Court finds that prior to the Reconsideration Hearing, the State did not designate experts and, in fact, did not present any testimony during the Reconsideration Hearing.

16. The Court finds that, specifically, during the Reconsideration Hearing, the State did not call an expert witness to testify and render an opinion as to whether Mr. Maldonado is mentally retarded and or intellectually and developmentally disabled.

17. The Court finds that the State and Mr. Maldonado requested that the Court incorporate for all purposes testimony and evidence considered in the 2006 Hearing, **except** for testimony and other evidence from Dr. Denkowski.

18. The Court finds that during the Reconsideration Hearing Mr. Maldonado presented live testimony from the following experts:

a. Jack M. Fletcher, Ph.D., an expert clinical neuropsychologist who testified in the 2006 Hearing and also was one of the psychologists who filed a complaint with the State Board against Dr. Denkowski;

b. Kevin McGrew, Ph.D., an expert psychologist and creator of the Woodcock-Johnson battery of intelligence tests;

c. Ricardo Weinstein, Ph.D., an expert bi-lingual neuropsychologist, familiar with Hispanic culture, with specific expertise in classification and measurement issues pertaining to the diagnosis of people with disabilities who provided a declaration for the 2006 Hearing;

d. Antonio Puente, Ph.D., an expert bi-lingual neuropsychologist with training in diagnosing people with disabilities who testified at the 2006 Hearing.

19. The Court finds that during the Reconsideration Hearing each of the foregoing expert's testimony was credible and reliable.

20. The Court finds that the State represented prior to the Reconsideration Hearing that it would not rely on the testing performed by Dr. Denkowski or his testimony offered in the previous 2006 hearing.

21. The Court finds that Denkowski's testimony during the 2006 Hearing, as well as the evidence offered by the State through Dr. Denkowski, to be unreliable and not credible in light of the Settlement Agreement.

22. The Court finds that the State admitted it would not rely on the testimony of Dr. Denkowski or any testing by Dr. Denkowski for this proceeding.

23. The Court therefore withdraws its previous findings of fact and conclusions of law, and substitutes them with the findings and conclusions stated herein. As such, the Court gives no weight to any of Dr. Denkowski's testimony or to any of the evidence sponsored by Dr. Denkowski.

24. The Court finds that Dr. Weinstein was born in Mexico and is a psychologist licensed to practice in the State of California where he specializes in the practice of neuro-psychology and neuro-psychological assessment. [DX 12, at 1, ¶ 1]. He has been in the psychology practice for thirty-seven years. [2012 H.T. Vol. 1, p. 162]. He has a forty-year-old son with Down Syndrome, and with a group of parents he started a school, developed a curriculum, and began work in the field of mental retardation. [*Id.*]. Over the course of his professional practice in diagnosing mental retardation, he has evaluated over 3,000 individuals. [*Id.*] He received his undergraduate degree from the Universidad Nacional Autonoma de Mexico (UNAM), located in Mexico City, Mexico. [DX 12 at 1, ¶ 2]. He has a master's degree from Merril Palmer Institute, Wayne State University, a doctoral degree from International College, and postdoctoral training certification in neuropsychology from the Fielding Institute. [2012 H.T. Vol. 1, p. 167]. He has

served as an adjunct professor at San Diego State University and has published articles on topics in neuro-psychology in peer-reviewed journals. [DX 12 at 1, ¶ 4]. He has testified as an expert witness in federal court and in state courts in California, Washington, and Florida, and has conducted court-appointed neuro-psychological evaluations in California, Washington, Oregon, Arizona, New Mexico, and Florida. [*Id.*].

25. The Court finds that Dr. Weinstein is well qualified to testify as an expert in the field of psychology.

A. Batería-R Test Administered by Dr. Weinstein in 2003

26. The Court finds that Dr. Ricardo Weinstein administered the Batería Woodcock-Munoz: Pruebas de habilidad cognitive-Revisada ("Batería-R") to Mr. Maldonado on February 5-6, 2003.

27. The Court finds that the Bateria-R test is an accepted test in the field of psychology used specifically for Spanish speaking subjects.

28. The Court finds that at the time Mr. Maldonado was tested, the Batería-R was an appropriate and valid measure of intellectual functioning in a Hispanic individual like Mr. Maldonado.

1. Batería-R Confirmed Appropriate & Reliable by Other Expert Testimony

29. The Court finds that Dr. Kevin McGrew, Director of the Institute for Applied Psychometrics, testified as to the validity of the test. [2012 H.T. Vol. 1, p. 125].

30. The court finds that Dr. McGrew received a bachelor's degree in psychology from Moorhead State University in 1974, a master's degree in school psychology from Moorhead State University in 1975, and a Ph.D. in educational psychology from the University of

Minneapolis in 1989, after he served the field as a school psychologist for twelve years. [*Id.* at 132].

31. The Court finds that Dr. McGrew was the co-creator of the Woodcock-Johnson III ("WJ-III") and Batería-III and also worked extensively on, but did not create, the Woodcock-Johnson-Revised ("WJ-R") and Batería-R. [*Id.*].

32. The Court finds that Dr. McGrew has published over thirty peer-reviewed journal articles and book chapters on the Woodcock-Johnson tests as well as two full books. [*Id.* at 129].

33. The Court finds that Dr. McGrew also co-authored a desk reference for intelligence testing, named the *Intelligence Test Desk Reference*. [*Id.* at 131]. The reference guide examines all major childhood and adult intelligence tests available since 1998, evaluating them from a common set of criteria and presenting best practice approaches. [*Id.*].

34. The Court finds that Dr. McGrew is an expert on intelligence tests, not just the Woodcock-Johnson batteries. [*Id.*].

35. The Court finds that Dr. McGrew is well qualified to testify as an expert in the field of psychology.

36. The Court finds that Dr. McGrew testified that the Batería-R is the Spanish equivalent of the Woodcock-Johnson test, which he co-authored and created. [2012 H.T. Vol. 1, p. 129].

37. The Court finds The Batería-R is a translation adaptation of the English Woodcock-Johnson Revised, which has been in the field since 1989. [*Id.*].

38. The Court finds that the Batería-R is based on the Cattell-Horn-Carroll theory of intelligence and measures seven of the major abilities [*Id.* at 135], and that other leading experts in intelligence testing, including Alan Kaufman, Ph.D. at Yale University, find that the Batería-R is incredibly comprehensive with excellent psychometric characteristics. [*Id.* at 142].

39. The Court finds that the Batería-R is normed for ages 2 to 95 plus. [*Id.* at 143].

40. The Court finds that the Batería-R was translated by Spanish-speaking people from different countries. [*Id.* at 144]. Once translated, the test items were administered to 3,911 Spanish-speaking people in and outside of the United States. [*Id.* at 145]. In particular, over 1,500 of the subjects were from Costa Rica, Mexico, Peru, Puerto Rico, and Spain. [*Id.*]. Although the original Woodcock-Johnson, published in 1977, was often used by school age and adult populations, the WJ-R, which is the English version of the Batería-R, caught the attention of clinical and neuropsychologists, and its use has been advocated in criminal settings. [*Id.* at 148-149].

41. The Court finds that, based on Dr. McGrew's expert opinion, the Batería-R is a "comprehensive, culturally specific and sensitive language appropriate measure of general intellectual functioning, and it was an appropriate measure used by Dr. Weinstein to estimate Mr. Maldonado's general intelligence." [*Id.* at 134].

42. The Court finds that Dr. Weinstein also testified that the Batería-R was a very appropriate test to administer [*Id.* at 169] because, he explained, that at the time he tested Mr. Maldonado there was no translation of the Wechsler test that was published in 2003. [*Id.* at 170]. Dr. Fletcher also concurred. [*Id.* at 62].

2. Support by the Literature of the Validity of the Batería-R as a Measure of Intelligence

43. The Court finds the following sources of literature advocate and support use of the Batería-R as a valid measure of intelligence testing because of its comprehensive measures:

- Psychology in Intellectual and Developmental Disabilities, Official Publication of Division 33, American Psychological Association, "Message from President," Vol. 36(2) (Fall 2010) ("Most non-English speaking defendants in *Atkins* cases have been Spanish speaking, and there are several IQ tests in Spanish...Kevin McGrew,

mentioned earlier, is one of the authors of a more appropriate test, the Batería III Woodcock-Munoz.") [DX 52R].

- James E. Ysseldyke, "Goodness of Fit of the Woodcock-Johnson Psycho-Educational Battery-Revised to the Horn-Cattell Gf-Gc Theory," *Journal of Psychoeducational Assessment*, Vol. 8: 268-275 (1990) (stating that the WJ-R is the most comprehensive measure of human cognitive abilities available) [DX 58R]

- Richard Woodcock and Ana Munoz-Sandoval, "The Batería-R in Neuropsychological Assessment," in *Neuropsychology and The Hispanic Patient: A Clinical Handbook*, pp. 143-168 (2001) [DX 59R]

- Excerpts from John Salvia and James Ysseldyke, *Assessment*, Fifth Edition (1991) ("The WJ-R provides a comprehensive assessment of cognitive and academic ability throughout the life span.") [DX 60R]

44. The Court finds, based on the evidence, that the Batería-R is a valid and appropriate measure of intellectual functioning and was a proper test for Dr. Weinstein to administer to Mr. Maldonado.

45. The Court finds that in 2003, Dr. Weinstein was asked to pre-screen Mr. Maldonado for mental retardation as a defense to his appeal. [2012 H.T Vol. 1, p. 174].

46. The Court finds that Dr. Weinstein administered the Batería-R, in Spanish, to Mr. Maldonado in the Polunsky Unit in 2003.

47. The Court finds that Dr. Weinstein administered the Batería-R in Spanish and by the accepted manner of his field by using the test manual. [*Id.* at 171].

48. The Court finds that Dr. Weinstein testified that the manual is very specific, and it is his goal to keep administration of tests as standardized as possible to get the most accurate score. [*Id.*].

49. The Court finds that Dr. Weinstein was qualified to administer the Batería-R to Mr. Maldonado.

50. The Court finds that during the administration of the Batería-R, Mr. Maldonado exerted his best effort and was cooperative. [*Id.* at 172].

51. The Court finds that Dr. Weinstein administered both the cognitive and achievement batteries of the Batería-R and concluded on the basis of Mr. Maldonado's scores on both batteries that his score of 61 shows that he functions at the level of a child aged seven years and ten months, a result that "is below the 1st percentile rank" and more than two standard deviations below the mean. [DX 12, at 9, ¶22].

52. The Court finds that Dr. Weinstein also reviewed results from sub-categories and determined there were no results that were statistically different or significant. [2012 H.T. Vol. 1, p. 177].

53. The Court finds that Dr. Weinstein's findings from his review of Mr. Maldonado's history, social and cultural influences, and the results of testing him for intelligence and achievement were that Mr. Maldonado functions in the mentally retarded range [DX 12, ¶ 22].

54. The Court finds that Dr. Weinstein calculated Mr. Maldonado's scaled score on the Batería-R to be a 61. [DX 12, at 9, ¶22].

55. The Court finds Dr. Weinstein's testimony of the calculation of 61 to be credible and reliable, and as such, the test was scored correctly.

56. The Court finds that Mr. Maldonado's score of 61 falls within the range established in the field of psychology for a diagnosis of mental retardation.

57. The Court finds that a consensus exists among mental health professionals and the AAIDD that the requirement of significantly subaverage general intellectual functioning is satisfied by "an IQ score that is approximately two standard deviations below the mean,

considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations."[3] [DX 53R, AAIDD Manual at 27]. T

58. The Court finds that the AAIDD Manual also states that "[a]n IQ score should be reported with confidence intervals rather than a single score. [DX 53R, AAIDD Manual at 40].

59. The Court finds that Dr. Puente administered two intelligence tests to Mr. Maldonado.

60. The Court finds that Dr. Puente is a native speaker of Spanish, who was born in Havana, Cuba, and who immigrated to the United States when he was nine years old. [2006 H.T. Vol. 2, p. 61], and that he has been assessing mental retardation in Hispanic individuals since 1979. [*Id.* at 66].

61. The Court finds that Dr. Puente obtained his bachelors' degree in psychology from the University of Florida in 1973 and his Ph.D. in psychology from the University of Georgia in 1978. From 1978 to 1981, he was a clinical psychologist at a large teaching psychiatric hospital run by the University of Florida. [*Id.* at 61-62; DX 8, at 3] In 1981, he joined the faculty at the University of North Carolina at Wilmington, where he presently holds a position as Professor of Psychology. [*Id.* at 60; DX 8, at 3], and that in 1982, he was the recipient of a Fulbright Scholarship for study in Argentina. [DX 8, at 3].

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[3] The AAIDD does not intend for a fixed cutoff point to be established for diagnosing a person with mental retardation. [DX 53R, AAIDD Manual]. The diagnosis is "intended to reflect a clinical judgment rather than an actuarial determination." *Id.* The AAIDD Manual explains that "it is important to use a range as reflected in the test's standard error of measurement" because of variations in test performance, examiner's behavior, or other undetermined factors. [DX 53R, AAIDD Manual]. Accordingly, a "standard error of measurement" must be taken into account in interpreting the IQ score obtained on any test. *Id.* The standard error of measurement is the range of IQ score of plus or minus five points within which there is a high level of confidence that a person's "true" IQ resides. *Id.*

62. The Court finds that Dr. Puente has held teaching appointments at the Universities of Madrid and Granada, in Spain, [*Id.* at 3] and he has lectured in Mexico, Puerto Rico, the Dominican Republic, Colombia, Cuba, and Spain. [2006 H.T. Vol. 2, pp. 62-63].

63. The Court finds that Dr. Puente has a private practice in psychology (with a specialty in neuropsychology) in Wilmington, North Carolina, where he offers services in both English and Spanish. [DX 8, at 3].

64. The Court finds that Dr. Puente has authored six books and more than 150 scientific and professional articles, most in English, but some in Spanish and Russian. [2006 H.T. Vol. 2, pp. 64-65; DX 8, at 3]. He is co-author of such books as *Neuropsychological Evaluation of the Spanish Speaker* and is the editor of Spanish language books on intelligence testing such as *Examen de Inteligencia Wechsler Para Niños-III Edición.* [DX 7, at 40]. His articles relevant to this case have included such titles as "Neuropsychological Evaluation of Ethnic Minorities," "Neuropsychological Assessments of Spanish Speaking Children and Youth" [2006 H.T. Vol. 2, p. 65; DX 7, at 42], and "Neuropsychological Assessment of Hispanics." [DX 7, at 43]. He is the Associate Editor of the scientific journal, *Neuropsychology Review.* [*Id.* at 36].

65. The Court finds that he is a member of the American Psychological Association, where he was past-President of the Division of Neuropsychology and is currently on the Committee for Psychological Tests and Assessments. [2006 H.T. Vol. 2, p. 64].

66. The Court finds that during the time when he has been a member of this Committee, he sponsored a symposium on assessment of culturally dissimilar individuals such as African-Americans and Hispanics. [2006 H.T. Vol. 2, p. 64]. He was also on a committee that spent ten years in preparing a translation into Spanish of the Wechsler Intelligence Scale for Children (WISC). [2006 H.T. Vol. 2, pp. 88-89].

67. The Court finds that Dr. Puente's primary focus area deals with assessment of neuropsychological functions in Spanish speakers. [2012 H.T. Vol. 1, p. 11].

B. Beta III and C-TONI Tests Administered by Dr. Puente in 2006

68. The Court finds that Dr. Antonio Puente administered, in Spanish, the Beta III and the Comprehensive Test of Non-Verbal Intelligence ("C-TONI") to Mr. Maldonado on June 27-28, 2006.

69. The Court finds that Dr. Puente was qualified to administer the Beta III and C-TONI.

70. The Court finds that Dr. Puente scored Maldonado received scores of 70 and 62, respectively, with a composite score of 66.

71. The Court finds Dr. Puente's testimony of the score of 70 and 62 with a composite score of 66 to be credible and reliable, and as such, Dr. Puente correctly scored each test.

72. The Court finds that on the two intelligence tests Dr. Puente administered to Mr. Maldonado, Mr. Maldonado scored a seventy on the Beta III, [DX 8, at 16], a number that, given a 95% confidence interval of eight points, qualifies as showing significant subaverage intellectual functioning under the *Atkins* and *Briseno* requirements for mental retardation.

73. The Court finds that he also scored a sixty-two on the CTONI, which, like the Beta III, is – as its name implies – a non-verbal test of intelligence. [DX 8, at 16].

74. The Court finds that Dr. Puente did not administer the Batería-R, which he testified was an appropriate measure, because Dr. Weinstein had already administered it and he wanted to avoid potential practice effects. [2012 H.T. Vol. 2, p. 21].

1. Validity of the Tests as Measures of Intelligence

(i) Beta III

75. The Court finds that the Beta III was developed during World War One to assess non-verbal intelligence in illiterate persons who did not read English. [2006 H.T. Vol. 2, p. 84].

76. The Court finds that the Beta III has instructions in Spanish, is supported by a great deal of research, and over-samples the Hispanic population because it uses as its "formative sample" a population that contains more Hispanics than are in the population at large. [*Id.* at 85].

77. The Court finds that the Beta III is a reliable and valid measure of intelligence.

(ii) C-TONI

78. The Court finds that the Comprehensive Test of Non-Verbal Intelligence (C-TONI) is a more recent test than the Beta III and is primarily used when assessing mental retardation in an individual whose native language is not English. [2006 H.T. Vol. 2, p. 86; 2012 H.T. Vol. 2, p. 14].

79. The Court finds that it has instructions that can be given in pantomime so it is well-suited for persons who do not understand English. [*Id.*].

80. The Court finds that, according to Dr. Puente, it is "well-normed," oversamples the Hispanic population, and yields a valid I.Q. score. [*Id.*] and [2012 H.T. Vol. 2, p. 14].

81. The Court finds that manuals that govern diagnosis of mental retardation recognize the C-TONI as a valid instrument "to be used to assess intellectual ability of individuals for whom most other intelligence tests are inappropriate or possibly biased." [DX 54R at 65].

82. The Court finds that the C-TONI is a reliable and valid measure of intelligence.

C. **Evidence of IQ Test Administered by the TDCJ is Not Reliable**

83. The Court finds that the Texas Department of Criminal Justice ("TDCJ") has scores pertaining to Mr. Maldonado's intelligence, and that an official report in the TDCJ's inmate file records his I.Q. as "below 73" and his "Educational Average" as "below 5.0." [Service Investigation Worksheet dated 2005/07/07, in SX-24 (unpaginated); 2006 H.T. Vol. 5, pp. 53 54].

84. The Court finds that scores such as these are normally obtained during the intake diagnostic process when, according to TDCJ guard Major Nelson, *"they do an interview with the offender and find out what education level he has or how far he's gone in school."* [*Id.* at 46].

85. The Court finds that the scores on the report, however, both have zeros written next to them, which Major Nelson testified, *"tells us that we don't actually have an I.Q. test on him."* [*Id.* at 47].

86. The Court finds that Major Nelson did admit that she could neither confirm nor deny whether the I.Q. notation reflected an actual test [*Id.*].

87. The Court finds that Major Nelson agreed that "official reports at Polunsky show an score IQ [anywhere] below 73" [*Id.* at 54]; and she could not explain how the 73 was selected to appear in the official record. [*Id.* at 60-61].

88. The Court finds that the TDCJ official record also notes that Mr. Maldonado's "literacy is questionable" and that he "has difficulty understanding English." [Service Investigation Worksheet dated 2005/07/07, in SX 24 (unpaginated)].

89. The Court finds that the TDCJ records finding that Mr. Maldonado has an I.Q. score anywhere below 73 and an EA score below 5 do not contradict the intelligence scores Mr. Maldonado received on tests administered by Drs. Weinstein.

D. Administration of WAIS-Espanol as a Screening Device

90. The Court finds that Dr. Weinstein administered the verbal portion of the WAIS-Espanol, a Spanish-language test of intellectual functioning known in full as the *Escala de Inteligencia Wechsler para Adultos* ("EIWA"), to Mr. Maldonado as a ***screening*** device and did not use nor intend to use the result in his report, although the data from the EIWA was included in his test protocols that were provided to the prosecution. [2006 H.T. Vol. 3, p. 109; 2012 H.T. Vol. 1, p. 174].

91. The Court finds that he used this test to determine how well Mr. Maldonado responded to instructions and whether he would be able to answer questions. [2012 H.T. Vol. 1, p. 175].

92. The Court finds that Dr. Weinstein administered only the verbal portion of the test, which is not a full test nor a test he would use to determine an accurate I.Q. score. [*Id.*].

93. The Court finds that the score obtained by Dr. Weinstein was not reported in his findings because he submitted a *"declaration"* and not a full report. [*Id.* at 192].

94. The Court finds that a full report would have included the partial score but because he did not rely on the EIWA score for his conclusion, he did not include that finding in his declaration to the Court. [*Id.*].

95. The Court finds that on the verbal portion of the EIWA Mr. Maldonado received an adjusted score of 63 based on a score of 83 after allowing for the age of the test.

96. The Court finds that the EIWA was first published in 1968. [DX 32, at 270]. It was derived from the 1955 version of the *Wechsler Adult Intelligence Scale* (WAIS), which was itself based on a 1939 test known as the Wechsler Bellevue Intelligence Scale. [*Id.*].

97. The Court finds that the WAIS was standardized on a population sample based on the 1950 United States census. [*Id.*]. It has been updated and re-normed *twice* since its publication in 1955--in 1981 as the WAIS-R and in 1997 as the WAIS-III. [DX 32, at 264; *see* SX 10].

98. The Court finds that the EIWA has not been updated or re-normed like the WAIS.

99. When the differences between the two tests (WAIS and EIWA) are taken into account, the result is that, "[i]n the lower ranges, the Full Scale IQs are ... overestimated by about 20 points." [DX 43, at 389].

100. The Court finds that Mr. Maldonado's adjusted score of 63 (*i.e.*, 83 minus the estimated twenty point inflation) on the EIWA places him exactly in the middle between Dr. Weinstein's finding of a sixty-one on the Batería-R and Dr. Puente's finding of a sixty-six composite score on the Beta III and C-TONI.

101. The Court finds that Mr. Maldonado's partial score on the WAIS-Espanol, administered by Dr. Weinstein, is irrelevant to its determination of whether Mr. Maldonado meets the requirements for mental retardation.

E. Application of the Flynn Effect

102. The Court finds that underlying any analysis or calculation of scores on intelligence tests is application of the phenomenon known as the Flynn Effect.

103. The Court finds that Dr. Fletcher testified that there are, in fact, times when a psychologist should adjust a test subject's scores when assessing him or her for the existence of mental retardation:

104. The Court finds that test scores are affected by the dating of standardization samples" [See 2006 H.T. Vol. 16, pp. 22-23][4] a phenomenon known as the "Flynn Effect," which was first described a couple of decades ago by Professor James R. Flynn, who discovered that the scores on general intelligence tests standardized on U.S. populations (such as the WAIS, the Stanford-Binet, and the WISC) were rising approximately 0.3 points per year, compared to their original standardization samples. *See* James R. Flynn, "Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect," 12(2) *Psychology, Public Policy, and Law* 170, 173 (2006) [DX 41]. According to Dr. Fletcher, the "Flynn Effect" is "widely accepted" by the psychological profession, including being called "robust and reliable" by Prof. Alan S. Kaufman, co-author (with Elizabeth O. Lichtenberger) of *Essentials of WAIS-III Assessment* (1999), a text on which Dr. Denkowski relied in his report concerning Maldonado's mental functioning. [2006 H.T. Vol. 16, pp. 23-24; SX-4, at 42].[5]

105. The Court finds that when the "Flynn Effect" is applied to Mr. Maldonado's score of eighty-three on the WAIS Español (EIWA) results in a score of 71 or 72.

106. The Court finds that Dr. Fletcher testified, the standardization sample on the EIWA dates from 1965 and the test was administered to Mr. Maldonado in 2003, thirty-eight years later. [2006 H.T. Vol. 16, p. 27]. Multiply thirty-eight times 0.3 to get approximately twelve and subtract that from eighty-three and you arrive at seventy-one or seventy-two, which are also within the confidence interval for mental retardation. [*Id.*].

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[4] Dr. Fletcher wrote a very recent article on the Flynn Effect. [DX 49R]. He, along with others, conducted a meta-analysis, which is a statistical approach to determining the amount of the Flynn Effect. [2012 H.T. Vol. 1, p. 60]. The weighted mean across the fourteen studies was 2.8 points, and the measurement error associated with the estimate of the Flynn Effect was less than one point per decade, or 0.1 per year. [*Id.*]

[5] The Flynn Effect "has demonstrated that norms in the United States become outdated at the rate of 3 points per decade[.]" [DX 39, at 21].

107. Court finds, based on uncontradicted testimony, the Flynn Effect is valid, and that its application to the intelligence scores Mr. Maldonado received is appropriate.

F. Prong Two: Maldonado's Significant Limitations in Adaptive Behavior

108. The Court finds that adaptive behavior is a person's ability to typically or habitually perform everyday acts of living. [2012 H.T. Vol. 1, p. 64]

109. The Court finds that adaptive behavior is discussed in terms of three domains: the ***conceptual domain***, which is language and communication; the ***social domain***, which is social skills; and the ***practical domain***, which are things like self-care, level of independence, the person's ability to take care of themselves independently on a daily basis. *Id.*

110. The Court finds that according to the AAIDD Manual, "*limitations in adaptive behavior* are operationally defined as performance that is appropriately two standard deviations below the population average on **one** of the three adaptive skill domains of conceptual, social, or practical." [DX 53R, AAIDD Manual at 47].

111. The Court finds, moreover, the AAIDD Manual recognizes deficits in adaptive behavior as "performance on a standardized measure of adaptive behavior that is normed on the general population including people with and without [intellectual disability] that is approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, and practical, or (b) an overall score on a standardized measure of conceptual, social, and practical skills." [DX 53R, AAIDD Manual at 43].

112. The Court finds that adaptive behavior measures what a person actually does on a habitual everyday basis and not what they are capable of doing.

113. The Court finds the focus of an adaptive behavior assessment, therefore, is on documenting the individual's deficits, not his strengths.

114. The Court finds, based on Dr. Weinstein's testimony, that people with mental retardation are capable of performing well in many areas. [2012 H.T. Vol. 1, p. 186]. He stated, *"[m]ental retardation is a disability of thinking. It is not a disability of learning."* [*Id.*]. A recent longitudinal study by the Department of Education reports that 79% of individuals with mild mental retardation have jobs or are in school; 49% have driver's licenses; 35% live independently; 62% are registered to vote; 10% are married; and 25% have children. [*Id.* at 197].

115. The Court finds the fact that Mr. Maldonado, at one point, was married and even had a driver's license is therefore not inconsistent with a potential finding that he is a person with mental retardation.

116. The Court finds that Dr. Fletcher is a Distinguished University Professor of Psychology at the University of Houston. [2006 H.T. Vol. 16, p. 7]. He received his Ph.D. in Clinical Psychology from the University of Florida in 1978. [DX 34, at 1, ¶ 2].

117. The Court finds that Dr. Fletcher is licensed by the State of Texas as a psychologist and is board-certified in Clinical Neuropsychology by the American Board of Professional Psychology. [2006 H.T. Vol. 16, p. 6]. For the past twenty-five years, in addition to teaching courses on the topics of intelligence, adaptive behavior, and neuropsychological assessments, he has completed research on children and adults with developmental disabilities, with a focus on the development of reading, language, and other cognitive skills. [*Id.* at pp. 8-11; DX 33].

118. The Court finds that, among many other posts, he is a past member and Chair of the Mental Retardation Research Committee of the National Institute of Child Health and Human Development, a committee that reviews research proposals on behalf of the National Institute of Health that involve mental retardation developmental disabilities. [2006 H.T. Vol. 16, p. 9]. He has also been a member of the President's Commission on Excellence in Special Education, a group that advised the Bush Administration on whether to include mental retardation in the reauthorization of the Individuals with Disabilities Education Act. [*Id.* at pp. 9-10].

119. The Court finds that he has been an Associate Editor of the *Journal of Clinical and Experimental Neuropsychology* and he has published over two hundred articles in peer-reviewed journals. [DX- 4, Exh. 1, at 7; 2006 H.T. Vol. 16, pp. 8-9].

120. The Court finds that Dr. Fletcher has created core courses at the University of Houston that are used to train entering graduate students in the methods of administering intelligence tests and behavior assessments. [2006 H.T. Vol. 16, p. 10].

121. The Court finds that Dr. Fletcher has extensive experience in making assessments of mental retardation in adults and children. [*Id.* at p. 11]

122. The Court finds that, within adaptive behavior, Dr. Fletcher described the three major domains: *conceptual, social, and practical.* [2012 H.T. Vol. 1, p. 64].

123. The Court finds that a person meets the definition of mental retardation for the adaptive behavior prong if there is a deficiency in one of these areas or if the composite score across the three areas is deficient. *Id.*

124. The Court finds that the AAIDD Manual advises that an administrator should obtain information regarding the individual's adaptive behavior "from a person or persons who know the individual well. Generally, individuals who act as respondents should be very familiar

with the person and have known him/her for some time and have had the opportunity to observe the person function across community settings and times. Very often, these respondents are parents, older siblings, other family members, teachers, employers, and friends." [DX 53R, AAIDD Manual at 47].

125. The Court finds, based on Dr. Fletcher's testimony, that maladaptive behavior is not relevant to analysis of adaptive behavior because this type of behavior does not represent behavior that is typically or habitually performed. [2012 H.T. Vol. 1, p. 66].

126. The Court finds, based on Dr. Fletcher's testimony, that maladaptive behavior includes criminal behavior, and that such behavior should not be considered in determining whether a person has mental retardation because such maladaptive behavior is not behavior that a person typically and habitually performs. [*Id.*].

G. <u>Dr. Puente's Adaptive Behavior Assessment</u>

127. The Court finds that Dr. Puente assessed Mr. Maldonado's adaptive behavior by relying on his own interviews, prior testing of Mr. Maldonado, his own tests and observations, and the testimony from Mr. Maldonado's father, his elementary school teacher, and his school classmate.

128. Court finds that, based on Dr. Puente's testimony, Mr. Maldonado has adaptive deficits in "numerous" areas. [2006 H.T. Vol. 2, p. 91].

129. The Court finds the most "glaring" deficit area, according to Dr. Puente, is in functional academics, where Mr. Maldonado had the equivalent of one year of education prior to the age of 18, while today "with all the years of continued effort on his part, he's got to about fifth grade." [*Id.*].

130. The Court finds that, based on Dr. Puente's testimony, Mr. Maldonado had adaptive deficits in his inability to establish or use a bank account [*Id.* at 93]; his inability both before and after the age of eighteen to use public transportation without help from others [*Id.*]; his lack of any leisure activities such as listening to music, watching movies, or enjoying sports such as soccer [*Id.*]; and his unsuccessful social relationships both before and after the age of 18 [*Id.* at 93-94].

131. The Court finds, based on Dr. Puente's testimony, Mr. Maldonado has "impaired functioning" in six neurological tests [*Id.* at 120], which are useful in helping to "understand the origins of some functional limitations." [*Id.* at 117].

132. The Court finds, Dr. Puente's, uncontradicted, testimony credible and reliable including his clinical judgments and the evidence he relied upon to make those judgments.

133. The Court finds, based on Dr. Puente's testimony, Mr. Maldonado has significant deficits in adaptive functioning in the conceptual, social, and practical domains that place him approximately two standard deviations below the mean in adaptive functioning.

H. Administration of the Vineland[6]

134. The Court finds that Dr. Puente used the Vineland Adaptive Behavior Scales-II ("Vineland") test procedure to analyze adaptive behavior.

135. The Court finds that, based on Dr. Puente's testimony, that the Vineland is a standardized procedure, and he used a form of the Vineland that represents a semi-structured interview.

[6] The Court sustained the State's objection to admission of Dr. Puente's results on the Vineland exam. The other testimony concerning the Vineland exam was not objected to by the State and was admitted as evidence.

136. The Court finds that the Vineland is an appropriate assessment identified in the AAIDD Manual and also recognized and accepted by courts[7] in this jurisdiction.

137. The Court finds that before administering the Vineland, he consulted with Dr. Fletcher, who was a colleague to Dr. Sarah Sparrow, the developer of the second version of the Vineland who is now deceased. [2012 H.T. Vol. 2, p. 32].

138. The Court finds that about two months before the evidentiary hearing, Dr. Puente confirmed that he could conduct the Vineland telephonically, retrospectively, and in an interview format. [*Id.*].

139. The Court finds that in 2006, although the Vineland was available, Dr. Puente was not confident he could administer the test properly and declined to administer it.

140. The Court finds that after discussing proper methodology with Dr. Fletcher, Dr. Puente administered the test. [*Id.* at 36]. Dr. Puente did not administer the Adaptive Behavior Assessment System ("ABAS") test to Mr. Maldonado in 2006 because, as he testified, it is not available in Spanish, it is not normed for Hispanic individuals, and it is supposed to be given to "high functioning individuals." [2006 H.T. Vol. 2, pp. 94-95].

141. The Court finds, based on Dr. Puente's testimony, Dr. Puente contacted fourteen witnesses and interviewed ten people in Spanish. [*Id.* at 33]. Dr. Puente focused on his interview with the teacher, who was most sophisticated. [*Id.*]. He contacted the teacher, Ms. Dilea Garcia, once in 2006 and twice in 2012. [*Id.*]. Dr. Puente emphasized that Mr.

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[7] *See, e.g., Wiley v. Epps*, 625 F.3d 199, 217 (5th Cir. 2010) (recognizing that "the authors of the Vineland test expressly state that retrospective interviews to obtain information about a subject's behavior at an earlier stage is permissible in certain circumstances, including when the subject is in a restricted environment, *such as a prison, and there is a question about the subject's adaptive functioning before coming to that environment*"); *Chester v. Quarterman*, No. 5:05-cv-29, 2008 U.S. Dist. LEXIS 34936, at *5 (E. D. Tex. Apr. 28, 2008) (stating the Vineland test is "an accepted instrument for measuring limitations in adaptive behavior").

Maldonado's school teacher was an important witness because not only was she his teacher for the few years he attended school but she was also his neighbor who saw him for fifteen years on a consistent basis. [*Id.* at 24].

142. The Court finds that Dr. Puente generated scores on the test based on his interview and testified that these scores were consistent with his findings in 2006. [*Id.* at 34].

I. Deficiencies in the Conceptual, Practical, and Social Skill Areas

1. Deficits in Maldonado's Conceptual Skill Area

143. The Court finds that Mr. Maldonado has the following deficits in the conceptual skill area:

> **Money, time, and number concepts**. Mr. Maldonado's uncle, Severiano Maldonado, testified that Mr. Maldonado had problems counting money. [2006 H.T. Vol. 15, pp. 8-9].
>
> **Reading and writing**. Several witnesses testified to Mr. Maldonado's performance in school. Dilea Garcia, Mr. Maldonado's neighbor and school teacher of five years, described him as "a slow learner" in comparison with the other students; noted that he had to seek help from the other students "because maybe he couldn't understand," and reported that he did not reach a very high grade level. [2006 H.T. Vol. 2, p. 159]. Mr. Maldonado dropped out of school for good when he was nine or ten years old. [*Id.* at Vol. 3, p. 8]. The daughter of Dilea Garcia, Patricia Garcia, who was a schoolmate of Mr. Maldonado's and approximately his same age, did not consider him to be a good student and agreed that he

was "noticeably slow." [*Id.* at 7]. She was unsuccessful in helping him with his homework because "he did not understand much." [*Id.* at 8]. His neighbor Socorro Nava Villegas, described him as "not good in the head." [DX 5, ¶ 9]. His uncle, Severiano Maldonado, testified that Mr. Maldonado "was never able to learn" and "could not follow simple instructions." [DX 4, ¶ 14].

2. Deficits in Maldonado's Social Skill Area

144. The Court finds, based on uncontradicted testimony, Mr. Maldonado has the following deficits in the social skill area.

Interpersonal relations. Mr. Maldonado did not socialize well with other children. His uncle stated in an affidavit that *"Virgilio was not like the other children. He did not play much with the other children."* [DX 4 at ¶ 14]. One of Mr. Maldonado's neighbors also remarked that *"I always thought of Virgilio as an orphan because he wandered about aimlessly ("vagando") from the time he was old enough to walk. Virgilio would always walk around alone."* [DX 5 at ¶ 6]. One of Mr. Maldonado's classmates also remarked that Mr. Maldonado *"isolated himself from the children."* [2006 H.T. Vol. 3 at p. 8]. Dr. Puente testified that children would not engage in activities with Mr. Maldonado, like games and playing marbles, because of his oddities and behavior. [2012 H.T. Vol. 2, p. 45].

Gullibility and naiveté. People with mild intellectual disabilities are easily led and coaxed into behavior that reflects poor judgment. [2012 H.T. Vol. 1, p. 71]. Based upon the facts of the crime, Mr. Maldonado is a follower, which is

consistent with his mental retardation. [*Id.*]. Even the capital offense for which Mr. Maldonado was found guilty did not demonstrate forethought, planning, or complex execution of purpose on his part. [2012 H.T. Vol. 1, p. 71]. To the contrary, the Court finds that these facts indicate and provide further evidence of Mr. Maldonado's deficits and gullibility.

3. Deficits in Maldonado's Practical Skills Area

145. Based on uncontradicted testimony, the Court finds that Mr. Maldonado has the following deficits in the practical skills area:

Activities of daily living.

Mr. Maldonado had adaptive deficits in his inability to establish or use a bank account [2006 H.T. Vol. 2 at p. 93]; his inability both before and after the age of eighteen to use public transportation without help from others. *Id.*

Occupational skills. Mr. Maldonado held certain jobs, but even his work was consistent with mental retardation. For example, his uncle, Severiano Maldonado, worked with Mr. Maldonado at Greenspoint Dodge for a few years, where he, too, supervised Mr. Maldonado's work, which consisted of washing cars. [2006 H.T. Vol. 15, pp. 9-10]. His uncle recalled that Mr. Maldonado "would forget to put cleaner on the cars," "would hurry up too much," and "would wash a line of cars where he was not supposed to wash." [*Id.* at 10].

Mr. Maldonado also did security work at the apartment complex in which he stayed, which awarded him a free apartment and a salary of $500 per

month. [Pet. Exh. 4, p. 8, ¶ 47]. At each job, Maldonado's relatives assisted and supervised him so that he could do his work and remain employed. [2006 H.T. Vol. 3, p. 18]. Mr. Maldonado worked at a taqueria for approximately three or four months. [2006 H.T. Vol. 3, pp. 35, 36]. Mr. Amaro, Mr. Maldonado's cousin, testified that he attempted to put Mr. Maldonado in charge of the cash register, but that he was not capable of handling the task "completely" because he was "limited" [*Id.* at 35-36] and did not "have the skill," [*Id.* at 41]; so, Mr. Amaro would either assign Mr. Maldonado to other tasks or do the work himself [*Id.* at 41]. He described Mr. Maldonado as "a good employee but limited," who could not "completely" do his job, and who was not reliable because he would sometimes not show up for his shift. [*Id.* at. 36]. He stated that Mr. Maldonado was not the manager of his taqueria and, in fact, could never have earned the title of manager. [*Id.* 35, 36-37].

J. **Testimony and Records from the TDCJ Should Not Be Used In Evaluating Adaptive Behavior**

146. The Court finds, based on uncontradicted testimony, that the environment in which the correctional officers and officials observed Mr. Maldonado is not indicative of typical community functioning and disregards the evidence presented by the State during the 2006 Hearing where the State called several Texas Department of Criminal Justice ("TDCJ") correctional officers and officials and admitted records in an attempt to establish Mr. Maldonado did not have any deficits in adaptive behavior.

147. The Court finds, based on Dr. Fletcher's testimony, practitioners generally do not, and should not, consider a person's behavior in prison for purposes of an adaptive behavior assessment. [2012 H.T. Vol. 1, p. 109]. He described incarceration as a highly structured and very atypical social situation where there is no independent living. [*Id.*]. For the same reasons, prison officials and guards, or those who supervise the inmates, are not valid respondents. [*Id.* at p. 113]. For purposes of an intellectual disability assessment, people who observed the inmate during the developmental period are far more reliable informants. [*Id.*].

The Court finds, based on Dr. Fletcher's testimony, other experts agree that prison environments should not be used to determine adaptive behavior; Marc Tasse, Ph.D., an expert on the assessment of adaptive behavior, in an article titled "Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases," published in the peer-reviewed journal *Applied Neuropsychology*, also recommends that correctional officers not be interviewed as respondents for adaptive behavior assessment: Correctional officers and other prison personnel should probably never be sought as respondents to provide information regarding the adaptive behavior of an individual that they've observed in a prison setting. The only extreme circumstance when one might consider interviewing a member of the prison personnel regarding an inmate's adaptive behavior would be if there is absolutely no one alive who can provide any information regarding the individual's functioning prior to incarceration. [DX 50R, Marc J. Tasse., "Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases," 16 *Applied Neuropsychology* 114 (Mar. 2009)] (emphasis added).

148. The Court Finds that the people who knew Mr. Maldonado during the developmental period thought he was "slow" and acted accordingly. Dr. Puente testified that no person identified Mr. Maldonado as mentally retarded because that term does not appear in the

lexicon of Acuyo (Mr. Maldonado's home village). [2012 H.T. Vol. 2, p. 25]. Instead, several family members and friends described Mr. Maldonado as "retrasado" or "lento," both meaning slow. [*Id.* at 26]. People treated Mr. Maldonado as slow, for example, in leisure activities. [*Id.*]. Mr. Maldonado never figured out games, like marbles, and therefore was not included. [*Id.*]. Mr. Maldonado was treated differently in school, in the playground, and in the community. [*Id.* at 27].

149. The Court finds there is no evidence that Mr. Maldonado formulated plans and carried them through. Rather, as Dr. Fletcher testified, the evidence demonstrates that Mr. Maldonado is a follower.

150. The Court finds there is no evidence that Mr. Maldonado lead anyone in anything.

151. The Court finds that there is no evidence that Mr. Maldonado could hide facts or lie effectively in his own other's interests

152. The Court finds that there is no evidence that Mr. Maldonado's conduct, in response to external stimuli, was or was not rational and appropriate.

153. The Court finds that the crime Mr. Maldonado committed did not show life-sophistication. [2012 H.T. Vol. 1, p. 71].

K. <u>Maldonado's Intellectual Disabilities Before the Age of Eighteen</u>

154. The Court finds, based on Dr. Fletcher's testimony, that intellectual disabilities begin very early in development and persist. [2012 H.T. Vol. 1, p. 68], and that sometimes they are due to genetic defects like Down Syndrome, environmental factors, or risk factors. For instance, somebody may have a brain injury in the developmental period, but it's something that basically arrest or disrupts development. [*Id.*]

155. The Court finds that to establish an intellectual disability, factors have to exist that interfere with the development of the person which is before the age of 18 and not after they are fully developed. *Id.*

156. The Court finds, based on Dr. Fletcher's testimony, that to analyze whether a person has mental retardation before age eighteen, there must be a careful review of the person's developmental history, school performance, prenatal history, postnatal history, and the occurrence of an event in adulthood, such as brain injury, that would explain why a person has mental difficulties. [*Id.* at 68-69].

157. The Court finds that Mr. Maldonado had problems with his development that began at a very early age that interfered with his school performance, and that persisted. [*Id.* at 69].

158. The Court finds, based on Dr. Weinstein's testimony that there were several risk factors in Mr. Maldonado's upbringing that lead him to the conclusion that onset of Mr. Maldonado's intellectual disability occurred before the age of 18. [*Id.*].

159. The Court finds, based on Dr. Weinstein's testimony, that Mr. Maldonado's mother abused alcohol during pregnancy; that Mr. Maldonado, as a child, would drink alcohol; also that he suffered from malnutrition; and that he was exposed to toxic substances, including pesticides, herbicides, and alcohol. [*Id.* at 179-80]. In addition, there was no intervening factor after the age of eighteen that would have lead Mr. Maldonado to lose cognitive abilities. [*Id.* at 180].

160. The Court finds that Dr. Weinstein agreed with Dr. Fletcher and testified that the onset of Mr. Maldonado's intellectual disability was most certainly before age eighteen. [*Id.* at 179].

161. The Court finds, based on Dr. Puente's testimony, people who knew Mr. Maldonado as a child established that he had intellectual disabilities prior to the age of eighteen. [*Id.* at Vol. 2, p. 30].

L. Mr. Maldonado's Risk Factor for Mental Retardation

162. The Court finds that AAIDD Manual sets forth risk factors commonly associated with mental retardation. The four categories of risk factors are: (1) biomedical: factors that relate to biologic processes; (2) social: factors that relate to social and family interaction; (3) behavioral: factors that relate to potentially causal behaviors; and (4) educational: factors that relate to the availability of educational supports that promote mental development and the development of adaptive skills. [DX 53R, AAIDD Manual at 60].

1) Behavioral Risk Factors

163. The Court finds that behavioral factors "relate to potentially causal behaviors, such as dangerous (injurious) activities or maternal substance abuse." AAMR, *Mental Retardation* at 126 (2002); AAIDD Manual at 60.

164. The Court finds, Dr. Weinstein administered a neurological examination and review of Mr. Maldonado's history of being exposed to large amounts of alcohol in the womb and determined that Mr. Maldonado was at risk of suffering from Fetal Alcohol Syndrome ("FAS") -- there is "a great possibility" that Mr. Maldonado suffers from Fetal Alcohol Syndrome ("FAS"), which "is one of the leading known causes of mental retardation." [DX12, at 9, ¶ 23].

165. The Court finds, based on Dr. Tara Wass, Ph.D.[8], an expert on FAS and its effect on child development, [DX2, at ¶ 2], that Mr. Maldonado's mother's heavy alcohol consumption during her pregnancy is consistent with behavior that leads to FAS and is highly probable caused Mr. Maldonado to suffer intellectual disabilities. [2006 H.T. Vol. 2, p. 22; DX 2, at [12]].

166. The Court finds that Dr. Wass reached her conclusion based in large part on information from Mr. Maldonado's father [2006 H.T. Vol. 2, pp. 15, 48] and on information in Dr. Puente's and Dr. Weinstein's reports, plus corroborating information from his grade-school teacher about the mother's drinking habits from both the teacher's affidavit and a personal interview with her. [*Id.* at Vol. 2, p. 30].

167. The Court finds, based on Dr. Wass's testimony, in the typical case of a diagnosis of FAS, the mother will have consumed 60 drinks per month, a level that Mr. Maldonado's mother reached in three days. [*Id.* at Vol. 2, p. 20].

168. The Court finds, based on Dr. Wass's testimony, approximately 25% of individuals whose mothers drank as heavily during pregnancy as did Mr. Maldonado's would be mentally retarded. [*Id.* at Vol. 2, p. 21].

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[8] Dr. Wass is a child development psychologist who specializes in the impact of prenatal ingestion of alcohol on the fetus. [2006 H.T. Vol. 2, p. 11]. She received a Ph.D. from the University of Denver in Developmental Psychology with a specialization in Developmental Cognitive Neuroscience. [DX 2, at ¶ 4, at [1]]. She has completed a two-year post-doctoral fellowship in "behavioral tetrology" which is "the study of agents that can cause birth defects (teratogens) with an emphasis on neurobehavioral effects (*e.g.*, intelligence, attention, motor, etc.)". [DX 2, ¶ 4, at [2]]. She has delivered reports at numerous professional conferences and published research articles in peer-reviewed journals. [*Id.*]. Among her relevant publications, she has an article in press titled "The neuroanatomical and neurobehavioral effect of heavy prenatal alcohol exposure" which will appear in J. Brick, ed., *Handbook of the Medical Consequences of Alcohol and Drug Abuse* (2d ed.). She has previously been certified as an expert in Fetal Alcohol Syndrome by a trial court in Memphis, Tennessee. *Keen v. State*, No. W2004-02159-CCA-R3-PD, 2006 WL 1540258 (Tenn. Crim. App. June 5, 2006, application for permission to appeal denied, Oct. 30, 2006).

169. The Court finds, based on Dr. Wass's testimony, that "cognitive deficits disorders" caused by FASD would appear before the age of eighteen, because they stem from brain damage caused by "prenatal alcohol exposure." [*Id.* at Vol. 2, p 23-24].

170. The Court finds that Mr. Maldonado was exposed to toxic substances contained in pesticides and insecticides during his childhood and adolescence. [DX 12, ¶¶ 29-31]. At the age of thirteen, he began to work as an agricultural worker in the fields fumigating crops. [*Id.* at ¶ 27]. As part of his duties, Mr. Maldonado was required to carry a tank filled with chemicals, such as Tamaron, Tiodan and cyanine, used in the fumigation process, on his back. [*Id.*]. These chemicals often leaked out of the tank, into the clothes that he was wearing, and eventually into his skin. [*Id.*].

171. The Court finds that exposure to such toxic substances can impair frontal lobe activity. [*Id.* at ¶ 31].

2) Educational Risk Factors

172. The Court finds that educational factors "relate to the availability of educational supports that promote mental development and the development of adaptive skills." AAMR, *Mental Retardation* at 126 (2002); AAIDD Manual at 60. The Court finds that impaired parenting is also relevant to this risk factor. The Court finds that Mr. Maldonado's uncle testified in his affidavit that Mr. Maldonado's mother (Transito) was a "local prostitute" and "would bring men (customers) home. Transito drank all the time. She was an alcoholic, a drunk." [DX 4 at 7]. Another neighbor testified that "Transito was a prostitute ("rabo verde"). She was known in Acuyo as 'La Guzga' (devourer of men). She drank a lot, especially at town dances." [DX 5 at 5].

173. The Court finds that the same neighbor also described that *"As long as I can remember, Transito paid no attention to [Mr. Maldonado] and left him alone. He walked around the village barefoot and in rags that were falling off him."* [*Id.* at 6].

3) Social Risk Factors

174. The Court finds that social factors "relate to social and family interaction, such as stimulation and adult responsiveness." AAMR, *Mental Retardation* at 126 (2002); AAIDD Manual at 60.

175. The Court finds that Mr. Maldonado had a turbulent and harsh childhood marked by neglect, deprivation, and abuse, and that his uncle, Severiano Maldonado, who lived in Acuyo both prior to the mother's pregnancy and during the time when Mr. Maldonado was growing up, [*Id.* at Vol. 15, pp. 6, 11, 19], testified that Mr. Maldonado was treated "badly" and that he had seen his mother hit him. [*Id.* at 8].

176. The Court finds that Mr. Maldonado's mother was violent with Mr. Maldonado and, when drunk, would beat him daily, sometimes hitting him in the head with rocks [DX 4, ¶11], and, at other times, hitting him with a whip on his hands, his arms, his head, and on his legs until they were bloody. [*Id.* at ¶15].

177. The Court finds that, as a child, Mr. Maldonado was very thin and frequently sick. [DX 6, ¶ 12; DX 5, ¶ 9]. When he was not sick, he was described as "very hyper" and running "back and forth like a rat." [DX 4, ¶ 18].

CONCLUSIONS OF LAW

Standard for Determining Mental Retardation

1. In the criminal courts of the State of Texas, Mental Retardation is defined pursuant to the American Association on Mental Retardation, now the American Association on Intellectual and Developmental Disabilities ("AAIDD") and/or Section 591.003(13) of the Texas Health and Safety Code. Both of which have very similar definitions for "mental retardation".

2. As such, mental retardation is defined by the following criterion:

a. significantly **subaverage general intellectual functioning;**

b. concurrent with related **deficits in adaptive functioning,** *that is, impairment in adaptive behavior defined as significant limitations in an individual's effectiveness in meeting the standards of maturation, learning personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales;*

c. the onset of which occurs prior to the age of 18. *Thus, the limitations in adaptive functioning are apparent before the age of eighteen concurrent with significant subaverage intellectual functioning.*

See *Ex Parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004) stating, *"Until the Texas Legislature provides an alternate statutory definition of "mental retardation" for use in capital sentencing, we will follow the AAMR or section 591.003(13) criteria in addressing Atkins mental retardation claims."*

3. **Significantly subaverage general intellectual functioning** is defined as an IQ score of approximately 70 or below (approximately 2 standard deviations below the mean)." *Id. citing* DSM-IV at 39; see also American Association on Mental Deficiency (AAMD), Classification in Mental Retardation 1 (Grossman ed.1983).

4. Establishing evidence of deficits in adaptive behavior is "exceedingly subjective", and it's likely that experts will view the same evidence and offer opposing opinions as to whether the evidence establishes deficits in adaptive behavior or not. See, *Ex Parte Briseno*, 135 S.W. 3d 1, 8 (Tex. Crim. App. 2004).

5. When experts offer opposing opinions as to whether evidence establishes deficits in adaptive behavior or not, the fact-finder in the criminal court ***may*** consider the following factors in weighing the evidence as indicative of retardation or of a personality disorder:

- Did those who knew the person best during the developmental stage –his family, friends, teachers, employers, authorities – think he was mentally retarded at that time, and if so, act in accordance with the determination?
- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

- Does he respond coherently, rationally, and on point to oral or written questions or does his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose? *Id.*

6. "Although experts may offer insightful opinions on the question of whether a particular person meets the psychological diagnostic criteria for mental retardation, the ultimate issue of whether the person is, in fact, mentally retarded for purposes of the Eighth Amendment ban on excessive punishment is for the finder of fact, based upon all of the evidence and determinations of credibility." *Id.*

7. The Court finds by a preponderance of the evidence that Mr. Maldonado has significantly subaverage general intellectual functioning based on uncontradicted testimony that Mr. Maldonado has a full scale score of 61 on the Batería-R, administered by Dr. Weinstein, and scores of 70 on the Beta III and 62 on the C-TONI, administered by Dr. Puente; all of which demonstrate that his intellect is firmly in the range of mild mental retardation, as recognized by the AAIDD Manual; and as such, meets prong one of the definition of mental retardation under the law.

8. The Court finds by a preponderance of the evidence that Mr. Maldonado's significantly subaverage general intellectual functioning developed prior to the age of 18.

9. The Court finds by a preponderance of the evidence that Mr. Maldonado has significant deficits in adaptive functioning in the conceptual, social, and practical domains that place him approximately two standard deviations below the mean in adaptive functioning meeting the second prong of mental retardation under the applicable law

10. The Court finds by a preponderance of the evidence that Mr. Maldonado's deficits in adaptive functioning in the conceptual, social, and practical domains occurred prior to the age of 18 and concurrent with his significantly subaverage intellectual functioning.

11. The Court finds when there are "battling experts" with opposing opinions formed after reviewing the same evidence, the *Briseno* factors may be considered in weighing evidence as indicative of mental retardation or of a personality disorder. *See Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004).

12. The Court finds by a preponderance of the evidence that there were no dueling experts with opposing opinions as to whether Mr. Maldonado had deficits in adaptive behavior or not.

13. The Court finds there was no evidence presented by the State where an expert testified to his opinion that Mr. Maldonado did not demonstrate deficits in adaptive behavior or that he had a personality disorder.

14. Although the Court ***may*** focus on the *Briseno* factors in determining whether Mr. Maldonado had limitations in his adaptive behavior related to his significantly subaverage intellectual functioning, the Court did not proceed to weigh the *Briseno* factors to determine whether they were indicative of Mr. Maldonado being mentally retarded or having a personality disorder because there was no contradictory expert opinion stating that Mr. Maldonado did not have a deficit in adaptive behavior but a personality disorder.

15. As such, the Court finds reliable and credible the well qualified expert opinions of the psychologists establishing by a preponderance of the evidence that Mr. Maldonado had limitations in his adaptive behavior related to his significantly subaverage intellectual functioning prior to the age of 18.

16. Therefore, the Court finds by a preponderance of the evidence that Mr. Maldonado is mentally retarded for purposes of the Eighth Amendment's ban on excessive punishment as established by all of the evidence and this Court's determinations of credibility.

17. Accordingly, under the holdings of *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), Mr. Maldonado cannot be put to death. His death sentence must be modified to a sentence of life imprisonment.

18. Any findings of fact determined to be conclusions of law shall be such, and any conclusion of law determined to be a finding of fact shall be so.

ORDER

The Court hereby adopts and incorporates herein the attached findings of fact and conclusions of law in this cause.

The Clerk is hereby ORDERED to prepare a transcript of all papers in cause number 721568-B and transmit same to the Court of Criminal Appeals as ordered by the Court of Criminal Appeals.

The Clerk is further ORDERED to send a copy of this Court's findings of fact and conclusions of law, including this Order, to Applicant's counsel and to counsel for the State.

SIGNED this 12th day of December, 2012

Hon. Hazel B. Jones
Presiding Judge of the
338th Criminal District Court,
Harris County, Texas

STATE OF TEXAS
COUNTY OF HARRIS

I, Chris Daniel, District Clerk of Harris County, Texas, certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.
Witness my official hand and seal of office this

12-14-12

CHRIS DANIEL, DISTRICT CLERK
HARRIS COUNTY, TEXAS

P Sibo

Deputy

Attachment C: South Carolina Department of Education Special Education Regulations (1999)

SOUTH CAROLINA STATE REGISTER

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Volume 23 **Issue No. 5**

This issue contains executive orders, notices, proposed regulations, emergency regulations, and final regulations filed in the Office of the Legislative Council and approved by the General Assembly pursuant to Article 1, Chapter 23, Title 1, Code of Laws of South Carolina, 1976.

Document No. 2413
DEPARTMENT OF EDUCATION
CHAPTER 43
Statutory Authority: 1976 Code Sections 59-5-60, 59-33-30, 59-21-510 et seq., 59-33-10 et seq.

43-243.1 Special Education, Education of All Handicapped Children

Synopsis: The Individuals with Disabilities Education Act, CFR 101-476, added requirements regarding the evaluation of students with disabilities. It was necessary for the State Department of Education to revise the eligibility for students with disabilities to participate in programs of special education.

Instructions: R43-243.1 This regulation is amended and will read as follows:

Text:

R43-243.1. Special Education, Education of Students with Disabilities

Table of Contents:

Introduction

This document includes the criteria for program entry into programs of special education for students with disabilities. It is intended that the criteria will be used by all members of the multidisciplinary team, which could include school psychologists, speech-language clinicians and other persons responsible for the identification and evaluation of students with disabilities. The Federal definitions for all categories of disabilities have been used, as included in the Individuals with Disabilities Education Act (IDEA), with one exception. The definition from the Code of Laws of South Carolina, 1976, was utilized for Preschool Child with a Disability

The categories of Educable Mental Disabilities, Trainable Mental Disabilities and Profound Mental Disabilities have been merged into one category of Mental Disability (MD) in line with the Federal definition. This has been done solely for the purposes of evaluation and initial service identification and will not affect the programming decisions that will be made for these students through the Individualized Education Plan (IEP) team. Placement of all students will be determined by the IEP team. Certification of teachers of students in this category will not be affected by the merging of these categories of disabilities. Teachers of students in the MD category who are

placed in self-contained classrooms must carry teaching certification(s) for the specific disability or disabilities of the students as indicated under certification regulations.

A guidance document will be developed to assist in the implementation of these regulations. Training will be provided to enable all appropriate school district staff members to utilize the criteria.

R43-243.1.1 Mental Disability

A. Definition: Mental disability means mental retardation, which is defined as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a student's educational performance.

B. Eligibility Criteria: A multidisciplinary evaluation team may determine that the student has a mental disability and is eligible for special education and related services, if appropriate, and if the evaluation information collected from multiple sources verifies all of the following:

(1) Significantly subaverage intellectual functioning must be evidenced by scores on both verbal and nonverbal scales at least two standard deviations (+/- the standard error of measurement) below the mean on one or more individually administered intelligence test(s);

(2) Functional limitation in adaptive skill areas must be evidenced by scores at least two standard deviations (+/- the standard error of measurement) below the mean on a comprehensive standardized adaptive behavior measure;

(3) Limitations in preacademic, academic and/or functional academic skills as evidenced by significantly subaverage results on one or more individually administered achievement tests or significantly subaverage results on a developmental skills assessment; and

(4) The student's mental disability adversely affects educational performance.

C. In order to report a child with a mental disability under the Education Finance Act, the following criteria must be utilized:

	Aptitude Standard Score*
Mild	48 - 70±
Moderate	25 - 48±
Severe	0 - 25±

*Assumes mean of 100 and standard deviation of 15.

For funding purposes only, under the Education Finance Act, students falling within the mild category are reported as EMH and students falling within the moderate and severe categories are reported as TMH.

D. Evaluation: The following evaluation components are required:

(1) Documentation of vision, hearing and speech/language screening completed within the past twelve (12) months;

(2) Developmental history, which includes a summary of demographic, developmental, educational, and medical history obtained from a parent or primary caregiver;

(3) One or more individually administered full scale norm-referenced measure(s) of verbal and nonverbal intelligence with appropriate reliability (>.85), validity, and standardization characteristics administered by a Certified School Psychologist, a Licensed School Psychologist or a Licensed Psycho-Educational Specialist within the past twelve (12) months. A report of the results of a full-scale norm-referenced measure(s) of verbal and nonverbal intelligence, which has been directly administered by a licensed clinical or counseling psychologist with training in the assessment of children and adolescents may be accepted by the school district. This instrument must have appropriate reliability (>.85), validity, and standardization characteristics, and must have been administered within the past twelve (12) months;

(4) A curriculum based, criterion referenced, or norm-referenced measure of preacademic, academic and/or functional academic achievement or a developmental skills assessment individually administered by a trained examiner within the past twelve (12) months;

(5) Standardized measure of adaptive behavior within the past twelve (12) months;
(6) Documentation to establish adverse effect on educational performance.

R43-243.1.2 Visual Impairment

A. Definition: Visual Impairment, including blindness, means an impairment in vision that, even with correction, adversely affects a student's educational performance. The term includes both partial sight and blindness.

B. Eligibility Criteria: A multidisciplinary evaluation team, which includes a teacher certified in visual impairment or other professional knowledgeable of the educational needs of students with visual impairments may determine that the student has the disability of visual impairment and is eligible for special education and related services, if appropriate, if evaluation information collected from multiple sources verifies:

(1) One of the following:

(a) The visual acuity, as determined by a licensed optometrist or ophthalmologist, with correction is 20/70 or worse in the better eye;

(b) The visual acuity, as determined by a licensed optometrist or ophthalmologist, is better than 20/70 with correction in the better eye, and there is documentation of either of the following conditions:

(1) A diagnosed progressive loss of vision;
(2) A visual field of twenty (20) degrees or less.

(c) The visual acuity is unable to be determined by a licensed optometrist or ophthalmologist and functional vision loss is supported by functional vision assessment findings;

(d) A diagnosed condition of cortical visual impairment as determined by a licensed optometrist, ophthalmologist, or neurologist.

(2) The student's visual impairment adversely affects educational performance.

C. Evaluation

(1) The following evaluation components are required:

(a) Documentation of vision, hearing, and speech/language screening completed within the past twelve (12) months (vision screening requirement is waived if a vision examination report meeting criteria indicated in Item (c) below is available);

(b) Developmental history, which includes a summary of demographic, developmental, educational, and current medical history obtained from a parent or a primary caregiver;

(c) A written report of a visual examination conducted within the past twelve (12) months by a licensed ophthalmologist or optometrist. For diagnosed cortical visual impairment, the examination may be conducted by a neurologist;

(d) A functional vision assessment, conducted by a teacher certified in the area of visual impairment, a credentialed orientation and mobility specialist, or a trained diagnostician;

(e) An assessment conducted by a teacher certified in visual impairment to determine appropriate literacy media and to evaluate braille skills;

(f) A norm-referenced or criterion referenced measure of academic achievement, or a developmental assessment, or an assessment of vision specific skills individually administered within the past twelve (12) months;

(g) Students whose primary disability is visual impairment may also exhibit characteristics of a concomitant disability, which adversely affects their educational progress. When these students are not making reasonable progress, further evaluation in the areas of suspected disability must be conducted;

(h) Documentation to establish adverse effect on educational performance.

R43-243.1.3 Orthopedic Impairment

A. Definition: Orthopedic Impairment means a severe orthopedic impairment that adversely affects a student's educational performance. The disability limits normal function of bones, muscles, or joints due to congenital anomaly (e.g., clubfoot, absence of some member, etc.) impairments caused by disease (e.g., poliomyelitis, bone

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	)	
	)	Case No. 2018-CP-43-001025
BOBBY WAYNE STONE,	)	
Applicant,	)	
	)	**CERTIFICATE OF SERVICE**
vs.	)	
	)	
	)	
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	
_____	)	

The undersigned certifies that a copy of Applicant's Post-Hearing Reply Brief was served was served by email to the AIS email addresses, pursuant to Section (b) of the Supreme Court of South Carolina's May 6, 2022 Order, this 2nd day of May, 2025, upon the following:

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May 2, 2025