IN THE
SUPREME COURT OF THE UNITED STATES

BYRON LEWIS BLACK
Petitioner,

v.

TONY MAYS, Warden,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S APPENDIX

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2005 WL 2662577
Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,
at Nashville.

Byron Lewis BLACK
v.
STATE of Tennessee.

No. M2004–01345–CCA–R3–PD.
|
July 19, 2005 Session.
|
Oct. 19, 2005.
|
Application for Permission to Appeal
Denied by Supreme Court
Feb. 21, 2006.

Appeal from the Criminal Court for Davidson County, No. 88–S–1479; Walter J. Kurtz, Judge.

Attorneys and Law Firms

Donald E. Dawson, Nashville, Tennessee, and Catherine Y. Brockenborough, Nashville, Tennessee, for the appellant, Byron Lewis Black.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; Michelle Chapman McIntire, Assistant Attorney General; and John Zimmerman, Assistant District Attorney General, for the appellee, State of Tennessee.

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

Opinion

OPINION

JOHN EVERETT WILLIAMS, J.

***1** This appeal is before us following the reopening of Petitioner's post-conviction petition for the limited purpose of determining whether Petitioner is mentally retarded and thus ineligible for the death penalty pursuant to our supreme court's decision in *Van Tran v. State*, 66 S.W.3d 790 (Tenn.2001) and the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). The post-conviction court ultimately determined that Petitioner had failed to prove that he was mentally retarded and that the weight of the proof was that he was not mentally retarded. Accordingly, the court denied Petitioner's request for a new trial and denied and dismissed the petition for post-conviction relief. In this appeal as of right, this court must determine the following issues: (1) whether Petitioner proved by a preponderance of the evidence that he is mentally retarded; (2) whether Tennessee Code Annotated section 39–13–203, as interpreted by the supreme court in *Howell v. State*, 151 S.W.3d 450 (Tenn.2004), is constitutional in light of the principles

outlined in *Atkins v. Virginia;* and (3) whether the absence of mental retardation is an element of capital murder requiring the State to bear the burden of proof and requiring submission of the issue to a jury. After review of the record and the applicable law, we find no errors of law requiring reversal. Accordingly, we affirm the post-conviction court's denial of post-conviction relief.

Byron Lewis Black was convicted in 1989 of three counts of first degree murder for the shooting deaths of his girlfriend, Angela Clay, and her two daughters, Latoya and Lakeisha Clay. A jury sentenced Petitioner to death for the murder of Lakeisha Clay and to two life sentences for the murders of Angela and Latoya Clay. Petitioner was also convicted of one count of burglary, for which he received a fifteen-year sentence. The Tennessee Supreme Court affirmed Petitioner's convictions and sentences on direct appeal. *See State v. Black*, 815 S.W.2d 166 (Tenn.1991).

Petitioner subsequently filed a petition for post-conviction relief, which was denied by the trial court and affirmed by this court on appeal. *See Byron Lewis Black v. State*, No. 01C01–9709–CR–00422, 1999 Tenn.Crim.App. LEXIS 324, 1999 WL 195299 (Tenn.Crim.App., at Nashville, Apr. 8, 1999). The Tennessee Supreme Court denied Petitioner's application for permission to appeal this court's judgment, and the United States Supreme Court denied Petitioner's writ of certiorari. *See Black v. Tennessee*, 528 U.S. 1192, 120 S.Ct. 1249, 146 L.Ed.2d 106 (2000).

Subsequently, Petitioner filed a petition for writ of habeas corpus in the United States District Court, which was dismissed by the grant of summary judgment on December 11, 2001. *Black v. Bell*, 181 F.Supp. 832 (M.D.Tenn.2001). Thereafter, Petitioner appealed to the United States Court of Appeals for the Sixth Circuit, and the Sixth Circuit Court of Appeals is currently holding its appeal in abeyance pending the disposition of this action.

***2** On December 4, 2001, the Tennessee Supreme Court released its opinion in *Van Tran v. State*, 66 S.W.3d 790 (Tenn.2001). This opinion held as a matter of first impression that the execution of a mentally retarded person violates the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution. The *Van Tran* Court further held that retroactive application of this new rule of law was warranted for cases on collateral review. Approximately six months later, on June 20, 2002, the United States Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), that execution of mentally retarded persons was cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution. In response to these two court opinions, Petitioner filed a motion to reopen his post-conviction petition on November 13, 2002, alleging that he was mentally retarded and thus ineligible for the sentence of death. The post-conviction court entered a preliminary order and found that Petitioner had made a sufficient showing for his petition to be reopened and held an evidentiary hearing.

Post–Conviction Proceedings

During the post-conviction proceedings, Petitioner presented the testimony of four lay witnesses, three expert witnesses, the affidavit of an additional expert witness, and numerous exhibits. The State presented the testimony of two expert witnesses. Petitioner's experts all found that Petitioner met the criteria to be diagnosed as mentally retarded. The State's experts found that Petitioner did not meet the criteria to be diagnosed as mentally retarded.

The lay witnesses presented by Petitioner testified as to various aspects of Petitioner's social and educational history. Mary Smithson–Craighead first testified on behalf of Petitioner. Ms. Smithson–Craighead had been the coordinator of the Nashville Education Improvement Project (NEIP) while Petitioner attended elementary school at Carter–Lawrence Elementary School. Ms. Smithson–Craighead testified that the particular elementary school that Petitioner attended had received funding from the NEIP because an assessment by Metro Nashville Schools had determined that the students at Carter–Lawrence were not at grade level. Ms. Smithson–Craighead further testified that at the time Petitioner attended elementary school, the schools in Nashville were segregated and the school Petitioner attended was made up of minority students who were financially disadvantaged.

Ms. Smithson–Craighead testified as to the administration of achievement tests and intelligence quotient ("I.Q.") tests during her tenure at Carter–Lawrence. She explained that the achievement tests were given in a group setting and were administered by the teachers. I.Q. tests, however, were administered individually by someone from the district office. Ms.

Smithson–Craighead testified that for the most part the standardized tests were given exactly by direction, but there had been an occasion where a teacher may have assisted a student on an exam. It was Ms. Smithson–Craighead's opinion that teachers can recognize students who are mentally retarded but that some students do slip through the cracks. She maintained, however, that teachers were sensitive to the possibility that a student might be mentally retarded. During her tenure at Carter–Lawrence, she had four students who were tested, removed from the school, and placed in another school in a classroom designated for the mentally retarded. Although Ms. Smithson–Craighead was the kindergarten through third grade NEIP coordinator at Carter–Lawrence while Petitioner attended school there, she never taught Petitioner.

***3** Petitioner's sister, Melba Corley, testified that during Petitioner's childhood, their family lived in South Nashville in an asbestos-shingle siding home. She testified that during his childhood, Petitioner enjoyed playing outside and would at times get so dirty in the iron rust outside their home that he required two baths a day. She explained that Petitioner also adored their grandfather, who was the only other male in the home. She and her three sisters helped their mother and grandmother with the chores around the house, but Petitioner only had to help bring in the wood and coal from outside and keep his area of the room they slept in upstairs clean. Ms. Corley testified that she never considered her brother to be mentally retarded when they were growing up nor did anyone in her family ever discuss the possibility in her presence. She explained that he did require help with his homework and did not seem to enjoy reading like she did. He was able to keep himself clean and dress himself. She further testified that he had pride in himself. She related that she and her siblings received a yearly check-up by a doctor. Petitioner traveled with her and her husband to Colorado and California at different times. On those trips, Petitioner would help with the driving, but he was not very helpful with reading the maps. She did admit that her mother smoked and drank alcohol during pregnancy. She did not, however, testify as to the amount her mother drank while she was pregnant with Petitioner. Further, Ms. Corley could not recall Petitioner having an injury that would have caused brain damage.

Al Dennis, Petitioner's high school football coach, testified that he had coached Petitioner at Hume Fogg High School from 1972 through 1974. He explained that at the time Petitioner attended this school, it was a vocational school. Mr. Dennis testified that Petitioner was an outstanding defensive player. In fact, his senior year, he was third in tackles and assists on the team. Mr. Dennis also testified that during Petitioner's senior year, the team won the Division A, Class A state championship title. Although Petitioner was an outstanding defensive player, he was not a good offensive player. Coach Dennis explained that he ran a complicated offense on the team, and Petitioner simply could not learn or remember the plays. As a result, he would make mistakes. Therefore, he could only play on offense when the team had a significant lead. Coach Dennis testified that based on Petitioner's inability to remember and understand the plays, it was his belief that Petitioner had a lower intelligence. He also distinctly remembered that Petitioner smiled all the time, even when it was inappropriate to do so. Coach Dennis stated that even when Petitioner was being criticized, he would smile. According to the coach, Petitioner got along well with his teammates and was respectful of the coaches. He did not remember any problems Petitioner had at school that were brought to his attention by any of the teachers.

***4** Richard Corley became acquainted with Petitioner when Petitioner's sister, Melba, married his brother. Mr. Corley worked at the insurance company Caroon and Black and assisted Petitioner in acquiring a job there. It was his belief that Petitioner worked at Caroon and Black from approximately 1974 until 1989. Mr. Corley testified that Petitioner basically served as a courier. Petitioner would make runs in a company van to the warehouse and bank and ordered supplies. When he went to the bank, he would deliver deposits, but he was not required to complete the deposit slips. He described Petitioner's job as simple and routine. When Petitioner was out, he and other employees could step in and do the job. Mr. Corley testified that he never considered that Petitioner was mentally retarded when he recommended him for the position at Caroon and Black. Mr. Corley further testified that Petitioner got along well with the other employees, was well-liked by the other employees, and seemed to be a good employee.

Dr. Albert Globus testified as an expert in psychiatry and neurology on behalf of Petitioner. Dr. Globus evaluated Petitioner in 2001 and again immediately preceding the post-conviction hearing. Dr. Globus concluded that Petitioner has a damaged brain. He explained that Petitioner had very serious abnormalities in his mental status examination. Specifically, Petitioner has a lack of cognitive ability and poor recent memory. Dr. Globus explained that Petitioner is very slow in his thinking and has a disconnect between what he is talking about and his mood, which always seems euphoric. Dr. Globus opined that Petitioner's poor short-term memory very likely places him in the mildly mentally retarded range.

Dr. Globus opined that there were several factors in Petitioner's early life that would cause some sort of mental ratio of delays in life and would result in mild or severe mental retardation in many people. Specifically, Dr. Globus identified the drinking of alcohol by Petitioner's mother during pregnancy as the most important factor. Dr. Globus also identified several

other potential etiological factors including playing of football, possible lead poisoning, and possible inadequate care at home. Dr. Globus testified that the playing of football is known to produce minor brain damage in people who "tackle with their heads." Petitioner reported to Dr. Globus that he had been hurt on several occasions in this fashion. Dr. Globus further explained that white paint had been made with a lead compound until it was outlawed because of its effects on development and the blood. Petitioner's sister had testified that there was white paint in Petitioner's childhood home and on the family crib, which had teeth marks on it. Dr. Globus testified that Petitioner had developed anemia during his first year or two of life, which could have been a result of lead exposure or poor nutrition or both.

Dr. Globus testified that brain imaging confirmed that Petitioner has brain damage. Dr. Globus had determined prior to the brain imaging that Petitioner's brain abnormalities exist in the frontal and temporal lobes. Dr. Globus testified that the brain imaging conducted by Dr. Robert Kessler confirmed such. Dr. Globus also testified that data gathered from Dr. Ruben Gur's assessment revealed that areas of Petitioner's brain are hypometabolic, which means that they process glucose at a rate below normal. Hypometabolism may indicate a site of a tumor, an epileptic fossa, a degeneration secondary to senile dementia or mental retardation. Dr. Globus also reviewed the findings of Dr. Daniel Grant and concluded that the psychological results are consistent with the other results. Finally, Dr. Globus concluded that Petitioner's mental retardation began before he was eighteen years old.

***5** On cross-examination, Dr. Globus explained that he was initially hired by the federal public defender's office to determine if the state court had erred in finding Petitioner competent to stand trial. Dr. Globus admitted that although he has opined that one of the etiological factors in determining that Petitioner is mentally retarded is that he received brain damage from playing football, Petitioner was never evaluated by a medical professional because of a head injury received while playing football. Dr. Globus explained that many professional football players have cumulative minor injuries to the brain, which is probably also true of high school players. Dr. Globus also admitted that the etiological cause of mental retardation cannot be determined with certainty. Furthermore, it cannot be determined with certainty that the ingestion of alcohol during pregnancy will cause mental retardation.

Dr. Daniel Grant testified on behalf of Petitioner as an expert in neuropsychology and forensic psychology. In making his assessment, Dr. Grant interviewed Petitioner on two occasions, for a total of twelve to fourteen hours. During his testing of Petitioner, he saw no evidence of malingering, although he did not specifically test for it. Dr. Grant explained that he administered a battery of tests, which would in effect rule out malingering because it's difficult to perform poorly on the same concept areas on various tests. Dr. Grant testified that there are two major measures of adult intelligence: the Wechsler Adult Intelligence Scale–Third edition ("WAIS–III") and the Stanford–Binet Intelligence Test. In drawing his conclusion that Petitioner is mildly mentally retarded, he conducted a series of tests and applied the independent living scale.

Dr. Grant testified that when psychological tests are used to meet the criteria to diagnose retardation, the standard error of measurement must be considered. According to Dr. Grant, there is generally a one to five point standard error of measurement with all intelligence tests. Dr. Grant explained that both the American Association of Mental Retardation ("AAMR") and the Diagnostic Statistical Manual for Psychiatry ("DSM") account for a standard error of measurement ("SEM") in intelligence testing. Accordingly, Dr. Grant testified that a person who scored a seventy-one on an I.Q. test may actually be classified as mentally retarded, because when adjusted by the SEM, the I.Q. score would fall within a range that extended both below and above seventy. Dr. Grant admitted that Petitioner received I.Q. scores while in school of eighty-three, ninety-two, and ninety-one, which are all above the range for mental retardation, even when adjusted by the standard error of measurement. Dr. Grant, however, noted that the I.Q. tests given to Petitioner while in school were administered in a group setting, and both the AAMR and the DSM recommend only individually administered tests. Furthermore, Dr. Grant explained that the results could be skewed depending on how they were scored. If the tests were scored by grade level rather than by age, Petitioner's scores would be skewed because he repeated second grade.

***6** Dr. Grant also acknowledged that Petitioner scored a seventy-three on the WAIS intelligence test in 1993 and a seventy-six on the WAIS–R intelligence test in 1997. However, Dr. Grant opined that Petitioner's scores were inflated as the result of the Flynn Effect, which recognizes that people acquire more information and knowledge over time, which in turn requires that the I.Q. tests be renormed to reflect the gain of knowledge. Dr. Grant testified that Dr. Flynn, for whom the Flynn Effect is named, has done research that shows that for every three years after norms are collected for an intelligence test, the I.Q. is inflated by one point. Therefore, in nine years, the person should score three points higher on the I.Q. test. Dr. Grant opined that although Petitioner scored a seventy-three on the WAIS in 1993, the test was published in 1980; therefore, Petitioner's corrected I.Q. would be sixty-nine, after adjusting for the four point increase in the population's I.Q. between

1980 and 1993. Furthermore, Petitioner's corrected WAIS–R score would be seventy-one, rather than seventy-six, because according to the Flynn Effect there would be a five-point inflation.

Dr. Grant testified that Petitioner's results from the independent living scale revealed problems with managing money, managing a home, transportation, and health and safety. Dr. Grant further concluded that Petitioner met the criteria for deficits in adaptive behavior as set forth in both the DSM–IV and the AAMR. Dr. Grant testified that Petitioner never lived independently, never cooked, never cleaned the house, never did laundry, never participated in the care of his son, never contributed financially to his family, and never had a bank account. Dr. Grant further noted that even while he was married, he and his wife lived with his family. Dr. Grant found that based on these factors, Petitioner had deficits in adaptive behavior. Dr. Grant explained that Petitioner had support from his family that would enable him to blend into the general population. Although there was testimony that his family did not see him as retarded, Dr. Grant explained that this is not inconsistent with persons who fall into the mildly mentally retarded range.

Dr. Grant concluded that Petitioner's mental retardation existed prior to age eighteen. As evidence of this conclusion, Dr. Grant pointed to findings from Dr. Globus and Dr. Gur that there are abnormalities in his brain that can best be explained through things that happened to Petitioner early in life. He also highlighted Coach Dennis' testimony that Petitioner had difficulty following plays. He noted that Petitioner repeated the second grade. Petitioner scored in the one percentile on a differential aptitude test administered in the ninth grade. Dr. Grant also pointed to the fact that Petitioner attended a very impoverished school.

The State presented two witnesses at the hearing: expert witnesses Eric Engum, Ph.D., J.D., and Susan Vaught, Ph.D. After extensive cross-examination, Eric Engum was qualified and permitted to testify as an expert in clinical and forensic psychology and neuropsychology. Dr. Engum opined that Petitioner did not meet the criteria to be diagnosed mentally retarded. Dr. Engum admitted initially in his testimony that he did not conduct his own testing of Petitioner. Instead, he relied upon the Petitioner's previous testing. Dr. Engum further explained that he did not conduct additional testing because he believed Petitioner was probably "test-wise" or "test-weary." Dr. Engum further opined that he believed Petitioner has "some sophistication in knowing how to present himself on the tests to make himself look impaired."

***7** As to Petitioner's present I.Q., Dr. Engum testified that he relied upon Dr. Kenneth Anchor's testing who assessed Petitioner near the time of his trial. At the time of the testing conducted by Dr. Anchor, Petitioner scored an overall I.Q. of seventy-six, and Dr. Anchor indicated that he believed that despite the score of seventy-six, he suspected Petitioner actually performed at a much higher level in the community. Dr. Engum further explained that I.Q. tests tend to underestimate the intelligence of minorities. Dr. Engum also noted that Petitioner scored a seventy-six when tested by Pat Jaros, and he scored a seventy-three when tested by Dr. Gillian Blair in October 1993. Based upon his review of the testing of Petitioner, Dr. Engum testified that he could find no evidence that Petitioner had an I.Q. of seventy or less at the time he committed the crimes at issue.

In addition to determining that Petitioner did not have an I.Q. of seventy or less, Dr. Engum also opined that Petitioner failed to meet the second criterion for mental retardation: deficits in adaptive behavior. Dr. Engum testified that he assessed Petitioner's adaptive behavior according to the legal standard in Tennessee. He testified that it was his understanding that under the Tennessee standard, the issue is whether a person can adapt his behavior to the surrounding circumstances, which is a different standard than that set out in the DSM–IV. The question he believed he must answer was whether the Petitioner could function within his environment in terms of going about and doing the daily activities that everyone else does. Dr. Engum testified that he relied upon the testimony of individuals who testified during the mitigation phase of Petitioner's trial, and those individuals "commented very favorably upon him in terms of his ability to function within the environment." Dr. Engum also testified that during his childhood, Petitioner functioned like a child within his culture and community. Dr. Engum further noted that prior to age eighteen, there was no individualized assessment by school psychologists, no indication of significant problems with juvenile authorities, and no unusual behavioral problems. According to Dr. Engum, there simply were no major deficits in Petitioner's adaptive behavior. Dr. Engum also assessed Petitioner's adult years prior to committing the crimes for which he was convicted, and again he found no deficits in adaptive behavior. Furthermore, Dr. Engum opined that Petitioner did not meet the standard for deficits in adaptive behavior under the Tennessee standard or under the criteria set forth in the DSM–IV. Although Dr. Engum believed that Petitioner suffered from personality problems, delusional problems, or psychological difficulties, those issues are separate and apart from the issue of whether Petitioner was mentally retarded.

On cross-examination, Dr. Engum admitted that Petitioner's grades were certainly not optimal and were highly inconsistent, but he determined that these problems may have resulted from motivational issues rather than mental retardation issues. Dr. Engum also acknowledged that the testing performed by Dr. Anchor was a screening test and was not as reliable as other testing performed. During cross-examination, Petitioner's counsel also brought out the fact that Dr. Anchor's license was revoked or suspended following Petitioner's trial because he had destroyed documents and test results. Dr. Engum reiterated that none of the experts who assessed Petitioner prior to 2001 made any identification of mental retardation. Petitioner argues on appeal that Dr. Engum's testimony and opinions are completely unreliable and should be given no consideration.

***8** Dr. Susan Vaught also testified on behalf of the State as a clinical psychology and mental retardation expert. Dr. Vaught opined that Petitioner did not meet the criteria to be diagnosed as mentally retarded. As for the first criterion, Dr. Vaught explained that in recent testing Petitioner was "at or right at" criteria. She testified that because Petitioner's life was at stake, she wanted to give him the benefit of any doubt. She then explained that when he was first assessed Petitioner was above criteria, but he fell below criteria as time progressed. It was her opinion that there were a lot of alternative explanations for the decline other than long-standing mental retardation; therefore, she examined his history to determine onset.

Dr. Vaught testified that I.Q. tests have historically been biased against minorities. She explained that, therefore, if you have an African–American who tests in the seventies, the clinician must be very cautious with the interpretation, especially if mental retardation is being considered, because there is a bias in the test. Dr. Vaught also testified that she was aware of the Flynn Effect, but it was not the standard of practice to correct for it, in terms of looking at an I.Q. score. Dr. Vaught explained her concerns about the reliability of the recent I.Q. testing performed on Petitioner. She explained that the thumb print of Petitioner's scores is much more consistent with brain injury or an ongoing organic condition than it is for mental retardation. She went on to explain that with mental retardation, you generally see a global deficit of scores or an "elevator-down phenomenon" rather than some high scores and some very low scores. Dr. Vaught explained that she routinely performs assessments to determine whether a person qualifies for services in the State and that a part of her assessment must be whether the condition occurred prior to age eighteen and is, therefore, chronic or whether it is a fairly recent problem. Dr. Vaught testified that as for Petitioner, she believed his recent I.Q. scores were a result of a motivational problem or an organic problem. In any event, however, she testified she gave the "benefit of the doubt in [Petitioner's] direction."

Dr. Vaught testified that to determine whether a person has deficits in adaptive functioning, she would first determine whether the person could complete normal tasks of daily living that most people accomplish. Next, the health history and school history must be reviewed. Dr. Vaught explained that it should be determined whether the milestones were met on time. She reviews the school records and programs in the school to determine educational history. She also reviews job history and marital history. As for Petitioner, Dr. Vaught had multiple sources of information, including but not limited to: medical records; school records; a taped interview with the police; testing performed by other clinicians; letters written by Petitioner; prior court testimony; and prison records. Dr. Vaught explained that in assessing deficits in adaptive functioning, she must consider three areas: conceptual, social, and practical.

***9** Language, reading and writing, money concepts, and self-direction are the four basic areas examined to determine if there is a deficit in the conceptual area of adaptive functioning. Dr. Vaught found that Petitioner had age appropriate functioning within the conceptual category. Further, Dr. Vaught found Petitioner's social skills were intact and at or above the level suggested by current measures of intellectual functioning. Although she determined that Petitioner may have had some mental health issues, he did not have social deficits in adaptive functioning. Finally, Dr. Vaught concluded that Petitioner had no practical deficits in his activities of daily living.

Dr. Vaught further opined that there was no onset of mental retardation of Petitioner prior to age eighteen. Dr. Vaught explained that Petitioner's childhood history did not follow the pattern of a person with mild mental retardation who has escaped diagnosis. Dr. Vaught admitted that Petitioner did not excel in school; his grades were low to average. He did, however, test within the normal range on standardized I.Q. and achievement testing in elementary and junior high school. At one point, the testing may have indicated a learning disability in reading, but later testing showed he had progressed. Standardized testing in the ninth grade showed that he tested "far below age peers," but he continued on in school. Dr. Vaught also explained that during his high school years and in particular his ninth grade year, Petitioner suffered "multiple stressors," including the death of a teacher, football injury, and birth of his first child. In any event, Petitioner graduated with a regular diploma. Dr. Vaught testified that she had "rarely, if ever, seen a person with mild mental retardation make it through high school with no assistance like that, and they've managed to get a regular diploma." Dr. Vaught further pointed

out that Petitioner played organized sports, was engaged in age appropriate activities such as dating, faced and managed a fairly high stress level, received his driver's license apparently without any vocational support, and kept employment without vocational support, training, or modifications.

Dr. Vaught candidly admitted that she neither personally interviewed nor tested Petitioner. She explained that she did neither for several reasons. One, she had been given voluminous records to review, and after her review of the records, she did not believe Petitioner met either the second or third criteria for mental retardation. Further, she saw a pattern of the scores on the I.Q. tests descending. She had also reviewed Dr. Jaros' report and believed that some organic results had occurred recently in Petitioner's life, and her findings would be skewed by such. It was also Dr. Vaught's opinion that as a result of the organic problems from which Petitioner was suffering, he would require clinical testing in the near future as a part of his diagnosis and treatment, and it was her belief that if she tested him, it would skew the results for the next clinician. Dr. Vaught further explained that she believed Petitioner had become savvy to the testing.

***10** On cross-examination, Dr. Vaught again reiterated that clinicians are aware of the Flynn Effect but that they do not adjust the scores based on it. Furthermore, she explained that she is very liberal in assessing a person to qualify for services as a result of mental retardation. She stated: "If I could possibly put somebody in for services that they need, I'm going to do it." She then testified that she had cautioned counsel for the State when he approached her for taking the case that if she could find that Petitioner is mentally retarded and keep him from being executed, she was going to do it. Dr. Vaught further admitted that Petitioner has a relatively impaired brain. Dr. Vaught referenced on several occasions in direct and cross-examination testimony her displeasure with Dr. Grant's comment that mental retardation was a mental illness. Dr. Vaught explained that mental retardation and mental illness are separate issues. Dr. Vaught explained that mental illness is a medical illness that affects a person's ability to think like a normal person from the standpoint of thought formation and mood. Mental retardation, however, is a developmental disability. It is something that a person is born with or acquires in childhood. She stated that mental retardation is a structural problem in the brain or "a very bad roll of the genetic dice." It has nothing, however, to do with mental illness.

Following the post-conviction hearing, the video deposition of Ruben Gur, an expert in neuropsychology, was taken and filed as part of the proof in the post-conviction proceedings. Dr. Gur concluded, after conducting an MRI and a PET scan, that Petitioner had brain damage. Dr. Gur testified that Petitioner's brain is damaged in the areas that control aggression and impulses, as well as Petitioner's ability to think about the future. Dr. Gur also testified that Petitioner had enlarged ventricles, which indicated that a lot of brain cells had died in the middle of Petitioner's brain. Dr. Gur explained that ventricular atrophy was a sign of several disorders and happens during gestation. He testified that large ventricles are a cardinal sign of schizophrenia but appear in mental retardation and in various forms of cerebral palsy or atrophy disorders. Dr. Gur testified that due to the scope of damage he found in Petitioner, he was looking for some major brain injury or a period of a coma, but neither of those are borne out in the record. Therefore, he found the most likely causes were fetal alcohol syndrome or a series of minor head injuries. He later admitted on cross-examination that he could not rule out other causes including adult alcohol and drug abuse. However, Dr. Gur testified that the results of Petitioner's PET scan also indicated brain damage resulting from fetal alcohol syndrome.

Dr. Gur explained that people with brain damage have "pockets of excellence" and "pockets of deficit," which explains why Petitioner may have performed well on some of the harder questions while missing some of the easier questions. Dr. Gur testified that the part of the brain that needed to be used to answer the easier questions may have been damaged. Accordingly, the fact that Petitioner correctly answered some of the harder questions while missing some of the easier questions is not an indication of malingering. Dr. Gur further testified that he did not test Petitioner for malingering because Petitioner appeared to be putting forth a lot of effort during the testing.

***11** Dr. Gur concluded that Petitioner is mentally retarded. He estimated that Petitioner has an I.Q. of sixty. He also opined that Petitioner's test results indicated he had deficits in adaptive behavior. Ultimately, Dr. Gur admitted that he could not specify a date certain when Petitioner's brain damage occurred. However, Dr. Gur testified that to a reasonable degree of medical certainty, Petitioner has serious brain damage and is mentally retarded.

Patti van Eys, a clinical psychologist at Vanderbilt University, submitted an affidavit regarding her evaluation of Petitioner. Dr. van Eys found Petitioner's I.Q. to be sixty-nine, based on the WAIS–II intelligence test. Dr. van Eys stated that she did not believe Petitioner was malingering. She also criticized the State's experts for failing to personally interview Petitioner in their assessments.

Analysis

In this appeal, we must determine whether the trial court erred in finding that Petitioner was not mentally retarded and thus eligible for the death penalty. In 1990, the Tennessee Legislature enacted Tennessee Code Annotated section 39–13–203, which prohibited the execution of mentally retarded persons. In so doing, the legislature set forth the criteria for determining whether a person is mentally retarded and the burden of proof to be applied. *See* Tenn.Code Ann. § 39–13–203(a) and (c). This statute, however, had an effective date of July 1, 1990, and did not address its effect on defendants previously sentenced to death. In 2001, in response to a motion to reopen a post-conviction petition filed by a defendant sentenced to death prior to the effective date of Tennessee Code Annotated section 39–13–203, the supreme court determined that the statute does not have retroactive application. *Van Tran v. State*, 66 S.W.3d 790, 798 (Tenn.2001). However, the *Van Tran* Court determined that pursuant to Article I, Section 16 of the Tennessee Constitution, it was constitutionally impermissible to execute a mentally retarded person. *Van Tran*, 66 S.W.3d at 800. Further, the *Van Tran* Court held that this newly recognized constitutional right warranted retroactive application to cases on collateral review. *Id.* at 811. Approximately six months after the *Van Tran* decision, the United States Supreme Court released an opinion holding that executing a mentally retarded person violates the United States Constitution. *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

Since releasing the *Van Tran* decision, our supreme court has had another occasion to address the *Van Tran* holding and its applicability. *See Howell v. State*, 151 S.W.3d 450 (Tenn.2004). In *Howell*, the supreme court elaborated on the appropriate criteria to be applied in determining whether a petitioner is mentally retarded, set forth the standards to be applied by the post-conviction court, set forth the appropriate burdens of proof, and determined that a petitioner is not entitled to have a jury determine whether he is mentally retarded. *Howell*, 151 S.W.3d at 457–58, 463–65. Accordingly, both the *Van Tran* and *Howell* decisions will be of paramount importance in our determination of whether the post-conviction court erred.

***12** In this appeal, Petitioner asserts that the trial court erred in determining that the evidence failed to prove that he satisfied the criteria to be deemed mentally retarded. Petitioner further asserts that Tennessee Code Annotated section 39–13–203 is unconstitutional as interpreted by the supreme court in *Howell v. State*. As a final argument on appeal, Petitioner contends that the supreme court erred in its holdings in *Howell*, that the petitioner bears the burden of proof, and that the determination of mental retardation is to be made by the court rather than a jury.

Standard of Review

The question of whether a defendant is mentally retarded and thus ineligible for the death penalty is a mixed question of law and fact. Accordingly, in this post-conviction appeal, we must review the post-conviction court's findings of fact de novo, with a presumption of correctness that is to be overcome only when the preponderance of the evidence is contrary to the court's findings. *Fields v. State*, 40 S.W.3d 450, 456 (Tenn.2001). However, in reviewing the application of law to the facts, we must conduct a purely de novo review. *Id.* at 457. Thus, no presumption of correctness attaches to the post-conviction court's conclusions of law. *Id.* Bearing this in mind, we will first address the issue of whether Petitioner is mentally retarded and thus eligible for the death penalty.

Petitioner's Eligibility for the Death Penalty

As set forth supra, in determining whether Petitioner is mentally retarded and thus ineligible for the death penalty, this court must follow the holdings of our supreme court in *Van Tran* and *Howell*. Moreover, although Petitioner was tried and sentenced prior to the enactment of Tennessee Code Annotated section 39–13–203, this court must apply the criteria set forth in that statute in making our determination. *See Van Tran*, 66 S.W.2d at 812, which held that although Tennessee Code Annotated section 39–13–203 did not have retroactive application, the applicable criteria to be used by a court in making a

determination of mental retardation are those set forth in the statute.

Tennessee Code Annotated section 39–13–203 sets forth the definition of mental retardation as follows:

> (1) Significantly sub-average general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;
>
> (2) Deficits in adaptive behavior; and
>
> (3) The mental retardation must have been manifested during the developmental period or by eighteen (18) years of age.

Tenn.Code Ann. § 39–13–203(a) (2003). This definition sets forth a three-prong test, and all three of the prongs must be satisfied to establish mental retardation. Moreover, our supreme court clarified in *Howell* that the demarcation of an I.Q. score of seventy in the statute is a "bright-line cutoff" and must be met. *Howell,* 151 S.W.3d at 456, 458–59. "[T]he statute should not be interpreted to make allowance for any standard error of measurement or other circumstances whereby a person with an I.Q. above seventy could be considered mentally retarded." *Id.* at 456.

***13** During the post-conviction proceedings, Petitioner presented the testimony of four lay witnesses, three expert witnesses, the affidavit of an additional expert witness, and numerous exhibits. The State presented the testimony of two expert witnesses. Petitioner's experts found that Petitioner met the criteria to be diagnosed as mentally retarded. Conversely, the State's experts found that Petitioner did not meet the criteria to be diagnosed as mentally retarded. In determining whether Petitioner meets the criteria to be deemed mentally retarded under Tennessee Code Annotated section 39–13–203, it will be necessary for the court to apply the criteria to the evidence presented.

Significantly Sub-average General Intellectual Functioning As Evidenced By A Functional Intelligence Quotient (I.Q.) of Seventy (70) or Below

The evidence in this record shows that Petitioner's intelligence has been tested no fewer than nine times. Petitioner's education records show that he was tested five times during his school years. However, the proof demonstrated that it was possible that one of the scores may have been placed on his record in error. Accordingly, the trial court did not rely upon that test in making its determination and neither will this court. In any event, while in the second grade in 1963, Petitioner scored eighty-three on the Lorge Thorndyke intelligence test. In 1964, Petitioner scored ninety-seven on an intelligence test. In 1967, Petitioner scored ninety-one on the Otis Beta intelligence test, and in 1969, Petitioner scored eighty-three on the Lorge Thorndyke intelligence test.

Petitioner's intelligence was next tested after his arrest for the murders of Angela Clay and her two daughters. Dr. Kenneth Anchor and Pat Jaros were hired by Petitioner's defense team in preparation for trial. Dr. Anchor and Pat Jaros determined that Petitioner had an I.Q. of seventy-six in 1988. Dr. Anchor determined that despite Petitioner's I.Q. of seventy-six, he suspected that Petitioner would perform at a much higher level in the community. Pat Jaros, a psychological examiner, testified at trial that Petitioner's I.Q. score of seventy-six was "just about right." Neither of Petitioner's experts found him to be mentally retarded. In 1993, Dr. Gillian Blair tested Petitioner's I.Q., and she found it to be seventy-three. During the post-conviction process, Dr. Pamela Auble also tested Petitioner. She determined his full-scale I.Q. was seventy-six. Dr. Auble found that Petitioner had neurological impairment, but she made no finding of mental retardation.

In 2001, Petitioner scored below seventy for the first time on an intelligence quotient test. Petitioner was tested by Dr. Patti van Eys, Ph.D., on the Wechsler Adult Intelligence Scale–Third edition ("WAIS–III"). On the WAIS–III, Petitioner scored sixty-nine. Dr. van Eys noted in her report that Petitioner's adult assessment results are consistently lower that his I.Q. estimates in childhood. She found this resulted from either later acute brain damage or a slower deteriorating process such as dementia or mental illness. She also noted that there was nothing in the records to substantiate acute brain damage. In 2001, Dr. Daniel Grant also evaluated Petitioner. Dr. Grant's testing showed that Petitioner scored fifty-seven on the Stanford–Binet Fourth edition test and sixty-four on the Comprehensive Test of Non–Verbal Intelligence ("CTONI").

***14** Based on the above testing, Petitioner's experts at the reopened post-conviction proceedings determined that Petitioner

had subaverage general intellectual functioning as evidenced by an I.Q. score of seventy or less. The experts based their conclusions on Petitioner's recent I.Q. scores. Petitioner's experts, Dr. Grant specifically, also concluded that Petitioner's previous adult I.Q. scores fell within the mentally retarded range, seventy or below, when adjusted by the standard error of measurement and the Flynn Effect. Dr. Grant explained that according to the Flynn Effect, people acquire more information and knowledge over time, which in turn requires that the I.Q. tests be renormed to reflect the gain of knowledge. According to Dr. Grant, the previous tests given to Petitioner during his adulthood had not been renormed in years, which caused Petitioner's I.Q. score to be inflated. Dr. Grant also opined that the tests given to Petitioner during his childhood were not reliable measures of his I.Q. because they were administered in a group setting, and both the AAMR and the DSM recommend only individually administered tests to measure I.Q.

Neither of the State's expert witnesses administered their own I.Q. tests of Petitioner. Instead, they relied upon the previous testing. Eric Engum, one of the State's experts, testified that Petitioner failed to meet the first criteria for mental retardation because his I.Q. was not seventy or below. In reaching this conclusion, he relied upon the testing of Petitioner conducted by his experts at trial and the initial post-conviction proceeding. Based upon his review of the testing of Petitioner, Dr. Engum testified that he could find no evidence that Petitioner had an I.Q. of seventy or less at the time he committed the crimes at issue.

Dr. Susan Vaught, also a State expert, testified that Petitioner was "at or right at" criteria in recent testing. She explained that I.Q. tests have historically been biased against minorities. She explained that, therefore, if you have an African–American who tests in the seventies, the clinician must be very cautious with the interpretation, especially if mental retardation is being considered, because there is a bias in the test. Dr. Vaught testified that she was aware of the Flynn Effect, but it was not the standard of practice to correct for it, in terms of looking at an I.Q. score. She, therefore, conceded that Petitioner currently meets the first criterion for mental retardation.

Petitioner's test scores have decreased as he has aged. During his childhood, he tested with scores in the eighties and nineties. Prior to trial and his initial post-conviction proceedings, Petitioner's own experts testified that his I.Q. score was above seventy. Only recently has Petitioner's I.Q. score fallen below seventy. Petitioner's experts testified that his adult scores fell within the mentally retarded range when adjusted by the standard error of measurement and/or the Flynn Effect. However, our supreme court has held that the I.Q. score of seventy in Tennessee Code Annotated section 39–13–203 is a "bright-line cutoff" and must be met. *Howell,* 151 S.W.3d at 456, 458–59. As the *Howell* Court stated: "[T]he statute should not be interpreted to make allowance for any standard error of measurement or other circumstances whereby a person with an I.Q. above seventy could be considered mentally retarded." *Id.* at 456.

Deficits in Adaptive Behavior

***15** The second criterion Petitioner must meet to prove mental retardation is that he has deficits in adaptive behavior. The *Van Tran* Court explained the second prong of the test as follows:

> The second part of the definition—adaptive functioning—"refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, socio-cultural background, and community setting." As discussed, a mentally retarded person will have significant limitations in at least two of the following basic skills: "communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." Influences on adaptive functioning may include the individual's "education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation."

Van Tran, 66 S.W.2d at 795 (quoting American Psychiatric Association, *Diagnostic and Statistical Manual on Mental Disorders*, 39, 40 (4th ed.1994) (citations omitted)). In 1994, our supreme court construed the term deficits in adaptive behavior in its ordinary sense as "the inability of an individual to behave so as to adapt to surrounding circumstances." *State v. Smith*, 893 S.W.2d 908, 918 (Tenn.1994).

Both the lay witnesses and the experts testified as to how Petitioner adapted to his surrounding circumstances. The lay witnesses testified that Petitioner grew up in a large, close-knit family in a disadvantaged area of Nashville and attended a

disadvantaged school. Petitioner repeated the second grade but appears to have functioned in the school system otherwise. He played football in high school, got along well with the other members of the team, and respected the coaches. None of the witnesses testified that he had any behavior problems in school or at home. After high school, he obtained employment at Caroon and Black Insurance Company where he ordered supplies, drove the company van, took deposits to the bank, ran errands, and worked in shipping and receiving. He was well liked by the other employees. Moreover, Petitioner purchased a car, apparently paid for the car himself, drove independently, and took great pride in keeping the car neat and clean. Petitioner married and had a child. Although Petitioner has always lived with his family, even during his five-year marriage, there was no testimony that he could not live independently. None of the lay witnesses ever considered Petitioner to be mentally retarded.

Dr. Grant tested Petitioner on the independent living scale and found Petitioner had problems with managing money, managing a home, transportation, and health and safety. Dr. Grant further concluded that Petitioner met the criteria for deficits in adaptive behavior as set forth in both the DSM–IV and the AAMR. As support for his conclusion, Dr. Grant pointed to the fact that Petitioner had never lived independently, cooked, cleaned the house, did laundry, participated in the care of his son, contributed financially to his family, or had a bank account. However, there is no proof in the record that Petitioner was unable to do these things.

***16** State expert Eric Engum opined that Petitioner failed to meet the deficits in adaptive behavior criterion. Dr. Engum testified that he assessed Petitioner's adaptive behavior according to the definition set out by the supreme court in *Smith*. He testified that it was his understanding that under the Tennessee standard as defined by *Smith*, the issue is whether a person can adapt his behavior to the surrounding circumstances, which is a different standard than that set out in the DSM–IV. The question he believed he must answer was whether the Petitioner could function within his environment in terms of going about and doing the daily activities that everyone else does. Dr. Engum testified that he relied upon the testimony of individuals who testified during the mitigation phase of Petitioner's trial, and those individuals "commented very favorably upon him in terms of his ability to function within the environment." Dr. Engum also testified that during his childhood, Petitioner functioned like a child within his culture and community. Dr. Engum further noted that prior to age eighteen, there was no individualized assessment by school psychologists, no indication of significant problems with juvenile authorities, and no unusual behavioral problems. According to Dr. Engum, there simply were no major deficits in Petitioner's adaptive behavior. Dr. Engum also assessed Petitioner's adult years prior to committing the crimes for which he was convicted and again found no deficits in adaptive behavior. Furthermore, Dr. Engum opined that Petitioner did not meet the standard for deficits in adaptive behavior under the Tennessee standard or under the criteria set forth in the DSM–IV. Although Dr. Engum believed that Petitioner suffered from personality problems, delusional problems, or psychological difficulties, those issues are separate and apart from the issue of whether Petitioner was mentally retarded.

State expert Dr. Susan Vaught testified that she routinely assesses adaptive behavior in individuals to determine if there are deficits. She explained that to determine whether a person has deficits in adaptive functioning, she first determines whether the person can complete normal tasks of daily living that most people accomplish. Next, she reviews the health history and school history. It is important to determine whether the milestones were met on time. She reviews the school records and programs in the school to determine educational history. She also reviews job and marital history. As for Petitioner, Dr. Vaught had multiple sources of information, including but not limited to: medical records; school records; taped interview with the police; testing performed by other clinicians; letters written by Petitioner; prior court testimony; and prison records. Dr. Vaught explained that in assessing deficits in adaptive functioning, she must consider three areas: conceptual, social, and practical.

Language, reading and writing, money concepts, and self-direction are the four basic areas examined to determine if there is a deficit in the conceptual area of adaptive functioning. Dr. Vaught found that Petitioner had age appropriate functioning within the conceptual category. Further, Dr. Vaught found Petitioner's social skills were intact and at or above the level suggested by current measures of intellectual functioning. Although she determined that Petitioner may have had some mental health issues, he did not have social deficits in adaptive functioning. Finally, Dr. Vaught concluded that Petitioner had no practical deficits in his activities of daily living. As a result, Dr. Vaught concluded that Petitioner did not have deficits in adaptive behavior.

Manifestation of Mental Retardation During the Developmental Period

***17** Finally, to prove mental retardation, Petitioner must prove that his mental retardation manifested prior to age eighteen; in other words, he must show that he had an I.Q. below seventy and had deficits in adaptive behavior by age eighteen. The proof in the record simply does not support such a conclusion.

None of Petitioner's I.Q. scores were below seventy prior to age eighteen. Dr. Vaught noted that Petitioner's I.Q. scores have steadily decreased over the years. She explained that with mental retardation, you generally see a global deficit or suppression of all the scores rather than some high scores and some very low scores. Dr. Vaught explained that she routinely performs assessments to determine whether a person qualifies for services in the State, and a part of her assessment must be whether the condition occurred prior to age eighteen and is, therefore, chronic or whether it is a fairly recent problem. Dr. Vaught testified that as for Petitioner, she believed his recent I.Q. scores were a result of a motivational problem or an organic problem. Dr. Vaught further testified that her findings were consistent with Pat Jaros, Petitioner's own expert, who testified at Petitioner's trial.

As the United States Supreme Court has noted:

> [M]ental retardation is easier to diagnose than is mental illness. That general proposition should cause little surprise, for mental retardation is a developmental disability that becomes apparent before adulthood.... By the time the person reaches 18 years of age the documentation and other evidence of the condition have been accumulated for years. Mental illness, on the other hand, may be sudden and may not occur, or at least manifest itself, until adulthood.

Heller v. Doe, 509 U.S. 312, 321–22, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (citations omitted).

Although Petitioner's experts maintain that his mental retardation is a result of his mother's drinking of alcohol while she was pregnant, the proof in the record simply does not support that Petitioner's I.Q. was below seventy or that Petitioner had deficits in his adaptive behavior prior to age eighteen. Accordingly, Petitioner cannot meet the third prong of the test for mental retardation. Because Petitioner failed to prove that he is mentally retarded by a preponderance of the evidence, he is not excluded from the sentence of death.

Constitutionality of Tennessee Code Annotated Section 39–13–203

Petitioner argues that the bright line test adopted in *Howell* that rejects an adjustment of an I.Q. score by the standard error of measurement excludes persons who are recognized as mentally retarded in the scientific community. Petitioner further argues that the approach adopted in *Howell* is in conflict with prevailing scientific practices. Petitioner contends that the prevailing scientific norm recognizes that an I.Q. score of seventy represents a range of sixty-two to seventy-eight, which accounts for the standard error of measurement.

Petitioner bases his argument on the Tennessee Supreme Court's 1997 decision that set the standard for evaluating scientific evidence, *McDaniel v. CSX Transportation*, 955 S.W.2d 257, 266 (Tenn.1997). In *McDaniel*, the supreme court held that when determining the admissibility of scientific evidence under Tennessee Rules of Evidence 702 and 703, a trial court may consider a potential rate of error to determine if the evidence is reliable. *McDaniel* does not require courts to consider a potential rate of error when applying scientific evidence. Instead, *McDaniel* allows courts to consider a potential rate of error in determining whether scientific evidence is reliable and therefore admissible. *Howell* does not affect the admissibility of evidence. Indeed, evidence was presented by Petitioner's experts in this case as to the standard error of measurement.

***18** The United States Supreme Court in *Atkins* left it to the states to develop an appropriate way to enforce the constitutional prohibition of executing mentally retarded persons. *Atkins*, 536 U.S. at 321. The Tennessee Legislature developed such a procedure in Tennessee Code Annotated section 39–13–203. *Atkins* did not require states to adopt a procedure that defined mental retardation using a standard error of measurement.

This issue is without merit.

Submission of Issue of Mental Retardation to a Jury and Burden of Proof

Finally, Petitioner contends that he has a fundamental right to life and that because the question of eligibility for the death penalty is a substantive element of capital murder, the state must bear the burden of proving that he is not mentally retarded and the issue must be submitted to a jury. Petitioner acknowledges that the Tennessee Supreme Court has rejected this argument but makes the argument in order to preserve it for later review. *See State v. Edwin Gomez*, 163 S.W.3d 632 (Tenn.2005) ("Indeed, a defendant is never precluded from raising an issue simply because a prior decision has rejected it."). Petitioner is not entitled to relief on this issue.

CONCLUSION

Based upon the foregoing authorities and reasoning, we affirm the order of the post-conviction court denying post-conviction relief.

All Citations

Not Reported in S.W.3d, 2005 WL 2662577

End of Document

Black v. Bell

United States District Court for the Middle District of Tennessee, Nashville Division

April 24, 2008, Filed

NO. 3:00-0764

Reporter
2008 U.S. Dist. LEXIS 33908 *

BYRON LEWIS BLACK v. RICKY BELL

Subsequent History: Vacated by, Remanded by *Black v. Bell, 664 F.3d 81, 2011 U.S. App. LEXIS 24798 (6th Cir.) (6th Cir. Tenn., Dec. 15, 2011)*

Prior History: *Black v. Bell, 2007 U.S. App. LEXIS 30798 (6th Cir., May 30, 2007)*

Core Terms

mentally retarded, state court, scores, measurement, seventy, argues, tested, Amendments, sentence, court held, concludes, requires, deficits, adaptive behavior, court's decision, summary judgment, burden of proof, district court, death penalty, aggravating, mitigating, factors, expert witness, brain damage, jury trial, test score, set forth, proceedings, adjusted, theories

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For Victor S. Johnson, III, Interested Party: Michael Alan Meyer, LEAD ATTORNEY, Eric R. McLennan, Tennessee Attorney General's Office, Nashville, TN.

Judges: TODD J. CAMPBELL, UNITED STATES DISTRICT JUDGE.

Opinion by: TODD J. CAMPBELL

Opinion

DEATH PENALTY CASE

MEMORANDUM

I. Introduction

Pending before the Court is the Respondent's Motion To Dismiss And For Summary Judgment (Docket No. 113). Petitioner has filed a response (Docket No. 120) to the Motion, and the Respondent has filed a reply (Docket No. 126). [1]

For the reasons set forth below, **[*2]** the Motion is GRANTED, and this action is DISMISSED.

II. Factual and Procedural Background

A. The Federal Court Proceedings

Pursuant to *28 U.S.C. § 2254*, Petitioner filed a Petition seeking habeas relief in this case on August 14, 2000. (Docket No. 1). After appointment of counsel, Petitioner filed an Amended Petition For Writ Of Habeas Corpus (Docket No. 8) raising numerous grounds, including an *Eighth* and *Fourteenth Amendment* claim that execution of the Petitioner would be cruel and unusual punishment because he is mentally retarded. The Court subsequently granted summary judgment to Respondent on all claims, including the mental retardation claim. (Docket Nos. 82, 83).

The Petitioner filed an appeal, and while the case was pending, the United States Supreme Court issued its decision in *Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)*. In Atkins, the Supreme Court held that executing a mentally retarded person violates the *Eighth Amendment's* ban on cruel and unusual punishment. The Court left to the states, however, "the task of developing appropriate ways to enforce the constitutional restriction" upon their execution of sentences. *122 S.Ct. at 2252*.

After Atkins **[*3]** was issued, the Sixth Circuit Court of Appeals held its appeal in this case in abeyance pending a decision by the Tennessee courts on whether Petitioner is mentally retarded. After an evidentiary hearing, the state trial court held that Petitioner is not mentally retarded, and that decision was affirmed on appeal by the Tennessee Court of Criminal Appeals. *Black v. State of Tennessee, 2005 Tenn. Crim. App. LEXIS 1129, 2005 WL 2662577 (Tenn. Crim. App. Oct. 19, 2005)*. The Tennessee Supreme Court denied Petitioner's application for permission to appeal. Id. The Sixth Circuit subsequently remanded the case back to this Court for reconsideration of Petitioner's mental retardation claim in this case in light of Atkins. (Docket No. 97).

B. State Court's Decision on Atkins Claim

As described above, the Tennessee Court of Criminal Appeals reviewed the evidence presented to the trial court and agreed with its decision that Petitioner had failed to satisfy the criteria to be deemed mentally retarded. *Black v. State, 2005 Tenn. Crim. App. LEXIS 1129, 2005 WL 2662577, at *18 (Oct. 19, 2005)*. As the court described, during the post-conviction proceedings, Petitioner presented the testimony of four lay witnesses, three expert witnesses, the affidavit of an additional **[*4]** expert witness, and numerous exhibits. *2005 Tenn. Crim. App. LEXIS 1129, [WL] at *2*. The State presented the testimony of two expert witnesses. Id.

[1] Respondent has also filed a Request For Waiver Of M.D. Tenn. Local Rule 56.01(b) (Docket No. 115), which requires that a movant file a list of undisputed material facts in support of its motion for summary judgment. Given the posture of this case and the standards applicable to deciding the issues presented, the Court concludes that the requirements of the local rule should be waived. Therefore, the Request is GRANTED.

After reviewing the evidence presented, the court explained that the applicable criteria to be used by a court in making a determination of mental retardation are those set forth in *Tennessee Code Annotated Section 39-13-203*:

> (a) As used in this section, "mental retardation" means:
>
> (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;
>
> (2) Deficits in adaptive behavior; and
>
> (3) The mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age.

The court pointed out that all three criteria must be satisfied to establish mental retardation. *2005 Tenn. Crim. App. LEXIS 1129, [WL] at *12*.

In considering application of the first criterion, the court noted that the Petitioner's intelligence had been tested "no fewer than nine times," and summarized the test results as follows:

> Petitioner's test scores have decreased as he has aged. During his childhood, he tested with scores in the eighties and nineties. Prior to trial and his initial post-conviction proceedings, Petitioner's own **[*5]** experts testified that his I.Q. score was above seventy. Only recently has Petitioner's I.Q. score fallen below seventy. Petitioner's experts testified that his adult scores fell within the mentally retarded range when adjusted by the standard error of measurement and/or the Flynn Effect. However, our supreme court has held that the I.Q. score of seventy in *Tennessee Code Annotated section 39-13-203* is a 'bright-line cutoff and must be met. *Howell, 151 S.W.3d at 456, 458-59* [*Howell v. State, 151 S.W.3d 450 (Tenn. 2004)]*. As the Howell Court stated: '[T]he statute should not be interpreted to make allowance for any standard error of measurement or other circumstances whereby a person with an I.Q. above seventy could be considered mentally retarded.' *Id. at 456*.

*2005 Tenn. Crim. App. LEXIS 1129, [WL] at *13-14*.

In applying the second criterion, the court explained that "adaptive functioning" refers to "'how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, socio-cultural background, and community setting.'" *2005 Tenn. Crim. App. LEXIS 1129, [WL] at *15* (quoting *Van Tran v. State, 66 S.W.3d 790, 795 (Tenn. 2001))*. The court reviewed the testimony **[*6]** of the lay and expert witnesses on this issue, but did not make a definitive determination about whether Petitioner had met the second criterion.

In applying the third criterion, the court explained that Petitioner must prove that he had an I.Q. below seventy and had deficits in adaptive behavior that manifested themselves prior to age eighteen. *2005 Tenn. Crim. App. LEXIS 1129, [WL] at *17*. Reviewing the proof, the court determined that Petitioner had failed to make such a showing:

> None of Petitioner's I.Q. scores were below seventy prior to age eighteen.
>
> * * *

> Although Petitioner's experts maintain that his mental retardation is a result of his mother's drinking of alcohol while she was pregnant, the proof in the record simply does not support that Petitioner's I.Q. was below seventy or that Petitioner had deficits in his adaptive behavior prior to age eighteen.

*2005 Tenn. Crim. App. LEXIS 1129, [WL] at *17*. Thus, the court held that because Petitioner had failed to prove mental retardation by a preponderance of the evidence, his death sentence would not be set aside. Id.

III. Analysis

A. Scope of Remand

The Respondent seeks dismissal of certain amendments made to the petition after remand by the Sixth Circuit as being beyond the scope of the remand order. **[*7]** [2]

The Sixth Circuit's remand order, in its entirety, provides as follows:

> On motion of Petitioner-Appellant filed September 6, 2006, this case is remanded to the district court for the limited purpose of reconsidering Petitioner-Appellant's mental retardation claim in light of *Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)*.

(Docket No. 97).

At the time of remand, the mental retardation claim appeared at Paragraphs 14. a. and 14. b. of Petitioner's first Amended Petition (Docket No. 8) and stated as follows:

> 14. Execution of Byron Black violates the *Eighth* and *Fourteenth Amendments*, because Byron Black is mentally retarded:
>
> a. Byron Black's functional intelligence quotient (I.Q.) is significantly subnormal. His I.Q. is 69.
>
> b. Byron Black also suffers from numerous cognitive deficits and deficits in adaptive **[*8]** behavior, which include, but are not limited to:
>
> 1) inappropriate social behavior, including e.g., inappropriate affect and smiling;
>
> 2) perseveration;
>
> 3) dysnomia, i.e., inability to name items;
>
> 4) primitive defense mechanisms;
>
> 5) a childlike understanding of himself and lack of insight;
>
> 6) concrete thinking;
>
> 7) lack of mental flexibility;

---

[2] In evaluating a motion to dismiss, the Court is to "construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle him to relief." *Roger Miller Music, Inc. v. Sony/ATV Publishing, LLC, 477 F.3d 383, 389 (6th Cir. 2007)*.

8) memory problems; and

9) inability to organize items within his memory.
(Docket No. 8).

After remand, the Petitioner filed an Amendment To Petition For Writ Of Habeas Corpus (Docket No. 110), which added the following: a claim for ineffective assistance of counsel for failure to investigate and properly present evidence of Petitioner's mental retardation (P 11. v. 3); several paragraphs describing the proof supporting the *Eighth* and *Fourteenth Amendment* mental retardation claim (P 14. c., d.); a claim based on the *Sixth*, *Eighth* and *Fourteenth Amendments* and *Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)* that the State is required to prove the absence of mental retardation beyond a reasonable doubt (P 14. e.); a claim based on the *Sixth* and *Fourteenth Amendments*, Ring, Atkins and Tennessee law that the Petitioner is entitled to a jury trial on the issue of whether he **[*9]** was ineligible for the death penalty because he is mentally retarded (P 14. f.); and a claim based on the *Sixth*, *Eighth* and *Fourteenth Amendments*, Ring, and Atkins that the Petitioner is entitled to a new jury to decide both the mental retardation issue and whether the death penalty should be imposed (P 14. g.).

Respondent argues that Petitioner should not be allowed to add any of these amendments to his petition because consideration of these amendments would exceed the scope of the remand. Petitioner argues, on the other hand, that the amendments should be considered because they all arise out of the decision in Atkins, and were not ripe for consideration until Atkins was decided.

Based on the language of the Sixth Circuit's Order remanding this case, the Court concludes that it is limited to "reconsidering Petitioner-Appellant's mental retardation claim" as that claim was fashioned at the time of remand. As set forth above, Petitioner's mental retardation claim, at the time of remand, was based on the *Eighth* and *Fourteenth Amendments*. Therefore, the paragraphs of the Amendment that purport to add constitutional claims based on other constitutional amendments and theories are not within **[*10]** the scope of the remand, and are accordingly dismissed. These include the following: PP 11. v. 3, 14. e., f., and g. (Docket No. 110, at pp. 1, 12-14). The paragraphs of the Amendment describing the proof supporting the *Eighth* and *Fourteenth Amendment* mental retardation claim (P 14. c., d.), however, simply describe the factual support for Petitioner's original mental retardation claim, and therefore, are within the scope of the remand.

In summary, the claims that are within the scope of the Sixth Circuit's remand appear at Paragraphs 14. a., b., c., and d. All other claims set forth in the Amended Petition are dismissed as beyond the scope of the remand.

B. Mental Retardation Claim

1. AEDPA

The Respondent seeks summary judgment as to Petitioner's mental retardation claim, [3] and takes the position that the Court must review the claim in accordance with the standards set forth in the

[3] *Rule 56(c) of the Federal Rules of Civil Procedure* provides that summary judgment may be rendered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed.R.Civ.P. 56(c)*; *Abdulnour v. Campbell Soup Supply Co., LLC, 502 F.3d 496, 501 (6th Cir. 2007)*. In order to prevail, the movant has the burden of proving the absence of a genuine issue of material fact as to an essential element of the opposing party's claim. *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986)*. In

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). AEDPA, which amended *28 U.S.C. § 2254*, applies to all habeas petitions filed after April 24, 1996, the effective date of the Act. *Mitchell v. Mason, 257 F.3d 554, 560-61 (6th Cir. 2001)*. As Black's Petition was filed on August 14, 2000, and after **[*11]** the effective date, this case is governed by AEDPA. [4]

Under AEDPA, when a claim is addressed on the merits by a state court, a federal court may grant habeas relief as to that claim only if the state court's adjudication "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *28 U.S.C. § 2254(d)*. With respect to the state court's factual determinations, the factual findings of a state court are presumed to be correct, and the petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. *28 U.S.C. § 2254(e)(1)*.

In *Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000)*, the Supreme Court held that a state court decision is "contrary to" Supreme Court precedent if either the "state court arrives at a conclusion opposite **[*13]** to that reached by [the Supreme Court] on a question of law" or "the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts."

The Williams Court held that a state court decision involves an "unreasonable application" of clearly established law if the state court identifies the correct governing legal principle from the Supreme Court's decisions, but unreasonably applies that principle to the facts of the petitioner's case. Id. The reasonableness of the state court's opinion is judged by an objective rather than a subjective standard. *120 S.Ct. at 1521-22*.

2. State court process

The Petitioner argues that the decision of the state courts on Petitioner's Atkins claim is due no deference under AEDPA because the state court proceedings did not comport with due process requirements. Petitioner cites *Panetti v. Quarterman, U.S. , 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007)* and *Rivera v. Quarterman, 505 F.3d 349 (5th Cir. 2007)* in support of his argument. In Panetti, the Supreme Court held that a state court decision rejecting the defendant's threshold showing of insanity under *Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)* **[*14]** was entitled to no deference under AEDPA because the state court failed to provide the defendant with a constitutionally adequate opportunity to be heard as required by Ford. The state court rejected the defendant's threshold showing of insanity under Ford after receiving reports from court-appointed experts to which the petitioner was not given an opportunity to respond. *127 S.Ct. at 2857*. The state court also refused to transcribe its proceedings, on repeated occasions conveyed information to defense counsel that turned out not to be true, provided at least one significant update to the state without providing the same notice to the defendant, and failed to provide a competency hearing. *127 S.Ct. at 2856-57*.

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determining whether the movant has met its burden, the Court must view the evidence in the light most favorable to the nonmoving party. *Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986)*; *Abdulnour, 502 F.3d at 501*.

[4] The Petitioner argues that AEDPA should not apply in this case because Atkins announced a new rule of substantive law which prohibits the imposition of a death sentence **[*12]** as to a defendant found to be mentally retarded. Petitioner has cited no authority adopting such a theory, and the Court is not persuaded that such a theory should be applied here.

In Rivera, the Fifth Circuit, citing Panetti, held that the state court's rejection of petitioner's Atkins claim for failure to make a prima facie showing of mental retardation was not entitled to deference under AEDPA. *505 F.3d at 356-61*. The court explained that the petitioner need only make a prima facie showing of mental retardation under Atkins in order to trigger the state court's obligation to provide him with the opportunity to develop his claim, and that the state court's **[*15]** summary rejection of the claim was unreasonable. *505 F.3d at 358*.

The facts of both these cases are easily distinguishable and do not support Petitioner's suggestion that the state court ignored due process requirements in considering his mental retardation claim. In considering the Petitioner's mental retardation claim in this case, the state trial court held a two-day evidentiary hearing at which Petitioner was permitted to call three expert and four lay witnesses, submit the affidavit of an additional expert witness, submit numerous exhibits, cross examine the State's witnesses, interpose objections, and present written and oral arguments. *Black v. State, 2005 Tenn. Crim. App. LEXIS 1129, 2005 WL 2662577 (Tenn. Crim. App. Oct. 19, 2005)*. The Court concludes that that the state court afforded the Petitioner an adequate opportunity to be heard on his mental retardation claim.

Petitioner also argues that the state court's decision is "arbitrary, unreasonable, unfair, and flies in the face of science" because the court refused to consider standard errors in test measurement, the "Flynn Effect," permitted the State's experts to testify, and placed the burden of proof on the Petitioner.

In reviewing the state trial court's **[*16]** decision, the Tennessee Court of Criminal Appeals considered Petitioner's proof and argument regarding the standard error of measurement and the Flynn Effect:

> Petitioner's experts, Dr. Grant specifically, also concluded that Petitioner's previous adult I.Q. scores fell within the mentally retarded range, seventy or below, when adjusted by the standard error of measurement and the Flynn Effect. Dr. Grant explained that according to the Flynn Effect, people acquire more information and knowledge over time, which in turn requires that the I.Q. tests be renormed to reflect the gain of knowledge. According to Dr. Grant, the previous tests given to Petitioner during his adulthood had not been renormed in years, which caused Petitioner's I.Q. score to be inflated.

*Black v. State, 2005 Tenn. Crim. App. LEXIS 1129, 2005 WL 2662577, at * 14*. [5] Susan Vaught, one of the State's experts, testified that clinicians are aware of the Flynn Effect, but that they do not adjust I.Q. scores based on it. *2005 Tenn. Crim. App. LEXIS 1129, [WL] at *8, 10*. She, and the State's other expert, Eric Engum, also testified that I.Q. tests have historically been biased against minorities in that they tend to underestimate the intelligence of minorities. *2005 Tenn. Crim. App. LEXIS 1129, [WL] at *7, 10*.

The court was ultimately unpersuaded that Petitioner's test scores should be adjusted downward based on the Flynn Effect and the standard error of measurement. As described previously, the court explained that the Petitioner's test scores were in the eighties and nineties during his childhood, and before trial and his first post-conviction proceeding, his own experts testified that they were above seventy. *2005 Tenn. Crim. App. LEXIS 1129, [WL] at *14*. The court recognized that Petitioner's experts found his more recent I.Q.

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[5] In addition **[*17]** to the expert proof introduced during the state proceeding, Petitioner also relies on the Declaration of Marc J. Tasse (Exhibit 1 to Petitioner's Opposition To Motion To Dismiss And For Summary Judgment (Docket No. 120)), to support his argument that the Flynn Effect should be adopted and used to reduce Petitioner's test scores. Neither Dr. Tasse's Declaration, nor the other evidence submitted by Petitioner that was not presented to the state court persuade the Court that the state court decision regarding the issue of mental retardation was unreasonable.

scores to fall below seventy within the mentally retarded range by adjusting them for the standard error of measurement and/or the Flynn Effect. **[*18]** Id. The court rejected this adjustment of the test scores, however, based on the Tennessee Supreme Court's decision in *Howell v. State, 151 S.W.3d at 458-59*.

In Howell, the Tennessee Supreme Court held, as a matter of statutory construction, that the Tennessee legislature intended to establish a bright-line cutoff point for determining mental retardation in the death penalty context, rather than using a range of I.Q. scores that would take into account measurement errors in the testing process, noting that the latter approach was used by the state in the social services context. *Id., at 458-59*. [6]

Other courts have considered the issue of whether to adjust test scores for the Flynn Effect or the standard error of measurement, but none has held that Atkins requires such an adjustment. In *Ledford v. Head, 2008 U.S. Dist. LEXIS 21635, 2008 WL 754486 (N.D. Ga. March 19, 2008)*, the District Court for the Northern District or Georgia rejected use of the Flynn Effect as a basis for reducing the petitioner's I.Q. scores:

> There was testimony **[*19]** at the hearing that the Flynn effect is a 'generally recognized phenomenon,' but experts for both petitioner and respondent agreed that it is not used in clinical practice to reduce IQ scores. . . Both Dr. King and Dr. Zimmermann testified that they have never seen it utilized except in capital cases. . .

*2008 U.S. Dist. LEXIS 21635, [WL] at *7*. The court also rejected petitioner's argument that his I.Q. scores should be reduced to account for the standard error of measurement:

> The Court recognized that 'standard error of measurement' is a generally accepted scientific concept. . . But the standard error of measurement simply means that an IQ score can overestimate or underestimate a person's true level of intellectual functioning. . . there is no basis for assuming that the standard error of measurement lowered petitioner's score enough to meet Georgia's mental retardation standard [of an I.Q. score of 70 or below]. . . Petitioner's IQ could just as likely be 80 as 68. . .

*2008 U.S. Dist. LEXIS 21635, [WL] at *8*. [7] Cf. *Bowling v. Commonwealth of Kentucky, 163 S.W.3d 361, 375 (Ky., 2005)*(Court holds that Kentucky statute defines mental retardation using a bright-line cut-off ceiling of an I.Q. of 70 and Atkins did not discuss or require consideration **[*20]** of margins of error or the Flynn Effect) with *Ohio v. Burke, 2005 Ohio 7020, 2005 WL 3557641, at *12-14 (Ohio App. 2005)*(Court explains that it is required to consider the Flynn Effect and the standard error of measurement in determining mental retardation under Ohio law, but it is not required to accept those theories).

The Fourth Circuit has rejected the suggestion that Atkins requires the states to accept the Flynn Effect or the standard error of measurement in determining mental retardation. See *Green v. Johnson, 515 F.3d 290, 300 n.2 (4th Cir. 2008)*(". . . neither Atkins nor Virginia law appears to require expressly that these theories [the Flynn Effect and the standard error of measurement] be accounted for in determining mental

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[6] In reaching its decision, the court noted that some states have similar statutes, while other states do not include specific numerical I.Q. scores in defining mental retardation. *Id., at 459*.

[7] The court also implicitly rejected any upward adjustment for the test bias against minorities.

retardation status."). See also *Walton v. Johnson, 440 F.3d 160, 178 (4th Cir. 2006)*(Rejecting as speculative petitioner's argument that the standard error of measurement would lower his score rather than increase it.)

Petitioner cites *Walker v. True, 399 F.3d 315 (4th Cir. 2005)* to support his argument that his scores should have been reduced based on these theories. **[*21]** The court in Walker, however, held only that the district court should have permitted expert testimony about the theories; it did not hold that the theories should be accepted to reduce the petitioner's scores. See *Green, 515 F.3d at 300 n. 2* ("To the extent that we held in Walker that the district court was required to consider the Flynn effect on remand, that case involved *de novo* consideration of the inmate's Atkins claim.").

The Court is not persuaded that the state court's failure to accept Petitioner's arguments about the Flynn Effect and the standard error of measurement rendered the state process arbitrary, unreasonable, or less than full and fair.

The Petitioner also argues that the process he received in state court was not full and fair because the state court should have excluded the State's expert witnesses. Petitioner's principal objection to consideration of the testimony of the State's experts, Dr. Vaught and Dr. Engum, is the experts' failure to personally evaluate the Petitioner.

In recounting the testimony of Dr. Engum, the Court of Criminal Appeals noted that he did not conduct his own testing of the Petitioner, but relied on Petitioner's previous test results. The **[*22]** court stated that "Dr. Engum further explained that he did not conduct additional testing because he believed Petitioner was probably 'test-wise' or 'test-weary.' *2005 Tenn. Crim. App,. LEXIS 1129, 2005 WL 2662577, at *6*. The court also recognized that Dr. Vaught did not personally evaluate the Petitioner:

> Dr. Vaught candidly admitted that she neither personally interviewed nor tested Petitioner. She explained that she did neither for several reasons. One, she had been given voluminous records to review, and after her review of the records, she did not believe Petitioner met either the second or third criteria for mental retardation. Further, she saw a pattern of the scores on the I.Q. tests descending. She had also reviewed Dr. Jaros' report and believed that some organic results had occurred recently in Petitioner's life, and her findings would be skewed by such. It was also Dr. Vaught's opinion that as a result of the organic problems from which Petitioner was suffering, he would require clinical testing in the near future as a part of his diagnosis and treatment, and it was her belief that if she tested him, it would skew the results for the next clinician. Dr. Vaught further explained that she believed Petitioner **[*23]** had become savvy to the testing.

*2005 Tenn. Crim. App,. LEXIS 1129, [WL] at *9*. [8]

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[8] The state court also noted Dr. Vaught's testimony on cross examination that "she is very liberal in assessing a person to qualify for services as a result of mental retardation:"

> She stated: 'If I could possibly put somebody in for services that they need, I'm going to do it.' She then testified that she had cautioned counsel for the State when he approached her for taking the case that if she could find that Petitioner is mentally retarded and keep him from being executed, she was going to do it.

*2005 Tenn. Crim. App,. LEXIS 1129, [WL] at *10*.

The Court is not persuaded that the state court's failure to exclude the State's witnesses rendered the proceeding unfair. The Petitioner's criticism of the State's experts is relevant to the weight to be given to their testimony, but does not support the total exclusion of their testimony. The court was not unreasonable in admitting the expert proof, especially given the court's obvious consideration and weighing of the Petitioner's criticism of the experts.

Petitioner also argues that the state court process was unfair because the court placed the burden of proving mental retardation on the Petitioner rather than the State. The state **[*24]** court considered Petitioner's burden of proof argument, but rejected it as having already been decided by the Tennessee Supreme Court in Howell. *2005 Tenn. Crim. App. LEXIS 1129, [WL] at *18*.

In *Howell, 151 S.W.3d at 466*, the Tennessee Supreme Court explained that neither Ring nor Apprendi requires the state to prove the absence of mental retardation because it is not an element of the offense, and a finding of mental retardation "works to reduce the maximum possible sentence . . . from death to life imprisonment." Other state and federal courts agree with this conclusion. See *United States v. Webster, 421 F.3d 308, 311-12 (5th Cir. 2005)*(Neither Atkins, Apprendi, nor Ring requires the government to prove the absence of mental retardation of a federal capital defendant); *Walker v. True, 399 F.3d 315, 325-26 (4th Cir. 2005)*(State does not have burden to prove that a defendant is not mentally retarded); *In re Kia Levoy Johnson, 334 F.3d 403, 405 (5th Cir. 2003)*; *State v. Lott, 97 Ohio St.3d 303, 307, 2002 Ohio 6625, 779 N.E.2d 1011, 1015-16 (Ohio 2002)*. See also *Medina v. California, 505 U.S. 437, 449, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992)*(State may presume a defendant to be competent and may require defendant to carry burden of proving **[*25]** incompetence by a preponderance of the evidence).

The Court concludes that requiring the Petitioner to bear the burden of proving mental retardation by a preponderance of the evidence was not unreasonable or unfair, and did not violate Petitioner's due process rights.

3. State Court Findings and Conclusions

Next, Petitioner argues that the state court's findings and conclusions are deserving of no deference by this Court under *Sections 2254(d)* and *(e)(1)* because they are objectively unreasonable. He contends that the state court's erroneous factual assertions entitle him to habeas corpus relief, or at a minimum, a hearing in this Court. [9]

The Petitioner argues that the state court was unreasonable in making the following statement: "However, there is no proof in the record that Petitioner was unable to do these things." *2005 Tenn. Crim. App.*

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[9] Petitioner also argues that ***Sections 2254(d)*** and ***(e)*** should not be construed to limit the federal court's determination of a constitutional claim even though that claim was adjudicated on the merits in the state court. Petitioner contends that these sections merely prohibit a court from granting habeas relief on a state-adjudicated claim, but they do not prohibit the Court from engaging in a *de novo*, independent analysis of that claim.

As for factual findings, the Petitioner argues that if the federal court is reviewing the same record that was before **[*26]** the state court, the federal court may review the state court's factual findings for objective reasonableness, rather under a presumption of correctness standard.

The Court finds it unnecessary to determine the validity of Petitioner's argument because even applying the analysis he suggests, the Court concludes that the state court's factual findings are objectively reasonable. Applying Tennessee law on mental retardation, as required by Atkins, to those facts, and the facts the Petitioner submits to augment the record in the state court, the Court concludes that Petitioner has not established a constitutional violation.

*LEXIS 1129, 2005 WL 2662577, at *15*. The statement comes at the end of a paragraph in which the court is discussing the proof offered on the second criterion the Petitioner must meet to prove mental retardation -- that he has deficits in adaptive behavior. In this paragraph, the court is discussing the testimony of Petitioner's expert, Dr. Grant:

> Dr. Grant tested Petitioner on the independent living **[*27]** scale and found Petitioner had problems with managing money, managing a home, transportation, and health and safety. Dr. Grant further concluded that Petitioner met the criteria for deficits in adaptive behavior as set forth in both the DSM-IV and the AAMR. As support for his conclusion, Dr. Grant pointed to the fact that Petitioner had never lived independently, cooked, cleaned the house, did laundry, participated in the care of his son, contributed financially to his family, or had a bank account. However, there is no proof in the record that Petitioner was unable to do these things.

Id.

Petitioner interprets the last sentence of the paragraph as stating there was "no proof" that the Petitioner was unable to live independently, cook, clean, do laundry, participate in the care of his son, contribute financially to his family, or maintain a bank account. Read in context, however, it is clear that the state court was pointing out a limitation in the Petitioner's proof -- the proof indicated that he *had not* performed these tasks, not that he *could not* perform these tasks. Petitioner does not point to evidence that the state court was wrong about that conclusion. Thus, the Court is not **[*28]** persuaded that this statement renders the state court's decision unreasonable.

Petitioner also argues that the state court was unreasonable in making the statement that ". . . the proof in the record simply does not support that Petitioner's I.Q. was below seventy or that Petitioner had deficits in his adaptive behavior prior to age eighteen." *2005 Tenn. Crim. App. LEXIS 1129, [WL] at *17*. Petitioner argues that the state court was unreasonable in concluding that there was no proof in the record that Petitioner's I.Q. was below seventy prior to age eighteen because he had presented proof of prenatal brain damage, as well as a score in the first percentile on a Differential Aptitude Test ("DAT") taken before age 18.

With respect to the proof of prenatal brain damage, the evidence before the state court was that the current evidence of brain damage in the Petitioner may or may not indicate that such brain damage existed and caused mental retardation in the Petitioner prior to age 18. [10] As for the DAT score, the Petitioner points to no persuasive evidence indicating that an "aptitude" test should be considered as equivalent to an I.Q.

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[10] The state court pointed out that Dr. Albert Globus admitted on cross examination that Petitioner was never evaluated by a medical professional because of a head injury received while playing football during his youth; that the cause of mental retardation cannot be determined with certainty; and that it cannot be determined with certainty that the ingestion of alcohol during pregnancy (by Petitioner's mother) will cause mental retardation. *2005 Tenn. Crim. App. LEXIS 1129, [WL] at *5*.

The state court also pointed out that although Dr. Ruben Gur testified that the Petitioner had suffered brain damage likely caused by fetal alcohol syndrome or a series of minor head injuries, he was unable to rule out other causes, and could not specify a date certain when Petitioner's brain damage occurred. *2005 Tenn. Crim. App. LEXIS 1129, [WL] at * 10-11*.

The court also noted Dr. Vaught's testimony explaining the difference between mental illness and mental retardation, and her conclusion that Petitioner's early difficulties were likely caused by mental health issues or learning disabilities, rather than **[*30]** mental retardation. *2005 Tenn. Crim. App. LEXIS 1129, [WL] at *8-10*.

test. Thus, the Court concludes that the state court was not unreasonable in stating **[*29]** that the proof in the record did not support the conclusion, under a preponderance of the evidence standard, that Petitioner's I.Q. was below seventy before age 18.

4. Right to Jury Trial

Finally, relying on the Supreme Court's decision in Ring, Petitioner argues that he was denied his constitutional right to a jury trial by the state court. Although the Court finds this claim, standing alone, to be beyond the scope of the remand, the Court will address the issue as it relates to the constitutionality of the state court's proceedings in determining mental retardation.

In rejecting Petitioner's argument that he was entitled to submit the Atkins mental retardation issue to a jury, the state court relied on the Tennessee Supreme Court's decision in Howell. In Howell, the court held that Ring did not require a jury to determine mental retardation:

> Under Tennessee's capital sentencing scheme, a jury determines guilt and also, in a separate proceeding, determines whether to impose the death penalty. See *Tenn.Code Ann. § 39-13-204* (2003). This sentencing scheme is qualitatively different from the Arizona statute in Ring. Under the Arizona law at issue in Ring, the maximum penalty for murder was death; . . . however, this sentence could only be imposed if the judge, not the jury, found aggravating factors present to support **[*31]** the death penalty. . . .
>
> In contrast, under Tennessee's capital sentencing scheme, it is the jury, the very same jury, in fact, that found the defendant guilty, that decides whether to impose the death penalty. *Tenn.Code Ann. § 39-13-204* (2003). In its deliberations, the jury is instructed to consider 'any evidence tending to establish or rebut the aggravating circumstances … and any evidence tending to establish or rebut any mitigating circumstances.' *Tenn.Code Ann. § 39-13-204(c)* (2003). Diminished mental capacity is among the mitigating factors that may by weighed against aggravating factors by the jury. See *Tenn.Code Ann. section 39-13-204(j)*. However, mental retardation is now a threshold issue that determines whether a defendant is eligible for capital punishment at all. Following Van Tran and Atkins, mental retardation completely exempts a defendant from capital punishment, rather than simply being among the mitigating factors to be weighed against aggravating factors by the jury.
>
> The United States Supreme Court, in Atkins, pointedly expressed that mental retardation should be considered apart from mitigating factors. The Court stated 'mentally retarded defendants [are less able] **[*32]** to make a persuasive showing of mitigation in the face of … aggravating factors.' *Atkins, 536 U.S. at 320, 122 S.Ct. 2242*. The Court went on to state that the demeanor of mentally retarded defendants may give the false impression of lack of remorse. *Id. at 321, 122 S.Ct. 2242*. This reasoning was also evident in Van Tran, in which we found that 'the limitations and impairments associated with mental retardation warrant more consideration than simply allowing the evidence to be weighed in the mix of aggravating and mitigating circumstances.' *66 S.W.3d at 810*. The Tennessee General Assembly apparently agrees, as evidenced by its placing the prohibition on executing mentally retarded individuals in *Tennessee Code Annotated section 39-13-203* rather than placing it among the mitigating factors listed in *Tennessee Code Annotated section 39-13-204(j)*. Accordingly, the petitioner's reliance upon Ring is misplaced, as the issue is not one of aggravating or enhancing factors, but of eligibility for the sentence imposed by a jury.

151 S.W.3d at 465-66.

Other courts have considered this issue and agree that there is no constitutional right to a jury trial on the issue of mental retardation. See *In re Kia Levoy Johnson, 334 F.3d 403 at 405*; **[*33]** *Walker v. True, 399 F.3d at 325-26*. See also *Schriro v. Smith, 546 U.S. 6, 126 S.Ct. 7, 163 L.Ed.2d 6 (2005)*(Ninth Circuit Court of Appeals exceeded authority in ordering Arizona courts to conduct a jury trial to resolve habeas petitioner's mental retardation claim).

This Court agrees with this analysis, and concludes that Petitioner's jury trial argument is without merit.

IV. Conclusion

For the reasons set forth above, the Respondent's motion to dismiss and/or for summary judgment is granted.

Should the Petitioner give timely notice of an appeal from this Memorandum and accompanying Order, such notice shall be treated as an application for a certificate of appealability, *28 U.S.C. § 2253(c)*; *Fed. R. App. P. 22(b)*. The Supreme Court has held that where a district court has rejected a petitioner's constitutional claims on the merits, in order to obtain a certificate of appealability, the petitioner "must demonstrate that reasonable jurists would find the district court's assesment of the constitutional claims debatable or wrong." *Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000)*. Where a district court denies a claim on procedural grounds, a certificate of appealability **[*34]** should issue "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id.

The Court concludes that Petitioner has made a substantial showing of the denial of a constitutional right as to his mental retardation claim, and reasonable jurists could find the Court's assessment of the constitutional claim debatable. See, e.g., *Castro v. United States, 310 F.3d 900 (6th Cir. 2002)*. Accordingly, the Court will issue a certificate of appealability on Petitioner's mental retardation claim under *Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)*.

It is so ORDERED.

/s/ Todd J. Campbell

TODD J. CAMPBELL

UNITED STATES DISTRICT JUDGE

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664 F.3d 81
United States Court of Appeals,
Sixth Circuit.

Byron Lewis BLACK, Petitioner–Appellant,
v.
Ricky BELL, Warden, Respondent–Appellee.

Nos. 02–5032, 08–5644.
|
Argued: Dec. 8, 2010.
|
Decided and Filed: Dec. 15, 2011.
|
Rehearing Denied Jan. 4, 2012.*

Synopsis

Background: Following denial of his petition for post conviction relief, affirmed at 1999 WL 195299, and denial of permission to appeal to Tennessee Supreme Court, state prisoner sought writ of habeas corpus, challenging his three murder convictions and death sentence, affirmed at 815 S.W.2d 166. The United States District Court for the Middle District of Tennessee, Todd J. Campbell, Chief Judge, 181 F.Supp.2d 832, district court's denied all of the claims that it decided on the merits, and denied a certificate of appealability (COA) regarding the claims that it dismissed as procedurally defaulted, and prisoner appealed. On remand, the district court denied prisoner's *Atkins* claim, and prisoner appealed.

[Holding:] After consolidation of prisoner's appeal of the district court's original dismissal of his habeas claims and his appeal of that court's denial of his *Atkins* claim, the Court of Appeals, Ronald Lee Gilman, Circuit Judge, held that state appellate court's assessment of Tennessee capital defendant's level of intellectual and adaptive functioning for purposes of *Atkins'* prohibition against execution of mentally retarded defendants was contrary to federal law under *Coleman*.

Affirmed in part, vacated in part, and remanded.

Boggs, Circuit Judge, filed dissenting opinion.

West Headnotes (14)

[1] **Habeas Corpus**🔑Mental competency; examination
Habeas Corpus🔑Death sentence

Federal court conducting habeas review could look to state law that had been issued after the defendant's state conviction had become final in order to determine how *Atkins'* prohibition against execution of mentally retarded defendants applied to defendant's case. 28 U.S.C.A. § 2254(d).

4 Cases that cite this headnote

[2] **Sentencing and Punishment**🔑Mentally retarded persons

State appellate court's assessment of Tennessee capital defendant's level of intellectual and adaptive functioning for purposes of *Atkins'* prohibition against execution of mentally retarded defendants was contrary to federal law under *Coleman* where court did not specify which I.Q. scores it relied on and why; state court did not explain the extent to which its denial of *Atkins* claim relied on any of defendant's various I.Q. scores nor did it consider the potential impact of the Flynn Effect and the SEM (standard error of measurement), despite the court's consideration of the expert testimony that discussed the impact of those factors on defendant's middle set of I.Q. scores. U.S.C.A. Const.Amend. 8; West's T.C.A. Const. Art. 1, § 16; West's T.C.A. § 39–13–203(a).

5 Cases that cite this headnote

[3] **Habeas Corpus**🔑Adequacy or effectiveness of state proceeding; full and fair litigation

Where a state court's analysis contradicts the governing law, federal habeas court must conduct an independent review of that issue, unconstrained by limitations of Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C.A. § 2254(d)(1).

7 Cases that cite this headnote

[4] **Sentencing and Punishment**🔑Mentally retarded persons

A court reviewing whether a defendant is mentally retarded for purposes of *Atkins'* prohibition against execution of mentally retarded defendants must focus on defendant's deficits, not his abilities.

3 Cases that cite this headnote

[5] **Habeas Corpus**🔑Competency
Habeas Corpus🔑Sentence and punishment

Because no court had yet analyzed habeas petitioner's *Atkins* claim according to the proper legal standard, reviewing court would refrain from reaching any independent conclusions and remand case to federal habeas court for determination of the claim. 28 U.S.C.A. § 2254(a).

4 Cases that cite this headnote

[6] **Mental Health** Mental disorder at time of trial

To be competent to stand trial, a defendant must have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him.

2 Cases that cite this headnote

[7] **Criminal Law** Conduct of trial or hearing

A defendant's competence to stand trial is a question of fact.

5 Cases that cite this headnote

[8] **Constitutional Law** Course and conduct of proceedings

Due process in a competency hearing requires that only the most basic procedural safeguards be observed. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[9] **Constitutional Law** Course and conduct of proceedings
Criminal Law Conduct of trial or hearing

Process that was undertaken in defendant's state-court competency hearing was not contrary to, nor did it involve an unreasonable application of, the process that was due to determine defendant's competence; court allowed both defendant and the prosecution to present their expert testimony at defendant's competency hearing, then, rather than base its determination on either of those experts, court appointed its own independent expert to evaluate defendant, and further afforded defendant a reevaluation at his attorneys' request after the voir dire. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[10] **Criminal Law** Adequacy of investigation of sentencing issues
Criminal Law Presentation of evidence regarding sentencing

A defense counsel's failure to reasonably investigate a defendant's background and present mitigating evidence to the jury at sentencing can constitute ineffective assistance; in assessing the reasonableness of an attorney's mitigation investigation, the court considers not only the quantum of evidence already known to counsel, but also

whether that evidence should have led a reasonable attorney to investigate further. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[11] **Criminal Law** Adequacy of investigation of sentencing issues

Counsel has a duty to conduct an independent investigation regarding mitigating evidence regardless of the defendant's reluctance to investigate and disclose such evidence; because of that obligation, counsel cannot rely solely on information provided by the defendant and his family in determining the extent of a proper mitigation investigation, but a reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[12] **Criminal Law** Adequacy of investigation of mitigating circumstances
Criminal Law Presentation of evidence in sentencing phase

Capital defendant failed to show that his trial attorneys were ineffective in investigating and presenting mitigation evidence at the penalty phase of his trial; there was no evidence to support the conclusion that defendant's trial attorneys should have been aware at the time of defendant's trial that any further investigation into his social history would have produced more evidence beyond that already obtained by the competency experts. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[13] **Criminal Law** Argument and comments

Even if defense counsel did make a mistake and should have objected to the argument that giving defendant a life sentence rather than the death penalty would reward him for killings of additional victims, such error was not prejudicial under *Strickland* because it was unlikely that the objection would have had any effect on the jury's decision; jury did not sentence defendant to death for the killing of the victim about whom the argument was made, defendant's death sentence was supported by six aggravating factors. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[14] **Constitutional Law** Conduct of or affecting jurors; deliberations
Criminal Law Authority or discretion of court

Tennessee defendant did not have a due process right to have the trial court answer the jury's questions regarding his parole eligibility and the length of his sentence where defendant could be eligible for parole based on the jury's

decision, and where defendant's future dangerousness was not at issue. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

Attorneys and Law Firms

***84 ARGUED:** Kelley J. Henry, Federal Public Defender's Office, Nashville, Tennessee, for Appellant. Joseph F. Whalen, III, Office of the Tennessee Attorney General, Nashville, Tennessee, for Appellee. **ON BRIEF:** Kelley J. Henry, Federal Public Defender's Office, Nashville, Tennessee, for Appellant. Joseph F. Whalen, III, Office of the Tennessee Attorney General, Nashville, Tennessee, for Appellee.

Before: MARTIN, BOGGS, and GILMAN, Circuit Judges.

Opinion

GILMAN, J., delivered the opinion of the court, in which MARTIN, J., joined. BOGGS, J. (pp. 107–08), delivered a separate dissenting opinion.

OPINION

RONALD LEE GILMAN, Circuit Judge.

Byron Black, who was tried in state court and sentenced to death in 1989 for committing three murders, appeals the district court's denial of his petition for a writ of habeas corpus. He raises various issues related to the court's 2001 denial of his original habeas petition as well as the court's 2008 denial of his amended petition based on *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). For the reasons set forth below, we **AFFIRM** the district court's denial of Black's habeas petition regarding his non-*Atkins* claims, **VACATE** the court's judgment regarding his *Atkins* claim, and **REMAND** the case for further proceedings consistent with this opinion.

I. BACKGROUND

Black was convicted on three counts of first-degree murder for the killing of his girlfriend Angela Clay and her two minor daughters, Latoya, age nine, and Lakeisha, age six. He was also convicted on one count of burglary arising out of the same incident. Black received a death sentence for the murder of Lakeisha, consecutive life sentences for the other two murders, and fifteen years of imprisonment for the burglary.

A. Factual background

Black was born on March 23, 1956. He was 33 years old when the murders were committed in 1988. The Tennessee Supreme Court, in deciding Black's claims on direct appeal, summarized the facts of this case, in part, as follows:

It appears that these bizarre and tragic murders occurred in the early morning hours of Monday, March 28, 1988. The

> bodies of the three victims were found Monday evening around 9:30 p.m. At the time of the murders, the Defendant was on [a] weekend furlough from the Metropolitan Workhouse in Davidson County....
>
> The Defendant was the boyfriend of Angela Clay, who had separated from her husband, Bennie Clay, about a year before her death. Bennie Clay was the father of Latoya and Lakeisha. Bennie Clay testified that at the time of Angela Clay's death, he and Angela were attempting to reconcile, but the Defendant was an obstacle to the reconciliation. He further testified that Angela began a relationship with the Defendant after their separation and that at times she was seeing both the Defendant and himself. In December, 1986, the Defendant and Bennie Clay had an altercation during a dispute over Angela.... The Defendant pled guilty to the shooting [of Bennie Clay] and received the workhouse sentence, which included weekend furloughs.

State v. Black, 815 S.W.2d 166, 170–71 (Tenn.1991).

***85** On the night of the murders, Black drove the victims to the home of Angela's mother. Angela and her two daughters were last seen that evening by her mother at around 11 p.m. Angela's mother testified that Angela telephoned her at approximately 11:20 p.m. that evening after Angela returned home. That phone call was the last time that any of the witnesses spoke to Angela before her death. The police arrived at Angela's apartment at approximately 9:30 p.m. the following night. They did not find any signs of forced entry into the apartment, but they found a pool of blood on the bed and the body of a small child on the floor. *Id.* The Tennessee Supreme Court continued its summary of the relevant facts, citing the testimony of Dr. Charles Harlan, Chief Medical Examiner for Davidson County:

> Investigation revealed the bodies of Angela and her nine year old daughter, Latoya, in the master bedroom. Angela, who was lying in the bed, had apparently been shot once in the top of the head as she slept and was rendered unconscious immediately and died within minutes....
>
> Latoya's body was found partially on the bed and partially off the bed, wedged between the bed and a chest of drawers. She had been shot once through the neck and chest....
>
> The body of Lakeisha, age six, was found in the second bedroom lying facedown on the floor next to her bed. She had been shot twice, once in the chest, once in the pelvic area....
>
> The receiver from the kitchen telephone was found in the master bedroom. The telephone from the master bedroom was lying in the hallway between the two bedrooms. The Defendant's fingerprints were the only prints recovered from the telephones. Two of his fingerprints were found on the phone in the hallway, and one was on the kitchen telephone receiver found in the master bedroom.

Id. at 171–72. A substantial amount of additional circumstantial evidence connected Black to the killings. *Id.* at 172–73.

B. Procedural history

In 1991, the Tennessee Supreme Court denied Black's numerous claims on his direct appeal. Black then filed a petition for post-conviction relief in the Davidson County Criminal Court. The trial court denied the petition after an evidentiary hearing, and the Tennessee Court of Criminal Appeals (TCCA) affirmed. Black's petition to appeal the denial of his post-conviction claims to the Tennessee Supreme Court was denied. The United States Supreme Court subsequently denied his petition for a writ of certiorari.

Black then filed a petition for a writ of habeas corpus in the district court, based on 28 U.S.C. § 2254, seeking relief on a number of evidentiary, procedural, and substantive grounds relating to both the guilt and penalty phases of his trial, as well as to issues that arose in his various state-court appeals. The district court denied all 34 of Black's habeas claims, including several subclaims, in December 2001. *Black v. Bell*, 181 F.Supp.2d 832 (M.D.Tenn.2001). It then issued Black a Certificate of Appealability (COA) for all of the claims that it decided on the merits and denied a COA regarding the claims that it dismissed as procedurally defaulted. Black timely appealed the court's decision.

After the Supreme Court decided *Atkins* in 2002, this court granted Black's motion to hold his case in abeyance so that Black could exhaust his *Atkins* claim in the state courts. Black then filed a motion in 2002 to reopen his post-conviction proceedings

in the state trial court. That court determined that Black had made a sufficient ***86** showing for his case to be reopened based on his *Atkins* claim. It held an evidentiary hearing, but ultimately determined that Black is not mentally retarded under the *Atkins* standard. The TCCA affirmed this decision in 2006, and the Tennessee Supreme Court denied Black's application for permission to appeal. The United States Supreme Court again denied Black's petition for a writ of certiorari. This court then remanded Black's pending appeal of the district court's denial of his § 2254 petition back to the district court so that it could reconsider Black's mental-retardation claim (which was one of Black's original 34 claims that the district court denied) in light of *Atkins.*

The district court did so in 2008, ultimately dismissing Black's *Atkins* claim on the basis that "the state court was not unreasonable in stating that the proof in the record did not support the conclusion, under a preponderance of the evidence standard, that [Black's] I.Q. was below seventy before age 18." It also dismissed Black's additional claim that the issue of his mental retardation should have been submitted to the jury, ruling that the claim was beyond the scope of this court's remand order, and also because the claim failed on the merits. But the district court granted Black a COA on his *Atkins* claim, and Black timely filed an appeal. We then granted Black's motion to expand his COA to include the issue of whether he had cause to excuse the procedural default of his claim that the jury improperly weighed an unconstitutional felony-murder aggravating circumstance. But we denied Black's motion to have two additional issues included in his COA.

Black's appeal of the district court's original dismissal of his habeas claims in 2001 and his appeal of that court's denial of his *Atkins* claim in 2008 have been consolidated in the present appeal. We thus have before us the issues that are within his COAs from both decisions. Although Black's COAs cover many issues, he has limited his appeal to a total of five.

In addition to Black's *Atkins* claim, the other four district-court determinations that Black now challenges are (1) whether he was competent to stand trial and whether he was entitled to an evidentiary hearing on that issue, (2) whether his trial counsel was constitutionally ineffective in failing to fully investigate, present, and argue mitigating factors against the death penalty, (3) whether his trial counsel was constitutionally ineffective in failing to object to the prosecution's comment during closing argument at the penalty phase of the trial that giving Black a life sentence for all three of the murders would "reward" him, and (4) whether the trial court erred by declining to clarify for the jury, upon its request, the effect of a life sentence.

C. *Atkins* background

Under Tennessee law, capital defendants are considered mentally retarded if (1) they have "[s]ignificantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) [they have d]eficits in adaptive behavior; and (3) [t]he intellectual disability must have been manifested during the developmental period, or by eighteen (18) years of age." Tenn.Code Ann. § 39–13–203(a).

Each side presented conflicting evidence concerning whether Black qualifies as mentally retarded. At Black's post-conviction proceedings on his *Atkins* claim, he presented four lay and three expert witnesses, the affidavit of another expert, and numerous exhibits in support of his claim. The State presented two expert witnesses in opposition. In addition, the state court considered the testimony of numerous lay ***87** and expert witnesses who testified during the course of Black's pre-*Atkins* proceedings.

1. Black's numerical I.Q. scores

One major category of evidence dealt with Black's numerical I.Q. scores. In its post-conviction opinion on Black's *Atkins* claim, the TCCA observed that Black's intelligence has been tested numerous times, from his grade-school years through 2001. *Black v. State*, No. M2004–01345–CCA–R3–PD, 2005 WL 2662577, at *13 (Tenn.Ct.Crim.App. Oct. 19, 2005). These scores can be grouped into the following three categories: (1) tests that were administered while Black was in elementary school, with the scores ranging from 83 to 97; (2) tests that were taken in preparation for Black's trial and during his first round of post-conviction proceedings, from 1988 to 1997, which ranged from 73 to 76; and (3) tests that were administered in 2001 by Black's experts who testified at his *Atkins* hearing, which ranged from 57 to 69. In addition, Black took achievement tests in high school. Dr. Daniel Grant, a psychologist and one of Black's expert witnesses, explained that Black's scores on the Differential Aptitude Test in the ninth grade placed his level of intelligence in the mentally retarded range.

A major point of contention in the present case, and an issue that the TCCA did not resolve, is which set of scores most accurately reflects Black's level of intelligence by the time he was 18 years of age. Although Black's first set of I.Q. scores were taken during this key period of his life and are above 70, his experts challenge the accuracy of these scores based on the sparse information concerning the testing details as well as the questionable supervision of Black's academic progress at his segregated elementary school.

Black's I.Q. scores from 1988 through 1997 were also above 70, but Dr. Grant opined that, when adjusted for the "Flynn Effect" and/or the standard error of measurement (SEM) that applies to these tests, these scores should be considered 70 or below. As Dr. Grant explained, the Flynn Effect calls for adjusting downward the score that a subject receives on an older I.Q. test based on the idea that the general population's level of knowledge increases over time, thereby raising the average score obtained on older tests. Dr. Patti van Eys, a clinical psychologist who submitted an affidavit regarding her evaluation of Black, noted that the Flynn Effect is "broadly accepted by the psychological community and recognized by the American Association on Mental Retardation (AAMR)."

On the other hand, State witness Dr. Susan Vaught, a clinical psychologist, testified that although the Flynn Effect is a recognized issue that a clinician might consider when interpreting an I.Q. test, she did not think that it should be used to adjust the numerical score that a subject received on his or her test. She explained that "[y]ou don't apply a numerical correction to a score that you get based on the Flynn Effect. It's not in that kind of use amongst clinicians who test[ ]." Dr. Eric Engum, the other clinical psychologist for the State, also rejected the practice of correcting for the Flynn Effect because "[o]ne cannot arbitrarily ... go back in time and 'correct' or 'recalculate' a previously obtained IQ based on [subsequent] changes in standardization."

As for the SEM, Dr. Grant testified that because the I.Q. score achieved on any particular test is fallible, the scores generally involve a SEM of five points up or down from the given score. Dr. Vaught similarly stated in her report that it is "typical and expected" under the prevailing ***88** standard of practice "to consider the [SEM] for any given test in order to determine if a patient's score could fall below 70."

The experts also disagree about the relevance of Black's 2001 I.Q. scores. Dr. Vaught conceded that, based on these most recent I.Q. scores, Black "currently meets the first criterion for mental retardation." *Black*, 2005 WL 2662577, at *14. But she and Dr. Engum were suspicious of the scores' validity based on comparisons to other indications of Black's level of intelligence. They suspected that Black was malingering (i.e., artificially deflating his scores) during these later tests. Black's experts, on the other hand, specifically determined that he was not malingering, and they were highly critical of the opinion of the State's experts that Black was malingering based solely on the written record, without having personally interviewed him.

Black's experts determined that his I.Q. fell in the mentally retarded range by the time he was age 18, but the State's experts disagreed. Dr. Vaught, in particular, noted that although Black's poor academic performance was "highly suggestive of learning disability or borderline intellectual capacity," she found "no compelling evidence that the lower-functioning picture I see now in Mr. Black's intellectual testing emerged prior to 18."

2. Black's brain damage

Another key point of contention is whether Black suffered from brain damage at an early age. Dr. Albert Globus, an expert in psychiatry and neurology who examined Black in 2001 in order to assess his competency to stand trial, reexamined him just before the state court's post-conviction hearing. In addition, Dr. Ruben Gur, an expert in neuropsychology, testified in a video deposition taken after the hearing regarding the cause of Black's brain damage. Both Drs. Globus and Gur concluded, based on MRI and PET-scan images of Black's brain, that Black has extensive brain damage that was likely caused by his mother's drinking alcohol while pregnant, but might also have been caused by other occurrences during his childhood.

The State does not contest that Black currently has brain damage. But the source of his condition is highly disputed. This point is important to the assessment of Black's level of intelligence by the time he was age 18. If his current brain damage existed at an earlier stage of his life, then his current level of intelligence is all the more probative of his intellectual capacity at that earlier stage because any symptoms resulting from his brain damage would have also been present earlier on. Moreover, if Black's brain was damaged earlier in his life, that determination would impact the credibility of the conclusion

by the State's experts—who never personally met with Black—that he was malingering on his recent I.Q. tests. Rather than offer an alternative explanation for his brain damage, the State argues that Black did not sufficiently prove that his brain damage was caused by the time he was age 18.

3. Expert assessments of Black's adaptive deficits

In addition to assessing Black's numerical I.Q. level, the various expert witnesses at his state post-conviction *Atkins* hearing testified regarding his level of adaptive functioning. These experts explained how Black functions in society and when his relevant characteristics manifested themselves. They dispute whether Black displays adaptive deficits and, if so, when these problems arose.

Black's experts explained that he has difficulty interacting according to ordinary social conventions and that he is paranoid, ***89** delusional, naive, and inappropriately happy. They also determined that he has deficits in his communication and functional academic skills and that he displays symptoms of various psychiatric disorders. Based on Black's childhood experiences, as well as the alleged early onset of his brain damage, Black's experts concluded that he had adaptive deficits by the age of 18.

But the State's experts determined that Black displayed adequate skills across a variety of practical, social, and intellectual categories of behavior. Although they thought that Black had various personality problems and that he might suffer from various mental disorders, they did not think that Black qualified as mentally retarded. The State's experts also determined that to the extent Black displayed adaptive deficits, he either strategically presented himself in that way (according to Dr. Engum) or had deteriorated more recently and therefore did not display these characteristics by the age of 18 (according to Dr. Vaught). After recounting some of the expert testimony on these issues, the TCCA concluded that Black did not meet his burden of proof to show that he had sufficient deficits in his adaptive behavior by the age of 18.

4. Lay witnesses

Black presented four lay witnesses at his *Atkins* post-conviction hearing to testify regarding various aspects of his social and educational history. Mary Smithson–Craighead, who started working as an administrator at Black's elementary school in 1965 and was in charge of Black's grade level for, at most, a year and a half, testified regarding the conditions at Black's school. Black's sister, Melba Corley, talked about Black's upbringing. Al Dennis, Black's high school football coach, discussed Black's experience on the football team. Finally, Richard Corley, Black's brother-in-law, testified about Black's job as a courier at an insurance company. Both sides draw on various aspects of these witnesses' testimony to support their respective positions concerning Black's level of intellectual functioning and his adaptive behavior by the age of 18.

5. Prior decisions on Black's* Atkins *claim

The state trial court determined that Black's post-conviction *Atkins* claim merited an evidentiary hearing. At this evidentiary hearing, Black had the burden of showing by a preponderance of the evidence that he met Tennessee's definition of mental retardation under *Atkins.* After the hearing concluded, the court summarized what it viewed as the determinative evidence from the voluminous record and, based on this evidence, denied Black's *Atkins* claim for post-conviction relief.

The TCCA affirmed the trial court's rejection of Black's claim. In its "Analysis" section, the TCCA mostly reviewed, without taking a stance on, the conflicting expert assessments of the factual record. But the TCCA did recognize that, according to Black's experts, the Flynn Effect and/or the SEM brings his middle set of I.Q. scores into the mentally retarded range. Based on *Howell v. State,* 151 S.W.3d 450, 457 (Tenn.2004), however, the TCCA determined that it was prohibited from considering these scientific concepts in assessing Black's numerical I.Q. score.

The TCCA's assessment of the factual record also makes clear that it was skeptical of the opinions of Drs. Globus and Gur regarding when Black's brain damage occurred. But the TCCA did not go so far as to make a definitive factual conclusion regarding the date of onset of Black's brain damage. The court also discounted Dr. Grant's conclusion that Black displayed deficits in his adaptive behavior ***90** because, although Dr. Grant observed that Black had never engaged in a number of

commonplace activities, "there is no proof in the record that [Black] was unable to do these things." *Black*, 2005 WL 2662577, at *15. It also pointed out that none of Black's childhood I.Q. scores fell in the mentally retarded range. But the TCCA reached its ultimate conclusion that "the proof in the record simply does not support that [Black's] I.Q. was below seventy or that [Black] had deficits in his adaptive behavior prior to age eighteen" without stating which pieces of evidence were essential to its conclusion. *Id.* at *17.

In denying habeas relief to Black on his *Atkins* claim, the district court approvingly referenced the TCCA's rejection of the application of the Flynn Effect and the SEM based on *Howell.* It also concluded, based on a review of how other jurisdictions have dealt with the Flynn Effect, that the TCCA's rejection of these concepts did not render the state process arbitrary, unreasonable, or less than full and fair.

The district court further rejected Black's three remaining arguments in support of his *Atkins* claim. First, the court determined that the TCCA's discounting of Dr. Grant's adaptive-deficits assessment did not render the state court's decision unreasonable. It found no basis to question the TCCA's ruling that, although the record indicated that Black *had not* performed the commonplace daily tasks mentioned by Dr. Grant, there was no showing that Black *could not* perform these tasks. Second, the court concluded that because Black had not shown that an aptitude test is equivalent to an I.Q. test, his low ninth-grade Differential Aptitude Test scores did not mean that his I.Q. was 70 or below by age 18.

Finally, the district court noted that "the evidence before the state court ... may or may not indicate that [Black's brain damage] existed and caused mental retardation" by the time Black was 18 years of age. The court based this observation on its determination that Drs. Globus and Gur were unable to point definitively to the cause of Black's brain damage or establish that this injury was the cause of Black's mental retardation. It also quoted the TCCA's reference to "Dr. Vaught's testimony explaining the difference between mental illness and mental retardation, and her conclusion that [Black's] early difficulties were likely caused by mental health issues or learning disabilities, rather than mental retardation."

II. ANALYSIS

A. Standard of review

Because Black filed his habeas petition after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), AEDPA's provisions apply to his case. *Murphy v. Ohio*, 551 F.3d 485, 493 (6th Cir.2009). This court in *Murphy* set out the standard of review under AEDPA as follows:

> Under AEDPA, a federal court may grant a writ of habeas corpus with respect to a "claim that was adjudicated on the merits in state court proceedings" if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A habeas petition may also be granted if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(2). A state-court decision is contrary to clearly established federal law "if the state court applies a rule that contradicts the governing ***91** law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." *Williams* [*v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)]. A state-court decision is an unreasonable application of clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case," *id.* at 407–08, 120 S.Ct. 1495, or if it "either unreasonably extends or unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context," *Seymour v. Walker*, 224 F.3d 542, 549 (6th Cir.2000).

Id. at 493–94. And, as the Supreme Court recently explained, our review under § 2254(d)(1) is "limited to the record that was before the state court." *Cullen v. Pinholster*, —— U.S. ——, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011).

B. *Atkins* claim

Black claims that he is not subject to the death penalty because he is mentally retarded, so that his execution would violate *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). A few months before *Atkins* was decided, the Tennessee Supreme Court also held as a matter of first impression in *Van Tran v. State*, 66 S.W.3d 790 (Tenn.2001), that the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution prohibit the execution of mentally retarded individuals. *Id.* at 794, 812. *Van Tran* further held that its newly announced rule applied retroactively to cases on collateral review. *Id.* at 811.

The Supreme Court held in *Atkins* that, in light of "our evolving standards of decency," the Eighth Amendment prohibits the execution of mentally retarded offenders. *Id.* at 321, 122 S.Ct. 2242. But the Court in *Atkins* did not define what it means to be "mentally retarded," instead "leav[ing] to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." *Id.* at 317, 122 S.Ct. 2242 (brackets omitted) (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416–17, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) (dealing with the issue of insanity)).

Under Tennessee law, capital defendants are considered mentally retarded for the purposes of an *Atkins* claim if they have an "intellectual disability" under § 39–13–203(a) of the Tennessee Code. *Howell v. State*, 151 S.W.3d 450, 457 (Tenn.2004). Defendants will meet this standard if (1) they have "[s]ignificantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy or below; and (2) [they have d]eficits in adaptive behavior; and (3) [t]he mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age." Tenn.Code Ann. § 39–13–203(a). Under Tennessee law, defendants have the burden of showing, by a preponderance of the evidence, that they qualify under this statutory definition. *See* Tenn.Code Ann. § 39–13–203(c).

In *Coleman v. State*, 341 S.W.3d 221 (Tenn.2011), the Tennessee Supreme Court recently issued a significant decision explaining the *Atkins* standard under Tennessee law. The State argues that this "recent state-law decision can have no impact on the reasonableness of the state courts' application of federal law or on the reasonableness of the state courts' factual determinations in light of the evidence presented in state court." This argument raises three distinct objections to our consideration ***92** of *Coleman*, all of which we find have no merit.

1. Application of* Coleman *in the present case

First, citing *Cullen v. Pinholster*, —— U.S. ——, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), the State argues that, under AEDPA, Black is limited to the record that was before the state court at the time the latter rendered its decision. But *Cullen* explicitly dealt with the parameters of the *factual* record that the district court may consider on habeas review. *Id.* at 1399–1400. *Coleman*, however, elucidates Tennessee's interpretation of *Atkins*' s *legal* standard. *Cullen* therefore does not prevent us from considering *Coleman* 's interpretation of *Atkins* under Tennessee law.

The state also focuses on the fact that *Coleman* is a "recent state-law decision." But the date of the *Coleman* decision does not prevent us from considering its impact on the present case because *Atkins* "has been made retroactive to cases on collateral review." *In re Bowling*, 422 F.3d 434, 436 (6th Cir.2005).

[1] And because "*Atkins* reserved for the states 'the task of developing appropriate ways to enforce the constitutional restriction,' " *id.* at 436–37 (quoting *Atkins*, 536 U.S. at 317, 122 S.Ct. 2242), federal courts conducting habeas review routinely look to state law that has been issued after the defendant's state conviction has become final in order to determine how *Atkins* applies to the specific case at hand. *See Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir.2002) (remanding Hill's *Atkins* habeas claim to the Ohio state courts to "develop [their] own procedures for determining whether a particular claimant is retarded and ineligible for death"); *Wiley v. Epps*, 625 F.3d 199, 208 (5th Cir.2010) (assessing whether the defendant qualified for an evidentiary hearing on his *Atkins* claim based on the Mississippi Supreme Court's standard even though "Wiley was convicted before *Atkins* was decided, and although he filed his state post-conviction application before the Mississippi Supreme Court established the state's requirements for obtaining an *Atkins* hearing"). We will therefore consider *Coleman* in our review of Black's *Atkins* claim under AEDPA. *See Fulcher v. Motley*, 444 F.3d 791, 822 (6th Cir.2006) (Clay, J., concurring) (explaining that even where a Supreme Court precedent applies retroactively, a federal court conducting habeas review of a state-court decision must still determine whether the decision was "contrary to" the retroactively applicable Supreme Court precedent).

2. Significantly subaverage intellectual functioning

Under the Tennessee Code, the first requirement that a defendant must meet in order to be considered mentally retarded under *Atkins* is that he or she must have "[s]ignificantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below." Tenn.Code Ann. § 39–13–203(a). The Tennessee Supreme Court has determined that the statute's incorporation of an I.Q. score of 70 is a "bright-line cutoff" that does not account for "a standard error of measurement in the test scores nor consideration of any range of scores above the score of seventy." *Howell v. State*, 151 S.W.3d 450, 458–59 (Tenn.2004). But even this bright-line cutoff allows for the consideration of more than one single source in determining a defendant's I.Q. Because the Tennessee statute "does not provide a clear directive regarding which particular test or testing method is to be used" to determine whether an individual is mentally retarded for purposes of death-penalty eligibility, "[a] ***93** court may certainly give more weight to one test, but should do so only after fully analyzing and considering all evidence presented." *Id.* at 459.

One of the defendant's full-scale I.Q. scores in *Howell* was a 73 on the WAIS—III test. *Id.* at 453. In support of his *Atkins* claim, the defendant presented the testimony of Dr. Daniel Grant (who also testified on Black's behalf in the present case) that a score on an I.Q. test represents a ten-point range of possible scores based on a five-point SEM in either direction. *Id.* When the SEM was considered, according to Dr. Grant, the defendant's I.Q. score of 73 in *Howell* fell in the mentally retarded range. *Id.* at 453–54. But the Tennessee Supreme Court determined that Tennessee law provides a "bright-line cutoff" for determining whether a defendant's I.Q. is 70 or below. *Id.* at 458–59. The Court therefore agreed with the trial court's refusal to interpret "the requirement of an I.Q. of seventy or below, as contained in the Tennessee statute, ... as representing a range of scores between sixty-five and seventy-five or below." *Id.* at 457. Based on this reasoning, the defendant's score of 73 was not in the mentally retarded range. (But the Court in *Howell* remanded the case for an evidentiary because the lower court imposed an overly demanding burden of proof on the defendant. *Id.* at 465, 467.)

Turning now to the case at hand, Black argues that the Flynn Effect and the SEM should be considered in determining his functional I.Q. level. Black's experts, as explained above, applied the Flynn Effect to correct for the outdated nature of the I.Q. test that was taken. I.Q. scores are scaled so that the average score on any test should be 100, but the Flynn Effect postulates that the longer that an I.Q. test has been in existence, the higher the average score will be. *See United States v. Davis*, 611 F.Supp.2d 472, 486 (D.Md.2009) (explaining that "the Flynn Effect means ... that over time, the test norms become outdated, such that the average score is no longer 100, but something higher"). This increase in the general level of factual information that leads to higher average scores on older tests explains why I.Q. test scores would increase with the age of the test "without a corresponding increase in actual intelligence in the general population." *Wiley v. Epps*, 625 F.3d 199, 203 n. 1 (5th Cir.2010). According to the Flynn Effect, scores on outdated tests thus need to be corrected for this upward deviation in the average score. *Id.* The SEM, on the other hand, "is an index of the variability of test scores produced by persons forming the normative sample" that "allows the evaluator to know the amount of error that could be present in any test." *Thomas v. Allen*, 607 F.3d 749, 753 (11th Cir.2010).

As the TCCA noted, Black's experts testified that his adult I.Q. scores, including pre-*Atkins* scores, "fell within the mentally retarded range when adjusted by the [SEM] and/or the Flynn Effect." *Black*, 2005 WL 2662577, at *14. But the court refused to consider this testimony because it concluded that *Howell* 's bright-line cutoff prohibited accounting for these adjustments under Tennessee law. *Id. Coleman* directly addresses this interpretation of *Howell.*

a. The* Coleman *decision

The defendant in *Coleman* brought an *Atkins* claim to challenge his death sentence. As part of his proof that his I.Q. score was in the mentally retarded range under Tennessee law, Coleman offered evidence regarding the impact of the Flynn Effect and the SEM in determining his ultimate I.Q. score. But the TCCA in *Coleman* determined, based on *Howell,* ***94** that Tennessee law does not provide "for the application of any standard error of measurement, including the 'Flynn effect,' to establish an IQ range rather than the bright-line cutoff of 70." *Coleman v. State*, No. W2007–02767–CCA–R3–PD, 2010 WL 118696, at *18 (Tenn.Crim.App. Jan. 13, 2010).

The Tennessee Supreme Court in *Coleman* acknowledged that *Howell* correctly interpreted the Tennessee statute in holding that "an expert's opinion regarding a criminal defendant's I.Q. cannot be expressed within a range (i.e., that the defendant's

I.Q. falls somewhere between 65 to 75) but must be expressed specifically (i.e., that the defendant's I.Q. is 75 or is 'seventy (70) or below' or is above 70)." *Coleman*, 341 S.W.3d at 242. But the lower state courts had misinterpreted *Howell* by extending its reasoning too far. As the Tennessee Supreme Court explained,

> following *Howell v. State*, some trial courts and the Court of Criminal Appeals have construed our holding that Tenn.Code Ann. § 39–13–203(a)(1) provided a "clear and objective guideline" for determining whether a criminal defendant is a person with intellectual disability to have established a mandatory requirement that only raw I.Q. test scores may be used to determine whether a criminal defendant has "significantly impaired general intellectual functioning" and that a raw I.Q. test score above seventy (70) may be sufficient, by itself, to disprove a criminal defendant's claim that he or she is a person with intellectual disability.

Id. at 240.

The Tennessee Supreme Court noted in *Coleman* that the Tennessee Code "does not provide clear direction regarding how a person's I.Q. should be determined and does not specify any particular test or testing method that should be used. In fact, the statute does not even employ the words 'test' or 'score.' " *Id.* at 241 (citation omitted). The statute's purpose is for the courts to arrive at the defendant's true functional I.Q. score. *Id.* But "[b]ecause the statute does not specify how a criminal defendant's functional I.Q. should be determined, we have concluded that the trial courts may receive and consider any relevant and admissible evidence regarding whether the defendant's functional I.Q. at the time of the offense was seventy (70) or below." *Id.* The practical import of this reasoning is that

> if the trial court determines that professionals who assess a person's I.Q. customarily consider a particular test's standard error of measurement, the Flynn Effect, the practice effect [which refers to increasing test scores based on an individual being retested with the same or a similar test], or other factors affecting the accuracy, reliability, or fairness of the instrument or instruments used to assess or measure the defendant's I.Q., an expert should be permitted to base his or her assessment of the defendant's "functional intelligence quotient" on a consideration of those factors.

Id. at 242 n. 55.

Allowing for the consideration of these factors was also found by the Court to be "consistent with current clinical practice," which may "require information from multiple sources." *Id.* at 244. Intelligence tests are just one of these sources. And because intelligence tests "are indirect rather than direct measures of intelligence, experts in the field recognize that they, like other measures of human functioning, are not actuarial determinations, that these tests cannot measure intelligence with absolute precision and that these tests contain a potential for error." *Id.* at 245 (citations, brackets, and internal quotation ***95** marks omitted). Moreover, recent practice in the Tennessee courts

> reflect[s] the parties' and the courts' existing awareness that, as a practical matter, a criminal defendant's "functional intelligence quotient" cannot be ascertained based only on raw I.Q. test scores. More importantly, they also reflect the parties' conclusion that Tenn.Code Ann. § 39–13–203(a) does not prevent them from presenting relevant and competent evidence, other than the defendant's raw I.Q. test scores, either to prove or to disprove that the defendant's "functional intelligence quotient" when the crime was committed was "seventy (70) or below."

Id. at 247–48.

The *Coleman* decision also recognized that "[a]scertaining a person's I.Q. is not a matter within the common knowledge of lay persons. Expert testimony in some form will generally be required to assist the trial court in determining whether a criminal defendant is a person with intellectual disability for the purpose of Tenn.Code Ann. § 39–13–203(a)." *Id.* at 241. "In formulating an opinion regarding a criminal defendant's I.Q. at the time of the offense, experts may bring to bear and utilize reliable practices, methods, standards, and data that are relevant in their particular fields." *Id.* at 242. These expert opinions

are subject to cross-examination, and the trial court is not bound to follow any particular expert. *Id.* But the trial court "must give full and fair consideration to all the evidence presented." *Id.*

b. Applying* Coleman *to the present case

[2] The Tennessee Supreme Court went to great lengths in *Coleman* to explain why its decision comported with its own prior precedent, Tennessee statutory law, other states' statutes, current clinical practice (which *Atkins* itself noted is generally incorporated in the various statutory definitions), and current litigation practice. *Id.* at 240–48. Even absent the Court's guidance in *Coleman*, the TCCA in the present case clearly misinterpreted the Flynn Effect's relevance under *Howell*. Although *Howell* emphasized the need to reach a single functional I.Q. score under Tennessee law, the decision made no mention whatsoever of the Flynn Effect. The purpose of adjusting for the Flynn Effect, after all, is to determine the single specific score that most accurately reflects the subject's I.Q. And unlike the SEM, adjusting for the Flynn Effect yields only one score. *See United States v. Davis*, 611 F.Supp.2d 472, 488 (D.Md.2009) (correcting for the Flynn Effect was found appropriate in order to more accurately determine whether the defendant met the "strict numerical cutoff"). Considering the Flynn Effect in determining a defendant's I.Q. score is therefore entirely consistent with *Howell* 's stated goal of assessing whether a defendant's single I.Q. score, rather than a range of scores, meets the statute's "bright-line cutoff."

Whether *Coleman* 's holding regarding the SEM clarifies *Howell* or deviates from *Howell* is more ambiguous. On the one hand, *Coleman* affirmed *Howell* 's holding that the Tennessee statute requires that an expert's assessment must be expressed in terms of a specific I.Q. score rather than a range of scores. *Coleman*, 341 S.W.3d at 242. On the other hand, the Court held that an expert should be permitted to consider "a particular test's standard error of measurement [the SEM], the Flynn Effect, the practice effect," or other "reliable practices, methods, standards, and data" in assessing the defendant's I.Q. *Id.* at 242 & n. 55. *Coleman* might therefore best be read as clarifying that although *Howell* prohibits interpreting the Tennessee statute ***96** "as representing a range of scores," *Howell*, 151 S.W.3d at 457, it does not prevent the SEM, as well as all other relevant scientific evidence, from being used by an expert in determining a defendant's single most accurate functional I.Q. score. *See Duncan v. United States*, 552 F.3d 442, 444–45 (6th Cir.2009) (explaining that "a decision does not announce a new rule when it is merely an application of the principle that governed a prior Supreme Court case" (internal quotation marks omitted)). In any event, regardless of whether *Coleman* clarified *Howell* 's holding or changed it regarding the SEM, the Tennessee Supreme Court's recent elucidation of the *Atkins* standard under Tennessee law must be applied in the present case in light of our earlier conclusion regarding *Coleman* 's retroactive applicability.

Coleman is particularly applicable because the TCCA's decision in the present case was cited to support the TCCA's conclusion in *Coleman* (before *Coleman* reached the Tennessee Supreme Court) that although evidence concerning the Flynn Effect or the SEM may be introduced into the record, neither of these factors may impact the court's ultimate determination of the defendant's specific I.Q. score. *Coleman v. State*, No. W2007–02767–CCA–R3–PD, 2010 WL 118696, at *18 (Tenn.Crim.App. Jan. 13, 2010). The TCCA in *Coleman* explained that "both in *Black* and the present case, a challenge is made to the veracity of the bright-line cutoff of 70 in establishing whether a defendant is not subject to the death penalty." *Id.* It then held that because Coleman, like Black, was allowed to present evidence regarding the Flynn Effect and the SEM, the defendant's due process rights were not violated. *Id.* But as the Tennessee Supreme Court explained in *Coleman*, allowing defendants to *present* evidence regarding the Flynn Effect and the SEM is not enough. Tennessee courts must also *consider* this evidence in assessing a defendant's ultimate functional I.Q. *Coleman*, 341 S.W.3d at 241–42.

3. Onset by the age of 18

In addition to having an I.Q. of 70 or below, this low level of intellectual capacity must have manifested itself by age 18 in order for the defendant to qualify as intellectually disabled under Tenn.Code Ann. § 39–13–203(a). Based on this rule, the TCCA in the present case denied Black's *Atkins* claim because it concluded that "the proof in the record simply does not support that [Black's] I.Q. was below seventy ... prior to age eighteen." *Black*, 2005 WL 2662577, at *17. But the TCCA did not explain the extent to which this conclusion relied on any of Black's various I.Q. scores. Nor did it consider the potential impact of the Flynn Effect and the SEM, despite the court's consideration of the expert testimony that discussed the impact of these factors on Black's middle set of I.Q. scores.

Just as the TCCA misinterpreted *Howell* in its *Coleman* decision, it made the same error here in deciding whether Black had demonstrated by a preponderance of the evidence that he had an I.Q. of 70 or below by the time he was 18 years of age. Although Black's experts testified regarding the value of the Flynn Effect and the SEM, the TCCA refused to consider these factors as a matter of law based on *Howell* rather than based on whether "professionals who assess a person's I.Q. customarily consider a particular test's standard error of measurement [or] the Flynn Effect." *See Coleman,* 341 S.W.3d at 242 n. 55. The TCCA's decision is therefore contrary to the latest Tennessee Supreme Court's decision on this subject. *See Williams v. Taylor,* 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (holding that "[a] ***97** state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law"). And because *Atkins* defers to the individual states to set out the standard for a defendant to qualify as mentally retarded, the TCCA's misinterpretation of *Howell* is contrary to *Atkins.*

[3] Where a state court's analysis contradicts the governing law, we must conduct an independent review of that issue, unconstrained by 28 U.S.C. § 2254(d)(1) (which mandates deference to state-court proceedings unless they "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"). *Fulcher v. Motley,* 444 F.3d 791, 799 (6th Cir.2006) (holding that after a federal court conducting habeas review determines that the state court's decision was contrary to clearly established Supreme Court precedent, the "federal court is unconstrained by § 2254(d)(1) and de novo review is appropriate" (brackets, citation, and internal quotation marks omitted)). We conduct this independent review because "we cannot grant habeas unless [the defendant] is 'in custody in violation of the Constitution or laws or treaties of the United States.' " *West v. Bell,* 550 F.3d 542, 553 (6th Cir.2008) (quoting 28 U.S.C. § 2254(a)).

Because the TCCA reached its ultimate conclusion that Black did not show by a preponderance of the evidence that his I.Q. was below 70 or that he had adaptive deficits by the time he was age 18, without specifying which I.Q. scores it relied on and why, "[i]t is impossible to determine ... the extent to which the [TCCA's] error with respect to its reading of [*Howell*] affected its ultimate finding" that Black did not meet his burden of proof. *See Williams,* 529 U.S. at 414, 120 S.Ct. 1495; *see also Mask v. McGinnis,* 233 F.3d 132, 140 (2d Cir.2000) (holding under AEDPA that the "state court's determination of factual issues ... were so closely intertwined with the state court's articulation of an erroneous legal standard, to which we owe no deference, that we can discern no independent factual issues to which we should defer"); *State v. Strode,* 232 S.W.3d 1, 16 (Tenn.2007) (holding that "the question of whether an individual is mentally retarded for purposes of eligibility [for] the death penalty is a mixed question of law and fact").

4. Black's adaptive behavior

Even if Black's I.Q. was 70 or below by the time he was age 18, we recognize that he must also have had deficits in adaptive behavior by the time he was 18 in order to be considered mentally retarded under Tennessee's *Atkins* standard. Tenn.Code Ann. § 39–13–203(a). We therefore now turn to the issue of Black's adaptive behavior.

In addition to explaining Tennessee's standard for determining a defendant's level of intellectual functioning, *Coleman* clarified the adaptive-deficits element of Tennessee's *Atkins* standard. The Tennessee legislature did not define what characteristics constitute "deficits in adaptive behavior," but the Tennessee Supreme Court explained that "deficits in adaptive behavior 'means the inability of an individual to behave so as to adapt to the surrounding circumstances.' " *Coleman,* 341 S.W.3d at 248 (brackets omitted) (quoting *State v. Smith,* 893 S.W.2d 908, 918 (Tenn.1994)).

Although *Smith* did not adopt the clinical definition of deficits in adaptive behavior, "Tennessee's trial and appellate courts have repeatedly relied upon expert analysis of adaptive behavior or functioning ***98** predicated upon definitions advanced within the relevant medical and psychological community and authoritative texts such as the AAIDD Manual and the DSM–IV." *Id.* These documents are, respectively, the Manual of the American Association of Intellectual and Developmental Disabilities and the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. As in *Coleman,* the TCCA in the present case looked to the definition of deficits in adaptive behavior that the Tennessee Supreme Court adopted in *Van Tran v. State,* 66 S.W.3d 790, 795 (Tenn.2001), which in turn based its standard on the DSM–IV.

The TCCA quoted the following passage from *Van Tran* that it had previously quoted in *Coleman:*

> The second part of the definition—adaptive functioning—refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, socio-cultural background, and community setting. As discussed, a mentally retarded person will have significant limitations in at least two of the following basic skills: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. Influences on adaptive functioning may include the individual's education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation.

Black, 2005 WL 2662577, at *15 (quoting *Van Tran*, 66 S.W.3d at 795 (internal quotation marks omitted)).

The TCCA in *Coleman* determined that although "[Coleman] has established that he has deficits in academic performance, he has not established that he suffers substantial limitations in at least two adaptive behavioral skill areas. Accordingly, he has failed to establish that he has adaptive deficits by a preponderance of the evidence." *Coleman v. State*, No. W2007–02767–CCA–R3–PD, 2010 WL 118696, at *29 (Tenn.Crim.App. Jan. 13, 2010). The Tennessee Supreme Court disagreed with the analysis of both the TCCA and the trial court. It determined that their erroneous interpretation of *Howell* led them to assess the possible causes of Coleman's apparent deficiencies in adaptive behavior without the benefit of "testimony indicating that Mr. Coleman's intellectual capacities rendered him intellectually disabled." *Coleman*, 341 S.W.3d at 249.

The lower courts' failure to properly consider this evidence concerning Coleman's intellectual capacities might have had "a substantial and injurious impact on the trial court and the Court of Criminal Appeals' decision-making in weighing the relative strengths of the causes of the seeming deficits in Mr. Coleman's adaptive behavior." *Id.* Notably, the Tennessee Supreme Court found that the lower courts' assessment of Coleman's adaptive deficits was flawed, even though they acknowledged that he had various personality problems, because they did not think that these personality problems could be characterized as deficits in adaptive behavior under Tennessee's *Atkins* standard. *See id.*

This problem is equally present in the TCCA's decision in the present case. Just as in *Coleman*, the TCCA here cited a number of expert assessments indicating that Black had various personality problems, but it concluded that these issues did not amount to deficits in his adaptive behavior. *Black*, 2005 WL 2662577, at *6–7, 10, 15–16. Even the State's experts acknowledged ***99** that Black has serious personality problems. *Coleman* 's conclusion that the erroneous exclusion of expert testimony concerning adjustments to Coleman's I.Q. score might have had "a substantial and injurious impact on the [lower courts'] decision-making in weighing the relative strengths of the causes of the seeming deficits in Mr. Coleman's adaptive behavior" is therefore equally applicable in the present case. *See Coleman*, 341 S.W.3d at 249.

The relevant question, however, is whether Black displayed the requisite deficits in his adaptive behavior *by the time he was 18 years of age*. *See* Tenn.Code Ann. § 39–13–203(a). As with the TCCA's analysis of Black's level of intellectual functioning, its conclusory reliance on the record as a whole and the ambiguity of the conflicting evidence make the TCCA's errors in assessing Black's adaptive deficits extend to the determination of whether these adaptive deficits manifested themselves by the time Black was age 18. The TCCA's analysis of the adaptive-deficits issue in the present case is thus contrary to *Coleman.*

[4] In addition to connecting the analysis of adaptive deficits to the proper assessment of intellectual capacities, *Coleman* contains several legal principles regarding adaptive deficits that are relevant to the analysis in the present case. The Tennessee Supreme Court held that "the definition of 'intellectual disability' embraces a heterogeneous population ranging from persons who are totally dependent to persons who are nearly independent." *Id.* at 231. This position supports the idea that a court reviewing whether a defendant is mentally retarded "must focus on Defendant's deficits, not his abilities." *United States v. Lewis*, No. 1:08 CR 404, 2010 WL 5418901, at *30 (N.D.Ohio Dec. 23, 2010). Various experts from both sides in the present case also testified that someone might be mentally retarded but still be able to carry out any of a number of everyday activities, such as maintaining a simple job or driving a car. A full, independent review of whether Black showed by a preponderance of the evidence that he displayed adaptive deficits by the time he was age 18 must therefore look at his weaknesses instead of at his strengths.

The Tennessee Supreme Court in *Coleman* also determined that the lower courts erred in

> their decision to distinguish between Mr. Coleman's mental illness and his intellectual disability as separate causes of his adaptive limitations. By concluding that Mr. Coleman's adaptive deficiencies were caused by his mental illness alone, the lower courts treated Mr. Coleman's mental illness and intellectual disabilities as separate dichotomous spheres rather than as interwoven causes.

Coleman, 341 S.W.3d at 249.

In making this point, the Tennessee Supreme Court explained that there is no consensus among the various state courts around the country, nor in the scientific literature, regarding "the role of causation with regard to assessing deficits in adaptive behavior." *Id.* at 250. The Tennessee Supreme Court in *Coleman* did not resolve this conflict because it determined that the matter should be addressed only after the record was more complete. *Id.* at 252. But even with the less-than-complete record before it, the Court noted that the expert testimony in the record established that mental retardation and other mental disorders are not mutually exclusive. *See id.* at 252–53. Rather, mental retardation and any number of other factors may coexist as comorbid causes of a defendant's deficient adaptive functioning. *See id.*

***100** The Tennessee Supreme Court thus concluded that the TCCA had erred in holding that Coleman's adaptive deficits were caused solely by his mental illness, without considering evidence that "intellectual disability and mental illness were inter-related and served to aggravate each other, combining to limit Mr. Coleman's adaptive functionality." *Id.* at 252. Moreover, although the Tennessee Supreme Court did not make a conclusive legal determination concerning the causal relationship between mental retardation and mental illness, the legal precedents and scientific literature that it cited explain that, at a minimum, courts must consider the possibility that a defendant's mental retardation and other mental illnesses might be comorbid causes of a defendant's personality problems. *See id.* at 251–53; *Lewis*, 2010 WL 5418901, at *32 ("Indeed, individuals with intellectual disability are three to four times more likely to have comorbid mental disorders than the general population."). *Coleman* thus establishes that even where a defendant suffers from mental illness, that finding does not preclude a concomitant determination that the defendant's personality problems constitute adaptive deficits under Tennessee's *Atkins* standard.

The TCCA in the present case repeatedly cited evidence that it interpreted as supporting the existence of Black's mental illness but not of his mental retardation. For example, the TCCA explained that Dr. Engum "believed that Petitioner suffered from personality problems, delusional problems, or psychological difficulties, [but that] those issues are separate and apart from the issue of whether Petitioner was mentally retarded." *Black*, 2005 WL 2662577, at *16. The TCCA also concluded, based on Dr. Vaught's testimony, that mental retardation "has nothing, however, to do with mental illness." *Id.* at *10. This reasoning is similar to the TCCA's error in *Coleman* of treating "Mr. Coleman's mental illness and intellectual disabilities as separate dichotomous spheres rather than as interwoven causes." *Coleman*, 341 S.W.3d at 249. On remand, a proper analysis of Black's case under *Coleman* must consider the potential relationship between mental retardation and mental illness.

5. Conclusion on Black's* Atkins *claim

Overall, the record is rife with conflicting testimony regarding Black's level of intelligence and adaptive deficits by the time he was age 18. The TCCA's decision is of little help because the court made so few definitive factual determinations leading up to its ultimate conclusion that Black did not show by a preponderance of the evidence that he qualifies as mentally retarded. Moreover, the TCCA did not have the benefit of *Coleman's* guidance when it refused to consider either the Flynn Effect or the SEM in evaluating the mental-retardation issue. Habeas review by the district court was similarly constrained.

The rules governing what factors may be considered in determining whether a defendant qualifies as mentally retarded under *Atkins* deal with questions of law. *See Clark v. Quarterman*, 457 F.3d 441, 444 (5th Cir.2006) (holding that the rules regulating the factors involved in the ultimate determination of whether a defendant qualifies as mentally retarded under *Atkins* raise questions of law); *see also Murphy v. Ohio*, 551 F.3d 485, 510 (6th Cir.2009) (reviewing the state court's resolution of the defendant's *Atkins* claim under AEDPA's standard for questions of law). The TCCA's assessment of Black's level of intellectual and adaptive functioning was therefore contrary to *Coleman* under AEDPA's legal standard.

[5] Ordinarily, where the state court's decision is contrary to clearly established ***101** law under AEDPA, we will conduct an independent review of the record in order to determine whether the defendant is "in custody in violation of the Constitution or laws or treaties of the United States." *West v. Bell*, 550 F.3d 542, 553 (6th Cir.2008) (quoting 28 U.S.C. § 2254(a));

Fulcher v. Motley, 444 F.3d 791, 799 (6th Cir.2006) (holding that when we determine that the state court contradicted the governing law, we must conduct an independent review, unconstrained by 28 U.S.C. § 2254(d)(1)). But we will refrain from reaching any independent conclusions ourselves because no court has yet analyzed Black's *Atkins* claim according to the proper legal standard, which was set out by the Tennessee Supreme Court in *Coleman*. *See Alley v. Bell*, 405 F.3d 371, 372 (6th Cir.2005) (en banc) (granting rehearing en banc and remanding the case for the district court to determine in the first instance whether it had jurisdiction to consider the death-row inmate's motion for relief from judgment in light of an intervening case that the district court did not originally consider); *see also Thaddeus-X v. Blatter*, 175 F.3d 378, 399 (6th Cir.1999) (vacating the district court's grant of summary judgment on the plaintiff's retaliation claim and remanding the case for the district court to apply the correct legal standard in the first instance).

A complete review must apply the correct legal standard to all of the relevant evidence in the record. We therefore **VACATE** the district court's denial of Black's *Atkins* claim and **REMAND** the case for it to review the record based on the standard set out in *Coleman* and consistent with this opinion.

6. Response to Dissent

We note that our dissenting colleague vigorously argues that *Coleman* "does nothing to implicate [Black's] *Atkins* claim," that "AEDPA forecloses consideration of this state court precedent as a ground for relief," and that a "[r]emand is unnecessary, inappropriate, and flatly contrary to federal law." For all of the reasons set forth above in this Part II. B., we respectfully disagree.

Moreover, we believe that the dissent fails to recognize that this case raises a unique set of circumstances. Retroactively applicable new rules under AEDPA and under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), are exceedingly rare occurrences. *See Ochoa v. Sirmons*, 485 F.3d 538, 540 (10th Cir.2007) (explaining that "*Atkins* reflects one of the rare instances in which the Supreme Court has announced a new rule of constitutional law that it has also expressly made retroactively applicable to cases on collateral review"). For the Supreme Court to explicitly leave to the states the task of defining the contours of such rules is even more out of the ordinary. But these are the unique circumstances that we face in this case, which is why we are convinced that a remand to the district court for reconsideration of Black's *Atkins* claim in light of *Coleman* is the proper resolution of this issue.

C. Competency to stand trial

[6] Black also challenges the state court's determination that he was competent to stand trial. He argues that, at the very least, the district court should have granted him an evidentiary hearing on this issue. To be competent to stand trial, a defendant must have " 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and 'a rational as well as factual understanding of the proceedings against him.' " *Filiaggi v. Bagley*, 445 F.3d 851, 858 (6th Cir.2006) (quoting ***102** *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam)). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but ... even one of these factors standing alone may, in some circumstances, be sufficient." *Drope v. Missouri*, 420 U.S. 162, 180, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

[7] A defendant's competence to stand trial is a question of fact. *Filiaggi*, 445 F.3d at 858. Under AEDPA, assuming that the state court's legal standard for determining whether a defendant is competent is not contrary to or an unreasonable application of clearly established Supreme Court precedent, the court's factual competency determination "must be upheld unless there is clear and convincing evidence to the contrary." *Id.* (internal quotation marks omitted).

Black argues that neither his experts nor the State's experts conducted a thorough evaluation of either his social history or his psychological and neurological impairments in assessing his competency to stand trial. But Black relies on evidence from his post-conviction proceedings, which was produced long after his trial, in order to support this claim. Although such after-the-fact evidence is relevant to competency determinations, "[t]he critical question is whether the evidence relied upon for determining a defendant's competence at an earlier time of trial was evidence derived from knowledge contemporaneous to trial." *Bowers v. Battles*, 568 F.2d 1, 4 (6th Cir.1977) (internal quotation marks omitted). Psychiatric opinions offered years after a habeas petitioner's trial are therefore not nearly as relevant as those issued at the time of trial. *Harries v. Bell*,

417 F.3d 631, 636 (6th Cir.2005).

Black received a competency hearing shortly before his trial. At this hearing, a psychologist and one of Black's attorneys testified on Black's behalf that he was unable to understand the judicial process, did not understand his attorneys' role, did not understand the consequences of the trial, and that he was unable to assist his attorneys. But the prosecution's three mental-health experts all interviewed Black and testified that although his intelligence was at the lower end of the normal range and that he probably had a personality disorder, he was not delusional and was competent to stand trial.

The trial court then appointed another expert, a psychiatrist, to evaluate Black. This expert concluded that Black was "clearly competent." The court adopted this conclusion. When Black's attorneys raised the competency issue again after voir dire, this same expert reinterviewed Black and once more found that he was competent. The trial court then reaffirmed its ruling that Black was competent to stand trial. In reviewing Black's competency claim on direct appeal, the Tennessee Supreme Court determined that Black "understood the nature and object of the proceedings against him and was able to consult with and assist counsel in preparing his defense." *State v. Black*, 815 S.W.2d 166, 174–75 (Tenn.1991).

Our earlier review of the TCCA's assessment concerning whether Black is mentally retarded under *Atkins* does not compel a similar result concerning his competency to stand trial because *Atkins* explicitly held that "[m]entally retarded persons frequently know the difference between right and wrong" and can be competent to stand trial. *See Atkins v. Virginia*, 536 U.S. 304, 318, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). The district court determined, and Black does not offer any evidence to the contrary, that Black's competency argument relies primarily on evidence from his post-conviction proceedings. ***103** "None of these experts state an opinion as to whether Petitioner met the standard for competence at the time of trial." *Black v. Bell*, 181 F.Supp.2d 832, 843 (M.D.Tenn.2001). The district court thus correctly determined that Black's evidence did not amount to "the clear and convincing proof required for this Court to disregard the state court's findings." *Id.* And the state court's decision was not "contrary to, [nor did it] involve[ ] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

[8] [9] Black further argues that the procedures used by the state trial court to determine whether he was competent were inadequate under the Due Process Clause. Due process in a competency hearing requires "that only the most basic procedural safeguards be observed." *Medina v. California*, 505 U.S. 437, 453, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) (internal quotation marks omitted). The court allowed both Black and the prosecution to present their expert testimony at Black's competency hearing. Then, rather than base its determination on either of these experts, the court appointed its own independent expert to evaluate Black. The court further afforded Black a reevaluation at his attorneys' request after the voir dire. Black has not pointed to any required process that he was denied. The process that was undertaken in Black's state-court competency hearing was therefore not contrary to, nor did it involve an unreasonable application of, the process that was required to determine Black's competence. In rejecting Black's challenge to the state court's determination of his competency to stand trial, we specifically note that we make no determination regarding his claim of incompetence to be executed, which the district court dismissed without prejudice because the claim was not yet ripe. *Black*, 181 F.Supp.2d at 882–83.

D. Ineffective assistance of counsel regarding mitigation evidence

Black next challenges the state court's rejection of his claim that his trial attorneys were ineffective in investigating and presenting mitigation evidence at the penalty phase of his trial. He contends that his attorneys failed to investigate his social history and failed to hire a psychiatrist regarding his mental-health issues.

To establish the ineffective assistance of trial counsel, Black must show that his counsel's performance (1) was deficient (i.e., that it was objectively unreasonable under prevailing professional norms), and (2) prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689, 104 S.Ct. 2052 (internal quotation marks omitted).

The test for prejudice is whether there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Id.* at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The *Strickland* prejudice component "focuses on the question whether counsel's

deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

[10] Defense counsel's failure to reasonably investigate a defendant's background ***104** and present mitigating evidence to the jury at sentencing can constitute ineffective assistance. *Wiggins v. Smith*, 539 U.S. 510, 522–23, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). In assessing the reasonableness of an attorney's mitigation investigation, the court considers "not only the quantum of evidence already known to counsel," but also whether that evidence should have led "a reasonable attorney to investigate further." *Id.* at 527, 123 S.Ct. 2527.

[11] Counsel has a duty to conduct an independent investigation regarding mitigating evidence regardless of the defendant's reluctance to investigate and disclose such evidence. *Harries v. Bell*, 417 F.3d 631, 638 (6th Cir.2005). Because of this obligation, counsel cannot rely solely on information provided by the defendant and his family in determining the extent of a proper mitigation investigation. *Rompilla v. Beard*, 545 U.S. 374, 388–89, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). But a "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Id.* at 383, 125 S.Ct. 2456.

As for demonstrating prejudice under *Strickland*, Black was required to show that his new evidence differs "in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing." *See Fautenberry v. Mitchell*, 515 F.3d 614, 626 (6th Cir.2008) (internal quotation marks omitted). "[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation." *Nields v. Bradshaw*, 482 F.3d 442, 454 (6th Cir.2007) (internal quotation marks omitted).

[12] Black claims that the TCCA's analysis was contrary to *Strickland* because the court concluded that he was required to establish that "but for his counsel's deficient performance, the result of his trial would *likely* have been different." As Black correctly argues, *Strickland* requires only a "reasonable probability" that the result would have been different but for his counsel's deficient performance. He thus argues that the TCCA's requirement that his attorneys' deficient performance would "likely" have resulted in a different result, *see Black*, 1999 WL 195299, at *13, overstated the level of prejudice necessary for relief. The Supreme Court has in fact held that if a state court rejects a defendant's ineffective-assistance-of-counsel claim based on a preponderance-of-the-evidence standard for prejudice rather than asking whether there was a "reasonable probability that ... the result of the proceeding would have been different," then that decision would be contrary to clearly established federal law. *Williams v. Taylor*, 529 U.S. 362, 406, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052).

But the district court emphasized that "[i]n discussing the *Strickland* prejudice standard, courts frequently use the term 'likely' interchangeably with the phrase 'reasonable probability.' " *Black*, 181 F.Supp.2d at 861 (citing *Stanford v. Parker*, 266 F.3d 442, 455 (6th Cir.2001)). The court reasoned that, in using the term "likely," the TCCA "focused on the same analysis as required by the 'reasonable probability' standard." *Id.* Our review of the record supports the district court's conclusion.

Moreover, Black's mitigation argument would fail even de novo review. He summarily argues that, had his trial counsel hired a psychiatrist, the psychiatrist would have easily discovered that he "suffers serious mental illness, has neurological impairments, and severe memory deficits," which would have led to a diagnosis of ***105** brain damage. But Black was in fact evaluated by various mental-health experts during the competency evaluation for his trial. Black now presents additional mental-health evidence that was obtained during his post-conviction process that he contends should have been uncovered by his penalty-phase attorneys. But Black's claim fails because there is no evidence in the record to support the conclusion that Black's trial attorneys *should have been aware at the time of Black's trial* (including the penalty phase) that any further investigation into his social history would have produced more evidence beyond that already obtained by the competency experts. *See Wilson v. Parker*, 515 F.3d 682, 698 (6th Cir.2008) (assessing the effectiveness of defense counsel's mitigation efforts by requiring a look at counsel's conduct "*at the time of its occurrence* (or when it should have occurred in the case of omissions)" (emphasis added)).

E. Ineffective assistance of counsel regarding the prosecutor's "reward" argument

[13] Black further claims that his trial counsel performed ineffectively by failing to object to the prosecution's penalty-phase

closing argument that giving Black a life sentence rather than the death penalty would reward him for the additional killings of Latoya and Lakeisha Clay because Black was already subject to a life sentence for the murder of Angela Clay. This claim is based on two Tennessee Supreme Court cases, *State v. Smith*, 755 S.W.2d 757 (Tenn.1988), and *State v. Bigbee*, 885 S.W.2d 797 (Tenn.1994), in which the prosecutor made similar arguments to the jury. The TCCA in the present case incorrectly accepted the lower court's distinction that whereas the defendants in those cases "had previously received life sentences for unrelated murders ..., [Black] was facing the death penalty in the same trial for three related killings. Accordingly, as the [TCCA] noted, the jury [in the present case] could not help but have full knowledge of all three sentences it was considering for the three murders." *Black*, 181 F.Supp.2d at 857 (quoting the TCCA's opinion).

The defendant in *Smith* was in fact tried for multiple murders in the same trial, just as Black was here. Although the Tennessee Supreme Court in *Smith* determined that the two separate murders should have been tried separately, it also concluded that the prosecution's "reward" argument was highly prejudicial specifically because the jury knew about the other murders. *Smith*, 755 S.W.2d at 767–68. In other words, *Smith* held that telling the jury that a life sentence will be "no additional punishment" because of the defendant's life sentence for a different murder is inherently prejudicial to the defendant even where the jury properly knows about the defendant's life sentence for another murder.

But, like the trial court, the TCCA ultimately did not decide whether counsel's performance was deficient because it agreed with the trial court that even if defense counsel did make a mistake and "should have objected to the argument," this error was not prejudicial because "it is unlikely that the objection would have had any effect on the jury's decision." *Id.* Black, however, claims that the prosecutor's argument was prejudicial because the jury sent a note asking the trial judge whether multiple terms for the murders would be served concurrently or consecutively, and it deliberated for 13 hours, allegedly showing that the jury was considering a life sentence. But, as the TCCA noted, the prosecutor made his "reward" argument about both of Angela's daughters, yet the jury sentenced Black to death for only Lakeisha's murder. Moreover, ***106** Black's death sentence was supported by six aggravating factors. We therefore agree that Black has not shown a reasonable probability that, but for the prosecutor's reward argument, the result of his penalty phase would have been different.

F. Instructing the jury regarding Black's parole eligibility

[14] Finally, Black argues that the trial court violated his due process rights by failing to answer the jury's questions regarding how long a life sentence actually was in Tennessee, and whether he could be paroled from a life sentence. Black contends that he had a due process right to have the jury receive instructions in response to these questions so that he could rebut the prosecution's improper argument that a life sentence would reward Black for the murders of Latoya and Lakeisha.

In support of this argument, Black cites *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), and *Shafer v. South Carolina*, 532 U.S. 36, 121 S.Ct. 1263, 149 L.Ed.2d 178 (2001). But none of these cases dealt with the type of prosecutorial-misconduct argument that Black raises here. *Gardner* involved a defendant's right to rebut information contained in a presentence report. And *Skipper* concerned a defendant's right to offer evidence of his good behavior in prison in order to rebut the prosecution's arguments regarding the defendant's future dangerousness.

Simmons and *Shafer* provide the closest analogy to the present case. In Simmons, the Court held that "where a defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is not eligible for parole." *Black*, 181 F.Supp.2d at 870. But if "parole is an option for a defendant sentenced to life imprisonment, ... the Simmons Court emphasized that it will not second-guess the refusal of a State to allow proof, instruction, or argument to the jury on the availability of parole." *State v. Bush*, 942 S.W.2d 489, 503 (Tenn.1997) (emphasis in original). And, as the district court explained, "[b]ecause Tennessee is a state in which defendants sentenced to life imprisonment are eligible for parole, ... *Simmons* does not require that the jury be given information about parole availability." *Black*, 181 F.Supp.2d at 870 (citing *Bush*, 942 S.W.2d at 503).

In fact, *Shafer* itself explains that *Simmons* does not apply where, as here, the defendant might be eligible for parole based on the jury's decision. *Shafer*, 532 U.S. at 51, 121 S.Ct. 1263 ("*Simmons* applies where [,] as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." (emphasis and internal quotation marks omitted)). Moreover, Black does not contend that the prosecutor's reward argument put his dangerousness at issue. We therefore agree with the district court's denial of Black's claim that he had a due process right to have the trial court answer

the jury's questions regarding his parole eligibility and the length of his sentence.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the district court's denial of Black's habeas petition regarding his non-*Atkins* claims, **VACATE** the court's judgment regarding the denial of Black's petition concerning his *Atkins* claim, and **REMAND** the case for further proceedings consistent with this opinion.

***107** BOGGS, Circuit Judge, dissenting.

In *Coleman v. State*, 341 S.W.3d 221 (Tenn.2011)—decided after oral argument in this case—the Tennessee Supreme Court construed a Tennessee statute prohibiting the execution of mentally retarded defendants under Tennessee law. The panel remands Black's case to the district court in light of *Coleman*, reasoning that *Coleman* "elucidates Tennessee's interpretation of *Atkins*'s legal standard." *See* Maj. Op. at p. 92. A thorough reading of *Coleman* reveals no such elucidation. *Coleman* is purely a construction of a state statute that makes only fleeting references to *Atkins*. For this reason, I cannot join the panel, and respectfully dissent.

A

There are three major flaws with the panel's opinion.

First, the panel contends that it is appropriate to "look to state law that has been issued after the defendant's state conviction has become final in order to determine how *Atkins* applies to the specific case at hand." This position, while correct in the abstract, is not supported by the two precedents cited. In *Hill v. Anderson*, this court remanded Hill's *Atkins* habeas claim to the Ohio state courts—in which Hill *had not yet exhausted* his "retardation claim"—to allow the courts to "develop [their] own procedures for determining whether a particular claimant is retarded and ineligible for death." 300 F.3d 679, 682 (6th Cir.2002). *Hill*, decided in the uncertain aftermath of *Atkins*, has no bearing on this case. Black has had ample opportunity to exhaust and has exhausted his *Atkins* claim in state courts, and in federal courts. To the extent that *Coleman* has any bearing on Black's case, the appropriate forum to relitigate such a claim is in state court, not on remand to a federal district court.

The other case cited, *Wiley v. Epps*, is readily distinguishable, in light of the Fifth Circuit's finding that AEDPA deference was unwarranted where the "case was intertwined with the alleged due process violation by the state court's failure to conduct a hearing." 625 F.3d 199, 208 (5th Cir.2010). "Wiley was convicted before *Atkins* was decided" and on collateral review was not offered an evidentiary hearing to develop his claim of mental retardation. *Ibid.* As such, a remand was appropriate to afford Wiley an opportunity to state his *Atkins* claim. *Id.* at 213 ("[I]t was an unreasonable application of clearly established federal law for the Mississippi Supreme Court to deny Wiley's *Atkins* claim without a hearing, and the district court correctly concluded that it was not bound to afford the state court's decision deference."). In contrast, as the majority notes, the state trial court "held an evidentiary hearing, but ultimately determined that Black [was] not mentally retarded under the *Atkins* standard." *See* Maj. Op. at p. 86. Black has had numerous opportunities to argue his *Atkins* claim, and the state court's determination is entitled to deference. *Coleman*, a creature of state law, does nothing to implicate his *Atkins* claim.

B

Second, the state law in question, enacted in 1990, has nothing to do with *Atkins* and its resulting jurisprudence, other than the fact that it relates to the execution of mentally retarded individuals. Tenn.Code Ann. § 39–13–203(a) prohibits the execution of an individual with an "intellectual disability" specifically defined as "[s]ignificantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below." The Tennessee Supreme Court announced in *Van Tran v. State* that the ***108** execution of mentally retarded individuals also violated the Tennessee Constitution. 66 S.W.3d 790, 812 (Tenn.2001). Noteworthy for our purposes, *Van Tran* was decided seven months before the Supreme Court's opinion in *Atkins v. Virginia*, but after certiorari was granted. *Id.* at 800. The *Coleman* opinion itself discusses *Atkins* only in the background section. The Tennessee Supreme Court's analysis in *Coleman*—which contains only fleeting references to journal articles about *Atkins*—focuses on "construing [the state] statute," *Coleman*, at 241. *Coleman* offers no "elucidation" of *Atkins.*

C

Third, and perhaps most importantly, even assuming that *Coleman* explicated *Atkins*, such analysis would be of no moment for purposes of AEDPA. Although "*Atkins* reserved for the states the task of developing appropriate ways to enforce the constitutional restriction," *In re Bowling*, 422 F.3d 434, 436–37 (6th Cir.2005), the majority is incorrect in reasoning that *Coleman* "enforce[s] the constitutional restriction." The Tennessee Supreme Court in *Van Tran* went out of its way to stress that its opinion—issued seven months before *Atkins*—was grounded on state, and not federal constitutional law. 66 S.W.3d at 801 ("Accordingly, although we will refer to relevant analysis under the Eighth Amendment, all of our opinions and conclusions with respect to the execution of mentally retarded individuals—an issue of first impression for this Court—are separately and independently based upon article I, § 16 of the Tennessee Constitution."). Indeed, even if the Tennessee Supreme Court did rely on an interpretation of *Atkins*, it could not alter or elucidate the relevant AEDPA inquiry—which is what was "clearly established federal law" as of 2006, when the "TCCA affirmed" the state trial court's decision that "Black is not mentally retarded under the *Atkins* standard." *See* Maj. Op. at p. 86.

The majority's remand cannot be reconciled with this court's limited role under AEDPA to grant relief only for an "unreasonable application of, clearly established *Federal law, as determined by the Supreme Court of the United States.*" 28 U.S.C. § 2254(d)(1) (emphasis added). *See Bobby v. Dixon*, —— U.S. ——, 132 S.Ct. 26, 181 L.Ed.2d 328 (2011) (per curiam). *Coleman* decided how a Tennessee state statute should apply to a Tennessee state court opinion decided under the Tennessee state Constitution. This case was not decided based on the Federal Constitution, and does not implicate Black's federal habeas challenge. AEDPA forecloses consideration of this state court precedent as a ground for relief.

* * *

I find no possibility that a federal court's consideration of *Coleman* could afford Black any remedy. Remand is unnecessary, inappropriate, and flatly contrary to federal law. Just as Coleman did, Black can seek relief under this new precedent in Tennessee state courts "in the form of a motion to re-open his prior post-conviction petition." *Coleman*, 341 S.W.3d at 226.

Because Black's remedy does not lie in the federal courts, I respectfully dissent.

All Citations

664 F.3d 81

Footnotes

[*] Judge Boggs would grant the petition for rehearing.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BYRON LEWIS BLACK	)	
	)	
v.	)	NO. 3:00-0764
	)	JUDGE CAMPBELL
	)	DEATH PENALTY CASE
RONALD COLSON, Warden Riverbend Maximum Security Prison	)	

MEMORANDUM

I. Introduction

This case is before the Court on remand from the Sixth Circuit to reconsider the Petitioner's claim made pursuant to Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Black v. Bell, 664 F.3d 81 (6th Cir. 2011); (Docket No. 134).[1] The Court heard oral argument on the issue on January 3, 2013. For the reasons set forth herein, the Court concludes that the Petitioner has failed to carry his burden of demonstrating intellectual disability[2] by a preponderance of the evidence.

II. Factual and Procedural Background

In 1989, Petitioner was convicted in Davidson County Criminal Court of three counts of first degree murder and one count of burglary in connection with the killing of his girlfriend, Angela Clay, and her two minor daughters, Lakeisha and Latoya. (See State v. Black, 815

[1] The parties indicate that Riverbend Warden Ronald Colson should be substituted for Ricky Bell as the Respondent in this case.

[2] As discussed herein, the term "intellectual disability" has now replaced the term "mental retardation" for purposes of Petitioner's Atkins claim. Because the evidence in this case was obtained prior to this change, however, the Court uses the term "mental retardation" in discussing the evidence.

S.W.2d 166 (Tenn. 1991); Addendum 12). The Petitioner received a death sentence for the murder of Lakeisha, consecutive life sentences for the other two murder convictions, and a fifteen-year sentence for the burglary conviction. Id. Petitioner's convictions and sentence were affirmed on direct appeal, and in state post conviction proceedings. Id. (Black v. State, 1999 WL 195299 (Tenn. Crim. App. April 8, 1999); (Addendum 28).

The facts surrounding Petitioner's convictions were described by the Tennessee Supreme Court in its opinion on direct appeal as follows:

> It appears that these bizarre and tragic murders occurred in the early morning hours of Monday, March 28, 1988. The bodies of the three victims were found Monday evening around 9:30 p.m. At the time of the murders, the Defendant was on weekend furlough from the Metropolitan Workhouse in Davidson County. The Defendant was serving a two-year sentence, after pleading guilty to malicious shooting, a felony.
>
> . . . The Defendant was the boyfriend of Angela Clay, who had separated from her husband, Bennie Clay, about a year before her death. Bennie Clay was the father of Latoya and Lakeisha. Bennie Clay testified that at the time of Angela Clay's death, he and Angela were attempting to reconcile, but the Defendant was an obstacle to the reconciliation. He further testified that Angela began a relationship with the Defendant after their separation and that at times she was seeing both the Defendant and himself. In December, 1986, the Defendant and Bennie Clay had an altercation during a dispute over Angela. As Bennie Clay was returning to his car, the Defendant shot at him. One shot hit the car, another hit Clay in the right foot, and another shot hit him in the back of his left arm. The bullet that went through his left arm lodged under his collar bone. Clay testified that he started running up the street and the Defendant chased him, continuing to shoot. Clay was finally unable to run any farther. He fell down, and the Defendant stood over him and had cocked the gun when Angela Clay ran up to the Defendant and pushed him away. Angela then took Bennie Clay to the hospital, where he remained for seven days. The Defendant pled guilty to the shooting and received the workhouse sentence, which included weekend furloughs.
>
> On Friday afternoon around 5:30 p.m., March 25, 1988, the Defendant was released from the workhouse on a weekend furlough. He returned to the workhouse on the evening of Monday, March 28, at approximately 5:15 p.m. after the murders were committed, but before the bodies were discovered.

Angela and her two daughters were last seen Sunday evening around 11 p.m. Angela's sister, Lenette Bell, had borrowed Angela's car on Sunday. Angela was employed at Vanderbilt Hospital, where she worked from 1:30 p.m. to 10 p.m. daily. Lenette Bell arranged to pick up Angela at the hospital at 10 p.m. When Lenette Bell arrived at the hospital, the Defendant was also waiting there for Angela. Angela's children, who were with Lenette Bell while their mother was working, chose to ride with the Defendant and their mother from the hospital. The Defendant drove Angela and her two daughters to the home of Amelia Bell, the mother and grandmother of the victims. Ms. Bell testified that the Defendant left her house in his car, and that her daughter and granddaughters left her house in her daughter's car about 10:20 p.m. Angela returned about 11 p.m. to pick up an iron she had forgotten. That was the last time Ms. Bell saw her daughter alive. Lenette Bell testified that Angela telephoned her at approximately 11:20 p.m. that evening. That was the last time any of the witnesses spoke to the deceased before her untimely death.

When Ms. Bell's daughter failed to return the iron the next morning, she telephoned her daughter but got no answer. She continued to call Angela throughout the day but received no answer. She became concerned and asked another daughter to drive to Angela's apartment. No one answered her knocks at the door. Ms. Bell made other telephone calls to try to locate her daughter and then went to her daughter's apartment with Lenette Bell, but no one responded to their knocks on the door. All the shades were drawn and Angela's car was parked outside of her apartment. It was then they decided to call the police.

The police arrived at approximately 9:30 p.m. on Monday evening, March 28, 1988, and found no signs of forced entry into the apartment; the door was locked. Officer James was able to open a window after prying off a bedroom window screen. All the lights were off. He shined a flashlight into a child's room and saw a pool of blood on the bed and the body of a small child on the floor. He exited the room, and officers secured the scene.

Investigation revealed the bodies of Angela and her nine year old daughter, Latoya, in the master bedroom. Angela, who was lying in the bed, had apparently been shot once in the top of the head as she slept and was rendered unconscious immediately and died within minutes. Dr. Charles Harlan, Chief Medical Examiner for Davidson County, testified that she was probably shot from a distance of six to twelve inches and that her gunshot wound was the type usually caused by a large caliber bullet.

Latoya's body was found partially on the bed and partially off the bed, wedged between the bed and a chest of drawers. She had been shot once through the neck and chest. Blood on her pillow and a bullet hole in the bedding indicated she had been lying on the bed when shot. Dr. Harlan testified that she was shot from a

> distance of greater than twenty-four inches from the skin surface. The bullet path and type of shot indicated that death was not instantaneous but likely occurred within three to ten minutes after her being shot. Bullet fragments were recovered from her left lung. Both victims were under the bedcovers when they were shot.
>
> The body of Lakeisha, age six, was found in the second bedroom lying facedown on the floor next to her bed. She had been shot twice, once in the chest, once in the pelvic area. Dr. Harlan testified that she had died from bleeding as a result of a gunshot wound to the chest. She was shot from a distance of six to twelve inches and died within five to thirty minutes after being shot.
>
> Abrasions on her arm indicated a bullet had grazed her as she sought to protect herself from the attacker. Bullet holes and blood stains on the bed indicated that she was lying in bed when shot and had moved from the bed to the floor after being shot. There were bloody finger marks down the rail running from the head of the bed to the foot of the bed. The size of the wounds and the absence of bullet casings indicated that a large caliber revolver had been used to kill the victims.
>
> One projectile was collected from the pillow where Latoya was apparently lying at the time she was shot. Fragments of projectiles were collected from the wall above Angela's head; others were collected from the mattress where Lakeisha was found.
>
> The receiver from the kitchen telephone was found in the master bedroom. The telephone from the master bedroom was lying in the hallway between the two bedrooms. The Defendant's fingerprints were the only prints recovered from the telephones. Two of his fingerprints were found on the phone in the hallway, and one was on the kitchen telephone receiver found in the master bedroom.

815 S.W.2d at 170-72.

Pursuant to 28 U.S.C. § 2254, Petitioner filed a Petition seeking habeas relief in this case on August 14, 2000. (Docket No. 1). After appointment of counsel, Petitioner filed an Amended Petition For Writ Of Habeas Corpus (Docket No. 8) raising numerous grounds, including an Eighth and Fourteenth Amendment claim that execution of the Petitioner would be cruel and unusual punishment because he is mentally retarded. The Court subsequently granted summary judgment to Respondent on all claims, including the mental retardation claim, on December 11, 2001. (Docket Nos. 82, 83).

The Petitioner filed an appeal, and while the case was pending, the United States Supreme Court issued its decision in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In Atkins, the Supreme Court held that executing a mentally retarded person violates the Eighth Amendment's ban on cruel and unusual punishment. The Court did not define the term "mentally retarded," but left to the states "the task of developing appropriate ways to enforce the constitutional restriction" upon their execution of sentences. 122 S.Ct. at 2252.

After Atkins was issued, the Sixth Circuit Court of Appeals held its appeal in this case in abeyance pending a decision by the Tennessee courts on whether Petitioner is mentally retarded. (Docket No. 91). The Petitioner then moved to reopen his state post conviction proceeding to raise the mental retardation claim. Black v. State of Tennessee, 2005 WL 2662577 (Tenn. Crim. App. Oct. 19, 2005). After an evidentiary hearing, the state trial court held that the Petitioner had not demonstrated mental retardation, and that decision was affirmed on appeal by the Tennessee Court of Criminal Appeals. Id. The Tennessee Supreme Court denied Petitioner's application for permission to appeal. Id.

The Sixth Circuit subsequently remanded the case back to this Court for reconsideration of Petitioner's mental retardation claim in this case in light of Atkins. (Docket No. 97). On the first remand, this Court applied the standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and held that the Tennessee courts' decisions denying Petitioner's Atkins claim were entitled to deference. (Docket No. 127). The Petitioner appealed that decision to the Sixth Circuit on May 21, 2008. (Docket No. 130).

III. The Second Remand of Petitioner's *Atkins* Claim

On December 15, 2011, the Sixth Circuit issued an opinion vacating the Court's judgment regarding the Atkins claim, and remanding the case for further proceedings consistent with the opinion. Black v. Bell, 664 F.3d at 84.[3]

In considering the Atkins claim, the appeals court pointed out that capital defendants are considered "mentally retarded" if they meet the criteria set forth in Tennessee Code Annotated Section 39-13-203. That statute, which was amended while this case was on appeal to substitute the term "intellectual disability" for "mental retardation,"[4] provides as follows:

> (a) As used in this section, "intellectual disability" means:
>
> > (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;
> >
> > (2) Deficits in adaptive behavior; and
> >
> > (3) The intellectual disability must have been manifested during the developmental period, or by eighteen (18) years of age.

The statute also provides that the defendant has the burden of demonstrating intellectual disability by a preponderance of the evidence. Tenn. Code Ann. § 39-13-203(c). Black v. Bell, 664 F.3d at 91.

The appeals court summarized the decisions of the state courts applying this statute as follows:

> The state trial court determined that Black's post-conviction *Atkins* claim merited an evidentiary hearing. At this evidentiary hearing, Black had the burden of showing by a preponderance of the evidence that he met Tennessee's definition of

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[3] The appeals court affirmed the denial of Petitioner's non-Atkins claims. 664 F.3d at 84, 106.

[4] See 2010 Tenn. Pub. Acts 734.

> mental retardation under *Atkins*. After the hearing concluded, the court summarized what it viewed as the determinative evidence from the voluminous record and, based on this evidence, denied Black's *Atkins* claim for post-conviction relief.
>
> The TCCA affirmed the trial court's rejection of Black's claim. In its 'Analysis' section, the TCCA mostly reviewed, without taking a stance on, the conflicting expert assessments of the factual record. But the TCCA did recognize that, according to Black's experts, the Flynn Effect and/or the SEM brings his middle set of I.Q. scores into the mentally retarded range. Based on *Howell v. State*, 151 S.W.3d 450, 457 (Tenn.2004), however, the TCCA determined that it was prohibited from considering these scientific concepts in assessing Black's numerical I.Q. score.
>
> The TCCA's assessment of the factual record also makes clear that it was skeptical of the opinions of Drs. Globus and Gur regarding when Black's brain damage occurred. But the TCCA did not go so far as to make a definitive factual conclusion regarding the date of onset of Black's brain damage. The court also discounted Dr. Grant's conclusion that Black displayed deficits in his adaptive behavior because, although Dr. Grant observed that Black had never engaged in a number of commonplace activities, 'there is no proof in the record that [Black] was unable to do these things.' *Black*, 2005 WL 2662577, at *15. It also pointed out that none of Black's childhood I.Q. scores fell in the mentally retarded range. But the TCCA reached its ultimate conclusion that 'the proof in the record simply does not support that [Black's] I.Q. was below seventy or that [Black] had deficits in his adaptive behavior prior to age eighteen' without stating which pieces of evidence were essential to its conclusion. *Id.* at *17.

664 F.3d at 89-90.

The Sixth Circuit ultimately determined that the decisions of the Tennessee courts were not entitled to AEDPA deference because they were at odds with Coleman v. State, 341 S.W.3d 221 (Tenn. 2011), a decision issued by the Tennessee Supreme Court while this case was on appeal, on April 11, 2011. The court determined that unlike the state court decisions in this case, Coleman required the consideration of evidence regarding the impact of the "Flynn Effect," the standard error of measurement ("SEM"), and other factors used by experts in determining a defendant's ultimate I.Q. score. 664 F.3d at 92-97. As to the second criterion, the court

determined that the state courts had erred because Coleman required that they "look at his weaknesses instead of at his strengths," and because they failed to consider the potential relationship between mental illness and mental retardation in assessing the Petitioner's deficits in adaptive behavior. 664 F.3d at 97-100. Consequently, the court concluded that an independent, de novo review of the record is appropriate. 664 F.3d at 97, 100-01. In a dissent, Judge Boggs determined that remand was inappropriate, and that the Petitioner should seek to re-open his prior post conviction proceeding based on the Coleman decision. 664 F.3d at 107-08.[5]

This Court subsequently considered Petitioner's request to introduce new evidence, and denied the request based on the language of the Sixth Circuit's opinion directing the Court to "review the record based on the standard set out in *Coleman*. . ." (Docket No. 150, at 2).

IV. De Novo Review

As directed by the appeals court, this Court undertakes a de novo review of the evidence admitted at the post conviction proceeding in state court to determine whether the Petitioner has satisfied the three statutory criteria. That record includes the testimony of Mary Smithson-Craighead, a teacher; Melba Faye Corley, the Petitioner's sister; Al Dennis, the Petitioner's high school football coach; Richard Corley, the Petitioner's brother-in-law; Petitioner's experts Dr. Albert Globus, Dr. Daniel Grant, and Dr. Ruben C. Gur (by deposition); and the State's experts Dr. Eric S. Engum and Dr. Susan Vaught. (Docket No. 106 (Addendum 30-31)). The record also

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[5] In a more recent decision, Keen v. State, ___ S.W.3d ___, ___ n. 13, 2012 WL 6631245 (Tenn. Dec. 20, 2012), the Tennessee Supreme Court held that Coleman did not establish a new constitutional right to be applied retroactively, and noted its agreement with Judge Boggs that "'*Coleman* decided how a Tennessee state statute should apply to a Tennessee state court opinion [i.e., *Van Tran*] decided under the Tennessee state Constitution.'" (quoting Black v. Bell, 644 F.3d at 107-08 (Boggs, J., dissenting)).

includes the affidavits of Dr. Patti van Eys, James Lawler, Ph. D. and Michael Nash, Ph. D. (Docket No. 106 (Addendum 29, Volume 2 of 3)), and a number of other exhibits, including the experts' reports, the Petitioner's school records, medical records and prison records, and testimony from the Petitioner's trial and first post conviction hearing. (Docket No. 106 (Addendum 30)).

As set forth above, in order to demonstrate that he is "intellectually disabled" under Tennessee Code Annotated Section 39-13-203(a), the Petitioner has the burden of demonstrating the following criteria by a preponderance of the evidence:

> (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;
>
> (2) Deficits in adaptive behavior; and
>
> (3) The intellectual disability must have been manifested during the developmental period, or by eighteen (18) years of age.

The statute requires that all three criteria be met in order to establish "intellectual disability." State v. Strode, 232 S.W.3d 1, 18, 2007 WL 2316355 (Tenn. 2007).

The record indicates that the Petitioner was born on March 23, 1956, and was 33 years old at the time the crimes were committed in 1988. Black v. Bell, 664 F.3d at 84. The Petitioner was approximately 48 years old when the state court proceedings on mental retardation were held in 2004. (Docket No. 106)(Addendum 29-31)).

A. IQ of 70 or below prior to age 18

Efficiency and logic suggest that, in this case, the Court consider the first criterion in conjunction with the third. Accordingly, the Court will first review the record to determine whether the Petitioner has shown: "Significantly subaverage general intellectual functioning as

evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below, . . . manifested during the developmental period, or by eighteen (18) years of age." Tenn. Code Ann. § 39-13-203(a)(1), (3).

In the state post conviction proceeding on the issue of mental retardation, the parties introduced evidence of various IQ tests taken by the Petitioner over his lifetime. The Petitioner's school records indicate that prior to age 18, he scored as follows:

Date of test	Name of test	Score	Petitioner's Approximate Age
1963	Lorge Thorndyke	83	7
1964	Unknown	97	8
1966	Lorge Thorndyke	92	10
1967	Otis	91	11
1969	Lorge Thorndyke	83	13

(Docket No. 106 (Addendum 30, Vol. 1, at 233 (testimony by Dr. Grant); Exhibit 1, Exhibit 36)).

Prior to his trial in 1989, the Petitioner's attorneys retained mental health experts to evaluate him for competency and sanity. At that time, the Petitioner scored as follows:

Date of test	Name of test	Administered by	Score	Pet's Approx. Age
1989	Shipley-Hartford	Dr. Kenneth Anchor/ Dr. Pat Jaros	76	33

(Id. (Addendum 30, Exhibit 4, at 5-7, 11; Exhibit 25, at 2308-09)).

During the first state post conviction proceeding, Petitioner's counsel retained different mental health experts to evaluate his mental status. At that time, the Petitioner scored as follows:

Date of test	Name of test	Administered by	Score	Pet's Approx. Age
1993	WAIS-R	Dr. Gillian Blair	73	37
1997	WAIS-R	Dr. Pamela Auble	76	41

(Id., (Addendum 30, Exhibits 15, 16, 33, 34, 36)).

During the initial habeas proceeding in this Court, still other mental health experts

evaluated the Petitioner. At that time, the Petitioner scored as follows:

Date of test	Name of test	Administered by	Score	Pet's Approx. Age
2001	WAIS-III	Dr. Patti van Eys	69	45
2001	Stanford-Binet-IV	Dr. Daniel Grant	57	45

(Id. (Addendum 30, Exhibits 10, 41)).

In summary, the Petitioner did not score 70 or below on an IQ test until 2001, when he was approximately 45 years old. The Petitioner argues that the test scores prior to that date are invalid, or the scores should be adjusted downward for various reasons. As for the IQ tests administered during his years in school, the Petitioner argues that those tests should not be considered at all because they were group-administered tests, which are less reliable than individually-administered IQ tests. Indeed, the experts on both sides indicated that testing an individual one-on-one was the preferred method for measuring IQ. (Docket No. 106 (Addendum 30, Vol. 2, at 234-236, 300, 372-73)). There is no support in the record, however, for completely disregarding all group-administered tests. Instead, the group setting goes to the "weight" to be given the test score. As Dr. Engum explained:

> Q. What significance, if any, do you place on the tests scores administered, and tests scores he received when he was in school? Are those to be considered?
>
> A. Oh, absolutely.
>
> Q. Or how much weight, if any, do you give those?
>
> A. I think they're (sic) two answers to your question. Number 1, I fully agree with Dr. Grant, that group administered IQ test[s] are not as accurate as individually administered IQ test[s]. That is, they have a greater standard error of measurement. On the other hand, they're utilized in a number of settings to determine how children are functioning. . . You might say the standard error of measurement on the Wechsler Adult Intelligence Skill, Third

> Edition, is plus or minus five points, roughly. On a group administered IQ test, it may be plus or minor (sic) eight points. So it's not as accurate. The place where you really get into some question is, if you have a group administered IQ test let's say, 73, then I wouldn't make a diagnosis of borderline versus mental retardation on that score. I would send him out for further testing. But where the test scores are substantially higher, I don't see that there's any reason to suspect that he was mentally retarded; and, in fact, the school authorities did not see him in that way.

(Id., at 372-74). Applying the eight-point SEM suggested by Dr. Engum to reduce the Petitioner's IQ scores prior to age 18 results in a range from 75 to 89, still comfortably above the statutory criteria of 70 or below.

The Petitioner also argues that the school test scores should be discounted because the Petitioner was in a low-performing school, and that the teachers were under pressure to inflate the test scores. Petitioner bases this argument on the testimony of Mary Smithson-Craighead, who taught at Head School in Nashville from 1953 to 1965, when she became the coordinator of the Nashville Educational Improvement Project. (Docket No. 106 (Addendum 30, Vol. 1, at 24-25)). At that time, Ms. Smithson-Craighead moved to Carter Lawrence, the Petitioner's school, for two years, where she supervised kindergarten through third grade, but was not one of the Petitioner's teachers. (Id., at 26, 31-33, 53-54). According to Ms. Smithson-Craighead, Carter Lawrence was a segregated school and one of the schools that needed the most help. (Id.) She made the following statement about standardized testing:

> Q. And what were your observations of the way that standard tests were given?
>
> A. They were given, by the greater part, they were given exactly by direction. But being human, teachers who had, if they've been working with a child during the year, and that child was doing all that he or she could do; the teacher, when they tested that child may come around and say, well, take so-and-so, and give him a

> little bit of extra help. Just because they like the child. And they realized a child had been doing all that he or she could do. And they'd be, well, do so-and-so, which was really against the directions of the test. It simply, really, made the testing invalid, but the test goes on with a group of tests. And that's it.

(Id., at 37). Ms. Smithson-Craighead later testified that the IQ tests given at the school were administered individually by a psychologist from the District Office, but the experts who testified opined that she was mistaken about that. (Id., at 49-51, 234).

The Court is not persuaded that this testimony warrants the discounting of Petitioner's school test scores. Ms. Smithson-Craighead's testimony does not include any time frame for the incidents she described, nor any specific information regarding the names of the teachers involved, the grade level of the classes involved, or whether she was referring to an achievement test, an IQ test, or some other test. Certainly, her testimony does not support the conclusion, apparently accepted by some of Petitioner's experts, that the *Petitioner's* scores were inflated on each of his IQ tests because his teachers helped him choose the correct answers. As for the performance level of the school, as Dr. Engum pointed out, the scores reflect a comparison of children across the country and is independent of the school system. (Docket No. 106 (Addendum 30, vol. 2, at 410-11, 422-23)).

Petitioner's experts also questioned the reliability of the school test scores by pointing out that the Petitioner failed the second grade, and the results would be skewed upward if the Petitioner's answers were compared with younger children in the same grade. (Id., at 301-02; 335-37). But there is no evidence that the tests were scored by grade rather than age. (Id., at 417). Even so, Dr. Vaught testified that the results would not be dramatic because there would only be a year's difference in the comparison. (Docket No. 106 (Addendum 30, vol. 3, at 637,

639)).

Weighing against the Petitioner's arguments for reductions of his school test scores is the expert testimony that IQ tests tended to underestimate the intelligence of African American children in the 1960s. (Id., vol. 1, at 309, 369; vol. 3, at 537-38). According to Dr. Vaught, this cultural bias "was one of the reasons why that diagnostic criterion was changed back in the '70s, from one standard deviations (sic) to two standard deviations below the mean." (Id., vol. 3, at 537).

Petitioner argues that his later scores, from 1993 and 1997, should be adjusted downward based on the "Flynn Effect." Dr. Grant explained that the Flynn Effect recognizes that after an IQ test is released it begins to age because the general population's level of knowledge increases over time, such that for every three years after the test is released, the norm IQ is inflated by one point. (Docket No. 106 (Addendum 30, vol. 1, at 239-45)). Based on this research, Dr. Grant deducted four points from the Petitioner's test score of 73 in 1993 and arrived at a score of 69; and deducted five points from Petitioner's score of 76 in 1997 for a score of 71. (Id., at 243-44). Dr. Grant did not use this theory to reduce the school IQ scores obtained from 1963 to 1969 before the Petitioner reached age 18. (Id., vol. 2, at 324). Dr. Grant relied on several articles to support his conclusion. (Id., at 239-42; vol. 2, at 322-27).

To support application of the Flynn Effect, the Petitioner also filed an affidavit of Dr. Patti van Eys, which stated that the Flynn Effect is broadly accepted by the psychological community, but unlike Dr. Grant, she did not rely on that concept to retroactively reduce the Petitioner's test scores. (Docket No. 106 (Addendum 29)). Indeed, Dr. Engum and Dr. Vaught testified that, while the Flynn Effect supports the need to re-norm an IQ test over time, and is

something to be considered in reviewing a person's test scores, there is no scientific support for retroactively reducing a particular test score based on the Flynn Effect. (Id., at 374-76, 446-49, 462-68; vol. 3, at 538-39; 599-605). As Dr. Vaught explained:

> I'm aware of the Flynn Effect, and I think most people are aware of that effect. However, it's not standard of practice to correct for it, in terms of looking at an IQ score. Again, you're aware of it. What the standard of practices (sic) to deal with the standard error of measurement on the instrument, which is the likelihood of a person getting a score within a certain range, the next time you administer it. That's the correction most people are willing to use. And that's the one in common usage among clinicians who do this for a living.

(Id., at 538-39).

The Court notes that the experts who administered the tests in 1993 and 1997 did not reduce the Petitioner's scores based on the Flynn Effect in light of the age of the tests they administered. In addition, the articles relied on by Dr. Grant describing the Flynn Effect do not appear to suggest the reduction of individual test scores as a scientifically valid remedy. (Docket No. 106 (Addendum 30 - Exhibit 11)).

Nevertheless, the Court will consider Dr. Grant's reduction of individual test scores based on the Flynn Effect. Dr. Grant applied that reduction only to test scores from 1993 and 1997, however, which were obtained when the Petitioner was 37 and 41 years old, respectively. The six test scores obtained prior to that time were not at or below 70. Thus, application of the Flynn Effect in this case provides weak support for the statutory requirement that the Petitioner have scores at or below 70 before he turned age 18.

The Petitioner also argues that the standard error of measurement should be applied to reduce Petitioner's test scores. Indeed, there was support from the experts on both sides for considering the SEM in reviewing test scores. (Docket No. 106 (Addendum 30, vol. 1, at 231-33;

vol. 3, at 538-39)). The SEM is applied in recognition of the fact that the test is not perfect, and according to Dr. Grant, the SEM for IQ tests is from one to five points, depending on the test. (Id., vol. 1, at 231-32). The Court notes, however, that the SEM does not require that test scores only be reduced, nor does it require that five points be used for every test. (Id., vol. 2, at 431). In any event, even if the Court applies an SEM of eight points to reduce all of the Petitioner's test scores in school, as discussed above, the lowest score would be 75. Although applying the SEM to reduce Petitioner's later scores may bring him closer to the statutory criteria, those scores provide weak support for the proposition that the Petitioner had scores at or below 70 before he turned age 18.

The Sixth Circuit criticized the state courts for failing to resolve "which set of scores most accurately reflects Black's level of intelligence by the time he was 18 years of age." 664 F.3d at 87. This Court has fully reviewed the record in this case, has fully considered the "Flynn Effect," the SEM, and other factors weighing on the accuracy of the test scores, and for the reasons set forth above, specifically finds that the tests taken by the Petitioner in school[6] most accurately reflect the Petitioner's level of intelligence by the time he was 18 years of age.

Petitioner also argues that the results of his brain scans showing an abnormal brain further support the contention that he satisfied the statutory criteria by age 18. As a result of sophisticated imaging of the Petitioner's brain, Dr. Gur testified that the Petitioner had abnormally enlarged ventricles. (Docket No. 106 (Addendum 31, at 48-52, 60-61)). According to Dr. Gur, this damage would affect a person's ability to control aggression and to consider the

[6] As set forth above, those tests were taken from 1963 to 1969, and produced scores ranging from 83 to 97.

outcome of his or her actions. (Id., at 72-73). Because of that brain damage, Dr. Gur opined that the Petitioner was mentally retarded, though he admitted that he is not an expert in mental retardation. (Id., at 102-03, 105-06). As to the cause of the brain damage, Dr. Gur testified that the damage would be consistent with that experienced by children whose mothers abused alcohol during pregnancy. (Id., at 99-102). Dr. Gur also opined, however, that the damage could also be caused by alcoholism in adults, lead poisoning, head injuries from football, and other conditions. (Id., at 105, 113-16). In discussing possible causes, he testified:

> Q. So just looking at all these possible causes along with your probable cause, there's really no way to say exactly what has caused the brain damage that you're saying that Mr. Black has with your findings?
>
> A. Really, there isn't. I –
>
> Q. Now, another kind of similar but – as far as timing, again your probable cause is maybe the fetal alcohol syndrome or lead poisoning, or something, he fell down, or ate dirt. You know, a lot of different things were mentioned in these reports that possibly could have caused some brain damage.
>
> A. Uh-huh.
>
> Q. But again, with timing, is there any way to tell exactly what time in his life that this happened?
>
> A. No. The only –
>
> Q. I'm sorry. Go ahead, Doctor.
>
> A. What you can say is that this kind of a brain doesn't happen overnight. . .

(Id., at 116). Dr. Gur later testified that he would "absolutely agree" that he could not determine whether someone is mentally retarded simply by looking at the brain scans alone. (Id., at 122-23).

Dr. Globus also opined that Petitioner's brain damage was possibly caused by the

Petitioner's mother's consumption of alcohol during pregnancy, playing football, or lead poisoning. (Id., at 159-62; 259-62; 265-66). Dr. Globus admitted, however, that the brain scans do not reveal the cause of the brain damage. (Id., at 274). In determining whether the brain injury could have resulted from a deficiency in adulthood, Dr. Globus testified that "there's a rule of medicine, that you take the simplest explanation that fits the facts." (Id., at 275).[7]

Although Dr. Gur and Dr. Globus relied on the "fact" that the Petitioner's mother drank during her pregnancy, they did not cite to the particular information upon which they relied. The Court has reviewed the record of the post conviction hearing on the issue of mental retardation for evidence about alcohol consumption by the Petitioner's mother during pregnancy. That topic was discussed by Petitioner's aunt, Alberta Crawford, during her testimony in the first post conviction proceeding. (Docket No. 106 (Addendum 30 - Exhibit 22)). Ms. Crawford testified that she is 13 years younger than the Petitioner's mother, Julia, who was 34 when she was pregnant with the Petitioner. (Id., at 526). Ms. Crawford testified that she and Julia "occasionally" went out and drank alcoholic beverages, specifically scotch. (Id., at 527). As for drinking while she was pregnant, Ms. Crawford testified:

> Q. Okay. Did your sister's drinking patterns ever change during the period of time she was pregnant?
>
> A. That I can't remember.
>
> Q. Did she ever stop drinking and say, I'm pregnant, I can't drink? Do you recall that at all?

---

[7] Dr. Globus also testified that his opinion was based on Petitioner's lack of exposure to other potential causes after his arrest and incarceration. (Id., at 188-89). He did not discuss the 13 to 14-year time span between the time the Petitioner turned 18 and the time of his arrest and incarceration.

A. I can't recall that, either. Because I wasn't around her, you know, after I got to be in high school and out of high school I wasn't with her all the time. So I really don't know.

Q. Well, after you were out of high school, though, you still continued to go socialize with her, correct?

A. Not all the time. Like I said, I wanted to go to a nightclub and I chose her to carry me because I didn't have anybody else to carry me. And I wanted to go to the ball park to see my brother play ball and I would go with her. Not just by herself. It was other people too.

(Id., at 528-29).

Petitioner's sister, Melba Faye Corley, who was approximately seven years old when her mother was pregnant with the Petitioner, testified about her mother's drinking:

Q. What do you remember about your mother and her drinking of alcoholic beverages?

A. Well, she was a member of like a little social club, and they would have like little dances and things. And they would get together and fix food, and they would have their own BYOB's, Bring Your Own Bottle, but it wasn't every month like that.

Q. Okay. Do you know if she changed this behavior during – you were in the household when your mother was pregnant with both, your brother, Byron Black, and also with your sister, Frieda Black correct?

A. Correct.

Q. Do you remember anything about your mother's drinking when she was pregnant?

A. She still drank, but I don't think it was ever stopped.

(Docket No. 106 (Addendum 30, vol. 1, at 80-81)).

Petitioner's uncle, Finas Black, was also questioned about the subject at the state post conviction hearing. (Docket No. 106 (Addendum 30 - Exhibit 38)). Mr. Black testified that he was one of ten siblings of the Petitioner's mother, Julia, and that he was twenty, twenty-five or

thirty years younger than Julia. (Id., at 513, 515). He also testified that he was about eight or nine when the Petitioner was born. (Id., at 516). Mr. Black said that he recalled Julia drinking "multiple drinks" of scotch "mostly on the weekends." (Id., at 518-19). He went on to testify:

> Q. And when – to your recollection or do you know whether or not your sister Julia Mae stopped drinking during when she was pregnant either with Byron or with Frieda [Petitioner's younger sister]?
>
> A. No, I wouldn't say so.
>
> Q. You would say she didn't.
>
> A. Right. She didn't.
>
> Q. And do you know whether or not she breast-fed Byron for a while after he was born?
>
> A. Yes, she did.
>
> Q. Did she stop drinking during that period of time?
>
> A. No, I wouldn't think so.
>
> Q. And your sister Julia Mae was sort of known as a partier, is that a fair statement?
>
> A. Yes, yeah.

(Id., at 519-20).

The testimony of Petitioner's mother, Julia Black, from the trial was admitted as an exhibit, but the question of whether she drank while pregnant with the Petitioner was not addressed during her testimony. (Docket No. 106 (Addendum 30 - Exhibit 15)).

To the extent Dr. Gur and Dr. Globus based their opinion of Fetal Alcohol Syndrome or Fetal Alcohol Effects on the testimony of adults recalling events that took place when they were seven to nine years old, their opinions regarding the cause of Petitioner's brain damage are not particularly persuasive. Dr. Engum's testimony pointed to the conjecture underlying these

opinions:

> Q. And you believe, of course, that some of that analysis of people like Dr. Globus, who's a neurologist and Dr. Gur, who does brain imaging?
>
> A. Right. But everybody's speculating about how much alcohol the mother drank. And I don't think that we really know that. I don't know. And I understand the mother is now deceased.
>
> Q. But we do have proof from witnesses that have testified, at the various parts of this case, that she drank weekends; she didn't stop during pregnancy.
>
> A. I've seen that testimony. Again, I will just tell you, there are some people that tend to minimize her alcohol consumption. There are some people who seek to maximize it. I don't know how much she drank. It's in the realm of conjecture.

(Docket No. 106 (Addendum 30, vol. 2, at 475-76)).

Also weighing against the opinion that Petitioner's brain was damaged at birth is the absence of medical records from Petitioner's pediatricians at Vanderbilt University Hospital revealing developmental concerns. (Docket No. 106 (Addendum 30 - Exhibits 7, 36)). Dr. Vaught testified that the "typical developmental impairments that you would see from Fetal Alcohol Effects or Fetal Alcohol Syndrome, apparently, were not present in this individual. He didn't have the milestone failures or be identified (sic) by his pediatricians as standing out like that." (Docket No. 106 (Addendum 30, vol. 3, at 625-26)).

Indeed, the Petitioner was not diagnosed as having mental retardation until he was 45 years of age, in 2001, as part of this litigation, though he was evaluated by numerous experts before that time. Dr. Kenneth Anchor, who was hired by the defense before the trial in 1989, testified that the Petitioner scored a 76 IQ, and opined that he suffered from a delusional disorder and was not competent to stand trial. (Docket No. 106 (Addendum 30, Exhibits 4 and 5)). Dr. Leonard Morgan and Dr. Bradley Diner testified that the Petitioner was competent, that he was

at the lower end or the normal intelligence range, but not mentally retarded, and that he may have a personality disorder. (Id., at Exhibits 6-9). Dr. William Kenner, appointed by the trial court, also testified that the Petitioner was competent, was not mentally retarded, and that he may have a personality disorder. (Id., at Exhibit 12). At the penalty phase, the defense called Dr. Pat Jaros, who testified that she worked with Dr. Anchor in evaluating the Petitioner, and found the IQ score of 76 to be:

> . . . just about right. I thought what came out on the I.Q. score was – there are some factors functioning here, perhaps some level of cultural deprivation or the people he grew up around perhaps had the same kind of grammar and syntax that he was exhibiting. Perhaps some of those factors, just sub-cultural influences may have been operating. But I thought the level that was obtained by the I.Q. test seemed pretty accurate.

(Id., at Exhibit 25, at 2310; Exhibit 26). All of these experts interviewed and/or tested the Petitioner before rendering their opinions.

Dr. Gillian Blair tested the Petitioner in 1993 and prepared a report indicating that the Petitioner scored a 73 IQ. (Id., at Exhibit 37). Dr. Pamela Auble, who was hired by the defense for the post conviction hearing in 1997, testified that she administered an extensive battery of tests, and that the Petitioner scored a 76 IQ. (Docket No. 106 (Addendum 30, Exhibits 33 and 34)). Dr. Auble also expressed concerns about the Petitioner's competence and possible brain damage. (Id.) Also in 1997, Dr. William Bernet testified that the Petitioner had a form of amnesia, and called for additional testing to determine the cause. (Id., at Exhibits 39 and 40). All of these experts interviewed and/or tested the Petitioner before rendering their opinions.

As stated above, Dr. Globus, Dr. Gur, Dr. Grant and Dr. van Eys rendered their opinions of mental retardation some time later, in 2001, when the Petitioner was 45 years old. Based on all the evidence set forth above, and the entire record, the Court specifically finds that although

the Petitioner may currently have a brain injury, the testimony of Petitioner's experts that the Petitioner's brain injury occurred prior to age 18 is not persuasive.

In summary, the Court concludes that the Petitioner has not shown significantly subaverage general intellectual functioning as evidenced by a functional IQ of 70 or below manifested by age 18. In reaching its decision, the Court makes no finding, and finds it unnecessary to make a finding, as to why the Petitioner's test scores have declined over time – whether due to motivation or brain injury.[8]

B. Deficits in adaptive behavior prior to age 18

The second criterion, considered in conjunction with the third, requires the Court to examine whether the Petitioner has shown: "deficits in adaptive behavior . . . manifested during the developmental period, or by eighteen (18) years of age." Tenn. Code Ann. § 39-13-203(a)(2), (3). The Tennessee Supreme Court has described this requirement to mean "the inability of an individual to behave so as to adapt to the surrounding circumstances." Coleman, 341 S.W.2d at 248 (quoting State v. Smith, 893 S.W.2d 908, 918 (Tenn. 1994)). The appeals court quoted a definition for the second criterion that has been applied by the Tennessee courts:

> The second part of the definition – adaptive functioning – refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, socio-cultural background, and community setting. As discussed, a mentally retarded person will have significant limitations in at least two of the following basic skills: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. Influences on adaptive functioning may include the individual's education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions

[8] The Court also makes no finding as to whether the Petitioner is competent to be executed under Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

that may coexist with Mental Retardation.

Black v. Bell, 664 F.3d at 98.

Dr. Grant testified that the tests he administered in 2001 showed the Petitioner had deficits in adaptive behavior. (Docket No. 106 (Addendum 30, vol. 1, at 221-24)). Dr. Grant based his determination that the Petitioner had adaptive deficits prior to age 18 on the following:

> Q. . . . What can you show, from your evaluation, that establishes that Mr. Black was in fact mentally retarded before the age 18?
>
> A. I think there are several things: One, there are some findings from Dr. Globus and Dr. Gur, were that, from Dr. Globus' testimony is that there are some abnormalities in the brain that can best be explained through the things that happened early in life. We have the Coach's testimony that he had difficulty following plays, it took more time. We also know that he repeated a grade. That the Differential Aptitude Test score put him with the 1 percentile. Although, we do have other scores that put him much higher, we have testimony that stems from that regional school: It was a very impoverished school; no one left the school that was at grade level; that was also a school chosen for the Ford Grant. I think that's the majority of what I can think of right now.

(Docket No. 106 (Addendum 30, vol. 2, at 285-86)). According to Dr. Grant, those with mental retardation can acquire academic skills up to the sixth grade level by their late teens. (Id., at 287).[9] Because he had such strong family support, Dr. Grant testified, he was able to blend into the population in his adult years. (Id.)

In terms of family support, Petitioner's sister, Ms. Corley, testified that she and the Petitioner lived with their mother and three other sisters in the home of their grandparents, and

---

[9] Dr. Engum testified, on the other hand, that only "an exceptional mentally retarded individual" could perform at that level. (Docket No. 106 (Addendum 30, vol. 2, at 482)). Dr. Vaught testified: "Most of my mild mentally retarded patients function between the 3rd and 5th grades. Some, exceptional ones, achieve the 5th to 6th grade criteria." (Docket No. 106 (Addendum 30, vol. 3, at 573)).

that the Petitioner and his grandfather were the only males in the household:

> Q. What type of chores did Byron have to do in the home to your observation?
>
> A. Well, I know he didn't do any cooking, because that was, basically all the – my grandmother's job, and mine, my mother's. He didn't really have any particular chores that I remember him doing in particular.
>
> Q. What about things like ironing his clothes or cleaning his clothes. Did he have any responsibilities there?
>
> A. No. That was all done by the ladies.
>
> Q. What about things like washing the dishes?
>
> A. No.
>
> Q. And mowing lawns, did he ever do anything like that as a kid?
>
> A. Huh-huh. That was basically done by, any lawn mowing done was done by my grandfather.

(Id., at 78, 89-90). Ms. Corley was not asked whether the Petitioner had tried to cook, do laundry or mow the lawn, and found he was unable to do so.

Ms. Corley went on to state that the Petitioner took pride in his personal appearance as a child. (Id., at 92-93). She recalled that the Petitioner could read and write, and "[a]s far as I remember, he wasn't a slow learner at that time." (Id., at 98-99). On cross-examination, Ms. Corley said that neither she nor her family members noticed anything odd about the Petitioner during his childhood that made them think he may be retarded or mentally ill. (Id., at 88).

The Petitioner has also relied on the testimony of Al Dennis, who coached football at Hume-Fogg High School while the Petitioner attended there, regarding his memory of the Petitioner:

> Well, one thing I discovered, I remembered that when he, as a senior, he

> weighed 150 pounds, and he was 5' 8 tall. So he wasn't very big. But he was an outstanding defensive player of all three years that he played for me. His senior year, he was third on the team in tackles, and assists in tackles.
>
> Now, offense is a different story. His sophomore year, he carried the ball one time. His junior year, he carried it twice. And the third year, we had an outstanding team we won the Division A, Class A, Championship. And we won several games by a fairly good margin. And we go to use back-up runners more than we normally did. And Byron ran the ball a number of times and scored several touchdowns. He's a good athlete. Good athlete.

(Docket No. 106 (Addendum 30, vol. 1, at 103-04)). Mr. Dennis testified that the offense he ran was a lot more complicated than the defense, and "I think that's probably why Byron didn't play more than he did, because it was difficult for him to learn the plays." (Id., at 104-05). Mr. Dennis also testified that he always remembers the Petitioner as smiling all the time, even in response to criticism. (Id., at 106).

On the other hand, Petitioner's brother, Thomas Black, testified that the Petitioner:

> . . . was a very responsible child. There was a lot of things about him, like he was always neat. He always helped out. He always had some little job or something like this when he was coming up. A lot of that was influence from my grandfather.

(Docket No. 106 (Addendum 30 – Exhibit 20, at 2259)). When asked why the Petitioner did not move out of the family home as an adult, Petitioner's sister, Arletta Delores Black, testified: "I'd say maybe he just didn't want the responsibility, I guess. I really don't know." (Docket No. 106 (Addendum 30 – Exhibit 21, at 2265)).

Dr. Engum and Dr. Vaught considered this testimony and other information in reaching the opinion that the Petitioner did not show deficits in adaptive behavior prior to age 18. Dr. Engum testified that he did not find evidence of such deficits:

> I could not find that there were any indications that he was not functioning like a child within his culture, in his community. He went to school. Admittedly, he

> was not the best student; I think I indicated that. But he did from, everything I can determine, graduate high school. He basically, his grades fluctuated. There was some D's. There were some C's. I can't speak to the quality of the school that he went to, but he did graduate. He played football. He appeared to be involved in those kinds of activities. I did not see any deficits or any mention of peer relationships, behavioral problems, problems attributable to Attention Deficit Disorder, problems attributable to any kind of learning disability.
>
> Again, there doesn't appear to be any individualized assessment by school psychologists. There's no indication of any significant problems with juvenile authorities when he was growing up. There don't appear to be any unusual behavioral problems of any type, prior to age 18.
>
> As I look through the testimony of the individuals during mitigation: Everybody said, as a matter of fact, teachers commented upon him as being one of her brighter children. Apparently, people in the community recognized him as somebody who is helpful. Always smiling. Always involved in things. There just did not appear to be any major deficits.
>
> Frankly, I think it's conjecture to sit there and say, well, people compensated for him, because there's no evidence in the records that anybody was compensating for, or setting limitations on him, or restricting his activities, as you would with somebody who might be mentally retarded.

(Docket No. 106 (Addendum 30, vol. 2, at 378-80)).

Dr. Vaught testified that she applied the framework suggested by the AAMR ("American Association on Mental Retardation") in examining whether the Petitioner had deficits in adaptive behavior, which focuses on three general areas: Conceptual, Social and Practical. (Docket No. 106 (Addendum 30, vol. 3, at 549-50)). Dr. Vaught explained that:

> Mr. Black's childhood history did not follow the pattern that I typically find for a person with mild mental retardation who has escaped diagnosis. His family was not raising the issue, and commented on him being normally developing, even motivated, industrious.
>
> Then he was receiving care through Vanderbilt University Medical Center Pediatrics. They were treating him off-and-on for a skin condition. They didn't raise the question of the developmental impairment and they should, you know, would. Vanderbilt is very much in the know about those things. And that, also, got my attention that none of the physicians treating him raised that condition.

> And he did have contact with the medical establishment. A lot of impoverished families don't. And so I don't have that data point. But in his case, he had doctor-contact, and they didn't raise the issue.
>
> He proceeded through school, intermittent difficulty, graduated with a normal diploma. . . . He was not remembered by his family or his teachers as being slow.

(Id., at 571-72). Dr. Vaught also pointed out that the Petitioner experienced the stress of a football injury, the birth of his first child and the death of one of his teachers while in high school, and he was still able to graduate. (Id., at 573-74). Dr. Vaught testified that "I have very rarely, if ever, seen a person with mild mental retardation make it through high school with no assistance like that, and they've managed to get a regular diploma." (Id., at 574). Dr. Vaught testified that while the DAT ("Differential Aptitude Test") scores, referenced by Dr. Grant, were low, they were not at the level typically associated with mental retardation. (Id., vol. 3, at 573-75).

The Petitioner attacks the validity of the findings made by Dr. Engum and Dr. Vaught based on their failure to interview and test the Petitioner. Dr. Engum explained that he decided not to conduct further testing because he thought the Petitioner was probably "test-wise" and "test-weary," and because the real inquiry is whether he met the statutory criteria at age 18, not at his current age. (Docket No. 106 (Addendum 30, vol. 2, at 367)). Dr. Engum further explained: "So, again, to do testing now is, in my mind, almost irrelevant and in (sic) somewhat misleading, because of, potentially, other intervening variables." (Id., at 510). Dr. Vaught testified that she did not interview the Petitioner primarily because "I didn't feel like I would add anything, because I already had, in my review of the records, determined that his adaptive functioning was higher than to be expected for a person with mental retardation. And that, I

could not find any evidence that the problems onset before age 18." (Id., at 535).[10]

The Court finds that the opinions of Dr. Engum and Dr. Vaught are not undermined by their failure to interview and/or test the Petitioner at age 45 regarding whether he was intellectually disabled prior to age 18. As discussed above, the record indicates that the Petitioner was interviewed and/or tested by at least eight different mental health experts prior to the latest round of testing in 2001.

Both sides point to Petitioner's life after age 18 to support their argument that the Petitioner did or did not have deficits in adaptive behavior. The Respondent refers to evidence that includes indications that the Petitioner obtained a drivers' license, bought and maintained a car, held a job for nine years, and made intelligent statements to police during questioning. The evidence cited by Petitioner includes testimony that he always lived with his mother, did not pay child support, and performed menial tasks at his job. Having fully reviewed this and all the evidence in the record, the Court maintains its opinion that the Petitioner has not shown deficits in adaptive behavior prior to age 18.

In considering whether the record establishes deficits in adaptive behavior, the Sixth Circuit directed this Court to "'focus on Defendant's deficits, not his abilities,'" 664 F.3d at 99 (quoting United States v. Lewis, No. 1:08 CR 404, 2010 WL 5418901, at *30 (N.D. Ohio Dec. 23, 2010)), and to "look at his weaknesses instead of at his strengths." Id. A full, independent review of the record persuades this Court that the Petitioner has not shown weaknesses or

---

[10] The Court notes Dr. Vaught's testimony that "I cautioned this man [the State's attorney] when he came to me: If I could, you know, find that this man is mentally retarded and keep him from being executed, I'm going to do it, you just need to understand that." (Id., at 602). Consequently, Dr. Vaught gave the Petitioner "the benefit of the doubt" that his current testing showed mental retardation. (Id., at 599-602; 539-44).

deficits in his adaptive behavior prior to age 18 within the meaning of the statute.

The Sixth Circuit also directed the Court to consider that deficits in adaptive functioning can be caused by both mental retardation and mental illness: "mental retardation and any number of other factors may coexist as comorbid causes of a defendant's deficient adaptive functioning." 664 F.3d at 99-100.[11] Because the Court does not find any deficits in adaptive function within the meaning of the statute prior to age 18, it is unnecessary to determine whether such deficits were caused by mental retardation, mental illness, or both.

In conclusion, the Court has fully considered the evidence in the state court record in applying the criteria set forth in Tenn. Code Ann. § 39-13-203, and concludes that the Petitioner has not met his burden of proving intellectual disability by a preponderance of the evidence.

V. Conclusion

For the reasons set forth above, the Court concludes that the Petitioner has not established that he is intellectually disabled by a preponderance of the evidence.

The Court concludes that Petitioner has made a substantial showing of the denial of a constitutional right as to his mental retardation claim, and reasonable jurists could find the Court's assessment of the constitutional claim debatable. See, e.g., Castro v. United States, 310 F.3d 900 (6th Cir. 2002). Accordingly, the Court will issue a certificate of appealability on

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[11] Dr. Vaught's testimony that mental retardation has nothing to do with mental illness, read in context, relates to her criticism of Dr. Grant's statement that mental retardation is a form of mental illness. (Docket No. 106 (Addendum 30, vol. 3, at 579-80)). In making this statement, Dr. Vaught was not addressing the cause of any deficits in Petitioner's adaptive behavior because she did not find any deficits within the meaning of the statute prior to age 18. (Id., at 583). Throughout her testimony, Dr. Vaught explained that the bad choices made by the Petitioner later in life, *though they did not indicate deficits during the developmental period*, may have had to do with personality issues.

Petitioner's mental retardation claim under Atkins v. Virginia, 536 U.S. 304 (2002).

It is so ORDERED.

Todd Campbell

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BYRON LEWIS BLACK	)	
	)	
v.	)	NO. 3:00-0764
	)	JUDGE CAMPBELL
	)	DEATH PENALTY CASE
RONALD COLSON, Warden Riverbend Maximum Security Prison	)	

ORDER

This case is before the Court on remand from the Sixth Circuit to reconsider the Petitioner's claim made pursuant to Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Black v. Bell, 664 F.3d 81 (6th Cir. 2011); (Docket No. 134).[1] The Court heard oral argument on the issue on January 3, 2013. For the reasons set forth in the accompanying Memorandum, the Court concludes that the Petitioner has failed to carry his burden of demonstrating intellectual disability by a preponderance of the evidence.

The Court concludes that Petitioner has made a substantial showing of the denial of a constitutional right as to his mental retardation claim, and reasonable jurists could find the Court's assessment of the constitutional claim debatable. See, e.g., Castro v. United States, 310 F.3d 900 (6th Cir. 2002). Accordingly, the Court will issue a certificate of appealability on Petitioner's mental retardation claim under Atkins v. Virginia, 536 U.S. 304 (2002).

It is so ORDERED.

Todd Campbell

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

[1] The parties indicate that Riverbend Warden Ronald Colson should be substituted for Ricky Bell as the Respondent in this case.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Filed: August 10, 2017

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Re: Case No. 13-5224, *Byron Black v. Wayne Carpenter*
Originating Case No. : 3:00-cv-00764

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Dixie Aerni
Deputy Clerk

cc: Mr. Keith Throckmorton

Enclosures

Mandate to issue.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 17a0174p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BYRON LEWIS BLACK,

Petitioner-Appellant,

v.

WAYNE CARPENTER, Warden,

Respondent-Appellee.

No. 13-5224

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 3:00-cv-00764—Todd J. Campbell, District Judge.

Argued: December 8, 2016

Decided and Filed: August 10, 2017

Before: COLE, Chief Judge; BOGGS and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Kelley J. Henry, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Nashville, Tennessee, for Appellant. John H. Bledsoe, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. **ON BRIEF:** Kelley J. Henry, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Nashville, Tennessee, for Appellant. Andrew H. Smith, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee.

BOGGS, J., delivered the opinion of the court in which GRIFFIN, J., joined, and COLE, C.J., joined in part. COLE, C.J. (pg. 22), delivered a separate opinion concurring in the majority opinion except for Section II.E and concurring in the judgment.

OPINION

BOGGS, Circuit Judge. In 1986, Byron Black shot his girlfriend Angela's ex-husband, Bennie. Black pleaded guilty to malicious shooting and was sentenced to two years of imprisonment at a Davidson County, Tennessee, workhouse. In 1988, while on a weekend furlough from that workhouse, Black entered Angela's home, shot Angela in the head as she slept, and then shot nine-year-old Latoya and six-year-old Lakeisha (Angela's children by Bennie) once and twice, respectively, killing all three victims. Black returned to the workhouse at the end of his furlough before law-enforcement officers discovered the bodies.

Black's trial and post-conviction proceedings have spanned nearly thirty years. Seventeen years have elapsed since Black filed the federal habeas petition presently before us. The Supreme Court and the Tennessee courts have recently recognized limitations imposed by the Eighth Amendment on the power of states to execute mentally retarded persons. But, for the reasons that follow, these jurisprudential developments do not give Black a reprieve from his sentence of death. We affirm the district court's denial of post-conviction relief.

I

Black stood trial for the 1988 triple murder. A jury found Black guilty of murder and burglary and sentenced him to death for one murder and life imprisonment for the other two murders. The Tennessee Supreme Court affirmed on direct appeal. The Tennessee Court of Criminal Appeals denied post-conviction relief, and the Tennessee Supreme Court denied further post-conviction review. In 2000, Black filed a federal habeas petition in which he raised various claims including a claim that his mental retardation precluded the imposition of the death penalty. The petition was dismissed as meritless. *Black v. Bell*, 181 F. Supp. 2d 832, 883 (M.D. Tenn. 2001). Black appealed to our court, but the Supreme Court shortly thereafter decided *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment prohibits states from executing "mentally retarded criminals"), so we granted Black's motion to hold his appeal

in abeyance while Black exhausted an *Atkins* claim in the Tennessee courts. *Black v. Bell*, No. 02-5032 (6th Cir. July 26, 2002) (order).

The Tennessee trial court conducted an evidentiary hearing and denied Black's *Atkins* claim as meritless, the Tennessee Court of Criminal Appeals affirmed, and the Tennessee Supreme Court denied further review. *Black v. State*, No. M2004-01345-CCA-R3-PD, 2005 WL 2662577 (Tenn. Crim. App. Oct. 19, 2005), *perm. app. denied* (Tenn. Feb. 21, 2006). Our court then remanded Black's appeal to the district court so that it could consider Black's *federal* habeas claim in light of *Atkins*. *Black v. Bell*, No. 02-5032 (6th Cir. May 30, 2007) (order). The Supreme Court in *Atkins* had "le[ft] to the States the task of developing appropriate ways to enforce" its prohibition on executing mentally retarded criminals. *Atkins*, 536 U.S. at 317. The district court thus, quite understandably, looked to Tennessee law in analyzing Black's *Atkins* claim.

Tennessee had enacted a statute defining mental retardation as follows:

> (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;
> (2) Deficits in adaptive behavior; and
> (3) The mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age.

Tenn. Code Ann. § 39-13-203(a) (2003).

The United States Supreme Court recently referred to a definition of mental retardation substantially similar to this tripartite Tennessee definition as the "the generally accepted, uncontroversial intellectual-disability diagnostic definition." *Moore v. Texas*, 137 S. Ct. 1039, 1045 (2017).

For its part, the Tennessee Supreme Court held in 2004 that the first part of Tennessee's statutory definition of mental retardation imposed a "bright line rule" requiring an *Atkins* petitioner to demonstrate an IQ of seventy or below. *Howell v. State*, 151 S.W.3d 450, 456–59 (Tenn. 2004) (agreeing with the State that § 39-13-203(a)(1) "should not be interpreted to make allowance for *any standard error of measurement or other circumstances* whereby a person with an I.Q. above seventy could be considered mentally retarded" (emphasis added)).

The district court considered Black's IQ scores as follows:

IQ Scores Before Age 18			
Date of Test	Name of Test	Score	Black's Approximate Age
1963	Lorge Thorndike	83	7
1964	Unknown	97	8
1966	Lorge Thorndike	92	10
1967	Otis	91	11
1969	Lorge Thorndike	83	13
IQ Scores After Age 18			
Date of Test	Name of Test	Score	Black's Approximate Age
1989	Shipley-Hartford	76	33
1993	WAIS–R	73	37
1997	WAIS–R	76	41
2001	WAIS–III	69	45
2001	Stanford-Binet-IV	57	45

Black argued to the district court that the Tennessee courts' denial of his *Atkins* claim was improper in part because those courts "refused to consider standard errors in test measurement [and] the 'Flynn Effect,'[1] permitted the State's experts to testify, and placed the burden of proof on the Petitioner." *Black v. Bell*, No. 3:00-0764, 2008 U.S. Dist. LEXIS 33908, at *15 (M.D. Tenn. Apr. 24, 2008). Black had argued in state court, and argued again to the

[1]The Flynn Effect, named after intelligence expert James Flynn, is a "generally recognized phenomenon" in which the average IQ scores produced by any given IQ test tend to rise over time, often by approximately three points per ten years from the date the IQ test is initially standardized. *See Ledford v. Head*, No. 1:02-CV-1515-JEC, 2008 WL 754486, at *7 (N.D. Ga. Mar. 19, 2008); *see also* Am. Ass'n on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* 36–41 (11th ed. 2010).

The WAIS–III test, for example, was published in 1997. When the WAIS-III was designed, it was administered to a "standardization sample" of 2,450 adults from the United States who were sorted into cohorts by age and other characteristics. D. Wechsler, The Psychological Corp., *WAIS–III Administration & Scoring Manual* (1997). IQ scores generated by the WAIS-III test essentially offer a measure of intelligence *relative to* the standardization sample of 2,450 people, all of whom took the test in 1995. The Flynn Effect would thus predict that average IQ scores generated by the WAIS–III in 2005 (ten years after it was normed) would be approximately three points higher, on average, than those generated in 1995, and would predict that scores generated by the same test in 2015 would be approximately six points higher, on average, than those generated in 1995.

But there is no legal or scientific consensus that *requires* an across-the-board downward adjustment of IQ scores to offset the Flynn Effect; rather, the Flynn Effect is one of many potential factors affecting the reliability and validity of any individual IQ score, and a professional who is assessing an individual's intelligence on the basis of an IQ score would take the Flynn Effect and other factors into consideration as part of that assessment.

district court, that his IQ scores should be reduced retroactively to account for both the standard error of measurement (SEM) and the Flynn Effect.[2]

The district court noted that the Tennessee Court of Criminal Appeals, in rejecting Black's argument to adjust his IQ scores downward to account for the SEM or the Flynn Effect, thoroughly considered the evidence provided by Black's experts and the State's experts. *Black v. Bell*, 2008 U.S. Dist. LEXIS 33908, at *15–20. The district court itself was "not persuaded" by Black's arguments. *Id.* at *21. Applying *Howell*, which had also guided the decision of the Tennessee Court of Criminal Appeals, the district court denied Black's *Atkins* claim on the basis that "the state court was not unreasonable in stating that the proof in the record did not support the conclusion, under a preponderance of the evidence standard, that [Black's] I.Q. was below

[2]The SEM is distinct from the Flynn Effect. The SEM allows for the possibility that an IQ score either overestimates *or underestimates* a subject's true IQ. Contrary to common understanding, a SEM of "five points" does not necessarily mean, for example, that a person with an IQ score of 75 *must* have a true IQ between 70 and 80. Rather, the SEM represents the *standard deviation* of true IQ scores from reported IQ scores. *See, e.g.*, Leo M. Harvill, *An NCME Module on Standard Error of Measurement*, 10 Educ. Measurement: Issues & Prac. 33 (1991). Thus, a SEM of five points means that a person with a reported IQ of 75 is approximately 68% likely to have a true IQ within five points of 75 (i.e., between 70 and 80—one standard deviation on either side of 75), approximately 95% likely to have a true IQ within ten points (*two* standard deviations) of 75 (i.e., between 65 and 85), and approximately 99.7% likely to have a true IQ within fifteen points (*three* standard deviations) of 75 (i.e., between 60 and 90). It is therefore a gross oversimplification to attempt to account for error in measurement by retroactively reducing (or increasing) a reported IQ score by *one* SEM (or any number of SEMs).

Further, the SEM itself varies by test, subtest, and test-taker. The American Psychiatric Association states in its *Diagnostic and Statistical Manual of Mental Disorders* simply that "there is a measurement error of approximately 5 points in assessing IQ." Diagnostic & Statistical Manual of Mental Disorders 41–42 (4th ed., text rev. 2000). But on the WAIS–III, for example, the SEM for an individual between the ages of 45 and 54, for the full-scale IQ score (as opposed, for example, to a verbal-only or performance-only scale score) is reported as only 2.23 points. *See* Am. Ass'n on Mental Retardation, *Mental Retardation: Definition, Classification & Systems of Supports* 51 (10th ed. 2002); *see also Hall v. Florida*, 134 S. Ct. 1986, 1995–96 (2014).

Thus, when experts acknowledge a SEM of "*up to* five points" on widely accepted IQ tests such as the Wechsler (WISC and WAIS series) tests, and a SEM of "*up to* eight points" on "group-administered" tests like the Lorge Thorndike, they are *not* saying that the *maximum gap* between reported score and true score is five (or eight) points, respectively. Nor are they saying that, other than probabilistically, any given reported IQ score should be viewed as being *up to* five (or eight) points higher or lower than the true IQ score. Rather, they are saying that the maximum *standard deviation* between reported score and true score is five (or eight) points—meaning there is *at least* a 68% likelihood that the individual's true score is within five (or eight) points of the reported score.

It is worth noting that "group-administered" tests like the Lorge Thorndike are not really "group tests" in the conventional sense: that is, the questions are not answered orally by groups of individuals. Rather, these tests are administered (much like the SAT or the LSAT) to individuals who each complete an *individual* written IQ test but may do so at the same time as others in a classroom-style setting under the guidance of a single administrator, instead of in a one-on-one setting as Wechsler-series tests (like the WAIS) are administered.

In short, SEM is complicated—and there is no authority that *requires* any adjustment, let alone a *downward* adjustment (when the true IQ score might just as well be *higher* than the reported score) to account for the SEM when analyzing IQ scores as part of an *Atkins* determination.

seventy before age 18." *Id.* at *28–29. Nevertheless, the district court issued a certificate of appealability, and Black again appealed to our court.

In 2011, however, before we issued an opinion on that appeal, the Tennessee Supreme Court changed course and overruled *Howell*, holding that Tenn. Code Ann. § 39-13-203(a)(1) "does not *require* that raw scores on I.Q. tests be accepted at their face value and that the courts *may consider* competent expert testimony showing that a test score does not accurately reflect a person's functional I.Q. or that the raw[3] I.Q. test score is artificially inflated or deflated." *Coleman v. State*, 341 S.W.3d 221, 224 (Tenn. 2011) (emphases added).

In light of *Coleman*, over a dissent, we again remanded Black's *Atkins* claim to the district court. *Black v. Bell*, 664 F.3d 81, 84 (6th Cir. 2011). Even though the Tennessee Court of Criminal Appeals could not have known, at the time it denied Black's state habeas relief, that the Tennessee Supreme Court would replace *Howell* with its opinion in *Coleman*, we held that the Tennessee Court of Criminal Appeals' decision was "contrary to the latest Tennessee Supreme Court's decision on this subject." *Id.* at 96. And because *Atkins* allowed states to define the contours of *Atkins* itself (such that *Atkins* incorporated *Coleman*, so to speak, for purposes of Black's claim), we held that the Tennessee Court of Criminal Appeals' decision was "contrary to clearly established" *federal* "law under [the Antiterrorism and Effective Death Penalty Act (AEDPA)]." *Id.* at 100–01. Thus, because no court had yet evaluated Black's *Atkins* claim under *Coleman*, we remanded Black's *Atkins* claim for the district court to analyze it "according to the proper legal standard, which was set out by the Tennessee Supreme Court in *Coleman*." *Id.* at 101. The district court denied Black's claim, and for the reasons that follow, we affirm.

II

On remand, the district court conducted a de novo review of Black's *Atkins* claim. The court accepted new briefing from Black and from the State. Black moved for an evidentiary hearing, and the court denied Black's motion on the ground that our remand was a limited

[3]The *Coleman* court discussed "the validity and weight of *raw scores* of intelligence tests." *Coleman*, 341 S.W.3d at 242 (emphasis added). The court was not referring to actual raw scores but rather to *reported* full-scale IQ scores unadjusted for Flynn Effect, SEM, or other factors.

remand directing the district court to review the record only, placing an evidentiary hearing "beyond the scope of the remand." R.150. Nevertheless, on January 3, 2013, the district court held oral argument on the merits of Black's *Atkins* claim, and the district court subsequently issued a 31-page opinion evaluating the record, analyzing the evidence provided by Black's experts and the State's experts, and concluding that Black had not "met *his burden* of proving intellectual disability by a preponderance of the evidence." *Black v. Colson*, No. 3:00-0764, 2013 WL 230664, at *19 (M.D. Tenn. Jan. 22, 2013) (emphasis added).

On appeal, Black contends that the district court erred in perceiving our remand to be a limited remand; erred in denying Black an evidentiary hearing; erred in failing to apply a summary-judgment standard in ruling on Black's *Atkins* claim; and erred in its merits determination that Black had not met his burden of establishing entitlement to *Atkins* relief. We address each issue in turn.

A. Our Remand Was a Limited Remand

We review the interpretation of our own mandate de novo. *United States v. Parks*, 700 F.3d 775, 777 (6th Cir. 2012). Under the mandate rule, a district court is bound by the scope of the remand issued by our court. *Mason v. Mitchell*, 729 F.3d 545, 550 (6th Cir. 2013); *Scott v. Churchill*, 377 F.3d 565, 570 (6th Cir. 2004). In concluding that we had issued a limited remand, the district court relied on this language from our prior opinion:

> A complete review must apply the correct legal standard to all of the relevant evidence in the record. We therefore **VACATE** the district court's denial of Black's *Atkins* claim and **REMAND** the case for it to review the record based on the standard set out in *Coleman* and consistent with this opinion.

Black v. Bell, 664 F.3d at 101.

We agree that our remand was limited: the scope of the remand, as expressly stated in this quoted language, was a review of the record under *Coleman.*

Black contends that the district court "erroneously restricted its review to the state court record alone." Appellant's Br. 5. When AEDPA deference applies to an *Atkins* claim, the district court would indeed be limited to reviewing the record that was before the state courts.

Cullen v. Pinholster, 563 U.S. 170, 180–81 (2011). Here, however, because Black was entitled to a de novo review of his *Atkins* claim without AEDPA deference, the district court was free to consider the full record before it, including materials that were made part of the federal habeas record after the close of state habeas proceedings. Black argues that the district court "believed that it lacked authority . . . to consider record evidence presented in federal court." Appellant's Br. 7. But the record does not support Black's argument: the district court, to be sure, stated that it was undertaking "a de novo review of the evidence admitted at the post conviction proceeding in state court," *Black v. Colson*, 2013 WL 230664, at *6, and that it "fully considered the evidence in the state court record," *id.* at *19, but nowhere in its memorandum opinion did the district court state that it was considering *only* the state-court record, or that it was declining to consider (or otherwise excluding) any of the exhibits that Black had provided to the district court in the course of the federal habeas proceedings.

At oral argument before our court, Black's counsel stressed that the district court erred by failing to consider certain exhibits, namely the declaration of Dr. Marc J. Tassé, R.120-1, and the declaration of Dr. Stephen Greenspan, R.120-2. But nothing in the record indicates that the district court *didn't* consider these exhibits—which were made part of the federal habeas record in 2008—when it issued its opinion in 2013. Indeed, at the oral argument before the district court in January 2013, Black's counsel brought *both* declarations to the attention of the district court, including record citations to each, and the district court in no way indicated that it would decline to examine those items. R.160 at 22 ("I would be remiss to not point out another objective measure of Mr. Black's adaptive functioning in affidavit of Dr. Ste[ph]en Greenspan. And that's at Docket Entry 120-2."); *id.* at 60 ("The Court: Is that what you called the screening test? Ms. Henry: Yes, sir. And you will see in Docket Entry 120-1, there is testimony there from Dr. Mar[c] Tass[é], who is the nation's leading expert on assessing intelligence.").

We therefore hold that the district court did not err in apprehending the scope of its remand. The district court understood that its task was to conduct a de novo review of the record before it—including, *at a minimum*, a de novo review of the state-court record applying *Coleman* in the same way that the Tennessee Supreme Court would have done if the *Atkins* claim were instead before that court. And while the district court was not *prohibited* under *Pinholster* from

considering additional evidence beyond the state-court record (because the district court was not subject to AEDPA's constraints), it was not error for the district court not to state whether and to what extent it was considering materials such as Dr. Tassé's and Dr. Greenspan's declarations that were part of the federal habeas record only. Indeed, as noted above, when the district court heard oral argument, it did—without cavil—engage with aspects of the declarations of both Dr. Tassé and Dr. Greenspan.

B. The District Court Did Not Abuse Its Discretion in Denying an Evidentiary Hearing

Relatedly, Black argues that the district court erred in denying him an evidentiary hearing. We review the district court's denial of an evidentiary hearing for abuse of discretion. *Cornwell v. Bradshaw*, 559 F.3d 398, 410 (6th Cir. 2009); *Getsy v. Mitchell*, 495 F.3d 295, 310 (6th Cir. 2007) (en banc). The fact that Black was "not disqualified from receiving an evidentiary hearing under [AEDPA] does not entitle him to one." *Bowling v. Parker*, 344 F.3d 487, 512 (6th Cir. 2003). Rather, when a court is able to resolve a habeas claim on the record before it, it may do so without holding an evidentiary hearing. *See Sawyer v. Hofbauer*, 299 F.3d 605, 612 (6th Cir. 2002).

Here, the district court did not abuse its discretion in denying Black's motion for an evidentiary hearing. Notably, even if we had authorized the district court to entertain new evidence in evaluating Black's *Atkins* claim, Black has not identified any evidence that he would introduce other than exhibits already made part of the state or federal habeas record. And while Black has cited authorities that support *allowing* an evidentiary hearing, Appellant's Br. 11, 15–16, 26, Black fails to support the contention that an evidentiary hearing was *required* in order for the district court properly to evaluate the voluminous record before it under *Coleman*. At oral argument, Black's counsel argued that an evidentiary hearing would have provided Black an opportunity to direct the court's attention to the findings and conclusions, for example, of post-conviction expert Dr. Tassé. But, as we have stated, Black *was* able to bring Dr. Tassé's declaration to the district court's attention at the oral argument before that court, and, in any event, the district court's task was to review the record in the same way the Tennessee Supreme Court would have reviewed it under *Coleman*—and the district court's thorough 31-page opinion

reflects that it was able to do that within the scope of our limited remand and without conducting an evidentiary hearing.

C. Principles of Summary Judgment Do Not Apply to a Merits Ruling on a Federal Habeas Claim

Black's brief on appeal makes various assertions that the district court should have applied a summary-judgment standard in conducting its review, but Black cites no authority for this supposed rule—a rule that would mean, it is worth noting, that Black would prevail so long as *any reasonable juror* would grant him relief, giving Black the benefit of all reasonable factual inferences. Appellant's Br. 5 ("On remand, Black's request for an evidentiary hearing was denied. The district court erroneously . . . resolved factual disputes in favor of Respondent."); *id.* 8 ("The district court compounded its error by failing to follow well-settled principles of summary judgment in its memorandum opinion. The district court credited the testimony of the State's witnesses in the face of the expert opinions of Black's witnesses. The district court refused to draw inferences in favor of Black. Rather, it did just the opposite."); *id.* 28–29 (apparently treating the *Atkins* proceeding as a summary-judgment proceeding at which Fed. R. Civ. P. 56 governs because it was "a summary proceeding" without an evidentiary hearing).

Summary-judgment procedures simply do not apply to a federal habeas court's final adjudication of an *Atkins* claim. Rather, it is Black who had the burden of proving, by a preponderance of the evidence, that he was entitled to relief. *See Parke v. Raley*, 506 U.S. 20, 34 (1992) (discussing "the preponderance of the evidence standard applicable to constitutional claims raised on federal habeas"); Tenn. Code Ann. § 39-12-203(c) ("The burden of production and persuasion to demonstrate intellectual disability by a preponderance of the evidence is on the defendant."). Part of the confusion in Black's briefing appears to arise from the fact that the State had filed a "Motion to Dismiss and for Summary Judgment" in the pre-*Coleman* federal habeas proceedings—and indeed, when Black originally filed his petition in 2002, before *Atkins* was decided, the district court granted "summary judgment" to the State on Black's claims.

But the district court's decision that Black now appeals was not *summary* judgment—it was judgment. Indeed, nothing in the 2011-13 habeas proceedings leading up to the district court's January 2013 memorandum opinion was styled "summary judgment" at all: the State

filed a "Brief Opposing [Black's] *Atkins* Claim," and Black filed a "Brief In Support Of His *Atkins* Claim," but nothing in the record appears to justify (and Black does not direct us to anything in the record that would justify) Black's contention that the district court's oral argument and opinion constituted a summary-judgment proceeding. Nor is there any support for the proposition that the district court's *Atkins* determination was transformed into a summary-judgment ruling because the district court declined to hold an evidentiary hearing, as Black's brief seems to imply. Appellant's Br. 5. The district court's *Atkins* determination was a final judgment on the merits of Black's *Atkins* claim, in which the district court properly weighed the evidence, made credibility determinations, and declared one party the victor.

At such a proceeding, under *Atkins* (as it incorporates state law), Black had to prove every element of his mental-retardation claim "by a preponderance of the evidence," without receiving the benefit of having any inferences drawn in his favor. Tenn. Code Ann. § 39-12-203(c); *see Coleman*, 341 S.W.3d at 233 ("The statute places the burden on the criminal defendant to prove by a preponderance of the evidence that he or she had an intellectual disability at the time of the offense and requires the trial court rather than the jury to make the decision.").

We therefore hold that the district court did not err when it resolved the factual disputes before it rather than employing a summary-judgment standard.

D. The District Court's Merits Ruling Was Correct

We review the district court's denial of habeas relief de novo. *Bigelow v. Williams*, 367 F.3d 562, 569 (6th Cir. 2004). But we review underlying factual findings for clear error, and we bear in mind that, contrary to the assertions in Black's brief, Black carries the burden of persuasion:

> Our review of the district court's factual findings is highly deferential. We start from the premise that a district court's factual findings in a habeas proceeding are reviewed for clear error. *Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir. 1999). "'Clear error' occurs only when [the panel is] left with the definite and firm conviction that a mistake has been committed. If there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States v. Kellams*, 26 F.3d 646, 648 (6th Cir. 1994). We are

> also mindful that in a habeas proceeding the petitioner "has the burden of establishing his right to federal habeas relief and of proving all facts necessary to show a constitutional violation." *Romine v. Head*, 253 F.3d 1349, 1357 (11th Cir. 2001).

Caver v. Straub, 349 F.3d 340, 351 (6th Cir. 2003).

The Supreme Court "le[ft] to the States the task of developing appropriate ways to enforce" its decision in *Atkins*, 536 U.S. at 317, but the Court has invalidated state procedures for evaluating *Atkins* claims when those procedures are "[n]ot aligned with the medical community's information," *Moore*, 137 S. Ct. at 1044 (2017) (invalidating Texas scheme where "indicators of intellectual disability [were] an invention of the [Texas Court of Criminal Appeals] untied to any acknowledged source"), and thereby "creat[e] an unacceptable risk that persons with intellectual disability will be executed." *Ibid.* (quoting *Hall*, 134 S. Ct. at 1990; *see also id.* at 1992 (invalidating Florida scheme that foreclosed "all further exploration of intellectual disability" where prisoner's seven IQ scores in the evidentiary record were all above 70 (ranging from 71 to 80) and two IQ scores that had been excluded from the record were under 70)).

To prevail on his *Atkins* claim under *Coleman*, Black would need to "prove by a preponderance of the evidence":

> (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;
>
> (2) Deficits in adaptive behavior; and
>
> (3) The intellectual disability must have been manifested during the developmental period, or by eighteen (18) years of age.

Coleman, 341 S.W.3d at 233 (quoting Tenn. Code Ann. § 39-13-203(a) (2010)).[4]

[4]The only difference between this statute and the 2003 version quoted in Part I, *supra*, is that the term "intellectual disability" replaced the term "mental retardation" in the 2010 version of the statute. In 2014, the Supreme Court in *Hall* used the term "intellectual disability" and acknowledged that previous opinions of the Court had used the term "mental retardation" to describe the same phenomenon. *Hall*, 134 S. Ct. at 1990. But the next year, in *Brumfield v. Cain*, 135 S. Ct. 2269, 2277, 2291 (2015), the Court used both terms in the same decision. Because the vast majority of Black's legal proceedings transpired before the term "mental retardation" began to fall out of favor, and because *Atkins* itself used "mental retardation," we have also used that term throughout this opinion, but we use "intellectual disability" in this section because it is the predominant term used by *Coleman*.

Black argues that the district court wrongly concluded that he did not have significantly subaverage general intellectual functioning as evidenced by a functional IQ score of seventy or lower before he turned eighteen. The district court's conclusion largely rested on its analysis of the series of IQ tests that Black has taken over the course of his life, *see Black v. Colson*, 2013 WL 230664, at *6–7, and the crux of Black's argument is that the court wrongly analyzed those IQ scores.

As set forth in Part I, *supra*, Black's school records reveal IQ scores ranging from 83 to 97 when Black was age seven to thirteen. After those tests, the next IQ test on record was administered to Black in 1989 (at age 33) before he stood trial for the triple murder: he scored 76. During Black's first post-conviction proceeding in state court, he was twice administered the WAIS–R (once in 1993 at age 37, once in 1997 at age 41) and scored 73 and 76, respectively. And during federal habeas proceedings (*after* his death sentence had been upheld by the Tennessee courts), Black scored 69 on the WAIS–III and 57 on the Stanford-Binet-IV, both administered in 2001 when Black was 45.

The district court relied strongly on the IQ testing done during Black's school-age years as most probative of Black's mental condition prior to age eighteen. *Id.* at *10. Not surprisingly, Black maintains that this reliance is misplaced. First, Black argues that these test scores are invalid because the tests were "group-administered."[5] In the state post-conviction proceedings, Dr. Daniel H. Grant, a neuropsychologist and forensic psychologist, testified that the appropriate mental-health testing models establish that group-administered tests are unreliable and should not be used to determine intellectual disability. Dr. Greenspan's declaration avers that group-administered tests are not acceptable for intellectual-disability determinations because they have much weaker reliability and validity and there is a lack of information about the circumstances under which the tests were administered. And Dr. Tassé's declaration avers that group-administered tests "are not well normed nor possess the psychometric properties necessary to be used in diagnostic decision-making." Dr. Tassé states that these tests "serve a screening purpose" but that he would not rely upon results from these

[5]As noted in Part I, *supra*, "group-administered" tests are written tests completed by individuals on their own; they are simply administered in a classroom setting as is the case with the SAT or other paper-based standardized tests.

tests "when making or refuting a diagnosis of mental retardation." Of course, these declarations do not, without more, provide much help for Black: even if Black had persuaded the district court to reject his childhood IQ scores as useful for "making or refuting a diagnosis of mental retardation," he would still have fallen short of carrying *his burden* to prove that he *was* intellectually disabled by age eighteen.

Moreover, a state expert and psychologist, Dr. Eric Engum, testified during state post-conviction proceedings that group-administered tests *are* relevant when considering whether an individual is intellectually disabled. While agreeing with Dr. Grant that these tests are not as accurate as individually administered tests, Dr. Engum believes that they are properly used as indicators of how well a child is functioning; if the test raised a concern about a child's intellectual capacity, the child would have been referred for more testing. Although the SEM for group-administered tests is higher (up to eight points) than the SEM for individually administered tests (up to five points),[6] Black was not referred for more testing (and indeed, Black graduated high school with a standard diploma), and all his childhood test scores would still be well above the numerical threshold for intellectual disability even if they were retroactively adjusted downward by one SEM.

Black next argues that even his adulthood IQ tests administered between 1989 and 1997, the scores from which fall in the low-to-mid 70s, overstate his level of intellectual functioning and that his results should be construed as below 70 when adjusted for the Flynn Effect. At oral argument, Black's counsel argued that the Supreme Court's decision in *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), "require[s]" us to look at the "Flynn-adjusted scores" as reported in Dr. Tassé's report. R.120-2; Oral Argument 25:10-26:00 (discussing *Brumfield* and *Hall*). But neither *Brumfield* nor *Hall* imposes any such requirement—indeed, neither case even mentions the Flynn Effect.

What they do mention is the SEM. *Brumfield*, 135 S. Ct. at 2278 (rejecting the argument "that Brumfield's reported IQ score of 75 somehow demonstrated that he could not possess subaverage intelligence," where Louisiana law categorically prohibited consideration of factors

[6] *See* n.2, *supra*.

such as the SEM when a defendant's reported IQ score was above 70); *Hall*, 134 S. Ct. at 1995–96 ("For purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score."). But as noted above, the SEM accounts for the possibility that an individual's true IQ score is *either higher or lower* than the reported score. And while the Supreme Court has rejected rigid rules that *prevent* a court from considering evidence of the SEM altogether, *see, e.g.*, *id.* at 1999–2001, the Court's decisions in no way *require* a reviewing court to *make* a *downward* variation based on the SEM in *every* IQ score, let alone to do the same with the Flynn Effect.

Further, while the Tennessee Supreme Court in *Coleman* held that "an expert should be *permitted* to base his or her assessment of the defendant's 'functional intelligence quotient' on a consideration of" "a particular test's standard error of measurement, the Flynn Effect, the practice effect, or other factors affecting the accuracy, reliability, or fairness of the instrument or instruments used to assess or measure the defendant's I.Q.," *Coleman* only *requires* a downward adjustment to counteract the Flynn Effect when the IQ test administered to a given individual is an "older version" than the then-current version of the test on the market. *Coleman*, 341 S.W.3d at 242 n.55. Black has not raised any argument that any of his specific IQ scores is *required* to be corrected for the Flynn Effect under *Coleman* because an earlier-normed version of the test was administered.

Rather, Black's argument is that we should retroactively lower his IQ scores because *his* experts say that we should. Black submitted evidence from various experts about the impact of the Flynn Effect. Dr. Grant testified, for instance (in the state post-conviction hearing), that the Flynn Effect should result in a four-point reduction in his IQ score from the 1993 testing, lowering the score from 73 to 69. Dr. Grant also said that the Flynn Effect should lower the 1997 score by five points from 76 to 71. Dr. Grant also opined that the WAIS–III, administered in 2001, which produced a score of 69, was a more accurate instrument than the WAIS–R and thus produced more accurate results. Dr. Greenspan's declaration avers that the Flynn Effect would reduce the 1993 test by four points to 69 and the 1997 test by *six* points to 70. Dr. Greenspan also agreed that the 2001 test (with a score of 69) used a more current instrument than previous assessments had. Similarly, Dr. Tassé opined that the Flynn Effect would reduce

Black's 1993 results by four points to 69 and his 1997 results by five points to 71. Dr. Tassé further maintained that the 2001 WAIS–III results should be lowered to a score of 67 due to the Flynn Effect.

On the other hand, the State presented testimony that the impact of the Flynn Effect was overstated by Black's experts. While Dr. Engum was aware of the Flynn Effect and the need to revise and restandardize IQ tests, he questioned the appropriateness of relying on the Flynn Effect to lower IQ scores retroactively based on the passage of time. Dr. Susan Vaught, a neuropsychologist, testified that it was not standard practice to correct scores due to the Flynn Effect nor was it routinely considered by practitioners as a basis for lowering an IQ score. Upon consideration of the parties' evidence (including specific mention of Dr. Grant's, Dr. Engum's, and Dr. Vaught's testimony), the district court concluded that the Flynn Effect provided "weak support for the statutory requirement that [Black] have scores at or below 70 before he turned age 18." *Black v. Colson*, 2013 WL 230664, at *10. The court accepted the existence of the Flynn Effect but concluded that the 1993 and 1997 tests were not as probative of Flynn's mental ability before age eighteen as the earlier tests, and declined to accept Black's argument that retroactively reducing IQ scores was a "scientifically valid remedy" to account for the Flynn Effect. *Ibid.*

Black further argues that the district court should have credited the 2001 IQ tests that placed Black's IQ score at 57 and 69. The district court noted, however, that Black was 45 years old when these tests were administered (and, incidentally, Black was 45 years old before he was ever "diagnosed as having mental retardation," *id.* at *13). The 2001 IQ scores were also generated after Black had been under a sentence of death for more than a decade. Unlike in a competency hearing under *Ford v. Wainwright*, 477 U.S. 399 (1986), where these scores might be probative of a prisoner's insanity *at the time of execution*, these recent scores have far less probative value, if any, in showing Black's mental capacity before he turned eighteen. Black has argued that his mental retardation at age 45 was (unless rebutted by the State) evidence of *lifelong* mental retardation sufficient to satisfy the requirement that mental retardation manifest itself before age 18; indeed, Black presented expert witnesses' findings that Black had a brain

disorder, perhaps caused by fetal alcohol spectrum disorder, but the district court found those experts were "not persuasive." *Id.* at *14.

Specifically, Dr. Albert Globus, a neuropsychiatrist, examined Black and conducted an extensive review of his past medical records and social history. While he did not conduct any IQ testing, Dr. Globus reviewed recent positron emission tomography (PET) scans of Black's brain, which revealed "definite abnormalities," including "changes in the cerebral cortex, the brain ventricles, and the white matter indicating organic damage to the structure of the brain." Dr. Globus also observed "[h]ypometabolism of glucose in the orbito-frontal cortex, the medial and polar temporal cortex, and the caudate and/or the putamen." Based on Black's life history, Dr. Globus opined that Black had an organic brain disorder with an onset well before his current offense. Dr. Globus concluded that these findings were "consistent" with Black's having an IQ of 70 or lower, which rendered him intellectually disabled—but while Dr. Globus stated that "evidence of early onset brain damage secondary to alcohol ingestion by [Black's] mother" was "sufficient to produce an IQ lower than all but two or three per cent of the population," Dr. Globus's evaluation of Black's mental ability centered around Black's *current* ability (in 2001, when Dr. Globus wrote his report). Dr. Globus did *not* affirmatively state that Black's IQ was 70 or lower before age eighteen.

The district court made several specific page citations to Dr. Globus's testimony. *See, e.g.*, *id.* at *11. But the district court did not assign great weight to Dr. Globus's findings because Dr. Globus had not substantiated the facts concerning alcohol use by Black's mother that Dr. Globus relied upon in his report, and because Dr. Globus admitted that the brain scans that he analyzed did not actually reveal whether Black's brain abnormalities were caused by fetal alcohol spectrum disorder or instead by an adulthood injury. *Ibid.*

Dr. Ruben Gur, a neuropsychologist, also concluded that Black suffered from a brain disorder. Dr. Gur noted damage in Black's frontal- and temporal-lobe functions and commented that Black's "deficits are particularly pronounced in executive functions, memory and emotion processing." Dr. Gur opined that these limitations potentially resulted from certain exposures during Black's childhood. These exposures may have included his mother's alcohol consumption while pregnant with him, or lead poisoning arising from his childhood living

conditions. Black also suffered several head injuries while playing football, although no formal diagnosis of concussion was ever made. At the time of Dr. Gur's report, Dr. Gur noted that Black demonstrated symptoms associated with serious psychiatric disorders, including paranoid and delusional beliefs—but these disorders are *not* necessarily concomitants of mental retardation.

The district court thoroughly evaluated all these reports, and the district court elected to disregard this most recent evidence of Black's mental ability because the district court was not persuaded that any injury that might have caused mental retardation had occurred before Black turned eighteen. *Id.* at *14.

In short, Black's argument requires three steps: (1) reject Black's childhood "group-administered" IQ scores (83, 97, 92, 91, 83); (2) either rely exclusively on the 2001 IQ scores (69, 57), or else apply a downward adjustment to the pre-2001 adulthood IQ scores (76, 73, 76) to account for the Flynn Effect and the SEM, so as to reduce those scores to below 70; and (3) presume that the adulthood scores, in the absence of contradictory childhood IQ scores (and by disregarding evidence put on by the State to rebut Black's contention that his mother's alcohol consumption caused Black to suffer any brain damage that caused any level of mental retardation), are evidence of lifelong mental retardation that must have manifested itself before age eighteen. Each of these three steps is a necessary condition for Black to prevail on his *Atkins* claim as we see it. And Black has not shown us any authority that would support taking *any* of these steps.

At the end of the day, without stronger evidence that Black's childhood IQ scores did not accurately reflect his intellectual functioning before he turned eighteen, the district court held that Black could not carry his burden of showing, by a preponderance of the evidence, that he had significantly subaverage general intellectual functioning before he turned eighteen.

Having reviewed the entire record, we cannot find fault with the district court's conclusion; after all, even if Black's childhood IQ scores were reduced by *both* eight points to account for the SEM (using the higher SEM applicable to group-administered tests, rather than five points for individually administered tests) *and* up to four points to counteract the Flynn

Effect,[7] they *all* would still exceed seventy. To be sure, there is almost always a *possibility* that a reported IQ score significantly higher than 70 is an inaccurate reflection of a true IQ score of 70 or below—indeed, there is approximately a one-in-300 chance that a reported IQ of 92 on a group-administered test (like Black's 1966 Lorge Thorndike score) reflects a true score lower than 70. But that possibility does not satisfy Black's burden to prove his intellectual disability by a preponderance of the evidence.

E. Implications of the Flynn Effect

There is good reason to have pause before retroactively adjusting IQ scores downward to offset the Flynn Effect. As we noted above, see n.1, *supra*, the Flynn Effect describes the apparent rise in IQ scores generated by a given IQ test as time elapses *from the date of that specific test's standardization*. The reported increase is an average of approximately three points per decade, meaning that for an IQ test normed in 1995, an individual who took that test in 1995 and scored 100 would be expected to score 103 on that same test if taken in 2005, and would be expected to score 106 on that same test in 2015. This does not imply that the individual is "gaining intelligence": after all, if the same individual, in 2015, took an IQ test that was *normed in 2015*, we would expect him to score 100, and we would consider him to be of the same "average" intelligence that he demonstrated when he scored 100 on the 1995-normed test in 1995. Rather, the Flynn Effect implies that the longer a test has been on the market after initially being normed, the higher (on average) an individual should perform, as compared with how that individual would perform on a more recently normed IQ test.

At first glance, of course, the Flynn Effect is troubling: if scoring 70 on an IQ test in 1995 would have been sufficient to avoid execution, then why shouldn't a score of 76 on that same test administered in 2015 (which would produce a "Flynn-adjusted" score of 70) likewise suffice to avoid execution? Further, even if IQ tests were routinely restandardized every year or two to reset the mean score to 100, and even if old IQ tests were taken off the market so as to avoid the Flynn Effect "inflation" of scores that is visible when an IQ test continues to be administered

[7]Of Black's five childhood IQ scores, the 1969 Lorge Thorndike test is the most susceptible to Flynn Effect inflation. The Lorge Thorndike test was published in 1957, so a reduction of the 1969 score by approximately four points would offset the maximum expected inflation of that score that would be attributable to the Flynn Effect.

long after its initial standardization, that would only mask, but not change, the fact that IQ scores are said to be rising.

Indeed, perhaps the most puzzling aspect of the Flynn Effect is that it is true. As Dr. Tassé states in his declaration, "[t]he so-called 'Flynn Effect' is NOT a theory. It is a well-established scientific fact that the US population is gaining an average of 3 full-scale IQ points per decade." The implications of the Flynn Effect over a longer period of time are jarring: consider a cohort of individuals who, in 1917, took an IQ test that was normed in 1917 and received "normal" scores (say, 100, on average). If we could transport that same cohort of individuals to the present day, we would expect their average score today on an IQ test normed in 2017—a century later—to be thirty points lower: 70, making them mentally retarded, on average.

Alternatively, consider a cohort of individuals who, in 2017, took an IQ test that was normed in 2017 and received "normal" scores (of 100, on average). If we could transport that same cohort of individuals to a century ago, we would expect that their average score on a test normed in 1917 would be thirty points higher: 130, making them geniuses, on average.

It thus makes little sense to use Flynn-adjusted IQ scores to determine whether a criminal is sufficiently intellectually disabled to be exempt from the death penalty. After all, if *Atkins* stands for the proposition that someone with an IQ score of 70 or lower *in 2002* (when *Atkins* was decided) is exempt from the death penalty, then the use of Flynn-adjusted IQ scores would conceivably lead to the conclusion that, within the next few decades, almost no one with borderline or merely below-average IQ scores should be executed, because their scores when adjusted downward to 2002 levels would be below 70. Indeed, the Supreme Court did not amplify just what moral or medical theory led to the highly general language that it used in *Atkins* when it prohibited the imposition of a death sentence for criminals who are "so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus," 536 U.S. at 317. If *Atkins* had been a 1917 case, the majority of the population now living—if we were to apply downward adjustments to their IQ scores to offset the Flynn Effect from 1917 until now—would be too mentally retarded to be executed; and until the Supreme Court tells us that it is committed to making such downward adjustments, we decline to do so.

III

Because Black cannot show that he has significantly subaverage general intellectual functioning that manifested before Black turned eighteen, we need not analyze whether Black has the requisite deficits in adaptive behavior, which he would *also* be required to demonstrate in order to be entitled to *Atkins* relief.

IV

In sum, the district court did not err in denying Black's *Atkins* claim under the applicable standard set forth by the Tennessee Supreme Court in *Coleman*.

AFFIRMED.

CONCURRENCE

COLE, Chief Judge, concurring in the opinion except for Section II.E. I concur with the majority opinion except as to the section discussing the implications of the Flynn Effect. In holding that Black did not prove that he had significantly subaverage general intellectual functioning, we concluded that Black's childhood IQ scores would be above 70 even if we adjusted those scores to account for both the SEM and the Flynn Effect. Accordingly, I would not address the question of whether we should apply a Flynn Effect adjustment in cases generally because it is unnecessary to the resolution of Black's appeal. Regardless, courts, including our own in *Black I*, have regarded the Flynn Effect as an important consideration in determining who qualifies as intellectually disabled. *See, e.g.*, *Black v. Bell*, 664 F.3d 81, 95–96 (6th Cir. 2011); *Walker v. True*, 399 F.3d 315, 322–23 (4th Cir. 2005).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13-5224

BYRON LEWIS BLACK,
Petitioner - Appellant,

v.

WAYNE CARPENTER, Warden,
Respondent - Appellee.

FILED
Aug 10, 2017
DEBORAH S. HUNT, Clerk

Before: COLE, Chief Judge; BOGGS and GRIFFIN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's denial of Byron Black's *Atkins* claim under the applicable standard set forth by the Tennessee Supreme Court in *Coleman* is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 13-5224

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 27, 2017
DEBORAH S. HUNT, Clerk

BYRON LEWIS BLACK,

Petitioner-Appellant,

v.

TONY MAYS, WARDEN,

Respondent-Appellee.

O R D E R

BEFORE: COLE, Chief Judge; BOGGS and GRIFFIN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: October 27, 2017

Ms. Kelley J. Henry
Federal Public Defender's Office
810 Broadway
Suite 200
Nashville, TN 37203

Re: Case No. 13-5224, *Byron Black v. Tony Mays*
Originating Case No. : 3:00-cv-00764

Dear Ms. Henry,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. John H. Bledsoe
Ms. Ann Delpha
Mr. James Ellis
Mr. Aaron Edward Winter

Enclosure

NAME Black Byron Louis (Last) (First) (Middle) 179112   Boy ☑ Girl ☐ (Sex)

NAME: Check if deceased, e.g.	V	Birthplace	Nationality	Occupation	Address
Father no on birth certificate					
Mother Julia Black		Nashville	U.S.A.	Maid	1015 Reservoir
Guardian					

Race	Birthplace				Date of Birth		
	Nashville (City)	Davidson (County)	Tenn (State)	U.S.A. (Country)	3 (Month)	23 (Day)	56 (Year)

Number of Children in Family: Boys 1, Girls 4
3. Child's Rank 3

PUPIL LIVES WITH (Check. Use "S" in case of Step-parents.)
Both Parents ___ Father ___ Uncle ___ Brother ___ Boards ___
Grandparents ___ Mother ✓ Aunt ___ Sister ___ Guardian ___

4. TUITION 06832228

SCHOOLS ATTENDED—ADDRESS RECORD

Dates of Attendance	SCHOOLS AND LOCATION	RESIDENCE RECORD
6-11-62	Carter-Lawrence	1015 Reservoir
6-6-67		1204 Horton St.
8-26-69	Rose Park	1204 Horton St.
8-31-71	Rose Park	1204 Horton St.
	Hume-Fogg	

Check Square for Authority
1. Baptismal Certificate ☐
2. Bible ☐
3. Birth Certificate ☐
4. Parent's Statement ☐
5. Passport ☐
6. Pupil's Statement ☐
7. ☐
8. ☐

EMPLOYMENT RECORD (During School Term or Vacation)

EMPLOYER	Kind of Work	Date Employed From	To	RECORD AS TO QUALITY OF WORK (Secure information directly from Employer)

5. EDUCATIONAL TEST RECORD

Date	Name of Test	Form	Examiner	Score	C. A.	Grade Equiv.
6-25-64	Metro Readiness	S	E.C.W.	39	6-3	Rating E
~~4-27-6~~	~~Lorge-Thorn.~~	~~B~~	~~F.A.H.~~	~~33~~	~~7-6~~	~~0-8~~
~~4/20/67~~	~~Metro. Achiev.~~	~~B~~	~~F.A.H.~~	~~4~~	~~8-1~~	~~L.S~~

GRADE	MONTH	YEAR	YEARS	MONTHS	LORGE-THORNDIKE VERBAL RAW SCORE	I.Q.	GRADE %ILE	AGE EQUIV.		GRADE EQUIV.	NON VERBAL RAW SCORE	I.Q.	GRADE %ILE	AGE EQUIV.		GRADE EQUIV.	TOTAL I.Q.
4	08	57	09	05	034	87	16	08	03	30	45	97	42	09	01	39	92

0960 0968 ... TAM 4.2 254 3. 1 6.0 455 4.6 15 5.0 405 4.9 052 4.3 052 3.4 052 5.3 354 3.4 021

NAME BLACK BYRON 179112
METROPOLITAN ACHIEVEMENT TEST
DEC.69 READ LNG. COMP PRB.SOLV
GRD.7 GE 4.0 5.5 5.6 5.2
FORM A STA 2 3 3 3

DEC 71 D.A.T. FORM L GR 09 BLACK BYRON 179112 675

V.R.		N.A.		VR&NA		ABSTR		CLER.		MECH.		SPACE		SPELL		GRAM.	
SCORE	PR	SCORE	PR	SCORE	PR	SCORE	PR	SCORE	PR	SCORE	PR	SCORE	PR	SCORE	PR	SCORE	PR

NTS032031031021029011038123041183033042041183043254034062

5. MENTAL TEST RECORD

GROUP EXAMINATIONS

Date	Name of Test	Form	Examiner	C. A.	M. A.	IQ	Interpretations
7-3/63	L.T.	B	FAH	7-6		83	
11/22/64	Otis	AS	FAH	8-5	8-2	97	
9/29/67	Otis	Beta	BJB	11-6		91	

INDIVIDUAL EXAMINATIONS

Date	Name of Test	Form	Examiner	C. A.	M. A.	IQ	Interpretations

NAME BLACK BYRON 179112
LORGE-THORNDIKE INTELL.TEST-VERBAL
DEC.69 BIRTH 03/23/56 CA 13-08
GRD.7 ACADEMIC APTITUDE 83
FORM A STANINE 3

DEC 72 SFTAA L-5
LNG NLNG TOTAL
034062041183035082

6. SCHOLARSHIP RECORD—ELEMENTARY SCHOOL (Grades 1-6 Incl.)

SEMESTER & YEAR	F 1962	S 1963	F 1963	S 1964	F 1964	S 1965	F 1965	S 1966	F 1966	S 1967	F 1967	S 1968	F 1968	S 1969	19	19	AV.
GRADE & TERM AV.	Gr. / Tm. Av.																
Arithmetic		1 S2		2 S2		2 S	Non-graded	c		B5		5A6		6B			

ATTENDANCE RECORD

Date Entered	School Entered	Grade Entered	SCHOOL LAST ATTENDED Name of School	Address
8/31	Rose Park	9		

S-D.7 GE 4.0 5.5 5.6 5.2
FORM A STA 2 3 3 3

DEC 71 D.A.T. FORM L GR 09 BLACK BYRON 179112 675

V.R.	N.A.	VRGNA ABSTR	CLER.	MECH.	SPACE	SPELL	GRAM.

HTS03203103102102901103812304118303304204118304325403406 2

Test	iner

NAME BLACK BYRON 179112
LORGE-THORNDIKE INTELL.TEST-VERBAL
DEC.69 BIRTH 03/23/56 CA 13-08
GRD.7 ACADEMIC APTITUDE 83
FORM A STANINE 3

DEC 72 SFTAA L-5
LNG NLNG TOTAL
03406204118303608 2

6. SCHOLARSHIP RECORD—ELEMENTARY SCHOOL (Grades 1–6 Incl.)

SEMESTER & YEAR	F 1962	S 1963	F 1963	S 1964	F 1964	S 1965	F 1965	S 1966	F 1966	S 1967	F 1967	S 1968	F 1968	S 1969	19__	19__	AV.
GRADE & TERM AV. (Gr. / Tm. Av.)																	
Arithmetic		1 S	2	2 S	2	2 S	Non-graded	C		B	5	5 A	6	6 B			
Art		1 S		S		S		B		B		B		B			
Geography								[illegible]		A		A		B			
History														—			
Home Ec., Ind. Arts														—			
Language								C		B		A		B			
Music		S		S		S		C		B		A		B			
Reading and Literature		N		U		N		C		B		B		B			
Spelling		N		U		S		C		A		A		A			
Science		N		S		S				B		A		B			
Writing		N		S		S		A		A		A		A			
Average		Pro. Gr. 2		Retn. Gr. 2		Pro. Gr. 3		Pro. Gr. 4		Pro. Gr. 5		Pro. 6th		Pro. Gr. 7			
(Remarks)	E. C. Woodson — Promotion in June		F. H. Huddleston — Promotion in June		Promotion in June — F. H. Huddleston		No Fall Grades — M. S. Russell		Promotion in June — Ora Ford		Promotion in June — B. M. Bailey		Promotion in June — J. M. Thomas				

6. SCHOLARSHIP RECORD—JUNIOR AND SENIOR HIGH SCHOOLS (Grades 7–12 Incl.)

SEMESTER & YEAR	69 1970	70 1971	71 1972	71 1972	Fall 72 1973	Spring 72 1973	Fall 73 1974	Sp. 1974	Fall 1974	Spring 1975	19__	19__	19__	19__	19__	19__	Total Units
GRADE & TERM AV. (Gr. / Tm. Av.)																	
English	7 D-	8 C	9 D	B [illegible]	10 D-	10 D	11 C	11 B	12 C	12 C-							
Social Studies	7 C	8 C+	9 B	1 B			11 D+	11 C-									
Mathematics	7 C	8 C	9 D	1 C	10 D+	10 D-											
Natural Science	7 C	8 D	9 C+	1 D													
Com., Law, Of App.																	
Com., Tp. I, Slp.									12 D+	12 C							
Com., Bkkg., St., Of. Pr.																	
Mech. (Art) Home Ec.	7 C		9 A	½ A													
Other Subjects: Printing I					10 D-	10 C	11 C-	11 C+	12 C	12 C							
Physical Ed.	7 B-	8 B	9 B	½ A-	10 A+												
Music	7 B																
Health						10 D-											

HUME-FOGG TECH
Guidance Office
[illegible]
Nashville, Tennessee 37208

Graduated 6/3 1975 Record sent to ________ College or other Higher Institution ________ 19__ Occupation, if not in school ________ 19__

ATTENDANCE RECORD

Date Entered	School Entered	Grade Entered	SCHOOL LAST ATTENDED: Name of School	Address
8/31	Rose Park	9th		

ELEMENTARY SCHOOL ATTENDANCE

School Year	K	1962 1963		1963 1964		1964 1965		1965 1966		1966 1967		1967 1968		1968 1969		19__ 19__
Semester	S	F	S	F	S	F	S	F	S	F	S	F	S	F	S	
Days Present	33	82	82	90	78	86	88	86	87	78	91	78	82	86	89	
Days Absent	7	7	3	0	7	1	0	1	1	7	1	9½	1	0	0	
Times Tardy	0	0	0	0	0	2	0		0	0	0	0	0	0	0	
Dismissals	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	

JUNIOR AND SENIOR HIGH SCHOOL ATTENDANCE

School Year	1969 1970		1970 1971		1971 1972		1972 1973		1973 1974		1974 1975		19__ 19__	19__ 19__
Semester	F	S	F	S	F	S	F	S	F	S	F	S		
Days Present	84	87	74	81	85	65	86	86	82	82	85	75		
Days Absent	2	2	15	3	5	20	0	3	8	3	3	9		
Times Tardy	6	18	0	0	0	0	0	0	0	8				
Dismissals														

DROP-OUT AND RE-ENTRY RECORD

Date	School Left	Reason	Date of Re-entry	School Re-entered

DECLARATION OF DANIEL H. GRANT, Ed.D.

1. I am Daniel H. Grant. I am licensed as a psychologist by the State of Georgia (Georgia License Number 859) with training in psychological and neuropsychological evaluation procedures. I have an Ed.D. in school psychology from the University of Georgia, with a major in school psychology and a minor in mental retardation and reading. In addition to attaining the qualifications for licensure in psychology, I obtained both pre and post-doctorial training at the Medical College of Georgia in clinical neuropsychology. I am board certified as a clinical neuropsychologist by the American Board of Professional Neuropsychology. I am also a board certified forensic examiner and a Fellow of the American College of Forensic Examiners.

2. My professional experience includes employment as a staff psychologist at Georgia Regional Hospital in Savannah, Georgia, an assistantship with Dr. Allen Kaufman in the Department of Educational Psychology at the University of Georgia, A school psychologist with the Hall County Hall County Board of Education in Gainesville Georgia, Georgia. For almost fifteen years I was a consultant psychologist (30 hours a week) for the diagnostic unit of the Coastal Correctional Institution in Garden City, Georgia, where I assessed approximately 2500 inmates with the majority being below the IQ of 80. I made recommendations regarding housing, and assisted in assessing inmates for potential problems with adaptability and adjustment to prison life. For six years I was a contract neuropsychologist for the Out Patient Psychiatry Department at Winn Army Hospital at Fort Stewart, Georgia. For the past three years I have been a contract part-time psychologist with the Georgia Department of Juvenile Justice at the Savannah Regional Youth Detention Center in Savannah, Georgia. My responsibilities there include providing assessment and treatment, making recommendations regarding housing, and assessing residents for potential problems with adaptability and adjustment to incarceration. I have also maintained a private practice in psychology and clinical neuropsychology. A true copy of my curriculum vitae is attached to this affidavit.

3. October 15 and 16, 2001 I evaluated Mr. Black. I met with Mr. Black at the Riverbend Maximum Security Institution in Nashville Tennessee. I conducted a clinical interview and administered a series of tests and procedures to assess Mr. Black's level of intelligence, adaptive functioning, language skills and memory functioning. The tests I administered included: Stanford Binet Intelligence Scale-Fourth Edition, Comprehensive Test of Nonverbal Intelligence, Peabody Picture Vocabulary Test, Expressive Vocabulary

Test, Visual Naming Test from the Multilingual Aphasia Examination, Oral and Written Language Scales, Letter and Category Fluency (F-A-S and Animals) Test, Wide Range Achievement Test-Revision Three(Arithmetic Subtest), Nelson Denny Reading Comprehension Test (Form H), Reitan Story Memory Scale, Denman Neuropsychological Memory Scale (Short Form),Visual Search and Attention Test, Benton Visual Form Discrimination Test, Benton Judgment of Line Orientation, Color Trials 1 and 2, Bender Gestalt, Independent Living Scales, Rapid Alternating Hand Task, structured clinical interview. These are the types of tests which experts in my field normally and regularly rely upon when forming and expressing expert opinions. I am trained at the administration and interpretation of these tests.

4. I have also examined a voluminous number of records, documents and testimony pertaining to Mr. Black. The reports I relied on the most are included below, the other documents are attached to the end of this declaration:

1. Interview with Finis Black by Gaye Nease
2. Interview with Mary Frances Coplan by Gaye Nease
3. Interview with Freda Whitney by Gaye Nease
4. Interview with Richard Corley by Gaye Nease
5. Interview with Melba Corley by Gaye Nease
6. Interview with Siblings of Julia Mai Black: Finis Black; Dan Black; and, Alberta Crawford on 4-22-97 by Libby Moore
7. Interview with Jackie M. Thomas by Gaye Nease
8. Interview with Teachers by Gaye Nease
9. Interview with Alberta Black Crawford by Gaye Nease
10. Interview with Lynette Childs Black by Gaye Nease
11. Interview with Johnny Moore (Supposed Father of Bryon Black) by Gaye Nease
12. Interview with Mary Coletta Harrison by Gaye Nease
13. Interview with Arleta Black Swanson (Byron's Sister)
    Interview with Karen Black Greer (Byron's Sister) by Gaye Nease
14. Trial testimony of Dr. Warren Thompson State of Tennessee v. Walter R. Kendricks, Davidson County, Tennessee,
15. Julia Black's statements to the police
16. Psychological Evaluation by Patti van Eys, Ph.D.
17. Psychological Evaluation by Pamela Auble, Ph.D.
18. Psychological Evaluation by Gillian Blair, Ph.D.
19. Byron Black's school records
20. Declaration of Ross Alderman
21. Mitigation Statute 39-13-204 page 25
22. Mental Retardation Statute 39-13-203 pages 46-47
23. Birth certificate of Byron Black
24. Hospital Records of Byron Black
    Baptist Hospital
    Meharry Hospital (formally General Hospital)
    Metro Health Records
    Riverbend Maximum Security Prison Health Records

Vanderbilt Clinic and Hospital Records
25. Incarceration Records of Byron Black
26. Transcript of Competency Hearing of Byron Black
27. Mackey V. State 537 S. W. 2nd 704 (TN1975)
28. Medical and death Information on Julia Mai Black
29. Miranda Warning Information
30 Records and Transcripts of Testimony
DeDe Wallace Center Competency Records
Calvin Y. Allmon, M.S.S.W.
Bradley Diner, M.D.
Leonard Morgan, Jr., Ph.D. Clinical Psychologist
Pat Jaros, M.A. Licensed Psychological Examiner
William Kenner, M.D. Psychiatrist

5. Mental Retardation
I understand the state of Tennessee defines mentally retarded defendants- Death sentence prohibited As used in section39-13-203 as:
1. Significantly subaverage general intellectual functioning as evidenced by a functional Intelligence Quotient (IQ) of seventy (70) or below:
2. Deficits in adaptive behavior and
3. The mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age.
This Standard derives from the classification systems of the American Association on Mental Retardation (AAMR, 1983 & 1992 ed.) and the Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R, 1987 & DSMIV-TR, 2000) which I have specifically considered in setting forth my opinion in this matter.

6. General intellectual functioning is defined as an intelligence quotient (IQ) obtained by assessment with one or more individually administered general intelligence tests, such as the WAIS-III or Stanford Binet or the Comprehensive Test of Nonverbal Intelligence (CTONI). Significantly subaverage general intellectual functioning is defined by the AAMR and the DSMIV-TR as an IQ of approximately 70-75 or below on a standardized, individually administered test of general intellectual functioning. Since any measure is fallible, an IQ score is generally thought to involve an error of measurement of approximately five points; hence, an IQ of 70 is considered to represent a band or zone of 65 to 75. Treating the IQ with so flexibility permits inclusion of people with IQ's somewhat higher than 70 who exhibit significant deficits in adaptive behavior.

7. Deficits in adaptive behavior (also known as "adaptive functioning "or "adaptive skills") refer to limitations in practical and social intelligence. Practical intelligence refers to the ability to maintain oneself as an independent person in managing the ordinary activities of daily living, and is important for adaptive abilities like functional academics, work, leisure, self-direction, and self-care. Social intelligence refers to the ability to understand social expectations and the behavior of other persons and to judge appropriately how to conduct oneself in social situations, and is central to such adaptive abilities like social skills, communication, work, leisure, home living, functional

academic skills and use of the community. It is a measure of an individual's ability to function effectively in society, and refers to the person's effectiveness in areas such as social skills, communication, and daily living skills, and how well the person meets the standards of personal independence and social responsibility expected of his or her age by his or her cultural group. Specific adaptive limitations often coexist with strengths in other adaptive or personal capabilities. In order to qualify for a diagnosis of Mental retardation, an individual must possess deficits in adaptive functioning in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self direction, functional academic skills, work, leisure, health, and safety.

8. Most mentally retarded people do not have obvious physical abnormalities. Oftentimes they appear to have nominally average language skills. Unless the disability is severe, many mentally retarded persons can perform semi-skilled and repetitive tasks with relative ease. They can drive cars. They can maintain lower level jobs with repetitive unskilled tasks. Mentally retarded people often develop coping skills in which they try to hide their disability in an attempt to appear as being "normal." One of these coping skills is the tendency to answer in the affirmative. For these reasons, many people who are thought of as simply being "slow" are in fact mentally retarded. Oftentimes there are no glaring indicators that a person may be mentally retarded.

9. A mentally retarded person does not have the mental capacity of an average person. The abilities to plan, organize and reason are often diminished, judgment is often limited, depending upon the complexity of the situation. Mentally retarded persons have limited learning abilities and poor abstract reasoning. They tend to think in concrete terms. Mentally retarded persons also tend to exhibit intellectual rigidity, which is often demonstrated by difficulty understanding and learning from mistakes and by persisting in counterproductive behaviors; for this reason, mentally retarded persons often experience difficulties in independently arriving at a behavior appropriate for a given situation. All of these limitations help explain why many mentally retarded people have difficulties understanding legal proceedings or legal defenses.

RESULTS OF THE EVALUATION OF BYRON BLACK

10. Mr. Black's performance on the Stanford Binet-Fourth Edition yielded a test composite score of 57 placing his level of intelligence within the mildly mentally retarded range of intelligence. Mr. Black's performance indicated that 99 percent of the population on which the test was normed scored better than did Mr. Black. Standard scores on the individual components of the test were: Verbal Reasoning 56, Abstract Reasoning 76, Quantitative Reasoning 61, Short-term Memory 56.

11. I also administered the Comprehensive Test of Nonverbal Intelligence (CTONI), a widely and professionally accepted test of nonverbal intellectual functioning which measures nonverbal planning, organizational skills, problem solving and spatial ability. His performance yielded a Nonverbal IQ of 64 (placing him at the 1 percentile), Pictorial Nonverbal IQ of 66 (placing him at the 1 percentile) and a Geometric Nonverbal IQ of

68 (placing him at the 2 percentile). Mr. Black's scores indicate that 98 to 99 percent of the population performed better than Mr. Black on this test. His performance on the CTONI placed Mr. Black's intellectual performance on all three intellectual measures within the mildly mentally retarded range of intelligence. Mr. Black's performance indicated the severity of his deficits in nonverbal reasoning, nonverbal planning, organizational skills and higher level complex spatial ability.

12. All of Mr. Black's scores were within the mildly mentally retarded range. It is my opinion, to a reasonable degree of psychological certainty, that Mr. Black's performance on these two measures of intelligence placed his intellectual abilities within the mildly mentally retarded range of intelligence.

13. Mr. Black was administered the WAIS-R on 10-7-93 by Gillian Blair. His performance on the WAIS-R yielded a Verbal IQ of 73, Performance IQ of 75 and a Full Scale IQ of 73. It should be noted the WAIS-R was normed in 1980. The Psychological Corporation, the publisher of the Wechsler Scales published an article in 1996 which stated individuals tend to gain approximately 3 to 5 IQ points over a 10 year period. One of the main reasons stated for revising the WAIS-R was outdated normative information. If Mr. Black's WAIS-R IQ scores are corrected for the age of the normative information his intellectual performance would be within the mildly retarded range of intelligence. His Full Scale IQ Score would be between 68 and 70. Pamela Auble, Ph.D. administered the WAIS-R to Byron on either 2-27-97or 3-5-97. He received a Verbal IQ score of 76, Performance IQ of 77 and a Full Scale IQ of 76. When these scores are corrected for the outdated normative information Mr. Black's intellectual performance on this administration of the WAIS-R should be reduced by 5 to 6 points. This would correct his Full Scale IQ by reducing it to an IQ of 70 or 71. On 3-28-01 Patti van Eys, Ph.D. administered the WAIS-III to Mr. Black. His performance on the WAIS-III yielded a Verbal IQ of 67, Performance IQ of 76 and a Full Scale IQ of 69.

14. It is important to note all of the individually administered intelligence tests administered to Mr. Black have yielded consistent results. His full Scale IQ on all of these tests place Mr. Black's level of intelligence within the mildly retarded range according to the DSMIV-TR and AAMR diagnostic criteria.

15. Mr. Black was given several group administered intelligence tests while a student. Mr. Black repeated the second grade and often group administered tests in school are scored by grade and not by age as individually administered IQ tests are. If you had repeated a grade this could inflate your IQ score significantly. Group administered tests are not as carefully normed in relation to the national census or socioeconomic data. When a test is administered in a group there can be little control of the testing situation. As Dr. Thompson said in his testimony in the State of Tennessee v. Walter Kendricks " They ....(group administered IQ tests)...predict some things, but it's not as accurate a measure of intelligence or ability as we'd like to have, but it was what we used back then." He went on to say that an 85 on an Otis-Lennon ..."did not rule out mental retardation." It is important to note the DSMIV-TR and the AAMR do not allow the use of a group administered intelligence test in the diagnosis of Mental Retardation.

16. Mr. Black's performance on the Differential Aptitude Test (DAT) administered in the ninth grade would be the best indicator of his level of functioning. This is a well normed test and is published by the publishers of the Wechsler Scales (WAIS-R and WAIS-III). His performance on the Verbal Recognition yielded a percentile of 3, stanine 1; Nonverbal yielded a percentile of 2, stanine of 1; and the VR&NA (a good predictor of intelligence and general ability) yielded a percentile of 1 and a stanine of 1. His performance on the DAT places Mr. Black's level of functioning within the mildly retarded range.

17. After reviewing Mr. Black's educational records and reading the interview of Jackie Thomas, Byron Black's Sixth grade teacher, and Mrs. Ford, Byron Black's fifth grade teacher, his true academic performance is suspect. Jackie Thomas stated, "...In my class what I did was I gave work that they could succeed at." Mr. Thomas further stated, "I always gave them something that they could do well. I would not allow a student to get a bad grade in my class." Mrs. Ford stated, "The black teachers were liberal in their grading." She further noted that A's and B's at that time probably would be C's and D's now.

18. Mr. Black's Performance on the Oral and Written Language Scale (OWLS) a test of receptive and expressive language skills, yielded a Listening Comprehension standard score of 71 (test age 10-6) and an Oral Expression standard score of 67 (test age 8-6). His performance on the OWLS indicates significant deficits with Mr. Black's Listening Comprehension and Oral Expression. Mr. Black's Performance on the Peabody Picture Vocabulary Test-Third Edition (PPVT-III), test of an individual's "hearing" or listening vocabulary, yielded a standard score of 66. Mr. Black's performance reveals a significant deficit in his listening or receptive language skills. His performance on the Expressive Vocabulary Test (EVT), a measure of expressive vocabulary, yielded a standard score of 57 indicating a significant deficit in Mr. Black's expressive vocabulary skills. To further measure his expressive language skills he was administered the Visual Naming subtest from the Multilingual Aphasia Examination. This is a test of naming pictures of familiar objects. Mr. Black's performance was severely defective and below the 2 percentile level. Mr. Black's significant deficits on the Expressive Vocabulary Test, Vocabulary Reasoning subtest of the Stanford Binet-Fourth Edition, and the Visual Naming subtest of the Multilingual Aphasia Examination probably also indicate a deficit in word retrieval and /or retrieval deficits in general. Mr. Black exhibited a strength in his verbal fluency (list all the words he can think of beginning with the letters F-A-S in one minute) on which he received a standard score of 90. His Category Fluency (list all the animals he could think of in one minute) yielded a standard score of 78. Mr. Black's lower Category Fluency standard score of 78 is most likely related to his word retrieval difficulties. t

19. Mr. Black's performance on the Arithmetic subtest of the Wide Range Achievement Test-Revision Three (WRAT-III) yielded a standard score of 72 and grade equivalent of 4.6. His performance on the Nelson-Denny Reading Comprehension Test yielded a grade equivalent of 4.7. Mr. Black's performance on these academic tests indicate significant deficits in his functional academic skills.

20. Mr. Black's performance on the Denman Neuropsychological Memory Scale (Short Form) Yielded a Verbal Memory Standard score of 65 which indicates a moderate impairment in Mr. Black's verbal memory. His performance on the Reitan Story Memory Scale yielded a learning standard score of 58 after five learning trials (story repartitions). His retention score after a four hour delay yielded a standard score of 116. This is a significant strength and indicates Mr. Black exhibits much difficulty with the acquisition and encoding of new information but once the information is acquired he is able to retain the information.

21. Mr. Black 's performance on the Visual Search and Attention Test yielded a percentile score of 19. This is a visual cancellation task and is a measure of sustained attention for one minute. Mr. Black's performance on the Color Trails 1 yielded a standard score of 88 indicated low average ability in his sustained visual attention involving perceptual tracking and simple sequencing. His performance on the Color Trails 2 which involves an alternating sequencing pattern and is a measure of visual scanning, sustained visual attention and graphomotor skills was within the lower limits of the average range. His sustained attention as measured on these tests is within the low average range. This would indicate Mr. Black's memory deficits are related to encoding difficulties and not to difficulties with sustained attention.

22. Mr. Black was administered the Benton Visual Form Discrimination Test and his performance was within the average range indicating good visual discrimination skills. His performance on the Benton Judgment of line orientation was within the low average range adequate visual orientation skills.

23. Mr. Black's performance on the Independent Living Scale placed his ability to manage money, do monetary calculations, pay bills and take precautions with money at a standard score of 73. His ability to manage the home, use public transportation and maintain a safe home was at a standard score of 73. His awareness of personal health status and ability to evaluate health problems, handle medical emergencies, and take safety precautions and use of health and safety was at a standard score of 72. His performance on the Memory and Orientation subtest was within the average range. It is a measure of his awareness of his surroundings and assesses short-term memory for brief facts rather than large chunks of semantically related information (a story) as measured by the two tests of memory described in section 20 of this declaration. Mr. Black rated his level of social adjustment as average but it is apparent this is a skewed self rating.

24. It is important to note Mr. Black never lived independently. He never did the laundry, cooked, cleaned the house or participated in the care of his son. Even when married he and his wife lived with relatives who cared for Mr. Black. He did not contribute financially to his family and his wife said he never had a bank account. He never contributed financially to the cost of housing or utilities.

25. Mr. Black is mentally retarded. His performance on the Wais-III administered by Dr. Patti van Eys yielded a Full Scale IQ of 69. His corrected Full Scale IQ on the WAIS-R

administered by Dr. Gillian Blair was 70 or less and his corrected Full Scale IQ score on the WAIS-R administered by Dr. Pamela Auble was 70 or 71. His performance on the Stanford Binet-Fourth Edition yielded a Test Composite (standard score) of 57. His performance on the Comprehensive Test of Nonverbal intelligence yielded a Nonverbal IQ of 64. All of these scores meet the criteria for significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (IQ) of 70 or below especially when the standard error of measurement is considered.

26. Mr. Black has significant deficits in adaptive behavior. For example communication skills as measured by Oral and Written Language Scales placed his listening Comprehension skills at a standard score of 71 (test age 10-6) and Oral Expression standard score 67 (test age 8-6) are significantly impaired. His performance on the Peabody Picture Vocabulary Test-Third Revision, standard score of 66 and his standard score of 57 on the Expressive Vocabulary Test revealed Mr. Black's expressive and receptive vocabulary are also significantly impaired. Mr. Black also had significant deficits on a test of visual naming and on the Verbal Reasoning subtest of the Stanford Binet- Fourth Edition. These test results indicate Mr. Black has a significant deficit in his communication skills.

Mr. Black's performance on the Nelson-Denny Reading Comprehension test placed his reading comprehension skills at the 4.7grade level. His arithmetic skills as measured by the Arithmetic subtest on the Wide Range Achievement Test were at the 4.6 grade level. His performance on the Managing Money subtest of the Independent Living Scale placed his ability to manage money, do monetary calculations, pay bills and take precautions with money was at a standard score of 73. Mr. Black's performance on these tests indicate his functional academic skills are significantly impaired.

It is also important to add Mr. Black has never lived independently, never did the laundry, cooked, cleaned the house, cared for his son or contributed financially to his family or to the maintenance of his residence.

27. His mental retardation manifested during the developmental period as noted by his not developing age appropriate independent living skills before the age of eighteen and as noted by his significantly subaverage performance on the Differential Aptitude Test that was administered when he was in the ninth grade. His performance on the VR&NA on the DAT yielded a percentile score of 1 which indicates 99 out of a 100 individuals scored better than Mr. Black on that test.

28. The Declaration of Ross Alderman, who was trial counsel for Mr. Black, describes behaviors Mr. Black presented at trial that are consistent with an individual who has significant deficits in language skills, memory, verbal reasoning, problem solving skills and significant subaverage intelligence. It is also important to note Mr. Black's deficits and difficulties reported in my declaration would be expected to become more apparent and he more dysfunctional in a stressful situation such as court. Therefore I was not surprised at Mr. Alderman's description of Mr. Black's behavior during his trial.

29. It is important to note the waiver used to obtain permission from Mr. Black to search his premises was written at a 12.0 grade level based on the Flesh-Kincaid Readability Formula. This is a formula that is regularly relied upon by linguists and reading specialists in order to determine the readability of written passages. As I have stated above Mr. Black's reading comprehension level is at the 4.7 grade level. He has significant deficits in his listening comprehension skills and a limited receptive or listening vocabulary. Given the fact that Mr. Black possesses reading and language skills within the fourth to fifth grade level it is probable that he may not have fully comprehended and understood the consequences of giving consent for the purposes for which these forms were intended, or do to his significantly subaverage intelligence that he could rationally make such a decision. This is further supported by the difficulty Mr. Black experienced comprehending and understanding the "happenings" in the court room and the difficulty he had in assisting his counsel which was noted in Mr. Alderman's Declaration. The concept of what constitutional rights are, the meaning of hereinafter, hereby authorize, the concepts of refusal of consent and of search warrants, are abstract. It would take great explanation and questioning to ensure that Mr. Black intelligently and knowingly comprehended the intent and potential harm to him entailed by his waiver of rights as set forth in these forms.

Date 16 November 2001

Daniel H. Grant, Ed.D.

Birth Certificate of Byron Black
Hospital Birth Records of Byron Black
Educational Records of Byron Black
Medical Records of Byron Black
- Baptist Hospital
- Meharry Hospital (General Hospital formerly)
- Metro Health Records
- Riverbend Maximum Security Prison Health Records
- Vanderbilt Clinic & Hospital Records

Incarceration Records of Byron Black
Psychological Records and Transcript of Testimony
- Kenneth Anchor, Ph.D. ABPP Licensed/Board Certified and Clinical Psychologist
- Pamela Auble, Ph.D. Clinical Neuropsychologist
- William Bernet, M.D. Psychiatrist
- Gillian Blair, Ph.D. Licensed Psychologist
- DeDe Wallace Center Competency Records
  - Calvilyn Y. Allmon, M.S.S.W.
  - Bradley Diner, M.D.
  - Leonard Morgan, Jr., Ph.D. Clinical Psychologist
- Pat Jaros, M.A. Licensed Psychological Examiner
- William Kenner, M.D. Psychiatrist
- Patti van Eys, Ph.D. Licensed Clinical Psychologist

Transcript of Competency Hearing Byron Black
Mackey v. State 537 S.W.2nd 704 (TN 1975)
First Degree Murder Statute
Mental Retardation Statute 39-13-203 pages 46-47
Mitigation Statute 39-13-204 page 25
Interview by Libby Moore April 23, 1997 of Julia Mai Black, Finis Black, Dan Black and Alberta Black Crawford.
Declaration of Connie Westfall
Interview of Lynette Childs Black 04/26/97 by Connie Westfall
Declaration of Gaye Nease
Interview of Jackie M. Thomas 09/26/01 by Gaye Nease
Interview of Alberta Black Crawford 03/19/01 by Gaye Nease
Interviews of Lynette Childs Black 03/24/01 & 11/10/01 by Gaye Nease
Interview of Johnny Moore 08/15/01 by Gaye Nease
Interview of Mary Frances Coplan 11/05/01 by Gaye Nease
Interview of Finis Black 03/23/01 by Gaye Nease
Interview of Mary C. Harrison 03/15/01 by Gaye Nease
Interview of Arleta Black Swanson and Karen Black Greer 10/18/01 by Gaye Nease
Interview of Richard Corley 10/11/01 by Gaye Nease
Interviews of Melba Black Corley 03/22/01 & 10/10/01 by Gaye Nease
Interview of Freda Black Whitney 03/17/01 by Gaye Nease

Miranda Warning information
Consent to search information
Transcript of Evidence State of Tennessee v. Walter R. Kendricks, Case # 92-C-1496 pgs 73-152
Medical and Death Information on Julia Mai Black
Declaration of Ross Alderman

BYRON LEWIS BLACK, Petitioner

No. 3:00-0764

vs. Judge Campbell

RICKY BELL, Warden, Respondent

DECLARATION OF STEPHEN GREENSPAN, Ph.D.

Declarant, Dr. Stephen Greenspan, states:

Background and Focus of My Evaluation

I was retained by attorneys Kelley Henry and Michael Passino of the Office of the Federal Public Defender in Nashville to perform various tasks in order to render an opinion concerning the validity of the claim of their client, Byron Lewis Black, to have mental retardation (MR) and, thus, to be exempt from execution in light of the 2002 US Supreme Court ruling in Atkins v. Virginia. I am being compensated at the rate of $200 per hour, plus travel expenses, for my services in this case.

Byron Black is an African-American male who at the present time is within a week or two of his 52nd birthday. He is under a sentence of death for three homicides committed in 1988, when he was 32 years of age. In 2004, a hearing was held before Tennessee Circuit Court judge Walter C. Kurtz to determine whether Mr. Black was exempt from execution under Atkins as well as van Tran v. State (Tennessee, 2001). On May 5, 2004, Judge Kurtz ruled that Mr. Black did not have MR. It is my understanding that my role is to render an opinion, based on my review of documents as well as new data collected by me, concerning whether or not I believe the earlier conclusion (namely that Mr. Black does not have MR) was justified.

The main basis for Judge Kurtz's conclusion, as I understand it, was that Mr. Black did not appear to meet the third—"Developmental Criterion"—prong of the legal definition of MR. This prong requires that "significant deficits in intellectual functioning" (the first prong) and "deficits in adaptive functioning" (the second prong) need to have been present and

noted before the age of 18. With respect to the period before age 18, Judge Kurtz was unconvinced that Mr. Black met either the intellectual or adaptive functioning criteria. With respect to Mr. Black's status as an adult, Judge Kurtz stated that while it appeared that Mr. Black did meet the intellectual functioning prong, he was unconvinced that he met the adaptive functioning prong as an adult.

The main focus of my evaluation is on whether I believe that Mr. Black did or did not meet the intellectual and adaptive functioning criteria during the developmental period. In addition, I will render an opinion as to whether or not Mr. Black meets the adaptive functioning criterion as an adult.

<u>My Qualifications</u>

In the past four years, I have been qualified as an expert on MR and related cognitive disorders in four or five capital proceedings in the states of Arizona, California and Colorado. In addition, I have previously been qualified as an expert on MR in family court proceedings in New Jersey and Connecticut. I am a licensed psychologist in the state of Nebraska and was previously licensed in the state of Tennessee (current status: inactive). In addition to testifying in several so-called "Atkins" proceedings, I have been a consultant (and submitted declarations) in numerous other cases. Although my work thus far has always been at the request of attorneys representing defendants, I have found that a claim of mental retardation was unjustified in approximately half of the cases in which I actually examined a defendant (in contrast to other cases, in which my role was limited to educating the court about the nature of mental retardation and/ or opined about the adequacy of reports by other experts.)

I am a Clinical Professor of Psychiatry at the University of Colorado Health Sciences Center, and Emeritus (retired) Professor of Educational Psychology at the University of Connecticut. I received a Ph.D. in Developmental Psychology from the University of Rochester, and was a Postdoctoral Fellow in Mental Retardation and Developmental Disabilities at the University of California at Los Angeles' Neuro-psychiatric Institute. Before moving to Connecticut, I held academic appointments at the University of Nebraska and at George Peabody College of Vanderbilt University.

I have been elected "Fellow" (a designation given only to the most qualified members) by the Mental Retardation division of the American Psychological Association and by the American Association on Mental Retardation. I was also elected to a term as President of the Academy on Mental Retardation, which is the most prestigious research organization in the field. I have published extensively on MR, with particular emphasis on "adaptive behavior." I am a leading scholar in the MR field, as seen in the most recent diagnostic manual of the American Association on Mental Retardation (AAMR), AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS (10th Edition, 2002) (hereinafter "the 2002 AAMR Manual"), which cited at least twelve publications by me, more than that of any other authority. My book WHAT IS MENTAL RETARDATION, co-edited with H. Switzky (AAMR; 2003; rev. ed. 2006) has, in a short time, become one of the most-quoted reference works in the field of mental retardation and has been described by Yale professor Edward Zigler as "the best book ever written about the definition and diagnosis of mental retardation." In 2008, AAMR recognized my contributions to the field by granting me its highest honor, the Gunnar and Rosemary Dybwad Award for Humanitarianism.

<u>Materials Examined and Activities Performed</u>

Expert reports or declarations examined:

- **Expert disclosure of Eric Engim, PhD dated July 2, 2003**
- **Declaration of Ruben Gur, PhD dated November 15, 2001**
- **Declaration of Daniel Grant, EdD, dated November 16, 2001**
- **Psychological Evaluation by Patti van Eys, PhD, dated March 28, 2001**
- **Report by Albert Globus, MD, dated November 14, 2001**
- **Report by Susan Vaught, PhD, dated May 2003**

Affidavits and Interviews from lay witnesses examined:

- **Affidavit of Arlita Black Swanson (sister), dated January 11, 2003**
- **Affidavit of Freda Black Whitney (sister), dated January 11, 2003**
- **Affidavit of Lynette Childs Black (sister), dated January 15, 2003**

- **Affidavit of Finis Black (uncle),, undated copy**
- **Affidavit of Alberta Black Crawford (sister), dated January 13, 2003**
- **Affidavit of Melba Black Corley (sister), dated January 11, 2003**
- **Affidavit of Mary Craighead (Elementary School Administrator) dated May 8, 2003**
- **Notes of Interviews with most of the above**
- **Notes of interview with Julia Mai Black (mother)**
- **Notes of interview with Renee Granberry, MD (cousin)**
- **Notes of interview with Richard Corley (co-worker and supervisor)**
- **Notes of interview with Rossi Turner (childhood friend)**
- **Notes of interview with Bart Tucker (high school counselor)**
- **Notes of interview with Karen Greer (sister)**

Other Documents examined:

- **Elementary and Secondary School grade reports for Byron Black**
- **Memorandum and order by Judge Walter C. Kurtz, dated may 5, 2004**
- **Independent Living Scale manual and record form (faxed from Dr. Grant)**

Activities Performed:

- **In-person Interview with Al Harris (former high school football coach)**
- **Phone interview with Mary Black (aunt by marriage)**
- **In-person interview and Vineland adaptive behavior assessment with Rossi Turner**
- **In-person joint interview and Vineland adaptive behavior assessment with Melba Black Corley and Freda Black Whitney**
- **In-person interview and assessment of Byron Black**
- **Phone interview with Dr. Daniel Grant (regarding the Independent Living Scale)**

Criteria To Use in Diagnosing Mental Retardation

As described in my widely-cited book WHAT IS MENTAL RETARDATION? (American Association on Mental Retardation, 2006), MR is not always an easy diagnosis to make, especially with individuals in the range of mild MR, where virtually all Atkins applicants are likely to be found. In this brief discussion, I shall discuss the three prongs to be used in diagnosing MR, emphasizing both the letter and the spirit of these prongs.

Virtually all legal definitions of MR used in the US are derived from either or both of the diagnostic manuals published by the American Association on Mental Retardation (AAMR, recently renamed the American Association on Intellectual and Developmental Disabilities) and the American Psychiatric Association, through its "Diagnostic and Statistical Manual" (DSM). The AAMR diagnostic manual has gone through several revisions, with the most recent being the tenth edition (AAMR-10), published in 2002. DSM has also gone through several revisions, with the most recent being the text-revised fourth edition (DSM-4TR), published in 2000. Starting with DSM-3 (1980), the definition of MR contained in each version of DSM has been derived entirely, except for minor wording changes, from the most current AAMR manual. Thus, the definition of MR contained in the 2000 DSM-4TR is derived from the 1992 AAMR-9, while it is highly likely that the definition of MR in the forthcoming DSM-5 will be nearly identical to the definition of MR contained in the 2002 AAMR-10. Therefore any differences in the definitions of MR in DSM and AAMR manuals reflect the fact that the most recent DSM manual pre-dates the most recent AAMR manual, and does not reflect substantive or philosophical differences between the two organizations.

The definitions of MR in the AAMR and DSM manuals contain two parts: a conceptual (abstract) definition, followed by an operational (concrete) definition. While the operational definitions of MR have changed somewhat over the years, the conceptual definitions have remained essentially unchanged since they were first formulated by AAMR over 45 years ago, in the fifth edition of its manual, published in 1961.

The conceptual definition of MR, as reflected in both AAMR and DSM manuals, and in statutes and court opinions in Tennessee and most other states, has three parts: (a) deficits in intellectual functioning, (b)

concurrent deficits in adaptive functioning (also known as adaptive behavior), and (c) evidence of the disorder before the onset of adulthood. As stated above, these conceptual criteria have remained essentially unchanged in various AAMR and DSM editions.

One difference between DSM 4-TR and AAMR-10 is that DSM 4-TR emphasizes "significantly subaverage intellectual functioning" and "concurrent deficits or impairments in present adaptive functioning" while AAMR-10 emphasizes "significant limitations in intellectual functioning and in adaptive behavior".

The Tennessee statute (TCA-39-13-203) defining MR in criminal cases is aligned more closely with DSM 4-TR, in that it emphasizes "deficits" in adaptive functioning rather than "significant deficits". Specifically, the statute reads: "…Mental Retardation means significant subaverage general intellectual functioning …, deficits in adaptive behavior … [and it] must have been manifested during the developmental period…"

This difference between "deficits" and "significant deficits" is more than a semantic distinction, in that it has implications for the operational definition that follows. The difference is that AAMR-10 applies the same criterion (approximately two standard deviations below the mean, or the second percentile of the population) for both intelligence and adaptive behavior, while DSM 4-TR applies the two standard deviation criterion only for intellectual functioning but does not specify any statistical criterion for meeting the second prong of the definition. Thus, "significant deficit" implies a more stringent criterion (typically set at the second percentile of the population) while "deficit" or "impairment" implies a much less stringent criterion, which if it is specified (not the case with DSM 4-TR or the Tennessee statute) is typically set at approximately one standard deviation below the mean (a standard score of 85, which indicates a percentile rank of about the 16th percent of the population).

The operational criteria for diagnosing MR, and the complications involved in applying them in this particular case, are discussed briefly in the following three sub-sections and in the Findings section that follows those.

(1) <u>The Intellectual Criterion</u>. MR is a disorder whose core impairment is in the area of intelligence. This construct is typically measured through one's performance on an individually-administered test of intelligence which results in a full-scale IQ score that locates one's functioning in relation to the mean for the general population. IQ tests are constructed so that the population mean is set at a score of 100, with a standard deviation (an index of statistical variability) of 15. The ceiling for MR is currently established as "approximately two standard deviations below the population mean". The term "approximately" refers mainly to the fact that no test is fully reliable and one should take various factors into account when interpreting a test number. The main thing to take into account is the fact that test scores vary approximately five points around one's "true score". As two standard deviations (2 x 15) equals 30 points, the upper IQ level for meeting the intellectual criterion for MR is 75 (100 minus 30 plus 5 [the reliability index]). In addition, one should take into account factors such as practice effect (possible learning from taking a second test too soon), changes in and adequacy of test norms, and possible malingering.

One of the factors to take into consideration when interpreting IQ scores is what has been termed the "Flynn effect". This term refers to the fact that the overall population has been gaining in performance on IQ tests at a rate of 3 points per decade (0.3 points per year), and this finding is taken into account by test developers when they develop new test editions every few years, in that the norms are toughened. Because a diagnosis of MR could be affected significantly depending on when in a test's cycle a person is tested, the Flynn effect has been used to adjust Full Scale IQ scores using the following formula: (a) subtract the year of the of the test's publication (or, ideally, when the norms were compiled, which typically is two years earlier) from the year a test was administered; (b) multiply this figure by 0.3; (c) subtract this figure from the person's obtained IQ score, with the resulting number being the Flynn-adjusted score.

Thus if someone was tested in 1990 on a test normed in 1978 and received an IQ score of 78, one would multiply 12 (1990-1978) by 0.3, with the resulting number being 3.6. Subtracting 4 points (the rounded sum) from 78, one would receive an adjusted IQ score of 74. A discussion of the Flynn effect in diagnosing MR is contained in a paper by me (Stephen Greenspan, Spring 2006. Issues in the use of the Flynn Effect to adjust IQ scores when

diagnosing MR, which appeared recently in PSYCHOLOGY IN MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, which is the official publication of the mental retardation Division of the American Psychological Association. As indicated in that paper, the Flynn effect adjustment formula when diagnosing MR has been accepted as a legitimate practice by state and Federal trial courts (e.g., Walker v. True, 399 F.3d 315, 322-32, 4th Cir. 2005). It is also beginning to be recognized in various appellate courts. As example, on February 28, 2007 the U.S. Navy-Marine Corps Court of Criminal Appeals stated: "In determining whether an offender meets this definition [of MR], standardized IQ scores scaled by the SEM and the Flynn effect will be considered" (web: NMCCA, code 07).

To summarize, the phrase "approximately two standard deviations below the population mean on a standardized test of intelligence" means that one should not rely rigidly on an IQ score number, but should take into account the adequacy of the test, the nature and meaning of the norms, the context in which the test was administered, ethnic and linguistic factors, etc. This is the main use for "clinical judgment" in diagnosing MR. As noted in the book CLINICAL JUDGMENT (AAMR, 2006) by Robert Schalock and Ruth Luckasson (two of the main authors of AAMR-10), clinical judgment in diagnosing MR is <u>not</u> a matter of relying on intuition or gut feeling (which can be misleading, especially in unqualified clinicians) but rather involves using test scores in a thoughtful and scientifically valid manner. A rigid reliance on a test score, without such thoughtfulness, can and often does result in "false positives" (wrongly concluding someone has MR when he does not) or "false negatives" (wrongly concluding someone does not have MR when he does".)

Although a clinician diagnosing MR should not rely on gut feeling (which can vary from clinician to clinician), the notion of clinical judgment (which is relied on heavily in reaching any diagnosis in the human services, not just MR) requires the clinician to interview and have some personal contact, however brief, with the person he or she is diagnosing. This is a matter of basic professional ethics and practice. In the 2004 state court MR hearing both of the two prosecution psychologists testified that they did not believe Mr. Black to have MR, in spite of their never having interviewed or even laid eyes on him. To me, such a "paper diagnosis" lacks credibility and serves to undermine the validity of their findings.

Because in the past, clinicians often relied rigidly and mindlessly on an IQ number, and particularly failed to rake into account the five-point standard error of test scores, AAMR-10 operationally defined approximately two standard deviations below the mean as "a score below 70-75". This indicates that clinicians or agencies making a determination of MR solely on whether a score is below or above 70 are not engaging in acceptable practice. Raising the ceiling from 70 into 70-75 also reflected a policy decision that past manuals, in their concern to eliminate false positives had defined the MR class too narrowly and some loosening of the criteria needed to be undertaken to avoid the now-widespread problem of false negatives.

DSM 4-TR (which preceded AAMR-10) does not use the 70-75 formula. However, it is stated quite clearly that one should take into account standard error of the test and not just rely rigidly on the obtained score. In addition, both AAMR-10 and DSM 4-TR indicate that there are circumstances where reliance on a single "full-scale" IQ score can be misleading. Specifically, it is well-known that individuals with known brain damage syndromes present a mixed pattern of intellectual competence and incompetence, and summarizing across to obtain a single score can serve to obscure the true nature and extent of an individual's impairment. In such circumstances, one must be especially careful to go beyond just full-scale IQ and look at other (sometimes more qualitative) sources of data where these are available and useful.

Finally, the emphasis in both AAMR-10 and DSM 4-TR is on use of individualized and adequately standardized measures, and not on group administered and/ or brief screening instruments. There are only a few such individualized instruments suitable for diagnosing MR, such as the Wechsler scales (WAIS-3), the Stanford-Binet (SB-5), the Woodcock Johnson cognitive battery, etc. Group measures are not acceptable for ruling MR in or out for several reasons, the two most important being: (a) their much weaker reliability and validity, and (b) lack of information about the circumstances of administration (e.g., the possibility that someone may have received help, not been paying attention, etc).

(2) <u>The Adaptive Behavior Criterion</u>. For over the past 45 years, it has no longer been considered adequate to rely solely on IQ scores in determining whether one has or does not have MR. This is because IQ test scores, particularly in the "mild" level of impairment, do not always translate to other settings, and a diagnosis of MR should indicate a fairly global impairment affecting many areas of functioning. Thus, to qualify for a diagnosis of MR, one should show significant deficits in both IQ and "adaptive behavior". The current conceptualization of adaptive behavior relies on a "tripartite model" of intelligence and adaptive functioning that I developed over 25 years ago, and uses my work as the basis. This model has three parts: (a) "conceptual" adaptive skills (understanding academic processes); (b) "practical" adaptive skills (understanding physical processes) and (c) "social" adaptive skills (understanding people and social processes). In determining if someone meets the Adaptive Behavior criterion, it is necessary to show significant deficits in only one of these three areas (AAMR-10). Sources of data can come, preferably, from formal test scores on rating instruments (such as the Vineland or ABAS) administered to informants, supplemented sometimes by formal test scores on individually administered measures (such as the Street Smarts Survival Questionnaire), and from qualitative information gathered from affidavits, records, and observation by an evaluator.

The 2002 AAMR manual specified that the most important source of information regarding whether an individual meets the adaptive behavior criterion is whether one falls approximately two standard deviations (i.e., a standard score below the 70-75 range) on a standardized rating measure of adaptive behavior such as the Vineland. Two pathways to meeting the AAMR's adaptive behavior criterion were offered: (a) a standard score below 70-75 on an overall (composite) score, or (b) a standard score below 70-75 on at least one of the three adaptive skill areas of conceptual adaptive skills, practical adaptive skills or social adaptive skills.

In establishing the possibility of being above 70-75 in one or even two of the three adaptive skill areas (or having good scores on particular items within sub-average adaptive skill areas), the AAMR wished to emphasize that having mild MR is not incompatible with being able to do many things, such as drive a car, hold a job, be married, have relatively normal language and (even) commit crimes that may require some degree of planning and volition.

In its Users Guide, which is a supplement to the 2002 Manual and written by the same authors, the AAMR indicates that in high stakes assessments, such as an Atkins hearing, the use of retrospective ratings of adaptive behavior is often necessary, and is justified in such cases. In such retrospective ratings, raters are asked to rate an individual not as he is today but as he was at the time when the rater knew him best, living in the community. Retrospective ratings are needed because the current setting (e.g., Death Row) does not provide opportunities to assess success or failure in more typical roles (e.g., worker) or tasks (e.g., operating appliances or dealing with neighbors). Also, MR is a disability that can best be understand as a need for supports in fulfilling such community roles and tasks. Another reason for retrospective assessment of adaptive behavior is because such assessments may not have been carried out during the Developmental period and retrospective assessment helps to establish if the individual had significant impairments during that period.

As already mentioned, one operational difference between AAMR-10 and DSM 4-TR, in terms of adaptive behavior/ functioning, is that DSM uses the words "limitations" and "deficits", implying either no statistical cutting score or, at most, a minus one SD (standard score of 85) criterion. AAMR-10, on the other hand, uses the words "significant deficits", implying minus two SDs (standard score below 870-75), although as mentioned, this can be accomplished either in terms of an overall adaptive composite (quotient) of 70-75 or less, or such a score in only one of the three domains of "social", "practical" or "conceptual" adaptive skills.

In DSM 4-TR, the criterion for adaptive functioning (the term this manual prefers, but which means the same thing as adaptive behavior) is defined as deficits in at least two out of eleven functional areas: communication, self-care, home living, social/ interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. This list is derived from AAMR-9 (1992), which was published eight years before DSM 4-TR. In AAMR-9, the adaptive behavior criterion was established as deficits in 2 out of 10 adaptive skill areas (health and safety were combined into one area) or deficits in overall composite adaptive quotient. In AAMR-10, these ten (11 in DSM 4-TR) skill areas were collapsed into the three adaptive behavior domains (social, practical, conceptual) mentioned above.

In the Tennessee statute (TCA-39-13-203), the adaptive behavior criterion (which is described simply as "deficits in adaptive behavior"), is stated globally and is not broken down into component skills or domains (unlike DSM 4-TR's 11 skills and AAMR-10's 3 domains). Because of that globality, and also because the standard is "deficits" rather than "significant deficits", the Tennessee definition appears to offer considerable flexibility (including the use of non-statistical data) in determining whether or not someone meets the adaptive behavior criterion.

(3) <u>The Developmental Criterion</u>. MR is a term indicating that an individual has serious intellectual impairments which first manifested during what is termed the "developmental period". The developmental period is defined as anytime between birth and 18 (some interpret this as before the end of one's 18th year). The purpose of this criterion is to rule out those who were normal in childhood but whose impairments first manifested in adulthood, such as through a motor vehicle accident. Information about whether one meets the developmental criterion can come from a variety of sources, such as medical or school records and testimony by teachers, family members and peers.

One of the controversies in interpretation of the developmental criterion involves whether or not the individual must have been eligible for a diagnosis of MR before the age of 18. This appears to have been the standard used by Judge Kurtz, but it my respectful view that he was mistaken in making that interpretation. If one takes that tack, then one can use the absence of any IQ score, or adaptive behavior score, before the age of 18 as evidence that would rule out a current diagnosis of MR. In my view, this is an incorrect, and overly rigid, interpretation of the developmental criterion.

A more appropriate, and flexible, interpretation of the developmental criterion is that when a person qualifies as having MR as an adult, one should be able to show that there were precursors or indicators that developed or were evident during the childhood or adolescent period. In other words, a diagnosis of MR would be inappropriate if a child was of average or above average intellectual and adaptive functioning prior to 18 but suddenly showed a steep decline, perhaps because of some injury that developed during adulthood. Outcome-based evidence, such as a child being retained in elementary school (which occurred in this case) and very

low academic achievement (also true in this case) can also be used as evidence that the developmental criterion has been met.

A related issue has to do with evidence of organic (i.e., biological) etiology, such as diagnosed brain damage that is most likely attributable to a developmental process that started early in life. To establish mild MR (which is the sub-category most relevant in this case), one does not have to have evidence of a known etiology, and such evidence is typically lacking. However, such evidence-when it exists—can by itself be used to satisfy the developmental criterion. A good example of this is if there is brain imaging evidence that is highly suggestive of neurological abnormalities indicative of Fetal Alcohol Spectrum Disorder (a major known cause of mild MR). Where such evidence exists (as it does in this case), this could also be used to buttress the conclusion that the third prong for a diagnosis of MR has been met.

<u>My Findings Regarding Whether Byron Black Has MR</u>

It is my conclusion that Byron Black qualifies for a diagnosis of mild MR. My reasons flow from my finding that he meets all three of the definitional prongs. These are discussed under each of the prongs below.

(a)<u>Intellectual Functioning Prong</u>. In adulthood, it is clear that Mr. Black meets the intellectual functioning prong of a diagnosis of MR. In November 2001, Dr. Daniel Grant obtained a full-scale IQ on the Stanford-Binet (SB-4) of 57. On the C-TONI, the best non-verbal IQ test which correlates highly with full-scale IQ, Dr. Grant obtained an IQ score of 64. In October 1993, Dr. Gillian Blair obtained a WAIS-R full-scale IQ score of 73, which is under the 70-75 ceiling. The WAIS-R was normed in 1979 and was, thus, 14 years obsolescent in 1993. A Flynn adjustment would reduce this IQ score by 4 points (0.3 for each year of norm obsolescence), bringing it to 69. In 1997, Dr. Pamela Auble also used the WAIS-R and obtained a full-sale IQ score of 76, which would be reduced another 6 points (for the 18 years of norm obsolescence). In March, 2001, Dr. Patti van Eys administered the more current WAIS-3 and obtained a full-scale IQ of 69, which is under the 70-75 cutting score, and very much in line with the Flynn-corrected scores for the outdated WAIS-R.

Thus, the overwhelming consensus among all of these individualized IQ administrations is that Mr. Black meets the first intellectual functioning) prong for a diagnosis of MR as an adult.

Individualized IQ data for Mr. Black as a child is lacking, for the simple reason that he left high school in the very same year that the federal statute (PL-94-142) that mandated special education was enacted. During the time that Mr. Black was in elementary school, the assumption was that a child would be socially promoted if he was well-behaved (which by all accounts, Mr. Black was), regardless of how little he learned (see Affidavit by Mary Craighead, an administrator at Mr. Black's elementary school). Just the same, Mr. Black was retained in the second grade, even given that tendency to overlook such learning difficulties. Undoubtedly, an individualized IQ test would have been administered had Mr. Black been born ten years later. The absence of such IQ data makes it impossible to know whether he would have qualified for a diagnosis of MR during that period.

Mr. Black's relatively good report cards in elementary school are incongruent with the fact that he was retained and also with his marginal or failing grades in High School. The mystery is cleared up when reading the statements by his fifth and sixth grade teachers (noted in point #17 in the declaration by Dr. Grant). They stated that "I would never allow a student to get a bad grade" (6th grade teacher) and "teachers were liberal in their grading" and a B would be the equivalent of a D at a later time (5th grade teacher). Furthermore, administrator Mary Craighead indicated in her affidavit that the emphasis back then was on helping low-achieving African-American children to feel good about themselves and to experience success in all of their endeavors.

This attitude likely also explains why Mr. Black obtained relatively high scores on group administered IQ tests, as it is very possible, indeed likely, that these tests (which even state experts testified are not appropriate for diagnosing MR) were administered in a non-standard manner that could even have involved teacher assistance.

Even so, it should be noted that the IQ criterion for diagnosing MR was minus 1 SD (full-sale score of 85), during the years 1961 to 1973, and that the 85 that Mr. Black obtained on the Otis-Lennon group IQ test could, thus, have qualified him at that time.

Dr. Grant correctly noted that the best evidence that Mr. Black would have met the MR intellectual functioning criterion in the Developmental period was his very low performance (standard scores of 71 and 67) on the Differential Abilities Test (DAT). Although not specifically termed an IQ test, the DAT correlates very highly with IQ and in the absence of an IQ test can be used as a substitute. Furthermore, Mr. Black's mostly failing grades in High School (where the overprotective stance of his elementary school no loner applied) is probably a better indicator of the depth of his intellectual limitations. Those limitations carry over today into his very low achievement standard score (72) as an adult on the WRAT-III and the Nelson-Denny reading test.

In short, Mr. Black gave clear evidence of intellectual limitations in the developmental period, and there is continuity rather than discontinuity linking his intellectual limitations today and his intellectual limitations as a child.

(b)<u>Adaptive Functioning Prong</u>. The main focus of my evaluation of Byron Black was on his level of adaptive functioning. That is because he appears, as summarized above, to meet the intellectual criterion, but questions were raised by Judge Kurtz regarding whether he met the adaptive functioning criterion either currently, or more specifically, prior to the age of 18.

Adaptive Behavior is most typically evaluated through a rating instrument, such as the ABAS-2 or the Vineland-2 (the two instruments which, along with the SIB, are most widely used in Atkins cases). Using a rating instrument to evaluate the adaptive functioning of someone who has been in prison, especially death row, for a number of years is difficult, if not impossible, for a number of reasons. These reasons include the difficulty in finding raters but more importantly, the absence of opportunities to perform many of the behaviors (such as cooking or using public transportation) that are items on such instruments. Furthermore, the whole purpose underlying the development of these instruments is to assess the supports needed to live successfully in the community, and to face the kinds of challenges and ambiguities one would find in the community. Obviously, death row is a setting that provides few such challenges and ambiguities.

A common mistake that is often made when evaluating the adaptive functioning of someone in prison is to look at his level of adjustment, such as through the presence or absence of discipline write-ups. Some experts, usually those testifying for the state, will look at a defendant who is not a discipline problem and conclude that he could not have MR. The problem with such a conclusion is that adjustment in prison is typically a matter of whether or not one has a cooperative versus hostile personality, and being a cooperative and pleasant person in no way rules out MR. In fact, it is likely the case that people with mild MR, assuming they do not also have mental illness, will tend to be more apt to go along with rules and orders, in part because such a tendency generally served them well in covering up their limitations in work, school and other settings in the community. Furthermore, there are relatively few choices one has to make on death row, and the rules are few, clear and unambiguous. So it is fair to say that people with mild MR are likely to adjust better in a highly structured setting such as death row, and such adjustment in no way can be used to infer how impaired one's adaptive functioning would be in the community.

For these reasons, to assess one's level of current adaptive functioning in prison, one would most likely have to rely on the few "direct" measures of adaptive functioning, such as the "Independent Living Scales" (ILS) used by Dr. Grant, or the "Street Survival Skills Questionnaire" (SSSQ) used by me. Both measures are direct in the sense that one presents everyday problems to a subject (such as filling out a bank deposit slip, or figuring out a paycheck) and seeing whether the subject passes such items. Both the ILS and the SSSQ are mainly measures of the "Practical Adaptive Skills" domain of adaptive functioning, and they have population norms.

Dr. Grant stated in his report that Mr. Black received a standard score in the 70-75 range on three of the five ILS sub-scales that, together, give information about the adaptive behavior domain of "Practical Adaptive Skills". These sub-scales are labeled "managing money" (standard score of 73), "managing home and transportation"(standard score of 73), and "health and safety" (standard score of 72). He was in the normal range on two other ILS sub-scales that, in my view, are unrelated to MR: memory and "social". The reasons why the social sub-scale on the ILS is not diagnostically relevant are two-fold: (a) it mainly taps happiness/ agreeableness which I have already noted is not indicative one way or the other of MR, and (b) it involves solely self-report (rather than problem-

solving) and self-report is notoriously unreliable as a source of diagnostic information in people with MR (who almost universally inflate their description of themselves in order to appear competent (this well-established phenomenon is termed "the cloak of competence". See the classic book of the same name by UCLA Professor Robert Edgerton).

As an independent validation of Dr. Grant's ILS data, I administered the SSSQ, another direct measure of adaptive behavior that mainly taps Practical Adaptive Skills. This test has over 200 items in which a subject is presented with an object or process and then picks the correct one out of four pictures that depicts the object or process. Mr. Grant obtained an overall standardized score (78) which is highly congruent with the 73, 73 and 72 standard scores obtained by Dr. Grant on three relevant sub-scales and certainly meets the "deficit" or "impairment" (minus one SD) standard implicit in DSM 4-TR and in TCA-39-13-203. Also, I found that Mr. Black was below the minus 2 SD standard on three of the nine SSSQ sub-scales and below the minus one SD standard on a fourth.

Before testing Mr. Black on the SSSQ, I administered the Dot Counting Test, which is one of the most used and respected measures of possible malingering on cognitive tasks. This test shows pictures with dots and the task is to count them correctly and in a short period of time. Mr. Black made zero mistakes, and this fact plus the very short average time per picture gave very strong indication that he approached the testing situation in a fully attentive and effortful manner. Thus, I concluded that the SSSQ scores were highly valid and lacked any indication of malingering.

Qualitative data suggesting Mr. Black met the adaptive behavior criterion in adulthood (but prior to conviction in this case) are that he never lived independently (lived with parents, even after marriage), never had a check book, never cooked, never washed his clothes, never did anything suggestive of adult status other than holding a job (which most adults with mild MR do) and driving a car (which many individuals with mild MR do, as suggested in the AAMR criterion of significant impairment in only one out of three domains). Another indication of Mr. Black's impaired adaptive status came from my interview with his high school football coach, Al Harris, who indicated that in over 30 years as a coach, Mr. Black stood out as especially slow. He indicated that although Byron had good physical skills, he could generally not be used on offense for the reason that he could

not learn the plays and was used on offense only when a highly simplified playbook was developed for his use.

Because lack of evidence of adaptive incompetence before the age of 18 appeared to be a major issue in Judge Kurtz's ruing, I conducted a retrospective assessment of Mr. Black's adaptive functioning, using the age 17 years-six months as the target age. I used the most widely-used and respected adaptive behavior rating instrument, the Vineland-2. This instrument is published by Pearson Assessment, the publisher of the most widely respected intelligence test, the Wechsler Scales, and is the publisher that adheres to the highest standards for test development.

The Vineland-2 is filled out by an examiner after each interview with one or more informants. I conducted two such interviews, one with a boyhood friend, Rossi Turner, who knew Mr. Black until he left Nashville to go to school outside the state, and a joint interview with two sisters: Melba Black Corley (older sister) and Freda Black Whitney (younger sister). In the latter interview, I asked for consensus between the two sisters before scoring each item and generally such consensus was obtained. I should note that all three informants hold responsible professional jobs and appear to be people of average or above average intelligence. All three of them indicated they knew Mr. Black very well during the age period (17-6) being rated.

The Vineland-2 labels its domains somewhat differently than does AAMR-10, but they are generally equivalent. The three domains on the Vineland-2 are: "Communication" (which taps basically what AAMR-10 calls "Practical Adaptive Skills"; "Daily Living Skills"(which taps what AAMR-10 calls "Practical Adaptive Skills") and "Socialization" (which taps what AAMR-10 calls "Social Adaptive Skills"). In addition, one sums across all of the items on the scale to obtain a Composite (overall) adaptive quotient.

The standard scores obtained on the Vineland-2 were as follows:
On Communication (Conceptual Adaptive Skills), Mr. Black received a standard score of 75 on the Vineland based on interview with the sisters, while he obtained an identical score on the Vineland based on interview with Mr. Turner.

On Daily Living (Practical Adaptive Skills), Mr. Black received a standard score of 76 on the Vineland based on interview with the sisters, while he obtained a standard score of 71on the Vineland based on interview with Mr. Turner.

On Socialization (Social Adaptive Skills) Mr. Black received a standard score of 63 on the Vineland based on interview with the sisters, while he obtained a standard score of 67 on the Vineland based on interview with Mr. Turner.

On overall Composite Adaptive Behavior, Mr. Black received a standard score of 70 on the Vineland based on interview with the sisters, while he obtained an identical standard score of 70 on the Vineland based on interview with Mr. Turner.

In short, Mr. Black met the AAMR-10 criterion of significant (minus two SD) deficit on adaptive behavior on both sets of Vineland ratings, and he also met the AAMR criterion of significant (70-75 or below) on one out of three domains. Using the somewhat less stringent standards embedded in DSM 4-TR and the Tennessee statute, his qualification is even more clear-cut.

(c)<u>Developmental Prong.</u> As indicted earlier, this prong can be interpreted as either meaning that one must show evidence that could cause a diagnosis of MR to be met prior to 18 (Judge Kurtz's apparent interpretation) or rather only evidence that adult impairments can be traced to indicators of failure, low functioning or causation evident prior to 18 (my interpretation).

Using the looser interpretation, there is no doubt in my mind that Mr. Black satisfies this prong. Although he attended an elementary school considered the most disadvantaged and low-functioning in the district (as reflected in its being chosen for a special Ford Foundation program), Mr. Black was made to repeat second grade, which is a clear indication that he was considered to be very "slow" even in that much slower than average setting. There is also very clear evidence from standardized achievement scores that Mr. Black functioned intellectually at a very low level.

Finally, very powerful evidence that Mr. Black meets the developmental criterion can be found in the very clear-cut evidence obtained by Dr. Gur of structural damage to his brain (abnormal corpus colussum, or mid-brain, seen in MRI image) suggestive of Fetal Alcohol Spectrum Disorder).

Using the more stringent approach to the Developmental criterion apparently used by Judge Kurtz, I believe Mr. Black also meets the developmental criterion, defined in TCA-39-13-203 as "the MR must have been manifested during the developmental period, or by eighteen (18) years if age". The main evidence that could be pointed to as suggesting that Mr. Black was of normal intelligence were the group IQ scores, but these are unreliable tests that cannot be substituted for individualized tests which were not routinely administered (because special education had not yet been federally mandated). Furthermore, the atmosphere at that time was one of helping children such as Byron Black to have feelings of success and it is possible, indeed likely, that he was given assistance with those tests. The Differential Aptitude Test given in 9th grade, and which showed scores under the 70-75 ceiling, along with mostly failing grades in High School are much stronger evidence of the extent of Mr. Black's limitations during the period before he turned 18.

Conclusion

It is my professional opinion, to a high degree of psychological certainty, that Byron Lewis Black meets all three criteria for a diagnosis of mild MR, whether using DSM 4-TR, AAMR-10 or TCA 39-13-203.

FURTHER DECLARANT SAITH NOT.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: March 13, 2008

Stephen Greenspan, Ph.D.

DECLARATION OF MARC J. TASSÉ, PhD, FAAIDD

I, Marc J. Tassé, declare under penalty of perjury and the laws of the United States, the following to be true to the best of my information and belief:

1. My name is Marc J. Tassé, Ph.D., FAAIDD and I am a licensed psychologist in North Carolina (NC #2613). I completed my Ph.D. in research-clinical psychology at the Université du Québec à Montréal. My doctoral dissertation focused on the study of adaptive behavior assessment in individuals with mental retardation. Following my Ph.D., I completed a post-doctoral fellowship in mental retardation and developmental disabilities at The Ohio State University Nisonger Center, University Center for Excellence in Developmental Disabilities Education, Research, and Service. I am also a "Fellow" of the American Association on Intellectual and Developmental Disabilities.

   I am an Associate Professor in the Department of Child and Family Studies at the University of South Florida (USF). I am also the Associate Director of the USF Florida Center for Inclusive Communities (FCIC). The USF FCIC is a federally funded University Center for Excellence in Developmental Disabilities. Our Mission is three-fold: (1) provide training to undergraduate, graduate and post-graduate students in the field of mental retardation and related developmental disabilities (MR/DD), (2) offer services and state-wide technical assistance to individuals with MR/DD across the age span and to agencies providing supports and services to these individuals, and (3) conduct research in the field of MR/DD.

   I've worked with individuals with mental retardation for the past 20 years. I have provided direct clinical services as well as supervised graduate and post-graduate psychology students in providing direct services to individuals with MR/DD. I've been involved in hundreds of psychological assessments and eligibility/diagnostic evaluations of mental retardation involving children, adolescents, and adults. I have worked extensively over the past 20 years directly with individuals with mental retardation of all ages. I have provided consultative services and technical assistance to families, service providers, and state MR/DD agencies. Over the past 10 years, I have also been involved in providing individual therapy to adolescents and adults with mental retardation and co-occurring psychiatric disorders or complex behavior problems.

   In the past (i.e., 1985 to 1993), I also worked as a behavior specialist (Douglas Hospital; Montreal, Canada), providing behavior programming and developing intervention plans for children and adults with mental retardation and co-occurring behavior problems or psychiatric disorders.

   In addition to my clinical work, I actively conduct research in the field of mental retardation. I have published over 65 book chapters, peer-reviewed journal articles, and monographs in the area of mental retardation or developmental disabilities. I have given over 100 presentations, workshops, or seminars at local, state/provincial, national, and international scientific/professional meetings in the field of mental retardation.

I am a co-author on the American Association on Intellectual and Developmental Disabilities (AAIDD; formerly known as the American Association on Mental Retardation) 2002[1] Manual that defines mental retardation and the recently published AAIDD User's Guide (Schalock et al., 2007)[2]. I have also worked on the development of standardized tests in the field of mental retardation. One such assessment instrument was the *Supports Intensity Scale* (SIS). The *SIS* is a standardized measure of individual support needs for adolescents and adults with mental retardation. I have also worked on the development and refinement of the Quebec Adaptive Behavior Scale, as well as other standardized assessment instruments in the area of measuring problem behavior and psychopathology in individuals with mental retardation. I currently Chair the American Association on Intellectual and Developmental Disabilities' *ad hoc* committee on the development of the Diagnostic Adaptive Behavior Scale (DABS). The DABS has been in development for approximately three years and should result in a standardized test of adaptive behavior that will focus on diagnosing the presence of "significant adaptive behavior deficits" for the purpose of diagnosing mental retardation. I was recently awarded the "Service" award by the American Association on Intellectual and Developmental Disabilities for my work with individuals with mental retardation and complex behavior support needs.

I am an active member of the following professional associations:

- American Association on Intellectual and Developmental Disabilities (Fellow)
- American Psychological Association [member of Divisions: 5 (Assessment), 33 (I&DD), 41 (Psychology & Law Society)]
- International Association for Behavior Analysis
- National Association for the Dually Diagnosed (MR/MI)
- North Carolina Psychology Board of Psychologists (License #2613)

I am an *ad hoc* reviewer for the following professional journals:

- American Journal on Mental Retardation
- Intellectual and Developmental Disabilities
- International Clinical Psychopharmacology
- Journal of Autism and Developmental Disorders
- Journal of Intellectual Disability Research
- Research in Developmental Disabilities
- Revue francophone de la déficience intellectuelle

2. I was asked by Attorneys Kelley Henry and Michael Passino, on behalf of their client Mr. Byron Black (D.O.B.: 3/23/1956), to do the following:

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[1] Luckasson, R., Borthwick-Duffy, S., Buntinx, W. H. E., Coulter, D. L., Craig, E. M., Reeve, A., Schalock, R. L., Snell, M. E., Spitalnik, D. M., Spreat, S., & Tassé, M. J. (2002). *Mental retardation: Definition, classification, and system of supports.* Washington, DC: American Association on Mental Retardation.

[2] Schalock, R. L., Buntinx, W. H. E., Borthwick-Duffy, S., Luckasson, R., Snell, M. E., Tassé, M. J., & Wehmeyer, M. L. (2007). *User's Guide Mental Retardation: Definition, Classification, and Systems of Supports, 10th Edition. Applications for Clinicians, Educators, Disability Program Managers, and Policy Makers.* Washington, DC: American Association on Intellectual and Developmental Disabilities.

a. Discuss the nature and common characteristics of mental retardation (MR) and the criteria and methods used in making a diagnosis of MR.

b. Review available reports by other experts in this case and evaluate their adequacy in relation to the criteria and methods discussed in (a).

c. Make recommendations to the attorneys regarding what additional assessment information might be needed to further establish the presence or absence of a diagnosis of mental retardation in this case.

d. Read the Memorandum and Order written by Judge Walter C. Kurtz of the Fifth Circuit Court for Davidson County, Tennessee on May 5th, 2004. Provide comments on aspects related to the diagnosis of mental retardation contained in this Order that might shed additional light in this case.

3. In undertaking the tasks described above, I examined the following relevant case materials relating to Mr. Byron Black:
   - Psychological/Psychiatric Evaluation/Opinion: Ms. Jaros and Drs. Anchor, Auble, Blair, van Eys, Vaught, Grant, Engum, Gur, Bernet.
   - Declaration of Dr. Globus
   - Deposition of Dr. Gur
   - Declaration of Dr. Greenspan
   - Social History and Life Time Line
   - Judge Kurtz's Memorandum and Order in the Fifth Circuit Court for Davidson County, TN (5/5/2004)
   - Post-conviction Hearing Transcripts 1989
   - Post-conviction Hearing Transcripts 2004

4. DEFINITION OF MENTAL RETARDATION

Van Tran v. State determined the mental retardation definition to be applied in Tennessee. Van Tran v. State defined mental retardation as follows: ***"significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) deficits in adaptive behavior; and (3) mental retardation manifested during the developmental period or by eighteen (18) years of age."***

The definition of mental retardation found in the Tennessee Code is consistent with the definitions endorsed by the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR; American Psychiatric Association, 2000)[3] and the American Association on Intellectual and Developmental Disabilities (AAIDD; Luckasson et al., 2002).

The **DSM-IV-TR** defines mental retardation as follows: (a) significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test; (b) concurrent deficits or impairments in present adaptive functioning in at least two of the

[3] American Psychiatric Association (2000). *Diagnostic and Statistical Manual of Mental Disorders (4th Edition, Text Revision; DSM-IV-TR)*. Washington, DC: Author.

following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety; and (c) onset is before age 18 years.

The **American Association on Intellectual and Developmental Disabilities'** (AAIDD; formerly known as the American Association on Mental Retardation) defines mental retardation as: "***a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. Mental retardation originates before age 18.***" The AAIDD operationally defined "significant limitations" to be at least two standard deviations below the population mean (i.e., typically a standard score of 70 when the mean = 100 and the standard deviation = 15). The adaptive behavior prong of this definition is met if the individual has significant limitations in (1) conceptual, practical, or social skills or (2) the overall composite (e.g., full-scale) score of adaptive behavior.

Intellectual Functioning

The assessment of intellectual functioning is a task that requires specialized professional training. For the purpose of diagnosing mental retardation, AAIDD stipulates that IQ assessment data should be obtained and interpreted by an examiner experienced with people who have mental retardation and who is qualified in terms of professional and state regulations as well as publisher's guidelines for conducting thorough and valid evaluations of intellectual functioning.

The determination that an individual's intellectual functioning is "significantly" sub-average fulfills the first requirement for being diagnosed with mental retardation. "Significant sub-average intellectual functioning" is defined as a performance that is represented by a full-scale IQ score of approximately 70 or less, while considering all sources of test error. A standard score or intelligence quotient of "70" represents a population-referenced performance that is two standard deviations below the population mean (i.e., population average score = 100, standard deviation = 15). Significant deficits in intellectual functioning are best determined using an individually administered standardized test of intelligence. The full scale or composite IQ is generally regarded as the best estimate of an individual's general intellectual functioning (Luckasson et al., 2002).

Assessment of intellectual functioning must be done using an individually administered comprehensive standardized test of intelligence. The results obtained from group administered tests of intelligence or abbreviated measures of intellectual functioning lack the sufficient reliability and psychometric robustness to be used for the purpose of making a diagnosis of mental retardation. These instruments serve a screening purpose but should not be relied upon when making or refuting a diagnosis of mental retardation.

The Wechsler Adult Intelligence Scale – Third Edition, when used in accordance to best practice, is considered by many as the gold standard for measuring an adult individual's intellectual functioning. Other well accepted individually administered full-scale measures of intellectual functioning for adults include: Stanford-Binet Intelligence Scale-Fifth Edition, Woodcock-Johnson III Test of Cognitive Abilities, and Kaufman Adolescent and Adult Intelligence Test.

Established practice in intellectual assessment informs us that there are several important factors to consider when interpreting the IQ score. The IQ score obtained on any standardized IQ test is an estimate of the individual's "true" intelligence. This estimate is not without error. In addition to the standard error of measurement of the test used, it is important to consider the Flynn effect and possible practice effect when interpreting IQ results (see AAIDD's User's Guide).

The AAIDD User's Guide proposed a number of guidelines to ensure proper assessment of intellectual functioning for the purpose of diagnosing mental retardation. Chief among these elements are the following:

- "*intellectual functioning is best understood as being composed of a general factor ('g')* [i.e., full-scale IQ score].
- *appropriate standardized measures should reflect the individual's social, linguistic, and cultural background and that proper adaptations must be made for any motor or sensory limitations.*
- *psychometric instruments that assess intelligence perform best when used with people who score within two to three standard deviations of the mean and that extreme scores are more subject to measurement error.*
- *assessment of intellectual functioning through the reliance on intelligence tests is fraught with the potential for misuse if consideration is not given to possible errors in measurement.*" (Schalock et al., 2007; page 12).

Sources of Error for the Test Administered

The AAIDD and DSM-IV-TR agree on the importance of taking into consideration all factors contributing error to the obtained IQ test results when interpreting someone's intellectual functioning for the purpose of making a diagnosis of mental retardation. The AAIDD (Luckasson et al., 2002) stipulated the following: *"Although far from perfect, intellectual functioning is still best represented by IQ scores when obtained from appropriate assessment instruments. The criterion for diagnosis is approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instrument's strengths and weaknesses."* (page 14). Furthermore, according to the DSM-IV-TR (American Psychiatric Association, 2000), **the IQ prong of mental retardation is met if an individual's full-scale IQ score falls between 70 – 75 (roughly accounting for a 95% confidence interval resulting from standard error of measurement on most IQ tests) or lower (DSM-IV-TR; see pages 41 – 42)**. In addition to the standard error of measurement, sources of error surrounding the obtained IQ score may include error that is attributable to the Flynn effect and/or practice effect, and thus the interpretation of the results should account for these factors (see Schalock et al., 2007).

Flynn Effect

The "Flynn effect" is a well-established scientific fact that IQ scores on standardized tests for the American population have been steadily increasing for more than 70 years. Dr. James R. Flynn is a well-respected researcher who studied this rise in IQ scores. Flynn's research uncovered that IQ scores have been increasing from one generation to the next in the United States, as well as in all other developed countries for which we have IQ data. This increase in IQ scores over time was dubbed the "Flynn effect" by Hernstein and Murray, the authors of the book *The Bell Curve*. Some have advanced plausible explanations for this increase in IQ scores that have included: improved nutrition, trend towards smaller families, better education, etc. The

only **theoretical** aspect to the Flynn effect is the "why." The causal factors driving this trend have not yet been scientifically established. Most likely, it is an interaction of multiple factors.

Flynn reported a greater increase in the Wechsler Performance IQ, which is more heavily loaded on fluid abilities, than on the Wechsler Verbal IQs. According to Flynn's research, the average gain in global IQ scores since 1932 is approximately 0.3 points per year. Because of this, IQ tests need to be renormed periodically to recalibrate the scores. In cases where a test with aging norms is used, a correction for the obsolescence of the norms is warranted (e.g., 0.3 points per year since norms were compiled). I will use the WAIS-III to illustrate this point. The population mean on the WAIS-III was set at 100 when it was originally normed in 1995 (test published in 1997). Hence, if the WAIS-III was used to assess an individual's IQ in 2005, the individual's score should be corrected downward as follows: 0.3 points x 10 = 3 points ("10" being the number of years elapsed since the norming of the WAIS-III). After taking the Flynn effect into consideration it is still necessary to account for the test's standard error of measurement when interpreting an individual's test results.

The AAIDD *User's Guide* (Schalock et al., 2007) emphasizes the importance of considering the Flynn effect when interpreting an individual's IQ score in making a diagnosis of mental retardation.

The so-called "Flynn effect" is NOT a theory. It is a well-established scientific fact that the US population is gaining an average of 3 full-scale IQ points per decade. The Flynn effect has been consistently documented over the past 60-plus years. There is NO published scientific evidence currently existing that casts any doubt over it relevance with respect to ongoing IQ gains in the American population. In fact, a recent study published in the *American Psychologist* (a top-rated peer-reviewed scientific journal published by the American Psychological Association), reported on data supporting the effects of the Flynn effect specifically on individuals with mental retardation (see Kanaya, Scullin, & Ceci, 2003[4]). The passage of time since an IQ test was normed is directly related to that test's obsolescence. More time has passed since the norming of an IQ test the greater will be the artificial inflation of the obtained IQ scores on that test. This obsolescence of the test's norms contributes to the error that surrounds the obtained IQ score and we must take this source of error into account when interpreting an individual's obtained IQ score.

National standards are crucial in any field to ensure a uniform and consistent application of best practice. National standards are based on a foundation of empirical knowledge, science, and peer-review and are meant to serve as a guide for proper practice in that respective field. Professional practice should be consistent with established national guidelines, when such standards are available. The AAIDD User's Guide published by the former American Association on Mental Retardation (Schalock et al., 2007) represents the accepted national standard on the proper diagnosis of mental retardation. These national standards clearly indicate that when trying to establish a diagnosis of mental retardation, with respect to the assessment of general intellectual functioning, it is necessary to correct any obtained IQ score for all sources of error associated with the test used. These professional guidelines specifically mention correcting for the obsolescence of a test's norms (i.e., "Flynn effect").

[4] Kanaya, T., Scullin, M. H., & Ceci, S. J. (2003). The Flynn effect and U.S. policies: The impact of rising IQ scores on American society via mental retardation diagnoses. *American Psychologist, 58,* 778 – 790.

Adaptive Behavior

Van Tran defines adaptive behavior as referring to "*how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, socio-cultural background, and community setting.*" In the AAIDD 2002 manual, adaptive behavior is defined as an individual's conceptual, social, and practical adaptive skills (see Luckasson et al., 2002). The AAIDD recommended that significant limitations in adaptive behavior be established through the use of standardized measures that have been normed on the general population. These three adaptive skills domains are defined as follows:

Conceptual Skills: defined by communication skills, functional academics, and self-direction.

Social Skills: defined by such abilities as interpersonal skills, social responsibility, following rules, and self-esteem. Higher order social skills have also been identified to include such elements as gullibility, naiveté, and avoiding victimization.

Practical Skills: consist of basic personal care skills such as hygiene, domestic skills, health and safety as well as work skills.

The AAIDD specified: "*The examination of adaptive skills must be documented within the context of community environments typical of the individual's age peers and culture*" (page 78). Hence, assessing an individual's adaptive behavior in an institutional context is inappropriate for the purpose of determining if an individual has mental retardation. Assessing if someone is well adapted in an institutional setting (e.g., a prison) might be useful for determining if additional structure is needed or for planning interventions to facilitate integration, but has no relevance in determining how an individual's adaptive functioning compares to the general population for the purpose of establishing a diagnosis of mental retardation.

Another important aspect of adaptive behavior assessment is the measure of the individual's "typical performance" and not best or assumed ability (Luckasson et al., 2002). Thus, when assessing the individual's adaptive behavior, we assess what the person **typically does** and not what he/she can do or could do. This is a critical distinction with the assessment of intellectual functioning, where we assess best or maximal performance.

The AAIDD 2002 definition reminded us of an important understanding about mental retardation. Namely, that within an individual with mental retardation, significant impairments often co-exist with strengths. Individuals with mild mental retardation are capable of doing many things. Most of these individuals will have strengths and areas of competence that might surprise many laypersons or even professionals who have limited experience in working with individuals with mild mental retardation. In the process of diagnosing mental retardation, the finding of significant limitations in conceptual, social, or practical adaptive skills is not outweighed by the presence of some ability on the individual's part. These discrete abilities are not uncommon in individuals with mild mental retardation and should not be viewed as discounting a diagnosis of mental retardation.

Age of Onset and Etiology

With respect to the possible cause of mental retardation, more than 40% of all cases of mild mental retardation are of undetermined etiology. The cause of mental retardation is often likely related to a combination of risk factors. These might include, but are not limited to, pre-natal maternal malnutrition, in uterine insult or trauma, genetic disorders, fetal alcohol spectrum disorder, pre-natal and post-natal exposure to toxins, childhood malnutrition, neglect, abuse, and/or impoverished and under-stimulating home environment.

There are several hundreds of disorders associated with mental retardation. Genetic disorders, such as Down syndrome, which have a well known phenotype (including almond shaped eyes, short stature, round face, etc) is more often associated with moderate to profound level of mental retardation. Again, the cause for more than 40% of cases of mild mental retardation remains unknown. AAIDD has listed numerous risk factors that might explain mental retardation, these risk factors may be of prenatal origin, perinatal, and/or postnatal (see table below).

Mental Retardation is a functional diagnosis, based on evidence regarding someone's functioning in academic and real-world settings. As such, knowledge of the cause of someone's mental retardation is not necessary in order to make a diagnosis, and in the majority of cases (especially of mild MR) one cannot say for certain what caused the condition. Nevertheless, knowledge of a possible or likely cause is a valuable thing to have, especially in establishing whether someone meets the developmental criterion. In the case of mild MR, especially in individuals from impoverished and disadvantaged backgrounds, it is often the case that environmental deprivation and parental under-stimulation in infancy and early childhood are contributing risk factors. However, one can be from such a background and still have contributing biological factors such as pre-maturity, low birth weight, prenatal infection or malnutrition, mother's alcohol consumption during pregnancy, birth trauma, chromosomal syndromes, etc. The key in diagnosing individuals from disadvantaged backgrounds is to see if an individual is viewed within his own family and community as unusually impaired, even when compared to other individuals from the same background. It also helps in making a diagnosis if one can also point to biological risk factors, such as severe head injuries or maternal alcohol consumption during pregnancy, even though evidence of a known cause is not necessary to make a diagnosis of mental retardation.

Table 1. Table of Risk Factors for Mental Retardation (see Luckasson et al., 2002; page 127)

	Biomedical	Social	Behavioral	Educational
Prenatal	Chromosomal Dx Single-gene Dx Syndromes Cerebral dysgensis Maternal illnesses Parental age	Poverty Maternal malnutrition Domestic violence Lack of access to prenatal care	Parental drug use Parental alcohol use Parental smoking Parental immaturity	Parental cognitive disability without supports Lack of preparation for parenthood
Perinatal	Prematurity Birth injury Nenatal Dx	Lack of access to birth care	Parental rejection of caretaking Parental abandon-ment of child	Lack of medical referral for inter-vention services at discharge

Postnatal	Traumatic brain injury Malnutrition Meningoencephalitis Seizure Dx Degenerative Dx	Impaired child-caregiver Lack of adequate stimulation Family poverty Chronic illness in the family Institutionalization	Child abuse and neglect Domestic violence Inadequate safety measures Social deprivation Difficult child behaviors	Impaired parenting Delayed diagnosis Inadequate early intervention services Inadequate special-education services Inadequate family Support

Dx = Disorders

5. MYTHS AND MISCONCEPTIONS REGARDING MENTAL RETARDATION

For most people with mental retardation, there is not a "mentally retarded" look. There are no distinctive features or personality types to mental retardation. It is important to remember the sage words of Ruth Luckasson (1990): "*Ninety percent of persons with mental retardation don't drool, don't stumble, aren't mute. They have significantly impaired intellectual ability, but often don't have any physical stigmata that indicate mental retardation. They won't 'look' a certain way.*" It is dangerously naïve to think that one can "tell" if someone is mentally retarded, or not mentally retarded, by looking or talking to them. Less than 10% of all cases of mental retardation are attributable to a condition such as Down syndrome. The vast majority (approximately 80%) of individuals with mental retardation function in the mild range of intellectual and adaptive behavior deficits.

The DSM-IV-TR notes: "*No specific personality and behavioral features are uniquely associated with mental retardation. Some individuals with mental retardation are passive, placid, and dependent, whereas others can be aggressive and impulsive*" (see page 44 – 45). Additionally, mental retardation can co-exist with any number of other psychiatric disorders or personality traits. The DSM-IV-TR is quite explicit on page 47 when it states: "*The diagnostic criteria for mental retardation do not include an exclusion criterion; therefore, the diagnosis should be made whenever the diagnostic criteria are met, regardless of and in addition to the presence of another disorder.*" Thus, for example, an individual may have both mental retardation and conduct disorder as a child or mental retardation and antisocial personality disorder as an adult. The presence of a co-existing mental disorder should not summarily be used to deny the individual's functioning if it meets criteria for a diagnosis of mental retardation.

6. CLINICAL JUDGMENT

The American Association on Intellectual and Developmental Disabilities (Luckasson et al., 2002) has recognized the important role of the professional's experience and knowledge of mental retardation and individuals with this condition, in diagnosing mental retardation. The AAIDD has defined clinical judgment as it relates to diagnosing mental retardation as follows:

> *"Clinical judgment is a special type of judgment rooted in a high level of clinical expertise and experience; it emerges directly from extensive data. It is based on the clinician's explicit training, direct experience with people who have mental retardation, and familiarity with the person and the person's environments"* (page 95).

AAIDD further clarified clinical judgment by stating:

> "… *[clinical judgment] should be viewed as a tool of clinicians with training and expertise in mental retardation and ongoing experiences with -- and observations of -- people with mental retardation and their families*" (page 95).

The professional must use his or her clinical judgment throughout the diagnostic process. The experience and clinical judgment in mental retardation informs the professional to take well-established phenomena such as Flynn effect, practice effect, and cloak of competence into consideration when evaluating the data used in making a diagnosis of mental retardation (see AAIDD User's Guide; Schalock et al., 2007).

When diagnosing other mental health disorders such as schizophrenia, clinical judgment plays a central role. In such a process, the clinician weighs various bits of evidence and then judges if an individual fits the behavioral criteria for a particular disorder. In the case of MR, however, the role of clinical judgment has very little room to operate, and is used mainly to see if test scores can be depended on reliably. There are two reasons for this: (a) many psychologists and psychiatrists have little or no training or experience in this area, and their clinical judgment about MR may be untrustworthy; and (b) because people with mild MR can have areas of relatively normal functioning, and not express obvious signs of sub-normality, clinical judgment can be very misleading, especially when it is used to rule out a diagnosis of MR. Thus, while clinical judgment has a role in diagnosing MR, it does not play as prominent a role as in other disorders (in which test scores have little or no diagnostic role) and clinical judgment should not be used as an independent diagnostic criterion separate from its use in commenting on and interpreting IQ and adaptive behavior test scores.

7. Review of Expert Reports Regarding Mental Retardation

The records indicate that Mr. Black was never administered an individual standardized test of intellectual functioning prior to his incarceration. All IQ scores reported in his school records were obtained from group administered tests of intelligence. These measures are not well normed nor possess the psychometric properties necessary to be used in diagnostic decision-making. For this reason, these results cannot be relied upon to confirm or refute prong 1 of a diagnosis of mental retardation.

Since his incarceration, Mr. Black has been evaluated on several occasions using individually administered tests of intellectual functioning. In this section I focus my comments on the psychological evaluations and reports that centered on the question of mental retardation.

Kenneth Anchor, Ph.D. Psychological Evaluation dated 1/17/1989 – Mr. Black was 32 years old.

Dr. Anchor interviewed and conducted some individual assessments with Mr. Black. Dr. Anchor administered the Shipley-Hartford Institute of Living Scale – Revised Norms and obtained an IQ score of 76. It should be noted that the Shipley-Hartford Institute of Living Scale is a short self-answered paper-pencil questionnaire that provides an abbreviated estimate of intellectual functioning and should not be relied upon for the purpose of confirming or refuting a diagnosis of mental retardation (see AAIDD; Luckasson et al., 2002).

Gillian Blair, Ph.D. Psychological Report dated 10/7/1993 – Mr. Black was 37 years old.

Dr. Blair administered the WAIS-R during an evaluation conducted at the Riverbend Maximum Security Institution. During this evaluation, Mr. Black obtained the following scores on the WAIS-R: VIQ = 73, PIQ = 75, FSIQ = 73. Dr. Blair also administered to Mr. Black a series of other tests that measured memory and personality (e.g., Rorchach, MMPI-2, PAI, Sentence completion test, WMS-R); however, she did not attempt to assess his adaptive behavior.

Pamela Auble, Ph.D. Psychological Report dated 3/5/1997 – Mr. Black was almost 41 years old.

Dr. Auble administered a battery of tests of personality, malingering, attention, memory, and intellectual functioning. Dr. Auble administered the WAIS-R (an individually administered test of intellectual functioning) to Mr. Black and obtained the following scores: VIQ = 76, PIQ = 77, FSIQ = 76. There was no assessment attempted of Mr. Black's academic skills or adaptive behavior.

Patti van Eys, Ph.D. Psychological Report dated 3/28/2001 – Mr. Black was 45 years old.

Dr. van Eys was retained to assess Mr. Black's intellectual functioning. Dr. van Eys administered the WAIS-III on which Mr. Black obtained a VIQ = 67, PIQ = 79, FSIQ = 69. No other assessment instruments were completed at this time.

Daniel H. Grant, Ph.D. Affidavit of Testing Conducted on 10/15 & 10/16/2001 – Mr. Black was 45 years old.

Dr. Grant administered a battery of assessment instruments to Mr. Black at Riverbend Maximum Security Institution. During this psychological evaluation, Dr. Grant assessed Mr. Black using the Stanford-Binet Intelligence Scale – Fourth Edition (SB-FE), Wide Range Achievement Test – 3rd Edition (WRAT-3), Nelson-Denny Reading Comprehension Test, among other tests.

Mr. Black's academic skills as measured on the WRAT-3 and Nelson-Denny Reading Comprehension Test yielded grade-equivalents of 4th grade for both arithmetic and reading comprehension. His performance on the SB-FE yielded the following scores: Verbal Reasoning = 56, Abstract Reasoning = 76, Quantitative Reasoning = 61, Short-term Memory = 56, and Composite Score = 57. The SB-FE Composite Score is comparable to the WAIS-III FSIQ. It should be noted, however, that the mean and standard deviation on the SB-FE are 100 and 16, respectively. Thus, a Composite Score = 68 would represent a score that is 2 standard deviations below the population mean.

Dr. Grant also administered the CTONI, a test of non-verbal intelligence. I will not review Mr. Black's results on this instrument since it is a narrow band test of intelligence and not as reliable as the SB:FE and should be used only when more robust and global measures cannot be used, according to AAIDD 2002 (Luckasson et al., 2002), which was not the case here.

Susan R. Vaught, Ph.D. Review of Existing Psychological Evaluation Data and Professional Opinion Regarding the Question of Mental Retardation dated May 2003 – Mr. Black was 45 years old.

Dr. Vaught was asked to conduct a file review of Mr. Black's previous psychological evaluations and extensive records. Following this review of previously administered intellectual evaluations, Dr. Vaught concluded that Mr. Black met prong 1 of the diagnostic criteria for mental retardation.

It would appear that Dr. Vaught never met with, nor interviewed, Mr. Black or anyone else who may have had knowledge about his adaptive behavior or developmental/social history. Dr. Vaught's conclusions regarding Mr. Black's adaptive behavior appear to be based entirely on a paper review. There is no evidence in Dr. Vaught's report either that she requested any specific or additional standardized testing be done to assist her in reaching her clinical opinion in this matter. It should be noted that Dr. Vaught relied on the AAIDD (Luckasson et al., 2002) Manual in making her determination of prong 2 "deficits in adaptive behavior"; however, AAIDD (2002) clearly specifies that "*for the diagnosis of mental retardation, significant limitations in adaptive behavior should be established through the use of standardized measures normed on the general population, including people with disabilities and people without disabilities. On these standardized measures, significant limitations in adaptive behavior are operationally defined as performance that is at least two standard deviations below the mean of either (a) one of the following three types of adaptive skills: conceptual, social, or practical, or (b) an overall score on a standardized measure of conceptual, social, and practical skills*" (see Luckasson et al., p. 76).

Eric S. Engum, Ph.D., J.D. Review of Existing Psychological Evaluation Data and Professional Opinion Regarding the Question of Mild Mental Retardation dated 7/2/2003 – Mr. Black was 45 years old.

Dr. Engum was asked to review the data from existing psychological evaluations and case records and opine regarding whether or not Mr. Black has mental retardation. Dr. Engum neither assessed nor interviewed Mr. Black before formulating his clinical opinion and completing his written report. Dr. Engum reviewed Dr. van Eys' psychological evaluation and asserted that Mr. Black had to be malingering during Dr. van Eys' administration of the WAIS-III because he obtained a scaled score of 4 on Digit Span and scaled score of 2 on Arithmetic. Dr. Engum's inference is solely based upon the fact that Mr. Black's scaled scores on these two subtests on the WAIS-III administration done in 2001 by Dr. van Eys were lower that Mr. Black's scores obtained on the previously administered WAIS-R in 1997 by Dr. Auble. First, one must be very cautious comparing results on different versions of an intelligence test. In 1997 Mr. Black was administered the WAIS-R and in 2001 he was administered the WAIS-III. These are entirely different versions of the WAIS and research has shown that individuals obtain consistently lower IQ scores when tested on a more recent version of the same IQ test (see above – the Flynn effect). This difference in scaled scores should not be assumed to be an indication of malingering on Mr. Black's part.

I disagree with Dr. Engum's assertion that one cannot or should not correct obtained IQ scores for error of measurement. Research over the past several decades has clearly shown that IQ scores are rising and that an individual score artificially higher on a test with aging norms than he would on a test with more recent norms (see Table 1 & Flynn effect above). This is in fact recommended by

Mr. Byron's Previous Results on IQ Testing

Flynn effect: IQ inflation = 0.3/year

TEST USED	YEAR NORMED	YEAR ADMIN.	# YEARS ELAPSED		IQ SCORES OBTAINED	IQ INFLATION	IQ SCORES CORRECTED FOR FLYNN EFFECT	TEST STANDARD ERROR OF MEAUREMENT IQ < 70 – 75 PRONG 1 MET?
WAIS-R	1979	1993	14	VIQ	73			
		Age: 37 y.o.		PIQ	75			
Dr. Blair				FSIQ	**73**	4.2	**69**	**YES**
WAIS-R	1979	1997	18	VIQ	76			
		Age: 41 y.o.		PIQ	77			
Dr. Auble				FSIQ	**76**	5.4	**71**	**YES**
WAIS-III	1995	2001	6	VIQ	67			
		Age: 45 y.o.		PIQ	79			
Dr. van Eys				FSIQ	**69**	1.8	**67**	**YES**
SB-FE	1986	2001	15	VR	56			
		Age: 45 y.o.		AR	76			
				QR	61			
				Mem	56			
Dr. Grant				Comp	**57**	4.5	**53**	**YES**

the AAIDD when interpreting IQ results for the purpose of making a diagnosis of mental retardation. It should be noted that when Mr. Black was administered the WAIS-R in 1993 by Dr. Blair, the WAIS-R had been normed almost 15 years earlier, thus resulting in an inflation of approximately 4 points on the WAIS-R Full Scale IQ. This is a significant source of discrepancy between the measured IQ (obtained on the WAIS-R) and the individual's true IQ.

I respectfully disagree with Dr. Engum's conclusion that there is no evidence indicating that Mr. Black has significant subaverage intellectual functioning. Table 1 clearly indicates that Mr. Black meets prong 1 of the definition of mental retardation.

8. After reviewing the existing psychological evaluations and reports available, I recommended to Mr. Black's attorneys that they hire a professional to conduct a thorough assessment of Mr. Black's adaptive behavior. This adaptive behavior assessment should be conducted by a professional experienced in the area of mental retardation and adaptive behavior assessment. Since Mr. Black has been incarcerated for numerous years and that a contemporary assessment of his current adaptive behavior is impossible, the best available method would be to interview relatives and other individuals who knew him well prior to his incarceration and possibly prior to age 18 years. Retrospective assessment of adaptive behavior is recommended in such cases by the AAIDD Guidelines for diagnosing mental retardation. I thought that this assessment would yield definitive information regarding prong 2 and contribute valuable clinical information regarding whether or not Mr. Black has mental retardation.

9. RECENT COMPREHENSIVE ASSESSMENT OF MR. BLACK'S ADAPTIVE BEHAVIOR

Stephen Greenspan, Ph.D., a nationally-recognized and respected expert in the field of mental retardation, conducted a comprehensive adaptive behavior assessment using multiple sources of information including: the Vineland Adaptive Behavior Scales – 2nd Edition (a comprehensive standardized assessment of adaptive behavior), a review of existing records, a review of existing affidavits from relatives and other individuals who know Mr. Black.

Dr. Greenspan followed the guidelines put forth by the AAIDD (Schalock et al., 2007) in conducting his retrospective adaptive behavior assessment. Dr. Greenspan interviewed three different individuals in order to complete the VABS-2. A retrospective assessment is sometimes the best method available of assessing the individual's adaptive behavior. Again, adaptive behavior must be assessed in relation to community living. Using a retrospective assessment of adaptive behavior is in some circumstances the only adequate means of assessing adaptive behavior since all existing diagnostic systems, including Van Tran, define adaptive behavior as: "[adaptive behavior] *refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, socio-cultural background, and community setting.*" Hence, this refers to how the individual copes and adapts to society's expectations in the community, not prison.

Dr. Greenspan also asked these individuals to recall and assess Mr. Black's adaptive behavior prior to his 18th birthday. The advantage of conducting a retrospective assessment in this manner is that it also allows a determination if the age of onset (prong 3) criterion was met.

Based on Dr. Greenspan's evaluation of Mr. Black's adaptive behavior, Mr. Black presents significant deficits in social adaptive skills as well as significant deficits in his overall adaptive behavior (VABS-2 Composite Score = 70), thus meeting AAIDD (Luckasson et al., 2002) and Tennessee Code Annotated section 39-13-203's prong 2 criterion for mental retardation.

10. COMMENTS ON JUDGE KURTZ'S CONCLUSIONS REGARDING MENTAL RETARDATION

Mental retardation is a developmental disability, with its origin during the developmental period. Again, although it originates during the developmental period, it is not always correctly identified and diagnosed during this developmental period. Mental retardation is a chronic and life-long condition from which one seldom out grows. Conversely, one does not acquire mental retardation in adulthood. Mental retardation is a functional definition, which has no pre-set cause or etiology that must be present to be diagnosed. Similarly, there are no co-existing conditions that preclude making a diagnosis of mental retardation. Hence, if an individual functions with significant impairments in intellectual and adaptive functioning and it can be reasonably assumed to have originated during the developmental period a diagnosis of mental retardation is warranted.

There was no reliable individualized assessment of Mr. Black's intellectual functioning conducted during his school years. One should not assume that because a child was not referred for testing or special education that the child in question was not struggling in school. Clearly Mr. Black struggled in school, doing poorly in reading and having been retained in second grade.

There appears to be compelling evidence that Mr. Black's current intellectual functioning is significantly subaverage. Most experts agree that Mr. Black meets prong 1 of the definition of mental retardation. Dr. Greenspan's recent comprehensive evaluation of Mr. Black's adaptive behavior provides strong evidence indicating that Mr. Black has significant limitations in adaptive behavior and that these deficits were manifested prior to age 18 years.

As per any diagnostic system as well as the Tennessee statute 39-13-203, prong 3 refers only to documenting that the onset of significant subaverage intellectual functioning and deficits in adaptive behavior were manifested prior to age 18. No diagnostic system requires that a definitive diagnosis of mental retardation be made before the individual reaches the age of 18 years. An initial diagnosis of mental retardation can be made at any age, as long as the manifestation of prongs 1 and 2 can be documented during the developmental period or in other words, before the individual turns 18 years old.

I declare under penalty of perjury and the laws of the United States that the foregoing is a true and correct statement.

Signed on this 17th day of March, 2008.

Marc J. Tassé, PhD, FAAIDD

COPY

IN THE FIFTH CIRCUIT COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

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BYRON BLACK, Petitioner,	)	
	)	Case No.: 88-S-1479
v.	)	
STATE OF TENNESSEE, Respondent.	)	DEATH PENALTY Post-Conviction

NOTICE OF FILING

Petitioner, Byron Black, hereby gives notice of the filing of the affidavits of Patti van Eys, Ph.D., and James E. Lawler, Ph.D., as substantive evidence in lieu of rebuttal testimony in the March 1-3, 2004, hearing in the above-referenced matter.

Dr. van Eys conducted a Wechsler Adult Intelligence Scale - Third Edition (WAIS-III) with Mr. Black in 2001 and would have been called to rebut the testimony of Dr. Eric Engum and Dr. Susan Vaught regarding the administration of the WAIS-III, particularly to address the issue of whether Mr. Black was malingering or trying to manipulate the test to lower his IQ score.

Dr. Lawler is the Head of the Department of Psychology at the University of Tennessee, Knoxville and would have been called to rebut the testimony of Dr. Engum that he held the position of Senior Research Associate in the Department of Psychology.

The introduction of both affidavits in lieu of rebuttal testimony was approved by the Court during the hearing.

Respectfully submitted,

Donald E. Dawson, BPR # 010723
Post-Conviction Defender

003210

TS-01-02-214

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Counsel for Petitioner, Byron Black

CERTIFICATE OF SERIVCE

This is to certify that a true and exact copy of the foregoing Notice of Filing has been mailed, first class postage prepaid, to John C. Zimmerman, Assistant District Attorney General, Washington Square, Suite 500, 222 Second Avenue North, Nashville, TN 37201-1649, on this the 31st day of March 2004.

Donald E. Dawson

IN THE CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE
DIVISION V

BYRON BLACK,	)	
Petitioner,	)	
	)	
	)	**Case No. 88-S-1479**
v.	)	
	)	
STATE OF TENNESSEE,	)	**DEATH PENALTY**
Respondent.	)	**Post-Conviction**

AFFIDAVIT OF PATTI VAN EYS, Ph.D.

The affiant, Patti van Eys, Ph.D., after being duly sworn, states as follows:

1. I am a Clinical Psychologist duly licensed to practice in the State of Tennessee. My Tennessee license number is P 1463.

2. I am currently employed as an assistant professor in the Department of Psychology and Human Development at Peabody College, Vanderbilt University, Nashville, Tennessee.

3. In 2001, I was contacted by attorneys at the Office of the Federal Public Defender for the Middle District of Tennessee and was asked to conduct a Wechsler Adult Intelligence Scale - Third Edition (WAIS-III) with Byron Black, a death-sentenced inmate at Riverbend Maximum Security Institution in Nashville, Tennessee.

4. The WAIS-III was released in 1997, replacing the WAIS-R that was released in 1981. Over time, scores on intelligence tests increase (by about 3 points per decade). Therefore, by 1997, when the WAIS-R was 16 years old, the use of this test was identifying fewer individuals as mentally retarded and an increasing number as gifted. Since both categories are defined as a set percentage – approximately 2.2% of the population – these increasing scores had two effects. First, the "under-diagnosing" of mentally retarded individuals resulted in some people being deprived of assistance authorized for individuals who are classified as mentally retarded. Second, the test results placed too many in the gifted category. Because of these score gains, the tests are periodically re-normed. It is then anticipated that an individual who had previously been given the WAIS-R will score lower on the re-normed WAIS-III. This gain effect, broadly accepted by the psychological community and recognized by the American Association on Mental Retardation (AAMR), is known as the Flynn Effect.

5. On March 28, 2001, I conducted a WAIS-III with Byron Black. The results were a Full Scale IQ of 69, a Verbal IQ of 67 and a Performance IQ of 79.

6. I have been told by one of Mr. Black's current attorneys that psychologists testifying on behalf of the state at Mr. Black's hearing on March 1-3, 2004, have questioned the validity of the results of the tests I gave. I have also been told that the psychologists who testified on behalf of the state have not tested, interviewed or even met Byron Black.

7. Understanding the results of an IQ test and judging whether the person being tested was highly motivated to do his best requires making clinical observations and exercising clinical judgment. Since the state's psychologists are not in a position to exercise either of these critical functions of an assessment, they are in no position to render any opinion about Mr. Black's efforts on the test. Any such opinion is pure speculation.

8. It is my understanding that the opinion of the state's psychologists was premised on the theory that because Mr. Black has been sentenced to death and because by March 2001 he may have thought that if he were found to be mentally retarded he would not be eligible for a death sentence, he intentionally performed poorly. While in the abstract one might consider this a possibility, it is far from the reality that I observed when I tested Mr. Black.

9. Mr. Black was clearly trying to do his best on the test. He was very concerned that he had not done well, and such observations were striking and appear in my report. It was apparent during my session with him that how he is perceived by others is very important to Mr. Black and he did not want to appear mentally disabled. He also appeared oblivious to his sentence of death. If anything, he had an inappropriately positive attitude. In fact, it is not clear that he fully understands the consequences of a death sentence.

10. The conclusion of the psychologists who testified for the state that Mr. Black intentionally performed poorly on the test I administered is particularly curious when the results on the WAIS-III are compared to the scores on the WAIS-R performed in 1997 by Dr. Auble. Mr. Black actually had a higher Performance IQ score (79) on the test I performed in 2001, than he had on the WAIS-R in 1997 (77). It is very difficult to believe that motivational factors in 2001 would result in lower Verbal and Full Scale scores on the one hand and a higher score on the Performance scale on the other.

11. With regard to Mr. Black's lower scores on the Stanford-Binet IV (SB-IV) conducted by Dr. Grant, it is shown through research comparing the SB-IV with the WAIS-R that the SB-IV results in lower scores (by about 4 points compositely; 9 points lower in persons with mental retardation). The WAIS-III has a similar correlational pattern with the SB-IV scores. The reason for this may be due to floor effects (e.g., the WAIS has a "higher" floor not allowing persons to score lower than a certain point), item difficulties, better differentiation of abilities, or some combination of these or other factors.

12. Although I was originally retained by Mr. Black's federal attorneys to assist as an expert witness in the area of mental retardation a subsequent change in my employment situation required me to withdraw from any formal relationship to Mr. Black's defense team.

Further the affiant saith not.

Patti van Eys

Patti van Eys, Ph.D.
Affiant

Subscribed and sworn to before me the 23rd day of March, 2004.

NOTARY PUBLIC DAVIDSON COUNTY, TENN.

Notary Public

My Commission expires: 1/26/08

My Commission Expires JAN. 26, 2008