APPENDIX TO PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

APPENDIX A – ORDER OF THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON, FILED APRIL 24, 2018

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

AKIL JAHI AKA PRESTON CARTER v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. P-28413

No. W2017-02527-CCA-R28-PD

ORDER

This matter is before the Court on the Petitioner's application for permission to appeal the post-conviction court's denial of his motion to reopen his post-conviction petition. The State has responded in opposition to the motion.

The Petitioner was convicted of two count of felony murder during the perpetration of aggravated burglary and sentenced to death by a Shelby County jury in 1995. On appeal, the Tennessee Supreme Court affirmed the conviction but set aside the death sentence and remanded the matter for a new sentencing hearing. *State v. Carter*, 988 S.W.2d 145 (Tenn. 1999). Upon remand, the Petitioner was again sentenced to death with the sentence affirmed by Court and the Tennessee Supreme Court on appeal. *State v. Carter*, 114 S.W.3d 895 (Tenn. 2003). The Petitioner sought post-conviction relief which was

denied by the trial court and said denial affirmed upon appeal. In addition, the Petitioner previously filed a motion to re-open his post-conviction proceedings which was also denied by the trial court an no proper appeal was perfected.

The Petitioner has once again filed a motion to reopen his petition for post-conviction relief relying upon the United States Supreme Court decision in *Moore v. Texas*, 137 S.Ct. 1039 (2017), which he argues created a newly established constitutional right that should be applied retroactively. The post-conviction court denied the Petitioner's motion to reopen post-conviction proceedings finding that the Petitioner had raised the issue of his intellectual disability and that the same had been previously litigated. Furthermore, the trial court found that *Moore* did not establish grounds under Tennessee Code Annotated section 40-30-117 to reopen a post-conviction petition. The Petitioner has timely filed an application for permission to appeal with this Court and the State of Tennessee has responded in opposition to the application.

Tennessee Code Annotated section 40-30-117(a) authorizes the reopening of post-conviction proceedings only under the following circumstances:

(1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a

constitutional right that was not recognized as existing at the time of trial; or

(2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and

(4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

T.C.A. § 40-30-117(a). The decision whether to grant a motion to reopen is within the discretion of the post-conviction court. *Id.* at (c).

The Petitioner first asserts that he is entitled to relief under Tennessee Code Annotated section 40-40-30-117(a)(1) in that the decision of the United States Supreme Court in *Moore* created a new constitutional right that would provide an avenue of relief. This Court must first assess whether the decision created a new constitutional right that afford any relief to the Petitioner. Tennessee Code Annotated section 40-30-122 addresses interpreta-

tion of a new rule of constitutional law stating in part:

"For purposes of this part, a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds."

Tenn. Code Ann. § 40-30-122. Further, the courts have determined that a "case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] . . . if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 109 S.Ct. 1060, 1070 (1989) (citations omitted); *see also Van Tran v. State*, 66 S.W.3d 790, 810-11 (Tenn. 2001).

In *Moore*, the Supreme Court held the analysis the Texas Court of Criminal Appeals (hereinafter "TCCA") of the intellectual disability of the was unconstitutional. *Moore* at 1044. The TCCA utilized factors created in *Ex Parte Jose Garcia Briseno*, 135 S.W.3d 1 (Texas Crim. App. 2004), to determine if Moore was intellectually disabled. In its ruling, the Supreme Court did not establish a newly created constitutional right to be retroactively applied but rather based its decision upon an application of its prior rulings in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), and *Hall v. Florida*, 134 S.Ct. 1986 (2014). The Supreme Court found error in the TCCA's use of its own self-created factors to determine the intellectual disability of the defendant

rather than "the generally accepted, uncontroversial intellectual-disability diagnostic definition." *Moore* at 1045. The Supreme Court stated that the TCCA's "conclusion that Moore's IQ scores established that is not intellectually disabled is irreconcilable with *Hall*. *Hall* instructs that, where an IQ score is close to, but above 70, courts must account for the tests 'standard error of measurement.'" *Id.* at 1049 (citing *Hall v. Florida*, 134 S.Ct. at 1995, 2001).

Moore is clearly derivative of *Atkins* and *Hall* and applies the standards created in the prior cases to the specific proceedings of the TCCA and abrogates the prior TCCA ruling in *Briseno*. The Supreme Court states

"By design and in operation, the *Briseno* factors "creat[e] an unacceptable risk that persons with intellectual disability will be executed," *Hall*, 572 U.S., at ——, 134 S.Ct., at 1990. After observing that persons with "mild" intellectual disability might be treated differently under clinical standards than under Texas' capital system, the CCA defined its objective as identifying the "consensus of Texas citizens " on who "should be exempted from the death penalty." *Briseno*, 135 S.W.3d, at 6 (emphasis added). Mild levels of intellectual disability, although they may fall outside Texas citizens' consensus, nevertheless remain intellectual disabilities, see *Hall*, 572 U.S., at —— – ——, 134 S.Ct., at 1998–1999; 536 U.S., at 308, and n. 3, 122 S.Ct. 2242; AAIDD– at 153, and States may not execute anyone in "the entire category of [intellectually disabled] offenders," *Roper*, 543 U.S., at 563–564, 125 S.Ct. 1183 (emphasis added); *see supra*, at 1048."

Moore at 1051. As with the prior Supreme Court ruling in *Hall*, the *Moore* decision did not enlarge the class of individuals affected by the Supreme Court ruling in *Atkins* but directed the application of the principles established in *Atkins*. Therefore it follows that the Supreme Court's decision in *Moore v. Texas* did not announce a new constitutional rule requiring retrospective application to permit reopening of the post-conviction petition in this Petitioner's case. *Moore* does not create a right under which the Petitioner may be granted relief as any proceeding would be predicated upon the exercise of the right established in *Atkins v. Virginia*.

The Petitioner further argues in his application that the trial court erred in its conclusion that the intellectual disability of the Petitioner was fully litigated and in its refusal to consider expert medical proof presented. Neither of these arguments establishes sufficient grounds for re-opening of a petition for post-conviction relief and would be applicable to the present matter only if the referenced *Moore* case created a newly established constitutional right. As we have addressed above, the *Moore* case did not create a newly established constitutional right and therefore further analysis of these arguments is not warranted.

The Petitioner has failed to satisfy any of the grounds for reopening a post-conviction petition. Accordingly, the post-conviction court did not abuse its discretion in denying the motion to reopen. *See* T.C.A. § 40-30-117(a), (c).

IT IS HEREBY ORDERED that the Petitioner's application for permission to appeal is DENIED. Because it appears that the Petitioner is indigent, costs are taxed to the State.

PER CURIAM

JOHN EVERETT WILLIAMS, JUDGE
ALAN E. GLENN, JUDGE
J. ROSS DYER, JUDGE

APPENDIX B – ORDER OF THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON, FILED MAY 21, 2018

AKIL JAHI AKA PRESTON CARTER v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. P-28413

No. W2017-02527-CCA-R28-PD

ORDER

Before the court is the petitioner's motion seeking rehearing of this court's order denying the petitioner's appeal from the denial of a motion to reopen post-conviction proceedings. See Tenn. R. App. P. 39. Upon full consideration, the motion is not well-taken and is, therefore, DENIED.

PER CURIAM
JUDGE JOHN EVERETT WILLIAMS
JUDGE ALAN E. GLENN
JUDGE J. ROSS DYER

APPENDIX C – ORDER OF THE CRIMINAL COURT FOR SHELBY COUNTY, TENNESSEE, FILED SEPTEMBER 29, 2016

AKIL JAHI AKA PRESTON CARTER v. STATE OF TENNESSEE

Criminal Court for Shelby County

MOTION TO REOPEN

No. P-28413

DEATH PENALTY

ORDER

This matter is before the Court on the May 14, 2015, Motion To Reopen Petition For Post-Post-Conviction Relief, Petitioner's April 19, 2016, Notice of Supplemental Authority in Support of Motion To Reopen, Petitioner's May 11, 2016, Notice of Additional Supplemental Authority in Support of Motion to Reopen, Petitioner's June 21, 2016, Motion to Continue Report Date, and the State's various responses to these pleadings in which the State seeks denial of the Motion to Reopen. Petitioner claims, by and through counsel, he is entitled to relief pursuant to Tenn. Code Ann. § 40-30-117(a)(1), based upon what he claims is a new rule of constitutional law announced in *Hall v. Florida, 572* U. S. ____, 134 S. Ct. 1986 (2014). He also claims *Hall* requires retroactive application to his case. In addition to the pleadings now before this Court, this Court has judicial notice of the record in Petitioner's prior post-

post-conviction proceedings, other collateral proceedings, and trial. After a careful review of the pleadings and applicable law and for the reasons stated below, Petitioner Jahi's Motion to Reopen is summarily DENIED.

I. Procedural History

In January 1995, Petitioner entered guilty pleas to two counts of first degree felony murder in the May 28, 1993, deaths of Thomas and Tensia Jackson during the aggravated burglary of their residence. Petitioner proceeded to a sentencing hearing in which the jury sentenced him to death based upon the following aggravating circumstance:

> (1) The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death.

See Tenn. Code Ann. § 39-13-204 (5) (1991 & Supp. 1993). Petitioner's convictions were affirmed on appeal, but his sentences were reversed based upon the use of invalid verdict forms. *State v. Carter,* 988 S.W.2d 145 (Term. 1999). Upon remand, the jury again sentenced Petitioner to death based upon the following aggravating circumstances:

> (1) The defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person; and
>
> (2) The murder was especially heinous, or cruel in that it involved torture or serious

> physical abuse beyond that necessary to produce death.

See Tenn. Code Ann. § 39-13-204 (2) and (5) (1991 & Supp. 1993). Petitioner's sentences were affirmed on appeal. *State v. Carter,* 114 S.W.3d 895 (Tenn. 2003), *cert. denied,* 540 U.S. 1221 (2004).

On May 4, 2004, Petitioner *pro se* filed a petition for post-conviction relief which was subsequently amended with the assistance of counsel on April 4, 2005, and December 9, 2010. On October 14, 2011, this Court entered an order denying the petition, which included a denial of a claim of intellectual disability. The denial of relief was affirmed on appeal. *Akil Jahi, aka Preston Carter v. State,* 2014 WL 1004502 (Tenn. Crim. App. Mar. 13, 2014), *perm. app. denied,* (Tenn. Sept. 18, 2014).

II. Motion to Reopen

Petitioner has filed a motion to reopen and asserts he is entitled to relief pursuant to Tenn. Code Ann, § 40-30-117(a)(1). Petitioner claims he is intellectually disabled and the United States Supreme Court's decision in *Hall v. Florida,* 572 U.S. ____, 134 S. Ct. 1986 (2014), established a new constitutional rule of law on the issue of intellectual disability not recognized at the time of trial or post-conviction proceedings. He further claims retroactive application is required.

The statutes governing motions to reopen were summarized in *Harris v. State,* 102 S.W.3d 587, 590-91 (Tenn. 2003).

Under the provisions of the *Post-Conviction Procedure Act,* a petitioner "must petition for post-conviction relief ... within one (1) year of the final action of the highest state appellate court to which an appeal is taken ...." Tenn. Code Ann. §40-30-202(a). Moreover, the Act "contemplates the filing of only one (1) petition for post-conviction relief." Tenn. Code Ann. § 40-30-202(c). After a post-conviction proceeding has been completed and relief has been denied, ... a petitioner may move to reopen only "under the limited circumstances set out in *40-30-217."* Id. These limited circumstances include the following:

> (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial; or
>
> (2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or
>
> (3) The claim in the motion seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the

> case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the of the ruling holding the previous conviction be invalid; and
>
> (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

(Citing Tenn. Code Ann. § 40-30-217(a)(1)-(4))(now Tenn. Code Ann. § 40-30-117(a)(1)-(4)).

The statute further states:

> The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file the action and is a condition upon its exercise. Except as specifically provided in subsections (b) and (c) [of section 102], the right to file a petition for post-conviction relief or a motion to reopen under this chapter shall be extinguished upon the expiration of the limitations period.

Tenn. Code Ann. § 40-30-102(a).

As included above, Tennessee Code Annotated § 40-30-117(a)(1) provides a motion to reopen may be filed based upon a new constitutional rule.

Petitioner here has filed a motion to reopen pursuant to *Hall v. Florida,* 572 U.S. ___, 134 S. Ct. 1986 (2014). Specifically, he argues *Hall* is a new rule of constitutional law which must be applied retroactively. Tenn. Code Ann. § 40-30-122 provides:

> ... a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds. A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.

In *Welch v. United States,* 578 U.S. ___, 136 S. Ct. 1257 (2016), the Court discussed the difference between substantive and procedural rules.

> "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*[1]*,* 542 U.S., at 124 S. Ct. 2519. "This includes decisions that narrow the scope of a criminal statute by inter-

[1] *Schriro v. Summerlin,* 542 U.S. 348, 351, 124 S. Ct. 2519 (2004).

> preting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Id.,* at 351-352, 124 S. Ct. 2519 (citation omitted); *see Montgomery,*[2] *supra,* at ----------, 136 S. Ct., at 728. Procedural rules, by contrast, "regulate only the manner of determining the defendant's culpability." *Schriro,* 542 U.S., at 353, 124 S. Ct. 2519. Such rules alter "the range of permissible methods for determining whether defendant's conduct is punishable." *Ibid.* "They not produce a class of persons convicted of the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.,* at 352, 124 S. Ct. 2519.

136 S. Ct. at 1264-65. The Court further indicated a procedural rule of law would be involved when a case regulates the evidence that the court could consider in making its decision or affects the judicial procedures by which a statute is applied. *Id.* at 1265.

Our own Tennessee Supreme Court in *Payne v. State,* ____ S.W.3d _____, 2016 WL 1394199 (Tenn. April 7, 2016), specifically addressed the issue of *Hall* and whether it should be applied retroactively.

> [T]he issue before the Court [in *Hall]* was the type of evidence which the defendant was to offer at the hearing otherwise provided. Thus, *Hall* does not address by what procedural avenue the Petitioner in this case might be afforded a

[2] *Montgomery v. Louisiana,* 577 U.S. ___, 136 S. Ct. 718 (2016)

> hearing on his claim of intellectual disability. *Hall* does *not* stand for the proposition that the Petitioner *is* entitled to a hearing under the facts and procedural posture of this matter.
>
> Moreover, even if *Hall* held that a condemned inmate must be afforded a hearing on a collateral claim that he is intellectually disabled, the decision would benefit the Petitioner only if it applied retroactively. However, the United States Supreme Court has not ruled that *Hall* is to be applied retroactively to cases on collateral review. The United States Courts of Appeal for the Eighth and Eleventh Circuits have concluded that *Hall* does *not* apply retroactively to cases on collateral review. *See Goodwin v. Steele,* 814 F.3d 901, 903-04 (8th Cir. 2014) (per curiam); *In re Henry,* 757 F.3d 1151, 1159-61 (11th Cir. 2014). The Petitioner has cited us to no federal appellate decision holding that *Hall* must be applied retroactively to cases on collateral review. We decline to hold that *Hall* applies retroactively within the meaning of Tennessee Code Annotated section 40-30-117(a)(1).

Payne v. State, 2016 WL 1394199, at *9.

Also, in *Vincent Sims v. State,* No. W2015-01713-CCA-R28-PD (Tenn. Crim. App. Order entered Jan. 28, 2016), *perm. app. denied,* (Tenn. May 6, 2016), the Tennessee Court of Criminal Appeals addressed the issues raised here concerning retroactivity and determined *Hall* did not establish a basis on which to reopen a post-conviction petition:

The Petitioner contends that the United States Supreme Court's opinion in *Hall v. Florida,* 134 S.Ct. 1986 (2014), established a "constitutional right that was not recognized as existing at the time of trial" and that "retrospective application of that right is required." *See* Tenn. Code Ann. § 40-30-117(a)(1). The Petitioner maintains that as a result of the Court's decision in *Hall,* he is intellectually disabled and, therefore, ineligible for the death penalty.

* * *

. . . [I]t does not appear that *Hall* announced a new rule. Rather, *Hall* appears to have clarified provisions in *Atkins* that the Florida courts had misconstrued. Regardless of whether *Hall* established a new rule of constitutional law, however, we conclude that the rule does not apply retroactively.

Tennessee Code Annotated section 40-30-122 provides:

> A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.

The Tennessee Supreme Court recently held that this provision applies in determining the retroactivity of new constitutional rules in post-

post-conviction proceedings. *Bush v. State,* 428 S.W.3d 1, 16 (Tenn. 2014). While *Hall* addresses provisions of the United States Constitution, "the states are not 'bound by federal retroactivity analysis when a new federal rule is involved.' *Id.* at 13 n.6; *see Danforth v. Minnesota,* 552 U.S. 288 (2008). Moreover, the retroactivity standard in section 40-30-122 is similar to the federal standard of *Teague v. Lane,* 489 U.S. 288, 307 (1989). *Bush,* 428 S.W.3d at 19-20.

In examining whether a rule that "places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" pursuant to Tennessee Code Annotated section 40-30-122, our supreme court has noted that [e]xamples of this type of rule include *Lawrence v. Texas,* 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), in which the United States Supreme Court held that states could not criminalize homosexual intercourse between consenting adults, and *Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973), in which the United States Supreme Court held that states could not in most cases criminally penalize doctors for performing early-term abortions. *Bush,* 428 S.W.3d at 17.

In *Penry v. Lynaugh,* 492 U.S. 302, 330 (1989), in which the United States Supreme Court held that retroactivity applies to "rules prohibiting a certain category of punishment for class of defendants because of their status or offense." *Hall,* however, only provides a new procedure "for ensuring that States do not

members of an already protected group." *In re Henry,* 757 F.3d at 1161. The class protected by *Hall,* those with intellectual disabilities, is the same class protected by *Atkins.* *See Hall,* 134 S. Ct. at 1990 (citing to the holding in *Atkins* that the execution of intellectually disabled defendants violated the United States Constitution and holding that Florida's "rigid rule creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional"). *Hall* did not expand this already protected class but rather, "limited the states' power to define the class because the state definition not protect the intellectually disabled as understood in *Atkins." In re Henry,* 757 F.3d at 1161 (citing *Hall,* 134 S. Ct. at 1986).

Even if *Hall* expanded the class described in *Atkins, Hall* did not categorically place the class beyond the state's power to execute. *Id.* Instead, *Hall* created a "procedural requirement that those with IQ test scores within the test's standard error would have the opportunity to otherwise show intellectual disability. *Hall* guaranteed only a chance to present evidence, not ultimate relief." *Id.* (emphasis in original). Accordingly, *Hall* does not place "primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *See* Tenn. Code Ann. § 40-30-122.

We next must determine whether the holding in *Hall* "requires the observance of fairness safeguards that are implicit in the concept of ordered liberty." *See id.* In this context, "safe-

guards" refer to "criminal procedural rules designed to guard against defendants being denied their due process right to a fundamentally fair adjudication of guilt." *Bush,* 428 S.W.3d at 18. Not all constitutionally-derived "fairness safeguards," however, warrant retroactive in post-conviction cases. *Id.* Only those "fairness safeguards" that are "implicit in the concept of ordered liberty" are to be applied retroactively. *See* Tenn. Code Ann. § 40-30-122; *Bush,* 428 S.W.3d at 18.

The Tennessee Supreme Court has held that the General Assembly intended that the phrase "fairness safeguards that are implicit in the concept of ordered liberty" should be interpreted in a manner similar to the federal standard for retroactivity set forth in *Teague v. Lane,* 489 U.S. 288 (1989). *Bush,* 428 S.W.3d at 20. The "fairness safeguards" in section 40-30-122 are "equivalent to the *Teague v. Lane* standard's 'watershed rules of criminal procedure' or 'those new procedures without which the likelihood of an accurate conviction is seriously diminished.' *Id.* (quoting Teague, 489 U.S. at 313).

Accordingly, we must give retroactive effect "only a small set of 'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding,'" *v, Summerlin,* 542 U.S. 348, 352 (2004) (quoting *Saffle v. Parks,* 494 U.S. 484, 495 (1990); *Teague,* 489 U.S. at 311). The fact that a new rule is "'fundamental' in some abstract sense is not enough; the rule must be one 'without which the

likelihood of an accurate conviction is *seriously* diminished.' *Id.* (quoting *Teague,* 489 U.S. at (emphasis in original). The United States Supreme Court has recognized that this class of rules is "extremely narrow, and 'it is unlikely any . . . ha[s] yet to emerge.' *Id.* (quoting *Tyler v. Cain,* 533 U.S. 656, 667 n. 7 (2001); *Sawyer v. Smith,* 497 U.S. 227, 243 (1990)).

To qualify as a watershed rule of criminal procedure, a new rule must meet two requirements. "First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. . . . Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton v. Bockting,* 549 U.S. 406, 418 (2007) (internal citations and quotation marks omitted).

The United States Supreme Court has acknowledged that

> in the years since *Teague,* we have rejected every claim that a new rule satisfied the requirements for watershed status. *See, e.g., Summerlin,* [542 U.S. at 352] (rejecting retroactivity for *Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)); *Beard v. Banks,* 542 U.S. 406, 124 S. Ct. 159 L. Ed. 2d 494 (2004) (rejecting retroactivtivity for *Mills v. Maryland,* 486 U.S. 367, S. Ct. 1860, 100 L. Ed. 2d 384 (1988)); *O'Dell [v. Netherland,* 521 U.S. 151, 157, 117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997)] (rejecting retroactivity for *Simmons v. South Carolina,*

> 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994)); *Gilmore v. Taylor,* 508 U.S. 333, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993) (rejecting retroactivity for a new rule relating to jury instructions on homicide); *Sawyer v. Smith,* 497 U.S. 227, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990) (rejecting retroactivity for *Caldwell v. Mississippi,* 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985)).

Id.

The only case in which the United States Supreme Court has identified as qualifying under this exception is *Gideon v. Wainwright,* 372 U.S. 335 (1963). *See Wharton,* 549 U.S. at 419. In *Gideon,* the Court held that counsel must be appointed for any indigent defendant charged with a felony. *Gideon,* 372 U.S. at 344-45. The Court explained that when an indigent defendant who seeks representation is denied such representation, an intolerably high risk of an unreliable verdict exists. *Id; see Wharton,* 549 U.S. at 419.

The rule announced in *Hall* is not to the rule announced in *Gideon.* The rule in *Hall* has a much more limited scope, and the relationtionship of the rule to the accuracy of the fact-fact-finding process is less direct and profound. The issue is not whether *Hall* resulted in a net improvement in the accuracy of fact-finding in criminal cases. *See Wharton,* 549 U.S. at 420. Rather, the question is whether the *Hall* rule is "one without which the likelihood of an accurate

conviction is *seriously* diminished." *Id.* (citations omitted) (emphasis in original). *Hall* did not result in a change of this magnitude.

Hall also did not "alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Sawyer,* 497 U.S. 242 (emphasis in original). It is insufficient to simply show that a rule is *"based* on a 'bedrock' right." *Whorton,* 549 U.S. at 420-21 (emphasis in original). Rather, in order to meet this requirement, "a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Id.* at 421. In applying this requirement, the Supreme Court has looked to *Gideon* as an example and has not "'hesitated to hold that less sweeping and fundamental rules' do not qualify." *Id.* (quoting *Beard,* 542 U.S. at 418).

Hall did not expand the class already protected by *Atkins,* i.e., defendants who are intellectually disabled. Instead, *Hall* limited the power of the states to define that class. Accordingly, *Hall* did not "alter[ ] our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *See id.; Sawyer,* 497 U.S. at 242.

The Petitioner has failed to establish that *Hall* applies retroactively to petitioners in post-conviction proceedings. Therefore, he may not rely upon *Hall* as a basis for reopening his petition for post-conviction relief.

(Footnotes omitted).

Accordingly, Petitioner's claims related to *Hall v. Florida,* 572 U.S. ____, 134 S. Ct. 1986 (2014), are found to be without merit and/or previously determined.

III. Conclusion

For the reasons discussed above, Petitioner's Motion to Reopen is DENIED.

ENTERED THIS 29 DAY OF SEPTEMBER, 2016.

s/_____
James Beasley
Criminal Court Judge

APPENDIX D – ORDER OF THE SUPREME COURT OF TENNESSEE AT JACKSON, FILED SEPTEMBER 17, 2018

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

AKIL JAHI AKA PRESTON CARTER v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. P-28413

No. W2017-02527-SC-R11-PD

ORDER

Upon consideration of the application for permission to appeal of Akil Jahi and the record before us, the application is denied.

PER CURIAM

APPENDIX E – Tenn. Code Ann. § 39-13-203

§ 39-13-203. Intellectually disabled defendants; capital punishment

Effective: July 10, 2014

(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.

(b) Notwithstanding any law to the contrary, no defendant with intellectual disability at the time of committing first degree murder shall be sentenced to death.

(c) The burden of production and persuasion to demonstrate intellectual disability by a preponderance of the evidence is upon the defendant. The determination of whether the defendant had intellectual disability at the time of the offense of first degree murder shall be made by the court.

(d) If the court determines that the defendant was a person with intellectual disability at the time of the offense, and if the trier of fact finds the defendant

guilty of first degree murder, and if the district attorney general has filed notice of intention to ask for the sentence of imprisonment for life without possibility of parole as provided in § 39-13-208(b), the jury shall fix the punishment in a separate proceeding to determine whether the defendant shall be sentenced to imprisonment for life without possibility of parole or imprisonment for life. Section 39-13-207 shall govern the sentencing proceeding.

(e) If the issue of intellectual disability is raised at trial and the court determines that the defendant is not a person with intellectual disability, the defendant shall be entitled to offer evidence to the trier of fact of diminished intellectual capacity as a mitigating circumstance pursuant to § 39-13-204(j)(8).

(f) The determination by the trier of fact that the defendant does not have intellectual disability shall not be appealable by interlocutory appeal, but may be a basis of appeal by either the state or defendant following the sentencing stage of the trial.

APPENDIX F – Tenn. Code Ann. § 40-30-117

§ 40-30-117. Motions to reopen

Effective: May 27, 2011

(a) A petitioner may file a motion in the trial court to reopen the first post-conviction petition only if the following applies:

(1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial; or

(2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and

(4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

(b) The motion must set out the factual basis underlying its claims and must be supported by affidavit. The factual information set out in the affidavit shall be limited to information which, if offered at an evidentiary hearing, would be admissible through the testimony of the affiant under the rules of evidence. The motion shall be denied unless the factual allegations, if true, meet the requirements of subsection (a). If the court grants the motion, the procedure, relief and appellate provisions of this part shall apply.

(c) If the motion is denied, the petitioner shall have thirty (30) days to file an application in the court of criminal appeals seeking permission to appeal. The application shall be accompanied by copies of all the documents filed by both parties in the trial court and the order denying the motion. The state shall have thirty (30) days to respond. The court of criminal appeals shall not grant the application unless it appears that the trial court abused its discretion in denying the motion. If it determines that the trial court did so abuse its discretion, the court of criminal appeals shall remand the matter to the trial court for further proceedings.

APPENDIX G – AFFIDAVIT OF ALAN S. KAUFMAN, PH.D., EXECUTED MARCH 6, 2015

AFFIDAVIT OF ALAN S. KAUFMAN, Ph.D.

I, Alan S. Kaufman, declare and state as follows:

1. All of the facts contained in this affidavit are known to me personally and if called as a witness, I could and would testify thereto.

2. Counsel representing Akil Jahi (fka Preston Carter) asked me to conduct an analysis of Mr. Jahi's intelligence testing history, prior expert reports, sworn court testimony from lay witnesses and experts, and other related documentation to determine whether Mr. Jahi is Intellectually Disabled based on all applicable clinical standards and clinical definitions governing the assessment of Intellectual Disability as identified in *Hall v. Florida,* 134 S. Ct. 1986 (2014). After a thorough review of materials and applying my expert analysis, I have concluded to a reasonable degree of scientific and professional certainty that Akil Jahi is Intellectually Disabled.

SUMMARY OF FINDINGS

3. Akil Jahi meets each of the three criteria for the diagnosis of Intellectual Disability:

a. **Intellectual Functioning**: Mr. Jahi's intellectual deficits are reflected in his performance on four prior IQ tests — WAIS-R in 1994, WAIS-III in 2000 and 2005, and WAIS-

WAIS-IV in 2009. After adjusting Mr. Jahi's IQ scores, as recommended by the applicable mental health professional standards, Mr. Jahi achieved full scale IQ Scores from 70 to 75. These full scale IQ scores are squarely in the range for the Intellectual Disability diagnosis that the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), American Association on Intellectual and Developmental Disabilities (AAIDD), American Psychiatric Association (APA), and *Hall v. Florida* set out. The validity and reliability of Mr. Jahi's intellectual deficits are supported by neurological testing, documentation found in records, and reports from those closest to him.

b. **Adaptive Behavior**: The Vineland Behavior Scales, Second Edition (Vineland- is a standardized test to measure an individvidual's ability to function in daily life. In 2009, an expert administered the Vineland-II to Akil Jahi's stepfather (Arthur Benson) and childhood friend (Monica McClain); the results show that Mr. Jahi exhibited significant deficits in three key sub-domains — Communication, Daily Living Skills, and Socialization. Deficits in only one domain may support a diagnosis of Intellectual Disability. scored "low" — often at a level lower than a 10-year-old — in the following skills areas: Expressive Communication, Written Communication, Community Daily Living Skills, Interpersonal Relations, and Coping Skills. A low score in only two skill areas may support

a diagnosis of Intellectual Disability. Mr. Jahi's results on the Vineland-II are supported by sworn court testimony from multiple individuals who have known Mr. Jahi well.

c. **Age of Onset**: There is ample evidence that Mr. Jahi's Intellectual Disability manifested before adulthood. Specifically, Mr. Jahi's school records, which include standardized test results, reveal that Mr. Jahi performed consistently poorly beginning in the fourth grade (earning C's, D's, and F's) and that he never passed eighth grade, which he repeated several times (earning D's and F's). Mr. Jahi's scores on standardized achievement tests mirror his schools records in that his scores took a. notable downward turn in fourth grade. At age 17, after spending years in the eighth grade before dropping out of school, Mr. Jahi's reading and language scores fell in the bottom one percent of his age-mates. Sworn testimony from several laypersons well acquainted with Mr. Jahi during his childhood further confirm that Mr. Jahi's intellectual and adaptive deficiencies existed prior to adulthood.

4. Because Mr. Jahi has significant limitations in intellectual function and adaptive behavior that originated in the developmental period, he meets the criteria for a diagnosis of intellectual disability.

QUALIFICATIONS

5. Since 1997, I have been a Clinical Professor of Psychology at the Child Study Center of the Yale University School of Medicine. I received my Ph.D. in Psychology from Columbia University and have researched and published extensively in the fields of clinical and school psychology, special education, neuropsychology, and psychological testing and measurement, including intelligence and psychoeducational and neuropsychological assessment. I was co-editor of the peer-reviewed journal *Research in the Schools* from 1992-2003 and currently serve on the Editorial Boards of *Psychological Assessment, Journal of Psychoeducational Assessment, Journal of Pediatric Neuropsychology*, and *Psychology in the Schools*, and am co-editor of Wiley's Essentials of Assessment book series.

6. I am author of more than a dozen psychological and educational tests widely used by professionals in the field to assess the intelligence and achievement of children and adults, including the Kaufman Assessment Battery for Children (K-ABC; Kaufman & Kaufman, 1983), the Kaufman Test of Educational Achievement (K-TEA), the Kaufman Brief Intelligence Test (K-BIT), and subsequent editions of these tests (KABC-II, KTEA-3, KBIT-2). The K-ABC and KABC-II have been translated and adapted for use in more than 25 countries worldwide. In addition, the Kaufman Adolescent and Adult Intelligence Test (KAIT) and the Kaufman Short Neuropsychological Assessment Procedure (K-SNAP) are published in Germany and the Netherlands and the computerized test, the K-CLASSIC, was

developed for French-speaking countries and is also published in Germany.

7. I worked closely with Dr. David Wechsler on the development and standardization of the Wechsler Intelligence Scale for Children-Revised (WISC-R) from 1970 to 1974 and my 1979 text *Intelligent Testing with the WISC-R* is considered a landmark publication in the field of the clinical and psychometric interpretation of IQ tests. I also authored the leading text on the Wechsler Adult Intelligence Scale-Revised (WAIS-R), *Assessing Adolescent and Adult Intelligence* (Kaufman, 1990), and my books, in general, are considered among the leading texts on how to interpret Wechsler's scales, including the current fourth editions (WISC-IV and WAIS-IV) (Flanagan & Kaufman, 2009; Kaufman, 1994a; Kaufman & Lichtenberger, 1999, 2006; Lichtenberger & Kaufman, 2013),

8. I have written widely cited articles and texts discussing the practice effects that are built in to IQ tests when a person is tested more than once on a Wechsler test (Kaufman, 1994b; Kaufman & Lichtenberger, 2006, pp. 202-209). I also have written extensively about the Flynn effect, the phenomenon that leads to IQ norms becoming outdated at the rate of 3 points per decade (Flynn, 1984; Kaufman, 2010a, 2010b; Kaufman & Weiss, 2010).

9. I am the author of the 2009 text *IQ Testing 101,* which discusses key concepts related to IQ test interpretation, written in straightforward language, without jargon, intended to be understood by bright laypersons. This book was cited in Supreme Court

decision *Hall v. Florida,* 134 S.Ct. 1986 (2014) regarding the importance of the standard error of measurement.

10. The most recent AAIDD publication, *The Death Penalty and Intellectual Disability* (Polloway, 2015), referred to me as "arguably the most prominent scholar on intelligence testing and interpretation of the various Wechsler IQ tests" (McGrew, 2015b, p. 159).

11. I testified as a defense witness in a hearing on the issue of a capital habeas petitioner's mental retardation claim in *Ex Parte Eric Dewayne Cathey,* Texas District Court, Harris County Case No. 713189, on January 27, 2010, and testified as a defense witness in the sentencing hearing of Stanley Robertson in College Station, Texas, February 21, 2013. I gave declarations as a plaintiff's witness to the U. S. District Court for the Northern District of California in *R. K. v. Hayward Unified School District,* Case No. C 06 07836 JSW in February 2008 and in *S. v. Fremont Unified School District,* Case No. C 06 07218 SI, in November 2009. I also have given numerous depositions in cases involving lead level and IQ and testified as a witness for the defense in two such cases: in *LaFontaine v. Franzese,* N.Y. Sup. Ct., Albany County Case No. 1210/1996, on October 25, 1999; and in *Scott v. City of New York,* N.Y. Sup. Ct., Kings County Case No. 026896/199, on June 18-19, 2007.

12. A copy of my current *curriculum vita* is attached.

DOCUMENTS REVIEWED

13. I have reviewed a variety of materials in this case upon which my opinions are based. These include: (a) Dr. Fred Steinberg's 1994 psychological report; (b) Dr. Joseph Angelillo's 2000 psychological report; (c) Dr. Pam Auble's 2009 psychological reports, July and August; (d) Dr. Geraldine Bishop's 2009 Vineland-II results and report and WAIS-IV data; (e) Dr. Angelillo's, Dr. Auble's, and Dr. Bishop's 2010 post-conviction testimonies; (f) Dr. Paul 2009 report and 2010-2011 post-conviction testimonies; (g) Testimonies of Arthur Benson, Lonzy Monica McClain, Bobby Taylor, Jeffrey Tharpe, Christine Taylor, and Mamie Watkins in 2009-2010; (h) School records of Preston Carter and Viola and the school and military records of McArthur Carter; (i) Excerpt from Tennessee state court denying Akil Jani's intellectual disability claim *(Jahi v. State,* 2014 Tenn. Crim. App. LEXIS 229, at *290-*290-293 (Tenn. Crim. App. Mar. 14, 2014); (j) Supreme Court decision, *Hall v. Florida,* 134 S.Ct. 1986 (2014); and (k) a variety of professional articles, test manuals, and books pertaining to IQ tests and their interpretation that include — but are not limited to — (i) a 1994 article on practice effects that appeared in the *Encyclopedia of Intelligence,* (ii) the 3rd edition of Kaufman and Lichtenberger's 2006 *Assessing Adolescent and Adult Intelligence,* (iii) a special 2010 issue of the *Journal of Psychoeducational Assessment* devoted to the Flynn effect (edited by Kaufman and Weiss); (iv) Kaufman's 2009 text *IQ Testing 101;* (v) the 1999 text by Kaufman and Lichtenberger *Essentials of WAIS-III Assessment;* (vi) Wechsler's (1991) *WISC-III Manual,* (vii) the 2013

second edition of Lichtenberger and Kaufman's *Essentials of WAIS-IV Assessment;* and (viii) two chapters by McGrew (2015a, 2015b) in the most recent publication by the AAIDD (Polloway, 2015). My opinions are based on these documents and other relevant scientific literature pertaining to cognitive and neuropsychological development and testing generally, and my expertise and experience in the fields of intelligence test development, intelligence test interpretation, psychometrics and neuropsychological testing. I express all opinions contained in report to a reasonable degree of scientific certainty.

ANALYSIS

11. My contention is that Mr. Akil Jahi meets criteria of Intellectual Disability. That the Tennessee State court concluded otherwise is inconsistent with scientific and medical community standards. In the United States, the American Association on Intellectual and Developmental Disabilities (AAIDD), and the American Psychiatric Association (APA) have established and promulgated the consensus-based, widely-accepted, three-pronged definition of intellectual disability cited with approval in both *Atkins v. Virginia* and *Hall v. Florida.* Each contains the same three components: a person with intellectual disability is one who displays significantly sub-sub-average general intellectual functioning and significantly sub-average adaptive functioning, and the disability manifests before adulthood. There is ample evidence that Mr. Akil Jahi meets all three criteria in this definition. However, the state court opinion did not follow appropriate standards in assessing each prong of the definition, particularly

regarding sub-average intellectual functioning. This determination requires taking into account both the Flynn effect (the fact that test norms get outdated) and the practice effect (the spurious inflation of IQs when a person is repeatedly tested over time). Contrary to established mental health professional standards, the State court refused to apply the Flynn effect to Mr. Jahi's IQs *(Jahi v. State,* 2014 Tenn. Crim. App. LEXIS 229, at *290-293 (Tenn. Crim. Mar. 14, 2014) and did not adequately address the issue of practice effects in producing spuriously high IQs the second, third, and fourth times he was administered Wechsler's scales as an adult. I will discuss these topics, in turn, and also consider the other two prongs of the definition of intellectual disability (sub-average adaptive behavior and manifestation of the disability prior to adulthood).

MEASURING INTELLECTUAL FUNCTIONING

THE FLYNN EFFECT

12. The State court *(id.)* relied on pr. Bishop's inaccurate testimony that the APA and AAIDD do consider the Flynn effect (PC Hr'g, 12/16/2010, p. 19 and 91). In fact, the 11th edition of AAIDD's official diagnosis and classification manual, Schalock et al. (2010) states: "As discussed in the Users Guide . . . that accompanies the 10th edition of this Manual, best practices require recognition of a potential effect when older editions of an intelligence test corresponding older norms) are used in the assessment or interpretation of an IQ score" (p. 37). That same requirement was discussed in the *User's Guide* that accompanied the 10th edition of the manual

(Schalock et al., 2007). Further, the State court *(Jahi,* 2014 Tenn. Crim. App. LEXIS 229, at *290-*290-293) on Dr. Bishop's incorrect testimony that the Wechsler series did not allow for Flynn effect adjustments (PC Hr'g, 12/16/2010, p. 92). However, the bulk of research on the Flynn effect has utilized the Wechsler series of IQ tests (Flynn, 2009; & Lichtenberger, 2006); an entire issue of the *of Psychoeducational Assessment* was devoted to the Flynn effect, as it affects Wechsler's series of scales (Kaufman & Weiss, 2010); and books written about Wechsler's series of scales by psychologists who developed and standardized the last several versions of Wechsler's series of scales include chapters specifically devoted to the Flynn effect (e.g., Zhou, Gregoire, & Zhu, 2010); Weiss, Saklofske, Coalson, & Raiford, 2010). McGrew (2015b), in an AAIDD publication, wrote about the consensus among the scientific community to adjust Wechsler Full Scale IQs, and other IQs, for the Flynn effect: "For Dr. Alan Kaufman (20104), arguably the most prominent scholar on intelligence testing and interpretation of the various Wechsler IQ tests, stated that 'the Flynn effect (FE) is well known: Children and adults score higher on IQ tests than they did in previous generations . . . . The rate of increase in the United States has apparently remained a fairly constant 3 points per decade since the 1930s (p. 382)' " (McGrew, 2015b, p. 159).

13. To explain the Flynn effect, I will quote from *IQ Testing 101* (Kaufman, 2009):

> James Flynn (1984) made the intriguing discovery that IQs of Americans increased, on average,

> by 3 points per decade. Children and adults in U.S. performed better on IQ tests from to generation at a predictable, steady rate. Flynn's initial study evaluated IQ test scores in the U.S. between 1932 and 1978, and the rate of increase was a steady 3 points per decade. Since that time, that same rate of gain has held true into the 1980s *(*Kaufman & Kaufman, 1983), the 1990s (Flynn, 1998), and the first decade of the 21st century (Zhou & Zhu, 2007). One consequence of this shift in the average intelligence of the whole country is that the norms for IQ tests get more out of date with each passing year. 10 years, the norms for an IQ test are 3 points of date, and after two decades the out-datedness reaches a hefty 6 points . . . These outcomes paradoxical. If people are getting smarter (or, at least, scoring higher on IQ tests), shouldn't their IQs be higher on the newer test? The answer is no. The newer set of norms is based on the smarter group of people just tested, so the new norms are *steep*. In contrast, the norms for the older test are based on a group tested some time ago, and those outdated norms are *soft* . . . . The new test has steeper norms, so a person's IQs be lower on the newer test, with new norms, on the old test, with an outdated (not as smart) reference group . . . . That 3-point difference illustrates the power of the Flynn effect (pp. 202-202-204 (emphasis in original)).

14. Ultimately, the State court's refusal to apply the Flynn effect to Akil Jahi's IQ scores *(Jahi,* 2014 Tenn. Crim. App. LEXIS 229, at *290-293) resulted IQs that were artificially inflated by outdated norms

and that were, therefore, not valid indicators of his true intellectual function. The most recent publication by AAIDD states flatly, with no qualifications: "The Flynn effect produces inflated and inaccurate test scores" (McGrew, 2015b, p. 156).

15. Without question, the scientific standard accepted within the medical and psychological professions, consistent with *Atkins v. Virginia* and *Hall v. Florida,* necessitate that the Flynn effect be considered when interpreting Mr. Jahi's WAIS-R Full Scale IQ earned in 1994 and his WAIS-III Full Scale IQs earned in 2000 and 2005; in all three instances the norms were 5 or more years old. (By contrast, the Flynn effect does not need to be applied to Mr. Jahi's IQ score from the WAIS-IV administered in 2009 because those norms were current, i.e., only two years old.)

16. The Flynn effect of 3 points per decade (or 0.3 points per year) has now been validated in the U.S. into the second decade of the 21st century (Wechsler, 2014). Further, Polloway's (2015) recent book published by AAIDD, *The Death Penalty and Intellectual Disability,* endorses Flynn's (2009) recommendation that IQs be adjusted 0.3 of an IQ point for each year that a test's norms get out of IQ expert Dr. Kevin McGrew, coauthor of the Woodcock-Johnson—Fourth Edition (WJ IV) wrote the intellectual function and Flynn effect chapters in Polloway's (2015) AAIDD book. He stated: "Not only is there a scientific consensus that the Flynn effect is a valid and real phenomenon, there is also a consensus that individually obtained IQ test scores derived from tests with outdated norms must be

adjusted to account for the Flynn effect, particularly in *Atkins* cases" (McGrew, 2015b, p. 160). The AAIDD's most recent guidelines for the definition classification of intellectual disability (Schalock et 2012) state: The *Flynn effect* refers to the increase in IQ scores over time (i.e., about .30 points per year) . . . . Both the 11th edition of the manual and this *User's Guide* recommend that in cases in which a test with aging norms is used as part of a diagnosis of ID, a corrected Full Scale IQ upward of 3 points per decade for age of norms is warranted" (p. 23). Reynolds, Niland, Wright, and Rosenn (2010) argue that failure to adjust for the Flynn effect might be "tantamount to malpractice. No One's life should depend upon when an IQ test was normed" (p. 480).

17. When Akil Jahi was tested on the WAIS-R by Dr. Steinberg in 1994, the test's 1978 norms were 16 years out of date. At the rate of 3 points per decade (0.3 points per year), that translates to 4.8 points out of date. That means that Mr. Jahi's WAIS-R Full Scale IQ was spuriously high; it was inflated by the outdated norms. To adjust for the Flynn effect, one must subtract 4.8 points from Mr. Jahi's WAIS-R Full Scale IQ of 75, which equals 70.2 (and logically rounds to 70 because fractions of IQ points make no clinical sense).

18. When Akil Jahi was tested on the WATS-III in 2000, the test's 1995 norms were 5 years out of date. At the rate of 3 points per decade, that translates to a spuriously high IQ by 1.5 points. To adjust for the Flynn effect, one must subtract 1.5 points from Mr. Jahi's WAIS-III Full Scale IQ of 78, which equals 76.5 (and rounds to 77). By the time he

was tested once again on the WAIS-III in 2005, the norms were 10 years out of date; his obtained Full Scale IQ of 79 was spuriously inflated by 3 points to outdated norms; one must subtract 3 points to adjust for the Flynn effect, yielding an outdated-ed-norms-adjusted IQ = 76. As noted, no Flynn effect adjustment is needed for Mr. Jahi's WAIS-IV Full Scale IQ of 78 obtained in 2009 because the norms were, at that time, fairly new. However, that does mean that the WAIS-IV IQ of 78 reflects an accurate picture of his intellectual functioning. Nor do his adjusted WAIS-III Full Scale IQs of 77 (2000 testing) or 76 (2005 testing) represent valid portrayals of his intelligence. *All three of these IQs are artificially inflated by the practice effect.* The 2000, 2005, and 2009 administrations of Wechsler's adult scales represent the second, third, and fourth times he was assessed with a version of Wechsler's IQ tests. The experience of having taken the test before artificially inflates a person's IQ score because of the incidental learning that takes place each time the test is administered. When a person, such as Mr. Jahi, is tested three or more times on a Wechsler scale, the practice effect has a special name, *progressive error.*

PRACTICE EFFECT

19. Importantly, 2010 AAIDD standards require the use of "clinical judgment in interpreting the obtained score in reference to . . . factors such as practice effects . . ." (Schalock et al., 2010, p. 35). McGrew (2015a) states, "when major score are in a collection of IQ test scores, interpretations requite assessment professionals to educate the recipients of their findings regarding the potential

reasons for the IQ test score variability. For example, assessment professionals should address issues such as practice effects . . .” (p. 105). The State court’s opinion should have taken into consideration the practice effects and progressive error that accompany the administration of a Wechsler IQ scale to the same individual on four separate occasions. it did not. In order to understand practice effects and progressive error, it is essential to understand the Verbal versus Performance (nonverbal) content of Wechsler’s IQ scales.

20. Wechsler’s intelligence scales, such as the WAIS-R and WAIS-III, are composed of two separate scales: (a) the Verbal Scale, which comprises school-school-like tasks such as defining words, solving oral arithmetic problems, and answering factual (e.g., What is the capital of Spain? Who is Bill Gates?); and (b) the Performance Scale, which uses blocks, puzzles, and a variety of pictures and designs to measure the ability to solve novel problems — the kind of skills that are not taught in school. The nonverbal Performance Scale is intended to measure the ability to solve new problems, but that novelty wears off fast. The ‘second time a Wechsler test is administered, the tasks are no longer novel and, therefore, they are no longer measuring the kind of intelligence that Dr. Wechsler intended to measure with the Performance Scale. (Note that although the latest version of the WAIS, the fourth edition, does not include a Performance Scale, it continues to rely on nonverbal indexes to measure IQ, namely the Perceptual Reasoning Index and the Processing Speed Index. It is, therefore, subject to the same kind

of practice effects and progressive errors as the WAIS-R and WAIS-III.)

21. The fact that the nonverbal subtests lose their novelty the second time they are administered (and the third, fourth, and so on) means that children and adults who are tested on a Wechsler Scale should, ideally, be retested on a different intelligence test when they are retested. That does not often happen because Wechsler's scales are considered the gold standard. However, it is incumbent on examiners to take into account the well-known impact of practice effects and progressive errors when interpreting the validity of IQs for an individual, especially on nonverbal tasks—the very tasks that are the *least* dependent on cultural experiences and environmental influences. When a person has been tested multiple times on Wechsler's scales, the first Wechsler scale administered should be considered the best estimate of that person's intelligence—so long as the scores are deemed valid by the examiner—because it is free from the taint of practice. In fact, Dr. Steinberg, who tested Mr. Jahi on the WAIS-R in 1994, considered his administration of the test to be valid and did not at all challenge Mr. Jahi's effort or compliance.

22. Research studies on practice effects support the notion that the novelty wears off on a second administration of Wechsler's intelligence scales. There has consistently been a differential practice effect on Verbal versus Performance tasks—namely the increase in IQs from one testing session to the next is substantially larger for Performance IQ than Verbal IQ. That finding holds for children, adolescents, and adults. For Wechsler's children's scale

as the WISC-R (Wechsler, 1974), the average IQ over an interval of about one month are as follows (based on data summarized by Kaufman, 1994b):

Ages	WISC-R Gain on Verbal IQ	WISC-R Gain on Performance IQ	WISC-R Gain on Full Scale IQ
7	3.9	8.6	6.6
11	3.4	10.8	7.6
15	3.2	9.2	6.9
Mean	**3.5**	**9.5**	**7.0**

For the WAIS-III, which was administered twice to Mr. Jahi, at ages 29 and 35, the average IQ gains for adolescents and young adults over an interval of about one month are as follows (based on data from Kaufman and Lichtenberger, 1999):

Ages	WAIS-III Gain on Verbal IQ	WAIS-III Gain on Performance IQ	WAIS-III Gain on Full Scale IQ
16-29	**3.2**	**8.2**	**5.7**
30-54	**2.0**	**8.3**	**5.1**

Therefore, the average gain to be expected on Wechsler's intelligence scales for children, adolescents, and adults, over a 1-month interval, is about 3 points on Verbal IQ, 8-9 points on Performance IQ, and 7 points on Full Scale IQ.

23. Importantly, these practice effects continue well past one month, as evidenced in a variety of research investigations. Canon and Thompson (1979) showed that the gain in Performance IQ was still

going strong after 4 months (8 points), although the gain on Verbal IQ had dwindled to 1 point. Further, their review of the stability of intelligence and the resilience of practice effects, Calamia, Markon, and Tranel (2012) stated: "Retest scores are assumed to highest at short intervals and then decrease with time (Theisen, Rapport, Axelrod, & Brines, 1998). However, several studies have found practice effects to persist years after testing, e.g., 3 years (Van der Elst et al., 2008), 5 years (Ronnlund et al., 2005), or even 7 or more years (Salthouse, Schroeder; & 2004)" (p. 547).

24. In a comprehensive review of 11 WAIS test-retest studies, Matarazzo, Carmody, and Jacobs (1980) found gains of about 2 points on Verbal IQ and 7-8 points on Performance IQ with intervals ranging from 1 week to 13 years. I concluded the following based on the results of a plethora of data on test-retest studies for Wechsler scales at all ages of childhood, adolescence, and adulthood (Kaufman, 1994b):

> The expected increase of about 5 to 8 points in global IQ renders any score obtained on a retest as a likely overestimate of the person's true level of functioning—especially if the retest is given within about six months of the original test, or if the person has been administered a Wechsler scale *(any* Wechsler scale) several times in the course of a few years.

(p. 832, italics in original).

25. The overall practice effect of about 7 points Wechsler's Full Scale IQ is merely the average gain.

In fact, even gains *twice* that large are common in normal population (Matarazzo & Herman, 1984). Matarazzo, Carmody, and Jacobs (1980) suggested using the rule of thumb that a gain of at least 15 points is needed in a person's Full Scale IQ from one administration to the next to denote a "significant" improvement (*i.e.* a gain that cannot be simply attributed to the known practice effect). Note, however, that "a 20- to 25-point gain is needed for Performance IQ" (Kaufman & Lichtenberger, 2006, p. 207).

26. As noted previously; the practice effects caused by repeated testing on the same IQ test have special name — *progressive error* (Kausler, 1991). That type of practice effect has been observed in numerous longitudinal investigations of the aging process. Performance IQ is well known to decline dramatically with increasing age (Horn & Hofer, 1992). However, in some longitudinal studies in which adults are tested many times on Wechsler's adult tests, the researchers have discovered that there is no age-related decline in Performance IQ. example, Schmitz-Scherzer and Thomae (1983) adults on the German WAIS as many as five times across the life span, and reported no decline in nonverbal ability through old age. The well-known decrease with age on Performance IQ was masked in this study by the powerful opposite influence of progressive error. "When individuals are tested repeatedly on Wechsler's Performance tasks, they no longer measure the kind of intelligence that thrives on novel problem-solving tasks with visual-spatial stimuli, and it becomes questionable whether they

measure intelligence" (Kaufman & Lichtenberger, 2006, p. 165).

27. Progressive error is often referred to in the aging-IQ literature as "test experience effects" (Salthouse, in press). These effects—when contrasted to true "age effects"—have been systematically modeled and studied in a variety of longitudinal investigations in which more than two assessments have been conducted (e.g., Ferrer, Salthouse, McArdle, Stewart & Schwartz, 2005; Ferrer, Salthouse, Stewart, & Schwartz, 2004; Rabbitt, Diggle, Smith, Holland, & McInnes, 2001; Tucker-Drob, Johnson & Jones, 2009; Wilson, Li, Bienas & Bennett, 2006). Much data have been accumulated to support the scientific, empirical basis of progressive error. Consider, for example, the findings of Rabbitt, Lunn, Wong, and Cobain (2008): "During a 20-year longitudinal study, 5,842 participants aged 49 to 93 years significantly improved over two to four successive experiences of the Heim AH4-1 intelligence test (first published in 1970), even with between-test intervals of 4 years and longer" (p. P235). Also, Sirois et al. (2002) tested male children and adolescents five times on Wechsler's scales, with intervals of about one year between assessments. Verbal IQ decreased slightly (about 2 points) over time but the progressive error was quite evident in the mean Performance IQs earned over five administrations: 108.5 at the baseline test, increasing steadily to 116.1 on the fifth test.

28. It is true that progressive error is not the variable that impacts data in studies of aging and "selective attrition" is another important variable.

(Selective attrition is the finding in longitudinal studies of aging that the brighter adults are the ones who continue to participate in repeated assessments of IQ over time, whereas the less intelligent adults tend to drop out of the studies.) Salthouse (in press) noted that some researchers who investigated the of test experience did not control for selective attrition. Therefore, he conducted a careful investigation of test experience with the variable of attrition controlled.

29. In that study, Salthouse (in press) directly examined the role of "test experience" in distorting the results of aging studies (with selective attrition controlled) and concluded: "Estimates of the magnitude of the test experience effects can be derived from the comparisons of the longitudinal and quasi-longitudinal differences. . . . The fact that most of the values were positive implies that *estimates of change from longitudinal comparisons underestimate the negative change that would have occurred without prior test experience"* (p. 8, italics added).

30. Rabbitt et al. (2008), in their large-scale longitudinal study cited previously, also identified considerable progressive error separate and apart from other variables such as selective attrition: "The main point of the present analyses is that, even after we take into account the effects of initial selection selective attrition of a sample, the marked practice effects during a prolonged longitudinal study found by some of us in earlier research . . . are replicated on a different and very much larger sample of participants" (p. P239). These authors further emphasize: (a) "significant practice improvements are found

when intervals between successive presentations of the task are as long as 4 years"; (b) "that even the oldest participants show gains . . . over periods of 8 and of 12 years"; and (c) "that younger participants gain more from practice than do relatively older participants" (p. P239).

31. In another recent study of "test experience", Salthouse (2014a) analyzed data from a high-quality sample that was tested either two or three times as part of a longitudinal study of aging and cognition. The *title* of that study reveals empirical support for the notion of practice effects and progressive error: "Frequent Assessments May Obscure Cognitive Decline." Based on Salthouse's (2014a) research, it is possible to quantify the impact of progressive error on important memory-related cognitive abilities at about 3 points. And again, Salthouse (2014a) considered the possibility that the spuriousness was due to selective attrition, but rejected that notion for two reasons: (a) "the observed changes for returning . . . participants were similar to the imputed changes of participants with only one occasion" (p. 5), and (b) "the analyses controlled a measure of general cognitive ability . . ., which served to adjust for initial differences between individuals with two and three assessments" (p. 5).

32. Salthouse (2014b) offered additional support for a 3-point impact of test experience (progressive error) in his review and integration of additional sets from high-quality aging research (e.g., Kaufman, 2013; Ronnlund, Nyberg, Backman, & Nilsson, 2005; Ronnlund & Nilsson, 2006, 2008). In that review, Salthouse (2014b) verified the important role of test

experience and used sophisticated statistical to permit quantification of the number of IQ points that are attributable to prior experience with the same test. Timothy Salthouse is widely considered the leading aging-IQ researcher alive. His two key 2014 publications provide empirical support that an approximate 3-point adjustment for test experience—when an adult is tested more than once on the same test, even over intervals of several years—is warranted. Also, his analyses made use of data obtained on Wechsler's adult scales, specifically research I conducted that used quasi-longitudinal methodology (which avoids practice effects and progressive error). "The analyses by Kaufman (2013) were particularly interesting because they on the samples used to establish the norms for different versions of the Wechsler Adult Intelligence Scale (WAIS) test batteries (Wechsler, 1997, 2008) to estimate age-related cognitive change without prior experience. . . ." (Salthouse, 2014b; p. 254).

33. Further verification of the magnitude of the change in IQ attributable to progressive error comes from the Sirois et al. (2002) study, mentioned previously, in which male children and adolescents were tested five times on Wechsler's scales, with intervals of about one year between assessments. Although Sirois et al. (2002) only provided data on separate Verbal and Performance IQs, it is a simple statistical procedure to compute the estimated mean Full Scale IQs from Wechsler's norms tables. I made these simple computations using the data published by Sirois et al. (2002). I compared the change in IQ earned by the male children and adolescents tested Sirois et al. (2002) from the first annual reevaluation

to the fourth annual reevaluation. The IQ on the first reevaluation (administered about one year after the baseline test) was 106.46; by the fourth reevaluation, that IQ had risen to 109.74. The gain in Wechsler Scale IQ due to progressive error equals 3.28 points, in total agreement with Salthouse's quantification of "test experience" as about 3 points.

34. Previously, I had suggested a 5-8 point practice effect based on a review of the extant literature from about 20 years ago. However, most of those studies involved *two* assessments rather than several assessments, and most of the studies used short intervals of one month or several months. In the one review of the literature that included studies with a wide variation in test intervals, some as long as 13 years, Matarazzo, Carmody, and Jacobs (1980) found gains of 5 points on Full scale IQ. The practice effect of 6-8 IQ points that predominate the Wechsler literature for individuals tested twice over brief intervals provide the best estimate of short-term improvements on Wechsler's scales. In contrast, the 3-5 IQ points found in studies that utilized longer intervals (especially the studies conducted by Salthouse and his colleagues that specifically investigated "test experience") are the best estimates of progressive error. That is to say, individuals like Akil Jahi, who have been tested multiple times on Wechsler's tests over the course of years, earn IQs that are spuriously high by 3-5 IQ points.

35. An examination of Mr. Jahi's scores on the verbal and nonverbal portions of Wechsler's scales demonstrates the differential practice effects and progressive errors that have been found in an array

research studies. [For the WAIS-IV, the Verbal IQ was replaced by the Verbal Comprehension Index (VCI) and the Performance IQ was replaced by the Perceptual Reasoning Index (PRI). These scores are shown in parentheses to distinguish them from the Verbal and Performance IQs.]

	WAIS-R	WAIS-III	WAIS-III	WAIS-IV
	Steinberg	Angelillo	Auble	Bishop
	1994	2000	2005	2009
Age	23	29	35	39
Verbal				
Verbal IQ	76	81	80	(78)
Nonverbal				
Performance IQ	75	79	83	(84)

Over time, Mr. Jahi's verbal abilities have shown relatively small increases whereas his nonverbal abilities have increased substantially. True to the research findings, the nonverbal subtests only measure "new" problem solving the first time they administered. After that initial exposure, they are no longer measuring the kind of "fluid" intelligence that Wechsler intended to measure with his Performance Scale. Mr. Jahi's Performance IQ and PRI were in low 80s the third and fourth times he was tested, suggestive of low average functioning. However, scores are an illusion and are not valid; they were spuriously inflated by progressive error, and they make his sub-average intellectual functioning appear to be approaching the normal level. Remember, too, that practice is not the only spuriousness to deal in Mr. Jahi's case; as discussed, the Flynn effect also produces spurious inflation of *all* scores on IQ tests when the norms are out of date—Verbal and

Performance IQs as well as Full Scale IQ. Therefore, Mr. Jahi's WAIS-R Verbal IQ of 76 and Performance IQ of 75 attained at age 23 are inflated by the same 4.8 points as his WAIS-R Full Scale IQ; they are best interpreted as values of 70-71.

36. Full Scale IQs represent the joint contribution of verbal and nonverbal scales. To control for the spuriousness of the practice effect and progressive error it is necessary to subtract 3 IQ points from each of the Flynn-adjusted WAIS-III Full Scale IQs that he obtained at ages 29 and 35; and also from his obtained WAIS-IV Full Scale IQ at age 39. These scores are shown below.

	WAIS-R Steinberg 1994	WAIS-III Angelillo 2000	WAIS-III Auble 2005	WAIS-IV Bishop 2009
Age	23	29	35	39
Full Scale IQ	75	78	79	78
Full Scale IQ (Adjusted for outdated norms—Flynn effect)	70	77	76	78
Full Scale IQ (Adjusted for Flynn effect and Practice effect/ Progressive error)	70	74	73	75

37. This adjustment for prior test experience represents a *conservative,* scientifically supported correction. In view of the number of times he was tested on a Wechsler scale, and the fact that most studies of practice effect and progressive error identify effects greater than 3 points (often *much* greater than 3 points), the suggested 3-point adjustment is, indeed, *highly conservative.* Based on the practice effect, progressive error, and test experience literature that has accumulated over the past half-century and continues to accumulate in 2015, there is strong scientific justification to support a larger correction than 3 points, for example 5 or even 7 points. But not to make any adjustment—as was done in the State court's opinion—is to completely ignore the known impact of test experience on an adult's obtained IQs. Scientists must take into account that there is spuriousness in Mr. Jahi's obtained scores on IQ tests because his obtained IQs—even when adjusted for the Flynn effect and banded with an appropriate band of error—are artificially inflated by repeated exposure to the tasks that compose Wechsler's scales. As I quoted before, research shows that progressive errors apply "if the person has been administered a Wechsler scale *(any* Wechsler scale) several times in the course of a few years" (Kaufman, 1994b, p. 832 (emphasis in original). He is not as intelligent as his scores might suggest.

38. Further, scientific and professional accepted standards of practice, consistent with *Atkins v. Virginia* and *Hall v. Florida,* require that Akil Jahi's IQ scores should be interpreted within the context of 90% or 95% confidence bands. The statistical concept

of the standard error of measurement (SEM) (AERA, APA, NCME, 1999; AAIDD, 2010) is well known. According to AAIDD (2010), the SEM is:

> the variation around a hypothetical 'true score' for the person. The standard error of measurement applies only to scores obtained from a standardized test and can be estimated from the standard deviation of the test and a measure of the test's reliability. The standard error of measurement, which varies by test, subgroup, and age group, should be used to establish a statistical confidence interval within which the person's true score falls. . . . Reporting the range within which the person's true score falls, rather than only a score, underlies both the appropriate use of intellectual and adaptive behavior assessment instruments and best diagnostic practices in the field of ID. Such reporting must be a part of any decision concerning the diagnosis of ID.

(p. 224).

39. In the *Diagnostic and Statistical Manual of Mental Disorders,* Fourth Edition, Text Revision (DSM IV-TR) (APA, 2000), the American Psychiatric Association explained the significance of the errors of measurement as follows:

> It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals

> with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.

(p. 42).

40. Importantly, the opinions expressed in the DSM-IV-TR nearly 15 years ago have not changed over time. The DSM-V (APA, 2013) reiterates: "Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally ± 5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75 (70 ± 5). Clinical training and judgment are required to interpret test results and assess intellectual performance" (p. 37).

41. Thus, one should never think of the IQ as an exact, objective measurement. Mr. Jahi's IQs, banded with two standard errors of measurement (SEMs), are presented below. For the WAIS-R, the Full Scale IQ shown has been corrected for the Flynn effect; the WAIS-III IQs have been corrected for *both* the Flynn effect and practice effects/progressive errors; and the WAIS-IV IQs have been corrected for progressive error.

	WAIS-R Steinberg 1994	WAIS-III Angelillo 2000	WAIS-III Auble 2005	WAIS-IV Bishop 2009
Age	23	29	35	39
Best Estimate of Full Scale	70	74	73	75
Band of (± 5 points = 2 SEMs)	65-75	69-79	68-78	70-80

42. Every single one of these IQ administrations indicate that Mr. Jahi's intelligence test score clearly qualifies him as an individual with an "IQ between and 75 or lower" as required for a finding of ID under the Eighth Amendment, as interpreted in *Hall v. Florida,* 572 U.S. ___ (2014). When the bands of error are considered, his true IQ is conceivably below 70. The known practice effects and progressive errors that compound interpretation of Mr. Jahi's WAIS-III and WAIS-IV IQs render these scores less vital than his initial WAIS-R Full Scale IQ of 75 (adjusted to 70 ± 5 based on the Flynn effect), obtained in 1994. That IQ test administration was deemed valid by Dr. Steinberg. The test scores are not clouded by the impact of experience with Wechsler's scales. It is true that the norms were 16 years old in 1994 and that a 5-point IQ adjustment is required to meet scientific standards regarding the Flynn effect. However, Dr. Steinberg is not to be faulted for using an outdated instrument. In fact, in 1994, the WAIS-R was the gold standard for adult assessment despite its dated norms; the WAIS-III was not published 1997. But even when all four test administrations

considered, the application of scientifically-based adjustments of all four Full Scale IQs for spuriousness—accompanied by the banding of all IQs with errors of measurement—leads to one inescapable conclusion: *Akil Jahi meets the first criterion of the three-pronged definition of ID. He has significantly sub-average intellectual functioning.*

ADAPTIVE BEHAVIOR

43. The second prong of the definition of intellectual disability posits that the person perform at a significantly sub-average level on standardized measures of adaptive behavior. Mr. Jahi's adaptive behavior, as measured by Dr. Bishop in 2009 with Vineland Adaptive Behavior Scales—Second Edition, places him squarely within the ID range. He earned deficient standard scores (normative mean = 100, standard deviation = 15, the same metric used for IQs) in the three sub-domains of Communication Daily Living Skills (68), and Socialization (52); deficits in one or more domains may support a diagnosis of intellectual disability. He scored "Low"—"Low"—and was often rated as performing lower the level of the average 10-year-old—in the following skill areas: Expressive Communication, Written Communication, Community Daily Living Skills, Interpersonal Relations, and Coping Skills. Deficits in two or more skill areas may support a diagnosis of intellectual disability. His overall Adaptive Behavior Composite was 55, which falls in the range that supports a diagnosis of intellectual disability. The adults who were interviewed by Dr. Bishop to obtain Mr. Jahi's adaptive behavior ratings—his childhood friend, Monica McClain, and his stepfather, Arthur

Benson—are both bright, perceptive, and articulate people who have been intimately acquainted with Mr. Jahi since he was a young child.

44. All of these scores identify Mr. Jahi as an adult with moderate to severe deficiencies in adaptive behavior. Furthermore, these scores are entirely consistent with an array of testimonies about Mr. Jahi's lifelong maladaptive behaviors, such as needing help to fill out job applications as a young adult and his life-long problems handling money (e.g., testimony of first cousin, Bobby Taylor). In her testimony, Monica McClain indicated that Akil Jahi (when he was known as Preston Carter) was a follower, not good with money, was still wetting his bed after age 10, was urged to shoplift by his cousins, and couldn't read as a child. His girlfriend, Mamie Watkins, testified that Mr. Akil, when supervising children, could not read a mercury thermometer and had to be shown how much medication to give children. *Without question, Akil Jahi meets the second prong of the definition of intellectual disability. He is deficient in his adaptive behavior.*

AGE OF ONSET

45. The third prong of the definition for intellectual disability requires that the disability be manifested before adulthood. Again there is ample evidence to document that fact. His school records show poor academic performance as of the 4th grade and document that he did not get past the 8th grade (which he repeated several times). A study of Mr. Jahi's school grades reveals that he performed at about an average level until grade 3. Starting in

grade 4, he became a below average student, earning mostly C's, D's, and F's in grades 4-7, before a primarily D & F student the several times he repeated 8th grade. As Dr. Bishop correctly indicates in her 2009 testimony, the demands made on the student in school change considerably at different points in time. She notes, "in the 1st grade the and teacher would read the instructions out loud together" (PC Hr'g, 01/21/2009, p. 147). "Beginning in the middle of the 3rd grade and then in the 4th and grade the student is expected to begin functioning very much on his own with less assistance from the teacher" *(id.).* Going from the 6th to 7th grade: "The shifts in curriculum involve the inclusion of abstract concepts. And in particular, they involve the ability the child to be able to reason inductively and deductively and come to a conclusion on their own without any assistance of the teacher. Abstract reasoning requires a fairly sophisticated level of cognitive development" *(id.* at p. 152).

46. Akil Jahi's average performance until grade and his sub-average intellectual functioning starting in grade 4 and continuing through the rest of his childhood, adolescence, and adulthood are entirely consistent not only with the changing demands of teachers at different grade levels (as aptly summarized by Dr. Bishop), but also with known, empirically-validated patterns of neurological development. The pre-frontal cortex of the frontal lobes of the brain—which are responsible for planning ability, executive functions, decision making, and abstract problem solving—begin to undergo rapid development when children are in grade 4; the growth peaks at ages 11-12, beginning the onset of what the noted

Swiss developmental psychologist, Jean Piaget, referred to as formal operational thought and the great Russian neuropsychologist Alexander Luria called "Block 3 planning ability." It is not uncommon for some children never to experience normal development of the pre-frontal cortex. Mr. Jahi never reached the stage of formal operational thought, the stage of intellectual development that is required to function as a normal pre-adolescent, adolescent, and adult; he never fully developed his Block 3 planning abilities.

47. Consistent with such a pattern of development, Akil Jahi's school achievement took a notable tumble in grade 4, as was evident from records and highlighted in Dr. Bishop's testimony in post-conviction, So, too, did his scores on tests of achievement. Page 7 of his school records shows his basically average scores on the Metropolitan Achievement Test and California Achievement Test through grade 3. By contrast, his scores earned from 1982 through 1987 on standardized tests (page 8 of school records) are notably sub-sub-average. The most pertinent scores in his record are labeled "PR", which refers to percentile rank; the PR denotes the percentage of his peers that he surpassed on each academic test. With one exception (Spelling in 1982), all of the percentile ranks were below 50; most were below 30, and many were below 15. Academically, Mr. Jahi performed well below most other children and adolescents his age. By when he had spent a few years in 8th grade, before dropping out of school, he surpassed less than 10% of his age-mates in most areas of achievement, surpassing only 1% in reading and in language. That

was at age 17, when he was not yet an adult, yet he often supervised Mamie Watkins's young child.

48. Akil Jahi reportedly earned a Kuhlmann-Finch IQ of 107 in grade 3. This group-administered test, published in 1951, was administered in 1978 when it was already 27 years out of date. This test was not highly regarded, was never revised or restandardized, and its IQs cannot be considered valid. As Dr. Bishop indicated in her 2009 testimony, based on its one mid-1950s review in the Buros *Mental Measurements Yearbook* (the authoritative source for test reviews), the Kuhlmann-Finch was evaluated as screening test of modest reliability, "and the validity of the test is considered to be weak" (PC Hr'g, 01/21/2009, p. 137). No weight can be given to the Kuhlmann-Finch IQ of 107 in Mr. Akil's school records. That score cannot be considered a valid estimate of his intellectual potential at any time of his life.

49. Further evidence that his disability was evident before adulthood comes from school records (he was in Chapter 1 classes for special help with reading and arithmetic) and from much testimony by those who knew him best as a child and adolescent. As Monica McClain testified, Preston was in those classes with her because "he couldn't read" (PC Hr'g, 01/20/2009, p. 93). "One day I needed help with my homework and I asked him and he couldn't read it. When we were in class he couldn't read the instructions that was given to him. So I knew that he couldn't read. Well, he said he couldn't read." When he was being given directions, "He would receive the directions but he couldn't carry it out . . . he didn't

understand the directions" *(id.* at pp. 93-94). Step-Step-father Arthur Benson testified: "In my opinion, he could take instructions in small doses. If you told him a whole lot to do, he wouldn't get it all, but if you told him a little, he could get a small amount done" (PC Hr'g, 12/17/2010, p. 19). Further, "it seemed as if his learning ability was slow, and I talked to his mother, and I told her, I think we should have him tested because he seemed to be a little slower than should be" *(id* at p. 20). Also, Mr. Benson stated that Preston didn't write notes, he read small kid books (not often) and lost all interest in reading *(id* at p. Maternal cousin Lonzy Catron, Jr. explained that "[Preston] wasn't a real good reader and I knew this by listening to him read, you know. He had trouble getting the words out, some of them he could get out and some of them he just couldn't." Q: "How long did he have a reading problem?" A: I believe the entire length of him going to school" (PC Hr'g, 01/20/2009, 24). And from Preston's older sister Christine Taylor: "Yeah, he got in trouble a lot for bad grades." . . . Q: "Did he have bad grades all the time?" A: "Yes." Q: "Did he get in trouble all the time for having bad grades?" A: "Yes" (PC Hr'g, 09/01/2009, pp. 88-89). And also from his older sister: Q: "When you were children, is there a particular game that you used to like to play with Preston that involved you making mud pies?" A: "Yes. I would make mud pies and tell him it was chocolate." Q: "And what would Preston do?" A: "He would eat it." . . . Q: "Did he do this just one time or more than one time?" A: "Just a few times." Q: " . . . How old would you say you were?" A: "Maybe seven or eight" Q: "So how old would that make Preston?" A: "Six or seven" (PC Hr'g, 09/01/2009, pp. 92-93). *All evidence unequivocally*

supports the fact that Akil Jahi had an intellectual disability well before adulthood.

CONCLUSION

50. Akil Jahi clearly meets all three prongs of accepted standard of an intellectual disability in the U.S. established and promulgated by the AAIDD and APA and cited with approval in both *Atkins* and A person with intellectual disability is one who displays significantly sub-average general intellectual functioning and significantly sub-average adaptive functioning, and the disability manifests before adulthood. The term *significantly sub-average* is defined precisely by formal statistical methods. The use of the term *significantly* indicates that score a person obtained on a test differs from the average or mean of the population on this test, and that this difference is not due to chance factors. Specifically, the term *significant* as used in the definition of intellectual disability means that the level of performance on the intelligence or adaptive behavior test is approximately two or more standard below the mean. Thus, where 100 represents the mean or average for the population, every 15 points by which someone deviates from the mean is considered a standard deviation. Thus, a score two standard deviations below the mean is 70. Akil Jahi has significantly sub-average intelligence on Wechsler's IQ tests and on the Vineland Adaptive Behavior Scales. Best practices require consideration of the Flynn effect, as well as considereration of practice effect. That is, errors of measurement that are known to accompany every administration of an IQ test to every individual in every

circumstance; or on the fact that they have from the experience of being tested again and again and again on the same series of IQ tests. Given the known, empirically determined impact of practice effects and progressive errors, Mr. Jahi's WAIS-III and WAIS-IV Full Scale IQ are spuriously inflated his prior test experience with different versions of same instrument. The most valid estimate of his intellectual functioning comes from the first time he was tested on Wechsler's scales, in 1994, at age 23, Dr. Steinberg. Dr. Steinberg considered the test scores valid (not spoiled by lack of effort or the application of inappropriate administration or procedures), but the test norms were 16 years out of date. When Mr. Akil's obtained Full Scale IQ of 75 was corrected for the Flynn effect, his IQ of 70 is 2 standard deviations below the normative mean of 100. Applying the 95% band of error yields a range of 65-75, a range that clearly depicts sub-average intellectual functioning. That 1994 intelligence test score clearly qualifies him as an individual with an "IQ between 70 and 75 or lower" as required for a finding of ID under the Eighth Amendment, as interpreted in *Hall v. Florida,* 572. U.S. ___ (2014).

51. Best practices is to interpret *the first* IQ earned by an adult on Wechsler's scales whenever person has been tested multiple times—so long as that first administration is deemed valid and was not administered when the person was a young child. Quite clearly, the 1994 WAIS-R provides the Full Scale IQ of choice to interpret, once it has been corrected for its long-outdated norms. The two WAIS-III Full Scale IQS and the WAIS-IV Full Scale IQ need not even be interpreted in light of the valid

WAIS-R IQ earned at age 23 by Akil Jahi. But if they are interpreted with scientific accuracy—by spurious inflation of scores due to the Flynn effect, the practice effect, and progressive error—then these IQs tell the same exact story of a man with sub-sub-average intellectual functioning (adjusted IQs of 73-74 on the WAIS-III and 75 on the WAIS-IV). That is to say, when Mr. Jahi's additional test results 2000; 2005, 2009) are properly evaluated using established clinical standards for the assessment of raw IQ scores — according to the DSM-5, AAIDD, *Hall v. Florida*— those additional scores also place Mr. Jahi firmly within the range of 70 to 75 (or required for a finding of ID.

52. Mr. Jahi's Vineland standard score of 55 is fully 3 standard deviations below the normative of 100, again supporting his sub-average intellectual functioning in the area of adaptive behavior. And there has been an array of testimony and data to support that Akil Jahi's disability was manifest in childhood and adolescence, before he was an adult. The correct diagnosis for Mr. Jahi is intellectual disability. This diagnosis is consistent with all data pertinent to the case and with Dr. Ragan's diagnosis of Akil Jahi with a cognitive disorder NOS on Axis 1 in his 2009 report. The State's court reached its wrong conclusions by its reliance *(Jahi* v. *State,* 2014 Tenn. Crim, App. LEXIS 229, at *290-293 (Tenn. Crim, App. Mar. 14, 2014) on Dr. Bishop's inaccurate testimony that the APA and AAIDD do not consider the Flynn effect (PC Hr'g, 12/16/2010, p. 19 and 91); by its reliance (p. 73, 2014 CCA Opinion) on Dr. Bishop's incorrect testimony that the Wechsler series did not allow for Flynn effect adjustments (PC

Hr'g, 12/16/2010, p. 92); and, ultimately, by its to apply the Flynn effect to Akil Jahi's IQ scores (*Jahi*, 2014 Tenn. Crim. App. LEXIS 229, at *290-*290-293) or even to consider the well-known impact of practice effects and progressive error.

53. Based upon all of these factors, it is my scientific, professional, and expert opinion, which I provide with a reasonable degree of scientific certainty, that the state Court's opinion came to the wrong conclusion about Akil Jahi's intellectual functioning; he is intellectually disabled and it is an egregious error to put this man to death.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of March, 2015, at San Diego, California.

s/
Alan S. Kaufman, Ph.D.