

## **APPENDIX**

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**APPENDIX A**



**IN THE COURT OF CRIMINAL APPEALS  
OF TEXAS**

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**WR-55,161-02**

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**EX PARTE ERIC DEWAYNE CATHEY**

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**ON APPLICATION FOR WRIT OF HABEAS  
CORPUS IN CAUSE NO. 713189-B IN THE  
176<sup>th</sup> DISTRICT COURT OF HARRIS  
COUNTY**

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*Per curiam.*

**ORDER**

This is a subsequent application for a writ of habeas corpus in a capital case that Applicant filed pursuant to Article 11.071, Section 5 of the Texas Code of Criminal Procedure. Applicant alleged in this application that he is intellectually disabled and ineligible for the death penalty under the United States Supreme Court's holding in *Atkins v. Virginia*, 536 U.S. 304 (2002). We denied relief on this application in 2014. *Ex parte Cathey*, 451 S.W.3d 1 (Tex. Crim. App. 2014).

In 2017, the United States Supreme Court concluded that some of the standards in our caselaw did not comport with the Eighth Amendment’s requirements regarding an intellectual disability determination. *Moore v. Texas*, 137 S. Ct. 1039 (2017) (“*Moore I*”). On November 7, 2018, we exercised our authority to reconsider this case on our own initiative. We remanded this case to the convicting court “to consider all of the evidence in light of the *Moore v. Texas* opinion and make a new recommendation to this Court on the issue of intellectual disability.”

After holding a hearing, the convicting court made findings of fact and conclusions of law recommending that we grant relief on Applicant’s claim of intellectual disability. We disagree.

Applicant continues to rely upon his 1996 WAIS-R IQ score of 77 to establish that he is intellectually disabled. Taking the standard error of measurement (“SEM”) into account, Applicant’s IQ score range is between 72 and 82. Although we agree that factfinders may consider the concept of the “Flynn Effect” in assessing the validity of a WAIS-R IQ test score, we decline to subtract points from Applicant’s obtained IQ score. *Cathey*, 451 S.W.3d at 5. On these facts, Applicant has failed to show the requisite deficits in intellectual functioning. *See Moore v. Texas*, 139 S. Ct. 666, 668 (2019) (“*Moore II*”) (stating that, to make a finding of intellectual disability, a court must see “deficits in intellectual functioning—primarily a test-related criterion”).

Applicant complains that when we rejected his intellectual disability claim in 2014, we improperly

relied on the *Briseno*<sup>1</sup> factors and focused on his “perceived adaptive strengths” and “behavior while incarcerated.” Even if we disregard these factors, we may still conclude based on school records and trial testimony that Applicant has failed to prove adaptive deficits. And we will not credit the results of the Vineland Adaptive Behavior Scales administered by Dr. Fletcher. Regardless of whether or not the Vineland can be administered retrospectively, the Vineland reporters in this case were highly motivated to misremember Applicant’s adaptive abilities. *Cathey*, 451 S.W.3d at 20. The adaptive behavior Applicant’s sister reported to Fletcher as part of the Vineland test was also contradicted by her trial testimony. *Id.*

Under the circumstances presented in this case, Applicant has not established that he is intellectually disabled according to the standards articulated by the United States Supreme Court in *Moore I* and *Moore II*. Based upon our own review, we deny relief on Applicant’s intellectual disability claim.

IT IS SO ORDERED THIS THE 28<sup>TH</sup> DAY OF APRIL, 2021.

Do Not Publish

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<sup>1</sup> *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004).

**APPENDIX B**  
**IN THE 176TH JUDICIAL DISTRICT COURT**  
**OF HARRIS COUNTY, TEXAS**

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EX PARTE ERIC	§	
DEWAYNE CATHEY,	§	TRIAL NO.
Applicant.	§	713189-B
	§	CCA NO. WR-
	§	55,161-02

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**COURT’S FINDINGS OF FACT AND**  
**CONCLUSIONS OF LAW**

On November 7, 2018, the Texas Court of Criminal Appeals remanded this cause to the Court for consideration of all of the evidence regarding Applicant Eric DeWayne Cathey’s (“Mr. Cathey”) claim in his Application for Post-Conviction Writ of Habeas Corpus, in light of the Supreme Court’s recent opinion in *Moore v. Texas*, 137 S. Ct. 1039 (2017). In this claim, Mr. Cathey alleged that he is a person of mental retardation<sup>1</sup> and thus entitled to habeas relief under the requirements of the Supreme Court’s

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<sup>1</sup> The term mental retardation is replaced by the term intellectual disability in the American Association on Intellectual and Developmental Disability Manual. INTELLECTUAL DISABILITY: DEFINITIONS, CLASSIFICATION, AND SYSTEMS OF SUPPORT (11th ed. 2010) (“AAIDD Manual”) and the American Psychological Association’s DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) (“DSM-5”). The terms mental retardation and intellectual disability are used interchangeably herein.

decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the execution of defendants with mental retardation violates the Eighth Amendment to the U.S. Constitution.

Now, the Court of Criminal Appeals has asked this Court to “make a new recommendation to the Court on the issue of intellectual disability,” considering all of the evidence of record and any new evidence from “mental health experts and any witnesses whose evidence the court determines is germane to the question of intellectual disability” in light of the *Moore v. Texas* opinion (*Moore I*). *Ex parte Cathey*, 2018 Tex. Crim. App. Unpub. 2018 WL 5817199 (Tex. Crim. App. Nov. 7, 2018) (per curiam) (unpublished). The United States Supreme Court has since issued a second opinion in *Moore v. Texas*, 586 U.S. \_\_\_\_ (2019) (*Moore II*), again reversing the Court of Criminal Appeals’ determination that the applicant failed to show adaptive deficits sufficient to support a diagnosis of intellectual disability. These findings therefore discuss the evidence in light of both *Moore I* and *Moore II*.

In 2010 this Court held an evidentiary hearing to determine whether Mr. Cathey is a person of mental retardation and also for evaluating evidence concerning the following four issues presented by the Texas Court of Criminal Appeals:

- (1) the scientific validity and reliability of the ‘Flynn Effect;’
- (2) whether clinical practitioners who are ordinarily called upon to diagnose mental retardation for purposes outside of the criminal justice system use and apply the ‘Flynn Effect’

- to I.Q. test results when making their particularized diagnoses of mental retardation;
- (3) whether the application of the ‘Flynn Effect’ to individual test results is generally accepted scientific procedure in the pertinent professional community outside of the criminal justice system; and
  - (4) the known or potential ‘error rate’ of the ‘Flynn Effect’ as it applies to a specific I.Q. test result.

*Ex Parte Cathey*, 2008 Tex. Crim. App. Unpub. LEXIS 850 (Tex. Crim. App. Nov. 18, 2008) (per curiam) (unpublished).

After reviewing the testimony of witnesses and the evidence presented at the 2010 hearing, the Court found that Mr. Cathey had proven by a preponderance of the evidence that he is a person with mental retardation and also found that the Flynn Effect is a scientifically valid and real phenomenon that should be applied to intellectual functioning test scores in death penalty cases to correct for norm obsolescence, and issued Findings of Fact and Conclusions of Law in support. However, in 2014 the Court of Criminal Appeals disregarded these findings and denied Mr. Cathey relief on his subsequent application for writ of habeas corpus. *Ex parte Cathey*, 451 S.W.3d 1 (Tex. Crim. App. 2014).

Upon consideration of all of the evidence properly before it, in light of *Moore v. Texas*, the Court finds that Mr. Cathey has proven by a preponderance of the evidence that he is a person with intellectual disability and also finds that the Flynn Effect is a scientifically valid and real phenomenon that should be applied to intellectual functioning test scores in death penalty cases to correct for norm obsolescence,



and issues these Findings of Fact and Conclusions of Law.

## **FINDINGS OF FACT**

### **I. PROCEDURAL HISTORY**

1. Applicant Eric DeWayne Cathey (“Mr. Cathey”) was convicted of capital murder in the 176th Criminal District Court of Harris County, Texas in Cause No. 713189 on March 12, 1997, and sentenced to death on March 14, 1997.

2. On March 20, 1997, Mr. Cathey filed a notice of appeal to the Texas Court of Criminal Appeals. The Court of Criminal Appeals affirmed the conviction and sentence on direct appeal on April 21, 1999. *Cathey v. State*, 992 S.W.2d 460 (Tex. Crim. App. 1999).

3. On September 16, 1999, Mr. Cathey filed a review petition to the Supreme Court. The Supreme Court denied Mr. Cathey’s petition for writ of certiorari on January 10, 2000. *Cathey v. Texas*, 528 U.S. 1082 (2000).

4. On March 15, 1999, Mr. Cathey filed an application for state post-conviction relief under Tex. Code Crim. Proc., art. 11.071. The Court of Criminal Appeals denied the application on April 2, 2003. *Ex Parte Cathey*, Writ. No. 55,161-01 (Tex. Crim. App. Apr. 2, 2003) (unpublished).

5. On April 2, 2004, Mr. Cathey filed his federal habeas petition in the United States District Court for the Southern District of Texas under 28 U.S.C. § 2254. The district court denied habeas relief on December 23, 2004.

6. On May 5, 2005, Mr. Cathey filed an application for certificate of appealability to the Fifth Circuit. The

Fifth Circuit denied Mr. Cathey's application on April 7, 2006. *Cathey v. Dretke*, 174 Fed. App'x 841 (5th Cir. 2006).

7. On November 17, 2008, Mr. Cathey filed an Application for Postconviction Writ of Habeas Corpus and Motion for Stay of Execution under Tex. Code Crim. Proc., art. 11.071. By order dated November 18, 2008, the Court of Criminal Appeals granted Mr. Cathey's motion to stay and remanded the writ to the 176th Criminal District Court, Harris County, Texas for a hearing on Mr. Cathey's claims. *Ex Parte Cathey*, 2008 Tex. Crim. App. Unpub. LEXIS 850 (Tex. Crim. App. Nov. 18, 2008) (per curiam) (unpublished). As a part of the factual inquiry on the issue of mental retardation, the Court of Criminal Appeals required the trial court to evaluate evidence concerning the Flynn Effect. *Id.*

8. On January 25-29, 2010, this Court conducted an evidentiary hearing to determine whether Mr. Cathey is a person of mental retardation and also to address the four issues specific to the application of the Flynn Effect mandated for review by the Texas Court of Criminal Appeals.

9. On December 31, 2012, the Court found that Mr. Cathey had proven by a preponderance of the evidence that he is a person with mental retardation and also found that the Flynn Effect is a scientifically valid and real phenomenon that should be applied to intellectual functioning test scores in death penalty cases to correct for norm obsolescence, and issued Findings of Fact and Conclusions of Law in support.

10. On November 5, 2014, however, the Court of Criminal Appeals disregarded this Court's findings

and denied Mr. Cathey relief on his subsequent application for writ of habeas corpus. *Ex parte Cathey*, 451 S.W.3d 1 (Tex. Crim. App. 2014).

11. On March 28, 2017, the United States Supreme Court decided *Moore v. Texas*, 137 S. Ct. 1039 (2017), holding that the Texas Court of Criminal Appeals (CCA) had unconstitutionally disregarded established medical standards for intellectual disability by focusing on the applicant's adaptive strengths rather than his deficiencies and by relying on the nonclinical *Briseno* factors.

12. On May 11, 2017, relying in part on *Moore*, the Fifth Circuit preliminarily authorized Mr. Cathey to file a second habeas petition in his federal case, finding that he made a prima facie case of intellectual disability.<sup>2</sup> *In re Cathey*, 857 F.3d 221 (5th Cir. 2017). But before proceeding with a second federal habeas petition, Mr. Cathey moved for a stay and abeyance so that he could seek reconsideration from the Court of Criminal Appeals.

13. On July 28, 2017, the Southern District of Texas stayed the federal proceedings so that Mr. Cathey could file a suggestion of rehearing in the Court of Criminal Appeals. *Cathey v. Davis*, No. 4:15-cv-02883, Order (S.D. Tex. July 28, 2017). On September 26, 2017, Mr. Cathey filed a Suggestion for the Court to Reconsider Case on its Own Initiative. By order dated November 7, 2018, the Court of Criminal Appeals exercised its authority to reconsider the case on its own initiative, and remanded the cause to this Court to "consider all of the evidence in light of the

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<sup>2</sup> Mr. Cathey's first federal habeas petition was filed and denied in 2004.

*Moore v. Texas* opinion and make a new recommendation to [the Court of Criminal Appeals] on the issue of intellectual disability.” *Ex parte Cathey*, 2018 Tex. Crim. App. Unpub. 2018 WL 5817199 (Tex. Crim. App. Nov. 7, 2018) (per curiam) (unpublished).

14. In accord with the Court of Criminal Appeals remand order, the Court determined that a writ evidentiary hearing was necessary to further develop the habeas record in light of *Moore*. The hearing was limited to an examination of new science and scholarship in the field of ID that has been developed since the 2010 hearing, and whether, in light of this science and scholarship, Fletcher and/or Proctor changed their respective clinical opinions.

15. The Court Finds that the DSM-5 and the AAIDD Manual; USER’S GUIDE TO INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2012) (“User’s Guide:”)<sup>3</sup>] has been updated.

## **II. THE 2010 EVIDENTIARY HEARING**

16. On January 25-29, 2010, this Court conducted an evidentiary hearing to determine whether Mr. Cathey is a person of mental retardation and also to address the four issues specific to the application of the Flynn Effect mandated for review by the Texas Court of Criminal Appeals. Mr. Cathey appeared in person and through his counsel of record.

17. Mr. Cathey presented live testimony from the

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<sup>3</sup> The 11<sup>th</sup> edition User’s Guide, published after the 2010 Evidentiary Hearing, has replaced the previous 10<sup>th</sup> edition which was cited in the Findings of Fact and Conclusions of Law issued by the Court on December 31, 2012.

following experts:

- a. James Robert Flynn, Ph.D., the discoverer of and world-renowned expert on the scientific phenomenon known as the Flynn Effect;
- b. Jack M. Fletcher, Ph.D., an expert clinical neuropsychologist with specific expertise in classification and measurement issues pertaining to the diagnosis of people with disabilities; and
- c. Alan Steven Kaufman, Ph.D., an expert psychologist and a top scholar on the development and interpretation of intelligence tests.
- d. Mr. Cathey presented testimony by affidavit <sup>4</sup>from the following people:
- e. Greg Olley, Ph.D., an expert psychologist and chair of the Division 33 American Psychological Association Committee on Mental Retardation (DX 47)<sup>5</sup>;
- f. Charlotte Ross, Mr. Cathey's older sister (DX 42);
- g. Robert Charles Jr., Mr. Cathey's brother (DX 43);

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<sup>4</sup> The Court admitted the affidavits as exhibits during the evidentiary hearing. "The Court of Criminal Appeals will defer to the trial court's findings of fact even when those findings are based on affidavits rather than live testimony." *Ex parte Thompson*, 15.3 S.W.3d 416, 418 (Tex. Crim. App. 2005).

<sup>5</sup> "DX" refers to exhibits admitted by the Applicant at the evidentiary hearing. "SX" refers to exhibits admitted by the State at the evidentiary hearing. "H.T." refers to the transcript taken at the evidentiary hearing.

- h. Noaella Bryant, Mr. Cathey's former wife (DX 44);
  - i. Celecia Baker, Mr. Cathey's younger sister (DX 45);
  - j. Faryion Wardrip, an inmate at the Polunsky Unit (DX 50); and
  - k. Ronald Hamilton, an inmate at the Polunsky Unit (DX 51).
18. The State presented live testimony from the following:
- a. Timothy Proctor, Ph.D., an expert forensic psychologist;
  - b. Leigh Hagan, Ph.D., an expert psychologist who offered opinion only on the validity of the Flynn Effect and not on whether Mr. Cathey is a person of mental retardation;
  - c. Don Cohen, an investigator employed by the Harris County District Attorney's office for post-conviction writs;
  - d. Captain Steven Bryant, a captain at the Polunsky Unit, Texas Department of Criminal Justice Correctional Institution Division;
  - e. Leah Madison, a correctional officer at the Polunsky Unit, Texas Department of Criminal Justice Correctional Institution Division; and
  - f. William Cook, a correctional officer at the Polunsky Unit, Texas Department of Criminal Justice Correctional Institution Division.
19. Mr. Cathey presented and the Court admitted a total of 59 exhibits. The State presented and the Court admitted a total of 21 exhibits.

### III. THE LEGAL STANDARD

20. Following the decision of the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that it is “cruel and unusual” to execute the mentally retarded, the Courts of this and other states have grappled with the appropriate procedures and standards by which this straightforward declaration of constitutional principle is to be applied. In Texas, the procedure is for the Court, without a jury, to consider appropriate evidence, including affidavits, and for the applicant to prove by a preponderance of the evidence that he is a person of intellectual disability. The preponderance of the evidence means proof “by the greater weight and degree of credible evidence.” *Compton v. Henrie*, 363 S.W.2d 179, 182 (Tex. 1963).

21. In determining whether Mr. Cathey is a person of intellectual disability, the Court has been guided by the scientific and clinical definitions of intellectual disability developed by the American Association on Intellectual and Developmental Disabilities (“AAIDD”), formerly the American Association on Mental Retardation (“AAMR”), and the American Psychiatric Association (“APA”). Both organizations recognize a three-pronged definition of intellectual disability. Under the AAIDD Manual, intellectual disability is characterized by (1) “significant limitations” in general intellectual functioning, (2) accompanied by “significant limitations” in adaptive functioning, (3) the onset of which occurs prior to the age of eighteen. [DX 4, AAIDD Manual]. Similarly, under the APA’s DSM-5, intellectual disability is characterized by (1) “deficits” in general intellectual functioning, (2) accompanied

by “deficits” in adaptive functioning, (3) the onset of which occurs during the developmental period. DSM-5 at 33.<sup>6</sup>

22. In *Moore I*, the United States Supreme Court held that the Texas Court of Criminal Appeals (CCA) had unconstitutionally disregarded established medical standards for intellectual disability when it relied on the nonclinical *Briseno* factors to assess intellectual disability, *Moore I*, 137 S. Ct. at 1052-53. *Moore I* recognized the validity of the clinical definitions of intellectual disability set forth in the AAIDD Manual and DSM-5, and remanded the case to the CCA for consideration of the issue of intellectual disability in view of these established medical standards. *Id.*

23. On remand in *Ex parte Moore*, 548 S.W.3d 552, 559-60 (Tex. Crim. App. 2018), the CCA adopted the “current medical diagnostic standards” embodied in the DSM-5, while noting that the standards in the DSM-5 and AAIDD Manual are “largely the same.” *Id.* at 559-60, 560 n. 50.. The CCA then applied the DSM-5 definition to the facts in *Moore* but reached the same conclusion that the applicant had not shown adaptive deficits sufficient to support intellectual disability. *Id.* at 573.

24. On February 19, 2019, the United States Supreme Court issued a new opinion in *Moore v. Texas*, 586 U. S. \_\_\_\_\_ (2019) (*Moore II*), reversing for a second time the CCA’s determination that the

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<sup>6</sup> The DSM-5, published after the 2010 Evidentiary Hearing, has replaced the DSM-IV which was cited in the Findings of Fact and Conclusions of Law issued by the Court on December 31, 2012. A copy of relevant excerpts from the DSM-5 is attached hereto as Attachment 1.



applicant failed to show adaptive deficits sufficient to support a diagnosis of intellectual disability. The Supreme Court held that the CCA had unconstitutionally disregarded established medical standards for intellectual disability by continuing to focus on the applicant's adaptive strengths rather than his deficiencies, even while applying the standard set forth in the DSM-5. *Moore II*, 586 U.S. \_\_\_\_ (2019) (slip op., at 6-7).

25. Moreover, the Supreme Court in *Moore II* emphasized the trial court's findings, noting that "[w]hen we first heard this case . . . we noted that the state trial court (a state habeas court) received affidavits and heard testimony from Moore's family members, former counsel, and a number of court-appointed mental health experts." *Id.* (slip op., at 1) (citations omitted). It also noted that the CCA "again relied less upon the adaptive deficits to which the **trial court** had referred than upon Moore's apparent adaptive strengths[.]" Slip Op. at 6-7 (emphasis added). The Supreme Court concluded that on the basis of the **trial court record**, the applicant had shown that he is a person with intellectual disability, and therefore reversed the CCA's ruling. *Id.* at \_\_ (slip op., at 10) (emphasis added).

#### A. Three Prongs of Intellectual Disability

26. In the 2010 evidentiary hearing, the witness testimony and evidence was primarily presented and evaluated in the context of the AAIDD Manual's three-pronged standard for intellectual disability, and to a lesser extent the DSM-IV's largely equivalent three-pronged standard (as previously stated, the DSM-IV is predecessor to the DSM-5, which had not

been published in 2010). For that reason, the evidence is discussed in these Revised Findings primarily using the language of the AAIDD Manual. This Court properly relied on the established medical standards set forth in the AAIDD Manual when it found that Mr. Cathey is a person with mental retardation, and the Court may continue to rely on the AAIDD Manual in view of *Moore I* and *Moore II*. See *Moore II*, 586 U. S. at \_\_\_ (slip op., at 2) (citing *Moore I*, AAIDD Manual, and DSM-5).

27. Each component of the definition of intellectual disability requires additional explanation. First, the consensus among mental health professionals and the AAIDD Manual is that the requirement of significant limitations in general intellectual functioning is satisfied by “an IQ score that is approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments’ strengths and limitations.”<sup>7</sup> [DX 4, AAIDD Manual at 27]. The

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<sup>7</sup> The AAIDD does not intend for a fixed cutoff point to be established for diagnosing a person with intellectual disability. [DX 4, AAIDD Manual at .39-40], The diagnosis is “intended to reflect a clinical judgment rather than an actuarial determination.” *Id.* The AAIDD Manual explains that “it is important to use a range as reflected in the test’s standard error of measurement” because of variations in test performance, examiner’s behavior, or other undetermined factors. [DX 4, AAIDD Manual]. Accordingly, a “standard error of measurement” must be taken into account in interpreting the IQ score obtained on any test. *Id.* The standard error of measurement is the range of IQ score of plus or minus five points within which there is a high level of confidence that a person’s “true” IQ resides. *Id.* Thus, obtained IQ scores up to 75 can satisfy the first component of the definition of intellectual

AAIDD Manual also states that “[a]n IQ score should be reported with confidence intervals rather than a single score. [DX 4, AAIDD Manual at 40]. The DSM-5 likewise recognizes that a score is indicative of intellectual disability if it is “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  $\pm$  5).” DSM-5 at 37.

28. Next, with respect to adaptive functioning, the AAIDD Manual recognizes deficits in adaptive behavior as “performance on a standardized measure of adaptive behavior that is normed on the general population including people with and without [intellectual disability] that is approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, and practical, or (b) an overall score on a standardized measure of conceptual, social, and practical skills.” [DX 4, AAIDD Manual at 43]. The DSM-5 similarly states that the requirement for deficits in adaptive functioning is met “when at least one domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community.” DSM-5 at 38.

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disability, for the true IQ score of a person who obtains a score of 75 is within the range of 70-80. *See Atkins v. Virginia*, 536 U.S. at 309 (“an IQ between 70 and 75 or lower...is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition”).

29. Third, with respect to the requirement that the onset of subaverage intellectual functioning and deficits in adaptive functioning occur before the age of eighteen, it is not required that there be a diagnosis of intellectual disability before the person's eighteenth birthday. [DX 4, AAIDD Manual at 27-28]. Rather, it is necessary only that the limitations in adaptive functioning be apparent before the age of eighteen, that IQ testing sometime during the person's life reliably establish an IQ of 75 or below, and that there be no intervening reason, such as a traumatic head injury, for the person's IQ to have diminished since the age of eighteen. [DX 4, AAIDD Manual at 32].

**B. Additional Guidance by the AAIDD Manual**

30. Both the Supreme Court and the Texas Court of Criminal Appeals have applied the definition of intellectual disability as set forth by the AAIDD, formerly known as the American Association on Mental Retardation. *See Atkins v. Virginia*, 536 U.S. 304, 309 n.3 (2002); *Ex parte Moore*, 548 S.W.3d at 560, n. 50. The AAIDD Manual definition of intellectual disability focuses on the presence of adaptive behaviors before the age of 18:

Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.

[DX 4, AAIDD Manual at 6], The AAIDD Manual also lists the following five assumptions "which are essential to the application of the definition":

*Assumption 1:* “Limitations in present functioning must be considered within the context of community environments typical of the individual’s peers and culture.”

*Assumption 2:* “Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.”

*Assumption 3:* “Within an individual, limitations often coexist with strengths.”

*Assumption 4:* “An important purpose of describing limitations is to develop a profile of needed supports.”

*Assumption 5:* “With appropriate personalized supports over a sustained period, the life functioning of the person with ID generally will improve.”

[DX 4, AAIDD Manual at 7],

#### **IV.THE FLYNN EFFECT**

31. The Flynn Effect is a scientifically valid and reliable phenomenon. It is applied by clinical practitioners in the diagnosis of intellectual disability and is used by practitioners outside the criminal justice system to correct for norm obsolescence. The Flynn Effect should be applied to individual test results to account for norm obsolescence and is a generally accepted scientific procedure. The Flynn Effect is sufficiently precise to make corrections to individual IQ scores because it has a known error rate.

##### **A. The Flynn Effect is a scientifically valid**

**and real phenomenon.**

32. All of the experts presented by the State and the Applicant recognized the Flynn Effect as a real phenomenon. The existence of the Flynn Effect, therefore, is uncontested.

33. James Flynn, Ph.D. is the foremost expert on IQ norm obsolescence over time, also known as “the Flynn Effect.”<sup>8</sup> Dr. Flynn is currently an emeritus professor and lecturer at the University of Otago in New Zealand. He attended the University of Chicago where he received his bachelor’s, master’s, and doctoral degrees in political science. Before joining the University of Otago faculty, Dr. Flynn taught psychology at Cornell University and created a research project based on his work. Dr. Flynn has been a distinguished visiting speaker at the universities of Cornell, Chicago, Harvard, and Princeton where he lectured on his research in intelligence and IQ testing. Dr. Flynn was a visiting scholar at the Sage Foundation in 2008 and 2009 and was a visiting scholar at the Hoover Institution at Stanford. Dr. Flynn has been profiled by the Scientific American. [DX 21, Profile of James Flynn, “Flynn’s Effects,” SCIENTIFIC AMERICAN 37 (2000)]. In 2007, the International Society For Intelligence Research recognized Dr. Flynn as being the most distinguished researcher in the area of intelligence. The New

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<sup>8</sup> Dr. Flynn explained that although the Flynn Effect is named after him, the use of the term was coined in 1994 by authors Richard Herrnstein and Charles Murray in their book, *The Bell Curve*. Dr. Flynn had been studying the Flynn Effect beginning 1983 and labeled it in his research as “IQ gains over time due to norm obsolescence.” [H.T. Vol. 4; 31].

Zealand Psychological Society honored Dr. Flynn as its first honorary fellow for life, and the University of Otago awarded him an honorary doctorate of science. Dr. Flynn is one of two distinguished associates of the Psychometrics Center at Cambridge, which sought Dr. Flynn's expertise in designing its IQ tests. Dr. Flynn delivered the keynote address at the American Psychological Association's symposium on the Flynn Effect at Emory University in 1996 and at Cambridge University in 2006, leading to his 2007 book with Cambridge University Press, *WHAT IS INTELLIGENCE?* [DX 6, James R. Flynn, *WHAT IS INTELLIGENCE?* (2009)]. Dr. Flynn has published 67 articles in peer-reviewed journals, with roughly 50 publications addressing the topic of IQ. He has contributed to Sternberg's *THE ENCYCLOPEDIA OF INTELLIGENCE*, the *CAMBRIDGE HANDBOOK OF INTELLIGENCE*, and the *OXFORD HANDBOOK OF DEVELOPMENTAL PSYCHOLOGY*. [H.T. Vol. 4: 31-38].

34. Dr. Flynn authored "The WAIS-III and WAIS-IV: Daubert Motions Favor the Certainly False over the Approximately True," published in the journal *Applied Neuropsychology*. [DX 18, James R. Flynn, "The WAIS-III and WAIS-IV: Daubert Motions Favor the Certainly False over the Approximately True," 16 *Applied Neuropsychology* 98-104 (2009)]. In this article, the results of Dr. Flynn's comparative study of individually administered tests from 1972 to the present were released. After administering tests with obsolete norms, alongside tests with current norms, and comparing the results, Dr. Flynn observed that there are significant IQ gains over time. Dr. Flynn's comparison of these tests was scientific and valid and included a sound method for translating tests having

different scales, such as the Stanford-Binet and the Wechsler, so that overall changes in scores over time could be accurately quantified. [H.T. Vol. 4: 53, 55-56, 58, 60].

35. Dr. Flynn also conducted a study with psychologist Lawrence F. Weiss, Ph.D., the senior psychologist in psychometrics at Psychological Corporation, who is responsible for standardizing and norming the Wechsler and other intelligence tests. Dr. Flynn and Dr. Weiss co-authored an article addressing the Flynn Effect titled "American IQ Gains from 1932 to 2002: The WISC Subtests and Educational Progress," published in the *International Journal of Testing*. [DX 19, James R. Flynn & Lawrence G. Weiss, "American IQ Gains from 1932 to 2002: The WISC Subtests and Educational Progress," 7(2) *Int'l Journal of Testing* 209-224 (2007)]. Dr. Weiss collaborated with Dr. Flynn and recognized the Flynn Effect in this article, acknowledging that IQ test norms become obsolete over time. Specifically, Dr. Weiss found that American IQ gains have occurred at a rate of 0.3 points per year from 1932 to 2002. [H.T. Vol. 4: 61-62].

36. Dr. Flynn testified that when a test administrator administers to the same group of subjects a recently normed IQ test and a less recently normed test, subjects will make relatively better scores on the older test and worse scores on the new test. [H.T. Vol. 4: 18]. This posed a conundrum because the recognized theory of intelligence is that IQ is static. Upon reaching majority, an individual IQ does not improve over time. [DX 4, AAIDD Manual at 28]. The Flynn Effect has been so well accepted by the scientific community that as a result, test-makers now



update their intelligence tests more frequently. [H.T, Vol. 4: 49, 82]. Applying the Flynn Effect to individual test results is accepted as a valid scientific procedure. [H.T. Vol. 4: 74].

37. Dr. Flynn testified that administering a test with outdated norms is comparable to measuring a person's height with a shrunken measuring tape, resulting in a readout that the person is 6'0" tall when the person is actually 5'6" tall. [H.T. Vol. 4: 47].

38. Dr. Flynn concluded that the Flynn Effect is a scientifically valid, reliable, and observable fact. The scientific community has accepted that IQ inflation is a real phenomenon. [H.T. Vol. 4: 43,47-48, 50-51, 74].

39. Alan Steven Kaufman. Ph.D. is one of the top scholars in the United States today on the development and interpretation of IQ tests. Dr. Kaufman is a clinical professor of psychology at the Yale University School of Medicine in the Yale Child Studies Center and has been associated with Yale since 1997. Dr. Kaufman also is an academic research psychologist specializing in areas of educational and school psychology and is specifically trained in test development, interpretation, and research. Dr. Kaufman holds a bachelor's degree from the University of Pennsylvania, a master's degree from Columbia University, and a doctorate degree in psychology from Columbia University with a specialty of measurement research and statistics. Before joining the faculty at Yale University, Dr. Kaufman held the position of professor at the University of Georgia, the University of Alabama, and the California School of Professional Psychology. Dr. Kaufman has written more than twenty books and holds a patent for a test device related to testing the

ability to process information visually on the subtest called Magic Window. Dr. Kaufman has authored over 150 articles that have been published in peer-reviewed journals. Most of these articles relate to the interpretation of intelligence tests, the structure and properties of intelligence tests, and neuropsychological tests and their application in general. Dr. Kaufman has authored 14 IQ tests and has worked in test development since 1968 when he took a position at the Psychological Corporation, which publishes the Wechsler tests. [H.T. Vol. 6: 7-10, 12].

40. Dr. Kaufman has extensive experience creating, developing, and standardizing IQ tests. Dr. Kaufman worked closely with David Wechsler, Ph.D. from 1970-1974 to revise the Wechsler Intelligence Scale for Children (“WISC”) and re-standardize the test to get a new normative sample. Dr. Kaufman was also in charge of supervising the Wechsler Intelligence Scale for Children-Revised (“WISC-R”) which was published in 1974. Dr. Kaufman has written about 12 books about the Wechsler exams. [H.T. Vol. 6: 10-11].

41. One such book, *ASSESSING ADOLESCENT AND ADULT INTELLIGENCE* [DX 10, Elizabeth Lichtenberger & Alan Kaufman, *ASSESSING ADOLESCENT AND ADULT INTELLIGENCE* (3d ed. 2006)], devotes a section to the Flynn Effect that summarizes the research by Dr. Flynn and others in the field, research within the United States, research cross-cultural in nature, and integrates the findings. Dr. Kaufman has also independently, and around the same time as Dr. Flynn’s earlier research, researched norm obsolescence as well. Dr. Kaufman’s research provides persuasive evidence that the Flynn Effect is

scientifically reliable. The Flynn Effect is repeatable within the United States at an average rate of three points per decade, plus or minus a small margin, from preschool children to old-age, and it has also been found for different levels of ability and using different tests and tasks both verbal and nonverbal as well as working memory. The Flynn Effect is a reliable and valid scientific finding that has been true for quite some time. [H.T. Vol. 6: 16-17].

42. Dr. Kaufman's book, IQ TESTING 101, [DX 7, Alan Kaufman, IQ TESTING 101 (2009)] published in 2009, was written as a primer to understand the important concepts related to IQ tests. IQ TESTING 101 discusses the malleability of IQ and the newly realized fact that it is not static or constant but is constantly changing over time in accord with the Flynn Effect. Dr. Kaufman also discusses the use of IQ tests in the public domain, including a discussion of the Flynn Effect in relation to *Atkins* cases. [H.T. Vol. 6: 17-18],

43. In his other publication, ESSENTIALS OF WAIS-IV ASSESSMENT, Dr. Kaufman recognizes the Flynn Effect as "well-known," describing that "a person's standard scores on an old test, with outdated, norms (e.g., the WAIS-III), will tend to be spuriously high. [DX 8, Elizabeth Lichtenberger & Alan Kaufman, ESSENTIALS OF WAIS-IV ASSESSMENT 33 (2009)].

44. Dr. Kaufman testified that based on scientific research, the Flynn Effect is scientifically valid and reliable in the United States. [H.T. Vol. 6: 38, 40],

45. Jack Fletcher, Ph.D. is a full professor in the Department of Psychology at the University of Houston. For the past thirty years he has completed research on children and adults with developmental

disabilities. He received a degree in clinical psychology from the University of Florida in 1978, is a licensed psychologist in the State of Texas, and is board certified as a clinical neuropsychologist by the American Academy of Clinical Neuropsychology and American Board of Professional Psychology. At the University of Houston he teaches courses on the assessment of adults and children, including those with developmental disabilities. He also teaches advanced courses on intellectual and neuropsychological assessment. He routinely conducts assessment for mental retardation and other developmental disabilities in children and adults. He has worked with the government's Social Security Administration as well as schools in the Houston Independent School District to evaluate intellectual functioning. He has specific expertise in classification and measurement issues pertaining to the diagnosis of people with disabilities. He served on the President's Commission on Special Education, a commission that was charged by the President to review the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, in preparation for its reauthorization. Dr. Fletcher has published 200 articles in peer-reviewed journals. [H.T. Vol, 5: 7, 8, 10-13].

46. Dr. Fletcher testified that the Flynn Effect is a widely recognized discovery. He stated that the Flynn Effect is the phenomenon identified by increased scores on IQ tests where people perform at higher levels. [H.T. Vol. 5: 21].

47. Dr. Fletcher observed that the Flynn Effect is universal, and although people disagree about what causes it, nobody disputes whether it is real or not.

[H.T. Vol. 5: 43]. He testified that “The Flynn Effect is a real and novel discovery. It is widely accepted around the world as an explanation for why IQ scores change over time.” [H.T. Vol. 5: 77]. The Flynn Effect is still well established scientifically and accepted as a valid phenomenon today. [See Affidavit of Dr. Jack M. Fletcher, Attachment 3].

48. Timothy Proctor, Ph.D. is a private practitioner in forensic psychology in Dallas, Texas. Dr. Proctor received a bachelor’s degree in psychology from Texas A&M University and a doctorate degree from the University of Texas Southwestern Medical Center. He also completed a post-doctoral fellowship in forensic psychology at the University of Southern California, Institute of Psychiatry, Law, and Behavioral Science and completed post-doctoral training in psychopharmacology. Dr. Proctor is board certified in forensic psychology. [H.T. Vol. 6: 77]. Dr. Proctor is not board certified in neuropsychology. Dr. Proctor devotes about one or two percent of his time attending to patients, and most of his practice relates to assessing applicants for disability benefits and assessing applicants in the civil and criminal justice system. He has not published any articles on the Flynn Effect or on mental retardation. [H.T. Vol. 7: 68-72].

49. Dr. Proctor, who was called by the State, testified that the Flynn Effect is real and that there are recognizable IQ gains over time. [H.T. Vol. 7: 43]. Dr. Proctor agrees with the Applicant’s experts that it is the best practice to recognize the Flynn Effect. [H.T. Vol. 7:61]. Dr. Proctor further agrees with the WAIS-III/WMS III TECHNICAL MANUAL in that there is a real phenomenon of IQ inflation over time and that an

examinee's IQ score will generally be higher when outdated norms are used. [H.T. Vol. 7:54].

50. Leigh Hagan, Ph.D. is a solo practitioner of clinical and forensic psychology in Virginia. He is licensed as a clinical psychologist in Virginia. Dr. Hagan received an undergraduate master's degree from the University of Virginia and a doctorate degree in counseling psychology from the University of Missouri at Columbia. He completed his post-doctoral training in Georgia. Dr. Hagan is a diplomate of the American Board of Forensic Psychology. He conducts evaluations for a number of forensic purposes. About 90%-95% of people he evaluates have a matter before the justice system. [Vol. 7: 104-109], Dr. Hagan has testified 50 times in the last four years in *Atkins* cases, admitting that he has not found or testified that any death row inmate was a person of mental retardation. Dr. Hagan also conceded that he had prepared and provided the State's counsel with an outline of topics she should address with him. [Vol. 7: 138-139].

51. Dr. Hagan, who was called by the State, agreed that there is a "genuine statistical observation" known as the Flynn Effect. [H.T. Vol. 7: 118]. He also acknowledged that in the WAIS-IV TECHNICAL AND INTERPRETIVE MANUAL, published by those who develop the Wechsler tests, the manual states that a group that scored 100 on the Wechsler Adult Intelligence Scale-III ("WAIS-III") was expected to score between 96 and 98 on the Wechsler Adult Intelligence Scale-IV ("WAIS-IV"). [H.T. Vol. 7: 142], This is unequivocal acknowledgement of the practical impact of the Flynn Effect.

52. Manuals guiding the determination of intellectual disability also recognize the Flynn Effect

as a real phenomenon.

53. The WAIS-III/WMS-III TECHNICAL MANUAL is authoritative and reliable. This manual recognizes the Flynn Effect and explains that “average IQ scores will gradually drift upward and give a progressively deceptive picture of an individual’s performance relative to the expected scores in his or her own age group.” [DX 13, WAIS-III/WMS-III TECHNICAL MANUAL (3d ed. 1997)] For example, “if the mean of the U.S. population on the WAIS-R was 100 in 1981, the inflation might cause it to be about 105 in 1997.” *Id.* This increase corresponds to applying the Flynn Effect’s 0.3 points inflation per year over the sixteen year period, and the conclusion of this manual is that because of the Flynn Effect, if an outdated test is given, an individual’s IQ score will be inflated. This application is a correction for the obsolescence of the norms. [H.T. Vol. 4: 43, 45-46; H.T. Vol. 6: 31].

54. The 2010 AAIDD Manual is authoritative and also supports the Flynn Effect, stating that “in cases where a test with aging norms is used a correction for the age of the norms is warranted.” (H.T. Vol. 4: 73-74]. The AAIDD Manual devotes an entire page and section to the Flynn Effect, recognizing it as an increase in IQ scores over time:

The Flynn Effect refers to the observation that every restandardization sample for a major intelligence test from 1932 through 1978 resulted in a mean IQ that tended to increase over time. Flynn (1987) reported that this effect was also observed in samples from other countries.

[DX 4 at 37],

55. The DSM-5 is authoritative and also recognizes the existence of the Flynn Effect, stating that “[f]actors that may affect test scores include . . . the ‘Flynn effect’ (i.e., overly high test scores due to out-of-date test norms).” DSM-5 at 37. The CCA has instructed that “the DSM-5 should control our approach to resolving the issue of intellectual disability.” *Ex parte Moore*, 548 S.W.3d 552, 559-60 (Tex. Crim. App. 2018).

56. The Court Finds that the Flynn Effect is a scientifically valid and real phenomenon.

**B. The Flynn Effect results in about 0.3 points inflation per year.**

57. It is uncontested that the experts testifying on behalf of the State and the Applicant recognized that the Flynn Effect results in about 0.3 points inflation per year or 3 points per decade.

58. Dr. Flynn testified that analysis of independently verifiable data establishes that during the World War I era, the IQ inflation rate was about 0.4 points per year, between WWI and 1972 about 0.33 points, with IQ inflation for the current generation at about 0.3 points per year. [H.T. Vol. 4: 4, 44]. IQ test data from the 1970s to the present shows that IQ gains occur at about 0.30 points per year. [H.T. Vol. 4: 41, 44, 52, 62, 66-70, 105]. Dr. Flynn stated that psychologists who submit their studies to peer-reviewed journals and correct IQ scores for the Flynn Effect in the amount of 0.3 points per year are more often published, whereas those who submit articles to peer-reviewed journals articles and do not correct obsolete IQ tests for the Flynn Effect will not have



their articles published. [H.T. Vol. 4, p. 101-102, 111]. For Wechsler tests, the 0.3 points per year average gain is consistently within the margin of error for such a number. [H.T. Vol. 4: 69-70].

59. Dr. Flynn's book, WHAT IS INTELLIGENCE?, includes a Figure AIII, with the following caption that provides further reliable support for the 0.3 point inflation per year: "Using the WISC to test whether the IQ gains of American children have been relatively uniform (about 0.30 points per year) between 1947 and 2002, and whether that has been true at all IQ levels. The three IQ levels I have chosen are 125-140 (high), 90-115 (average), and 55-80 (low). At each level, the broken line represents a gain of exactly 0.30 points per year. The solid lines show how little actual rates of gain have deviated from that value." [DX 6, James R. Flynn., WHAT IS INTELLIGENCE? (2009)].

60. Dr. Kaufman, Dr. Fletcher, and Dr. Proctor unequivocally agreed with Dr. Flynn, testifying that the Flynn Effect is roughly three points per decade or 0.3 points per year. [H.T. Vol. 6: 19; H.T. Vol. 5: 25; H.T. Vol. 6: 102-103]. Even Dr. Hagan was forced to concede that after analyzing all the available data on the Flynn Effect, including an analysis of only the Wechsler tests, the rate of gain fits tightly around 0.3 points per year. [H.T. Vol. 7: 144]. The precision of the Flynn Effect correction is supported by the preponderance of expert testimony in this case.

61. Manuals guiding the determination of intellectual disability also recognize that the Flynn Effect results in about 0.3 points inflation per year. The AAIDD Manual, which applies to all intelligence tests, finds that obsolete norms may create a problem

with identifying people as having intellectual disability. [DX 4]. The AAIDD Manual specifically instructs testers to recognize the Flynn Effect in the amount of 0.33 points per year. [H.T. Vol. 4: 132].

62. As long ago as 1997, even test makers recognized correction for the Flynn Effect. The WAIS-III Technical Manual<sup>9</sup> recognizes that there is a real phenomenon of IQ inflation over time and explains that data suggests the inflation rate is 0.3 of a point per year. [H.T. Vol. 4: 48-49]. The manual states:

**Updating of Norms.** Because there is a real phenomenon of IQ-score inflation over time, norms of a test of intellectual functioning should be updated regularly (Flynn, 1984, 1987; Matarazzo, 1972), Data suggest that an examinee's IQ score will generally be higher when

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<sup>9</sup> The most updated Wechsler test is the Wechsler Adult Intelligence Scale-IV ("WAIS-IV"), published in 2008. However, it is significant that even older test manuals, including the WAIS-III which was published pre-*Atkins*, recognized the Flynn Effect. Additionally, silence of the WAIS-IV technical manual on correction for the Flynn Effect is no evidence that scores should not be corrected for norm obsolescence when an old test is used. It is not a surprise that a manual published for a new test does not mention the Flynn Effect because such a correction is only needed when older intelligence tests are used. However, even the technical manual for the WAIS-IV provides a conversion table that shows the impact of norm obsolescence. As stated in a recent article, "Clearly publishers have acknowledged the [Flynn Effect] by renorming tests more frequently and providing validity studies and conversion tables. A publisher should not be expected to address every use of the test." Jack M. Fletcher, Karla K. Stuebing, and Lisa C. Hughes, "IQ Scores Should be Corrected for the Flynn Effect in High-Stakes Decisions," 28(5) *Journal of Psychoeducational Assessment* 469 (2010).

outdated rather than current norms are used. **The inflation rate of IQ scores is about 0.3 point each year.**

[DX 13 at 8-9] (emphasis added).

63. Several publications on intelligence and intelligence scores recognize that the Flynn Effect results in inflation of 0.3 points per year:

- Alan Kaufman, IQ TESTING 101 203 (2009) (“After 10 years, the norms for an IQ test are 3 points out of date, and after two decades the outdatedness reaches a hefty 6 points.”) [DX 7];
- Elizabeth Lichtenberger & Alan Kaufman, ESSENTIALS OF WAIS-IV ASSESSMENT 33-34 (2009) (“Overall, the Flynn Effect has shown that, on average, American children and adults have increased their scores on intelligence tests at the rate of 3 points per decade...”) [DX 8];
- Elizabeth Lichtenberger & Alan Kaufman, ASSESSING ADOLESCENT AND ADULT INTELLIGENCE 39 (3d ed. 2006) (“As impressive as the three-point gain per decade for people in the United States has seemed to readers of Flynn’s (1984) article, the United States has outgained only two of the nations studied by Flynn (1987)...”) [DX 10];
- James R. Flynn, “Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect,” 12 *Psychology, Public Policy, and Law* 184 (2006) (“It

recommends deducting 0.3 IQ points per year from the scores of defendants for every year that passed between the date when the test was normed and the date when the test was taken.”) [DX 17];

- James R. Flynn, “The WAIS-III and WAIS-IV: *Daubert Motions* Favor the Certainly False Over the Approximately True,” 16 *Applied Neuropsychology*, 100 (2009) (“The bold highlights comparisons where either a later form of the WISC has been used to check an earlier form of the WISC or a later form of the WAIS has been used to check an earlier form of the WAIS. These show rates of gain averaging at about 0.3 points per year with admirable consistency.”) [DX 18];

- James R. Flynn & Lawrence G. Weiss, “American IQ Gains from 1932 to 2002: The WISC Subtests and Educational Progress,” 7(2) *Int’l Journal of Testing* 217 (2007) (“Taking the midpoint of the most recent estimates, the WISC gives a gain of 0.318 points for the period between 1948 and 2002 with little variation.”) [DX 19];

- James R. Flynn, “The Mean IQ of Americans: Massive Gains 1932 to 1978,” 95(1) *Psychological Bulletin* 32 (1984) (“If we select out the eight combinations with the largest number of subjects, they evidence rates of gain whose consistency is quite remarkable, ranging from .250

points per year to .440 points, with a median of .332.”) [DX 24];

- Alan S. Kaufman, “Looking Through Flynn’s Rose-Colored Scientific Spectacles,” 28(5) *Journal of Psychoeducational Assessment* 494 (2010) (citing research conducted by Tomoe Kanaya & Stephen J. Ceci) (“The bulk of evidence suggests that the Flynn Effect is at least three points per decade for IQs in the range associated with mental retardation.”);

- Alan S. Kaufman & Lawrence G. Weiss, “Guest Editors’ Introduction to the Special Issue of JPA on the Flynn Effect,” 28(5) *Journal of Psychoeducational Assessment* 379 (2010) (“IQ gains from one generation to the next have occurred on a worldwide basis, with the American gain being three points per decade.”);

- Jack D. Fletcher, Karla K. Stuebing, & Lisa C. Hughes, “IQ scores should be corrected for the Flynn effect in high stakes decisions,” 28(5) *Journal of Psychoeducational Assessment* 469-473 (2010) (obtaining a Flynn Effect average across studies of 2.80 points per decade with a confidence interval of 2.50 to 2.09 and a standard error of the mean (SEM) of approximately 1.0.) [Attachment 3, Exhibit 3-2];

- Lawrence G. Weiss, “Considerations on the Flynn Effect,” 28(5) *Journal of Psychoeducational Assessment* 482-493 (2010) (“The Flynn Effect (Flynn Effect) is real” and “has been shown to be near 3 IQ points per decade on average across a large number of studies, countries, and tests.”) [Attachment 3, Exhibit 3-3];
- Lisa H. Trahan, Karla K. Stuebing, Jack M. Fletcher, & Merrill Hiscock, “The Flynn effect: A meta-analysis 140(5) *Psychological Bulletin* 1332-1360 (2014) (assessing the average Flynn Effect for the full scale IQ composite of multifactorial IQ tests from 285 studies going back to 1951 and finding that the average was 2.31 points per decade with a confidence interval of 1.99 to 2.64) [Attachment 3, Exhibit 3-4];
- Jakob Pietschnig, & Martin Voracek, “One Century of Global IQ Gains: A Formal Meta-Analysis of the Flynn Effect (1909-2013),” 10(3) *Perspectives on Psychological Science* 282-306 (2015) (identifying 271 independent samples with approximately 4,000,000 participants from 31 countries, and finding the mean Flynn Effect was 2.80 points per decade) [Attachment 3, Exhibit 3-5],

64. The Court finds that the Flynn Effect results in about 0.3 points inflation per year and that the rate of gain is sufficiently precise to be relied upon and

applied by this Court.

**C. Scores on intelligence tests should be corrected for the Flynn Effect.**

65. It is proper procedure to apply and correct intelligence scores based on the Flynn Effect because of norm obsolescence. This is supported by the AAIDD Manual, credible experts in this case, a survey of psychological practitioners, the scientific literature, and other courts. [I think this is fine – she heard from experts].

66. In *Atkins* cases, the determination of IQ score is of ultimate importance and every method improving accuracy must be used. [H.T. Vol. 4: 93-94]. The AAIDD Manual and the User’s Guide to the AAIDD Manual affirm that best practices require recognition of a potential Flynn Effect when older intelligence tests are used in the assessment or interpretation of an IQ score. [DX 4, AAIDD Manual; USER’S GUIDE TO INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2012) (“User’s Guide:”) <sup>10</sup>]. As stated by the User’s Guide:

The *Flynn Effect* refers to the increase in IQ scores over time (i.e., about 0.30 points per year). The Flynn effect affects any interpretation of IQ scores based on outdated norms. Both the 11<sup>th</sup> edition of the manual and this *User’s Guide* recommend that in cases in which a test

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<sup>10</sup> The 11<sup>th</sup> edition User’s Guide, published after the 2010 Evidentiary Hearing, has replaced the previous 10<sup>th</sup> edition which was cited in the Findings of Fact and Conclusions of Law issued by the Court on December 31, 2012.

with aging norms is used as part of a diagnosis of [intellectual disability], **a corrected Full Scale IQ upward of 3 points per decade for age of norms is warranted.**

[User's Guide at 23] (emphasis added). The AAIDD Manual is the leading guide for those giving intelligence tests. It is the product of years of preparation and review for leading practitioners in the field, rather than one company that publishes and sells a certain intelligence test. An earlier version of this manual is cited in *Atkins* and the current version is cited in *Moore I* and *Moore II*. See, e.g. *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Moore II*, 586 U.S. at \_\_\_\_ (slip op., at 2) (citing *Moore I*, AAIDD Manual, and DSM-5).

67. The WAIS-III Technical Manual also recognizes the need to correct scores for the Flynn Effect:

Regardless of the reasons for these changes in test performance, periodic updating of the norms is essential; otherwise, **average IQ scores will gradually drift upward and give a progressively deceptive picture of an individual's performance** relative to the expected scores in his or her own age group.

[DX 13, WAIS III/WMS-III TECHNICAL MANUAL at 9] (emphasis added).

68. Dr. Flynn, in his article "Tethering the Elephant" also describes that "Failure to adjust the scores [for the Flynn Effect] is to take flight from



reality.” [DX 17, James R. Flynn, “Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect, 12 *Psychology, Public Policy, and Law* 170 (2006)]. Dr. Flynn advocates correcting scores by the following: “for every year between the year when a person took a test and the year when the test was normed, deduct 0.3 IQ points from the IQ score.” [DX 18, James R. Flynn, “The WAIS-III and WAIS-IV: *Daubert Motions* Favor the Certainly False Over the Approximately True,” 16 *Applied Neuropsychology*, 100 (2009)].

69. Dr. Kaufman supports the AAIDD Manual’s scientific opinion that it is good practice to apply the Flynn Effect in instances where one is not able to use a recently normed test. [H.T. Vol. 6: 23].

70. Applying the Flynn Effect to an individual test score to correct for norm obsolescence is a method for ensuring that the individual is evaluated against an accurate normative basis. [H.T. Vol. 6: 31]. Dr. Fletcher testified that it is probably an error to conceptually think about the Flynn Effect as an adjustment of an individual IQ score. The Flynn Effect is actually a correction of the normative base, the denominator, the ruler against which the attained score is compared, and as such, a practitioner does not adjust the score itself but rather corrects the normative basis against which the score is compared because that normative base has shifted. [H.T. Vol. 5: 78-79].

71. Dr. Proctor testified that it is important for him to follow the procedures of the IQ test manuals, and he relies on them. [H.T. Vol. 6: 161, H.T. Vol. 7:37-38]. Dr. Proctor agreed with the WAIS-III Technical Manual that if test administrators give a test with outdated norms, then the resulting IQ score could be

deceptively high. [H.T. Vol. 7:43]. If future test manuals advise practitioners to apply the Flynn Effect, Dr. Proctor would do so. [H.T. Vol. 7:41]. Dr. Proctor testified he understands that it is generally accepted practice to update norms and that one should not just “accept” an IQ score with an eighteen-year-old normative basis. [H.T. Vol. 7:56]. Indeed, Dr. Proctor also testified that one of the principal reasons why IQ tests are re-normed is because of the Flynn Effect. [H.T. Vol. 7: 21].

72. Dr. Proctor’s support for his opinion that it is inappropriate to take the Flynn Effect into account when calculating IQ scores is not persuasive. Dr. Proctor testified that the Flynn Effect is somehow encompassed by the standard error of measurement but also conceded that there is no support in the literature for this opinion. He has not authored any articles on the subject let alone on mental retardation. [H.T. Vol. 7: 63, 39,40, 58, 59].

73. Dr. Greg Olley, chair of the division 33 American Psychological Association Committee on mental retardation and the death penalty, conducted a study in the spring of 2008 of a targeted population to obtain information about the current forensic practices of psychologists. [DX 47]. Dr. Olley sent a survey to approximately fifty educators and forensic psychologists who were nominated by his Committee based on their experience in mental retardation and forensic psychology. Dr. Olley received thirty-five responses. Dr. Hagan testified that he himself participated in the Olley survey. [H.T. Vol. 7: 167]. Eighty-five percent of the respondents were psychologists. When asked whether the Flynn Effect is a real occurrence, 91.2% responded yes. Dr. Hagan

testified that he would have answered yes to this question. [H.T. Vol. 7: 169]. When asked whether correcting an obtained IQ score would be justified to account for the Flynn Effect, 87.5% responded yes. [DX 47]. The Court finds Dr. Olley's survey reliable evidence that correction for the Flynn Effect is recognized and accepted by practicing forensic psychologists in the area of mental retardation.

74. Dr. Hagan also conducted a survey in 2007 and found that applying the Flynn Effect was not the proper and trusted convention and custom in psychology. [H.T. Vol. 7: 120, SX 20]. Dr. Hagan surveyed twenty-eight directors of doctoral training programs approved by the American Psychological Association and board-certified school psychologists. [SX 20]. The survey relied on recognition of fourteen texts, four of which were authored by Dr. Kaufman, who testified that he advocates correction for the Flynn Effect. [H.T. Vol. 7: 158]. The survey did not include manuals such as the AAIDD, which have explicitly recommended correcting IQ scores for norm obsolescence. The survey also did not consider whether and how many of the respondents had evaluated convicted criminals, and Dr. Hagan conceded that the school psychologists included in his survey typically do evaluations in the education system only, having no experience with *Atkins* claims and applicants. [H.T. Vol. 7: 160]. Dr. Hagan also admitted that the directors of clinical training programs he surveyed received their training and education far before the Flynn Effect was discovered. [H.T. Vol. 7: 167]. The Court finds Dr. Hagan's findings unpersuasive because the sample of practitioners he surveyed lacked the expertise and

proper knowledge to address recognition of the Flynn Effect in *Atkins* cases.

75. The Court finds that correction of IQ test scores for norm obsolescence is warranted. By way of example, the Court finds the hypothetical presented on cross-examination to State's expert, Dr. Hagan, convincing. Dr. Hagan was asked to assume that two identical brothers, Joe and Jerry, have identical intellectual functioning. Joe took an intelligence test on January 1 of any given year, and Jerry took an intelligence test similar in content on February 1 of the same year, a month later. In the intervening time period, a new IQ test was published so Jerry took a new test with new norms. Both Joe and Jerry answered 50 questions correct. Joe scored a 73, and Jerry scored a 70, although both took the same test with the same items. Dr. Hagan argued that the difference in scores was due to Jerry taking a different measure and denied that the difference in scores resulted from obsolete norms. [H.T. Vol. 7: 147-148]. The Court disagrees and finds that obsolete norms may account for difference in IQ scores as presented by this example.

76. Several experts in the field of mental retardation have published articles that advocate application of the Flynn Effect to correct for norm obsolescence:

- Stephen Greenspan, "Issues in the Use of the 'Flynn Effect' to Adjust Scores When Diagnosing MR," 31(3) *Psychology in Mental Retardation and Developmental Disabilities* (2006) ("Given that mild [mental retardation] is still a somewhat-inadequately defined

category, it is important to err in very close cases on the side of being overly inclusive, especially given the potentially fatal consequences of a false negative diagnostic conclusion. Use of the Flynn Effect is a useful, and valid, method for increasing the likelihood that a psychologist will correctly diagnose [mental retardation] in someone deserving of that label.”) [DX 26];

- James R. Flynn, “The WAIS-III and WAIS-IV: *Daubert Motions* Favor the Certainly False Over the Approximately True,” 16 *Applied Neuropsychology*, 100 (2009) (“I advocate adjusting WISC and Wechsler Adult Intelligence Scale (WAIS) scores as follows: for every year between the year when a person took a test and the year when the test was normed, deduct 0.3 IQ points from the IQ score.”) [DX 18];

- James R. Flynn, “Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect,” 12 *Psychology, Public Policy, and Law* 174-75 (2006) (“Failure to adjust IQ scores in the light of IQ gains over time turns eligibility for execution into a lottery...”) [DX 17];

- John H. Blume, Sheri Lynn Johnson & Christopher Seeds, “Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases,” 18 *Cornell J. L. & Pub. Pol’y* 689, 711-714

(2009) (“Due to the Flynn effect, IQ scores must be adjusted to take into account when the IQ test was taken in relation to when the test was re-normed. As with the practice effect, failure to take the Flynn effect into account results in an artificially high IQ score.”) [DX 15];

- Jack M. Fletcher, Karla K. Stuebing, and Lisa C. Hughes, “IQ Scores Should be Corrected for the Flynn Effect in High-Stakes Decisions,” 28(5) *Journal of Psychoeducational Assessment* 469 (2010) (“IQ test scores should be corrected for high-stakes decisions in which a test with older norms is invoked as evidentiary support in the decision-making process. This could include not only Atkins cases involving capital offenses and the death penalty but also intellectual disability (ID) decisions involving social security eligibility or special education where eligibility hinges on a specific score or range of scores.”) [Attachment 3, Exhibit 3-2];

- Cecil R. Reynolds, John Niland, John E. Wright, and Michael Rosenn, “Failure to Apply the Flynn Correction in Death Penalty Litigation: Standard Practice of Today Maybe, but Certainly Malpractice of Tomorrow,” 28(5) *Journal of Psychoeducational Assessment* 477 (2010) (“As a generally accepted scientific theory that could potentially

make the difference between a constitutional and unconstitutional execution, the [Flynn Effect] must be applied in the legal context.”).

- Kevin S. McGrew, “Intellectual Functioning,” in E.A. Polloway (Ed.), *THE DEATH PENALTY AND INTELLECTUAL DISABILITY* 85-111 (2015) (concluding there is a “scientific and professional consensus” supporting the Flynn Effect as “a scientific fact” and “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 scores derived from tests with outdated norms must be adjusted to account for the Flynn effect, particularly in *Atkins* cases. (The use of a Flynn effect correction in clinical settings is less of an issue given that psychologists in such settings typically have more leeway to interpret scores as ranges, invoke clinical judgment, and incorporate information regarding measurement error in interpretation of the scores when making a diagnosis. In contrast, certain high stakes settings [e.g., *Atkins* cases; eligibility for Social Security Disability benefits] may have strict point-specific cut-scores [i.e., “bright line” criteria] where examiners, or the recipients of the scores [e.g., the courts], do not allow for such clinical interpretation. Thus, the

Flynn effect adjustment is more relevant, appropriate, and primarily discussed in literature and law dealing with this type of high stakes IQ testing.)” [Attachment 3, Exhibit 3-7].

- Stephanie C. Black, “High Stakes IQ Testing: The Flynn Effect and its Clinical Implications,” 25(1) *Journal of the Australian and New Zealand Student Services Association* 1334 (2017) (“The Flynn Effect affects the periodical re-norming of intelligence tests and the comparability of IQ scores over time. This has clinical implications for the assessment of intellectual ability for various client populations, including forensic, disabled, juvenile and ethnic minority clients, as well as social implications concerning ethical intelligence, developing nations and the concept of age-related cognitive decline. Examples of high-stakes decisions based on IQ tests include fitness to stand trial, access to social disability services and, of particular interest for the education sector, access to special education services and accelerated programs.”) [Attachment 3, Exhibit 3-8].

77. Courts across several jurisdictions have also recognized and approved of correction for the Flynn Effect in evaluating intelligence scores in death penalty cases:

- *Ex Parte Sosa*, No. W2-7729A (81st/218th Judicial District, Atascosa



County, Texas, Feb. 10, 2011) (entering findings of fact and conclusions of law that recognize the Flynn Effect, stating that “[i]n the United States, the average IQ of the population increases .3 points per year, or 3 points every 10 years.”);

- *Thomas v. Allen*, No. 09-12869, 2010 U.S. App. LEXIS 10836, \*1, \*8 (11th Cir. May 27, 2010) (stating that the Flynn Effect is a well-supported, “empirically proven statistical fact,” tested through peer review and recognized and accepted by professional communities and holding that a court must account for the Flynn Effect when determining whether an IQ score falls within the mental retardation range and that a court should not view a raw, unadjusted IQ score as precisely measuring true);

- *Holladay v. Allen*, 555 F.3d 1346, 1358 (11th Cir. 2009) (“Moreover, all of the scores were on the WAIS tests, which may have reflected elevated scores because of the Flynn Effect.”);

- *Walker v. True*, 399 F.3d 315, 323 (4th Cir. 2005) (finding district court erred when it failed to consider the validity of defendant’s Flynn Effect evidence and ordering that Flynn Effect evidence be considered on remand);

- *United States v. Davis*, 611 F. Supp. 2d 472, 485-88 (E.D. Md. 2009) (“[T]he

Court finds the defendant's Flynn Effect evidence both relevant and persuasive, and will, as it should, consider the Flynn-adjusted scores in its evaluation of the defendant's intellectual functioning.");

- *Wiley v. Epps*, 668 F. Supp. 2d 848, 894-95 (N.D. Miss. 2009) (taking into consideration the obsolescence of test norms in weighing the evidence on intellectual functioning);

- *People v. Superior Court of Tulare County*, 155 P.3d 259, 263 n. 4 (Cal. 2007) (recognizing that "[t]he Flynn effect is the observed tendency of mean scores on a given IQ test to increase slowly over time.");

- *United States v. Parker*, 65 M.J. 626, 629 (N.M. Ct. Crim. App. 2007) (finding that the Flynn Effect is to be considered when evaluating a defendant's IQ);

- *Williams v. Campbell*, No. 04-0681-WS-C, 2007 U.S. Dist. LEXIS 27050 (S.D. Ala. Apr. 11, 2007) (holding that the Flynn Effect could potentially render IQ scores unreliable);

- *Green v. Johnson*, 431 F. Supp. 2d 601, 610 (E.D. Va. 2006) (stating that evaluation of mental retardation purposes requires considerations other than whether the score of above or below 70, including consideration of the Flynn Effect).

- *Burgess v. Commissioner*, 723 F.3d 1308, 1321 n. 16 (11th Cir. 2013) (permitting consideration of Flynn Effect);
- *Black v. Bell*, 664 F.3d 81, 95-96 (6th Cir. 2011) (lower courts erred in failing to consider Flynn Effect);
- *Thomas v. Allen*, 607 F.3d 749, 757-58 (11th Cir. 2010) (district court's application of Flynn Effect not clearly erroneous);
- *Brumfield v. Cain*, 854 F. Supp. 2d 366, 391-92 (M.D. La. 2012) (considering Flynn Effect as part of holistic assessment of intellectual functioning), *affirmed by* 808 F.3d 1041 (5th Cir. 2015);
- *United States v. Hardy*, 762 F. Supp. 2d 849, 857-67 (E.D. La. 2010) (conducting an exhaustive review of literature and applying the Flynn Effect).

78. The Court finds that correcting intelligence scores for the Flynn Effect is proper procedure, supported by peer-reviewed scientific literature, other courts, and by a preponderance of the expert testimony and evidence presented to this Court.

**D. Correction for norm obsolescence is separate than the application of the standard error of measurement.**

79. IQ scores, separate and apart from the Flynn Effect, must account for measurement error. All psychometric tests, even when they are reliable, like

the Wechsler test, have a small amount of measurement error that is typically expressed in terms of standard errors of measurement. [H.T. Vol. 5: 47]. Dr. Fletcher testified that the standard error of measurement is based on an index of variability around each person's average score. The error must be standardized to get the standard deviation, and the standard error of measurement is computed by the standard deviation and the square root of the sample size. [H.T. Vol. 5:48]. Generally, two standard measurement errors are used to create a 95 percent confidence interval, equating to about five points. The convention is to express this as a range that is five points on either side, plus or minus. *Id.*

80. The State's experts' conclusion that the standard error of measurement already accounts for the Flynn Effect is incorrect. Correction for the Flynn Effect applies to the norms of tests. The standard error of measurement applies to the observed test score and is a statistical analysis. Even if the scores increase, there is no effect on the standard deviation of the test (usually fifteen points) and has no effect on the standard error of measurement because the entire distribution of test scores shifts and are higher than when originally normed. Thus, applying the convention that indicates an average IQ is 100 and two standard deviations below the mean indicates significantly subaverage IQ, would require scores of 103 and 73 on a ten year old test, 106 and 76 on a 20 year old test, and so on to show mental retardation. Dr. Fletcher testified that the Flynn Effect cannot possibly be part of the standard error of measurement, and Dr. Proctor could not cite to any authority to support his contrary conclusion. [H.T. Vol. 7: 202].

81. Dr. Flynn described the norming of tests to measuring height with a measuring tape. He stated that each test has a reference group that sets the norms and is a tape measure. The measuring tape tells a person whether an individual is of average height, meaning having an intelligence score of 100, or whether a person is a bit above average, having an intelligence score of 115, or whether a person is below average. The norm is “the tape measure for actually giving the IQ scores” [H.T. Vol. 4: 44-46]. Dr. Flynn also explained that if an older test is used, the score may be deceptive. For example, he explained that if a person left a tape measure out in the rain, it may shrink. If the same tape measure was used after it became obsolete, the height that was measured would be incorrect. [H.T. Vol. 4: 47].

82. Also supportive, the AAIDD Manual discusses the Flynn Effect and the standard error of measurement as two separate issues in two separate sections. [H.T. Vol. 7: 204]. The AAIDD Manual, on page 37, recognizes the Flynn Effect as an “observation that every restandardization sample for a major intelligence test from 1932 through 1978 resulted in a mean IQ that tended to increase over time. [DX 4, AAIDD Manual at 37]. On the other hand, the AAIDD Manual, on page 36, states the standard error of measurement “is used to quantify [a] variability and provide a stated statistical confidence interval within which the person’s true score falls.” [DX 4, AAIDD Manual at 36].

83. The Court finds that application of the Flynn Effect is separate than an adjustment for the standard error of measurement.

#### **E. The Flynn Effect is applied by clinical**

**practitioners to individual test results and is also accepted outside the criminal justice system.**

84. Practitioners outside the criminal justice system apply the Flynn Effect. [H.T. Vol. 6: 39]. Dr. Fletcher testified that practitioners who are experts in the area of mental retardation consider and apply the Flynn Effect in determining whether individuals are eligible for Social Security benefits or special education in the school system. [H.T. Vol. 5:21].

85. The AAIDD User's Guide applies to clinical practitioners and is an attempt to make it clear to clinical practitioners how they should apply the AAIDD Manual. [H.T. Vol. 5:25]. The User's Guide advocates the practice of correcting for aging norms by applying the Flynn Effect. [User's Guide at 23]. In a list of guidelines for clinical practitioners, the guide specifically instructs clinical practitioners to make a correction upward of 3 points per decade for the age of the norms:

The Flynn effect affects any interpretation of IQ scores based on outdated norms. Both the 11<sup>th</sup> 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 [intellectual disability], a corrected Full Scale IQ upward of 3 points per decade for age of norms is warranted. **For example, if the Wechsler Adult Intelligence Scale (WAIS-III; 1997) was used to assess an individual's IQ in July, 2005, the**

**population mean on the WAIS-III was set at 100 when it was originally normed in 1995 (published in 1997). However, on the basis of Flynn's data (2006), the population mean on the WAIS-III Full-Scale IQ corrected for the Flynn Effect would be 103 in 2005 (9 years x 0.30 = 2.7). Hence, using the significant limitations of approximately 2 [standard deviations] below the mean, the Full-Scale IQ cutoff would be approximately 73 and not approximately 70 (plus or minus the SEM).**

*Id.* (emphasis added) (internal citations omitted).

86. Applying the Flynn Effect to correct for norm obsolescence, including to individual test results, is generally accepted scientific procedure in the pertinent professional community outside the criminal justice system, which includes psychologists, clinical school psychologists, neuropsychologists, researchers, and test consumers. [H.T. Vol. 6: 39].

87. Dr. Fletcher testified that “you will find people discussing the Flynn Effect in estimating it 0.3 points per year in virtually any major textbook or treatise on intellectual assessment.” [H.T. Vol. 5: 27].

# **1. Application of the Flynn Effect in determining disability in the school system**

88. One of the categories and eligibility criterion under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400, is mental retardation. The

IDEA is a federal special education law that applies to all fifty states in terms of determination of disability. Under the IDEA, mental retardation is analyzed using a three-pronged definition, similar to that set out in the AAIDD Manual. Dr. Fletcher testified that there are several examples of where the states implement the IDEA and consider the problem of using obsolete norms and the misdiagnosis of mental retardation because of inflated scores. [H.T. Vol. 5: 33]. The federal statutes, however, do not specify any criteria to be used. The states take what Congress passes and then translate that into standards. Dr. Fletcher testified that the federal statutes would not discuss the Flynn Effect, but in practice, it is a consideration. [H.T. Vol. 7: 206].

89. Dr. Fletcher testified that special education benefits in schools depend on correction for the Flynn Effect. Practitioners recognize that obsolescence of old norms is an issue. The Weschler Intelligence Scale for Children-Revised (“WISC-R”), for example, for a time, gave inflated scores, and as a consequence, children who might have received special education benefits when assessed with the WISC-R, would not receive them. Obsolescence is particularly an issue in schools because school districts cannot always afford to purchase the newest and latest versions of an IQ test. [H.T. Vol. 5: 34]. It is proper for school districts that use outdated IQ tests to correct scores in accordance with the Flynn Effect. [H.T. Vol. 6: 26].

90. Dr. Fletcher elaborated that when he served on the President’s Commission for Special Education, the Commission would hold hearings on the costs of assessment. The cost of administering tests to determine whether or not a child was eligible for



special education benefits ranged from \$800 to \$8,000 and the average was about \$4,500 per child. A kit for the Wechsler, for example, costs over \$1,000 with the hard case, and a school must then buy manuals and response booklets. [DX 36, Price Sheet for Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) and DX 37, Price Sheet for Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV); H.T. Vol. 5: 38].

91. Concerns about costs of purchasing new intelligence tests are also voiced in peer-reviewed journals. For instance, in the article, “Are All IQ Scores Created Equal? The Differential Costs of IQ Cutoff Scores for At-Risk Children,” authors Tomoe Kanaya, Ph.D. and Stephen J. Ceci, Ph.D. write “Replacing old IQ norms with new (more accurate) norms, however, is an expensive and slow process. Faced with a cost of approximately \$1,000 per testing kit and the need to purchase many such kits, school districts can adopt a new IQ norm as quickly as their budgets allow.” [DX 27, Tomoe Kanaya and Stephen J. Ceci, “Are All IQ Scores Created Equal? The Differential Costs of IQ Cutoff Scores for At-Risk Children,” 1(1) *Child Development Perspectives* 52 (2007)]. The recommendation of these authors was that there be a correction for obsolete norms by school systems. *Id.*

92. In a commentary to the article authored by Tomoe Kanaya and Stephen J. Ceci, Keith Widaman, in his article “Stalking the Roving IQ Score Cutoff: A Commentary on Kanaya and Ceci (2007)” agreed that the Flynn Effect is a proper correction in the education system:

If Flynn-effect adjustments can dampen improper score fluctuations due to aging norms and thereby smooth out the proportions of students receiving IQs of 70 or below, I think adjustments should be used; in fact, it would be inappropriate to do so. This “quick fix” is admittedly imperfect and should be monitored by continuing research to ensure that it has no unintended negative consequences. **Nonetheless, use of Flynn-effect adjustments, however imperfect, is likely to have fewer negative consequences than would the failure to use such adjustments.**

[DX 32, Keith Widaman, “Stalking the Roving IQ Score Cutoff: A Commentary on Kanaya and Ceci (2007)” *Child Development Perspectives* 57 (2007)] (emphasis added).

93. Drs. Kanaya and Ceci reasserted their position very recently in a 2010 article by stating that “IQ scores play a major role in determining the educational experiences and opportunities provided to a child (and the costs incurred by the schools to implement these special education services) throughout his or her school years.” Stephen J. Ceci and Tomoe Kanaya, “‘Apples and Oranges Are Both Round’: Furthering the Discussion on the Flynn Effect,” 28(5) *Journal of Psychoeducational Assessment* 441, 444 (2010) (stating there is a higher likelihood for the Flynn Effect to have an impact on a child’s special education diagnosis).

94. Dr. Kaufman concurred in his testimony. He

explained that during one of his lectures at Yale University, a school psychologist who attended the lecture commented that his school district has had a money freeze for years where updated versions of the different intelligence tests are not available. Dr. Kaufman responded that the psychologist should use the best test available, but if the only test available is an outdated one, then correction for the Flynn Effect should be made at three points per decade. [H.T. Vol. 6: 27].

95. The Court finds application of the Flynn Effect in determining special education benefits persuasive evidence that clinical practitioners use the Flynn Effect outside of the criminal justice system.

## **2. Application of the Flynn Effect in determining eligibility for Social Security disability benefits**

96. The Flynn Effect is recognized by the United States government. In the Social Security benefits guide, MENTAL RETARDATION, DETERMINING ELIGIBILITY FOR SOCIAL SECURITY BENEFITS, prepared by the Committee on Disability Determination for Mental Retardation [DX 11], authors advise and discuss the Flynn Effect:

Research suggests that **intelligence in the entire population increases at a rate of approximately 3 IQ points per decade**, which approximates the standard error of measurement for most comprehensive intelligence tests. Thus, tests with norms older than 10 to 12 years will tend to produce **inflated scores** and could **result in the denial**

**of benefits to significant numbers of individuals** who would be eligible for them if more recent norms had been used. Disability examiners who use tests with outdated norms may be **systematically if unintentionally denying benefits** to those who are legally entitled to them. **The examiners also risk losing their licenses for ethical violations of the their professional codes.**

[DX 11, National Research Council, MENTAL RETARDATION, DETERMINING ELIGIBILITY FOR SOCIAL SECURITY BENEFITS (2002) at 123 (emphasis added); H.T. Vol. 5: 30].

97. Dr. Fletcher testified he has applied the Flynn Effect in determining whether individuals have mental retardation and therefore qualify for benefits through the Social Security Administration. For example, he administered an IQ test to an individual, and after determining that his IQ was in the range associated with mental retardation, he also administered an adaptive behavior assessment. Dr. Fletcher further examined the individual's school records, and the records indicated there were difficulties, although the individual was not in special education for mental retardation but for behavior problems. The IQ test that was given, the Wechsler Intelligence Scale for Children-Revised ("WISC-R"), was about fourteen or fifteen years old, and Dr. Fletcher testified that under these circumstances, he applied the Flynn Effect. [H.T. Vol. 5: 28-29].

98. Dr. Proctor agreed that when determining Social Security benefits, if intelligence tests with older norms are administered, a significant number of

individuals will be denied benefits who would otherwise be eligible because of “inflated” scores. [H.T. Vol. 7: 70], Once again, this is agreement by the State’s own experts that the Flynn Effect cannot be ignored.

99. The Court finds application of the Flynn Effect in determining Social Security benefits persuasive evidence that clinical practitioners use the Flynn Effect outside of the criminal justice system.

**F. The known error rate of the Flynn Effect.**

100. In their professional opinions, both Dr. Flynn and Dr. Kaufman viewed error rates associated with correcting individual scores as a misunderstanding of the application of the Flynn Effect. Correcting for the Flynn Effect is not a question of modifying individual scores; instead, it is a question of adjusting the normative basis of the test, which has been altered by the rise overall in intelligence scores of about three points per decade. Therefore, the need to reflect accurately the individual’s test score is a need to understand how the norms have changed. [H. T. Vol. 6; 41-42]. For instance, an average IQ score when the test is normed is 100, but the average will be 103 a decade later because of norm obsolescence. Correcting the individual score when a test with aging norms is used corrects for norm obsolescence. Otherwise, standards for the determination of mental retardation would have to increase by three points each decade. In the example given above, the score associated with mental retardation on a ten year old test would be 73.

101. On the issue of error rate at the evidentiary hearing, Dr. Fletcher presented assessments completed by his research team, which were later

published, Jack M. Fletcher, Karla K. Stuebing, and Lisa C. Hughes, "IQ Scores Should be Corrected for the Flynn Effect in High-Stakes Decisions," 28(5) *Journal of Psychoeducational Assessment*, 494 (2010), that showed that across Wechsler/Binet tests, the measurement error associated with the Flynn Effect of three points per decade is plus or minus one on either side of that confidence interval. [H.T. Vol. 5: 46].

102. Dr. Fletcher testified that this error rate is minimal given that the average norm obsolescence is consistently found to be about 0.3 points per year accounting for different ages, ability levels, and even different types of tests such as Wechsler, Binet, or Kaufman. [H.T. Vol. 6: 42]. The amount of variability around the average amount of change is small given the size of the mean difference. It is generally larger at lower levels of IQ so 0.3 points per year is a conservative estimate.

103. Dr. Fletcher's published study and related testimony demonstrated that the 95% confidence intervals for the Flynn Effect using the 14 studies identified by Dr. Flynn as contemporary comparisons of Wechsler and Binet scales is 2.50 to 3.09, with a weighted mean of 2.80, close to Flynn's unweighted average of 2.99. Dr. Fletcher testified and concluded in his article that the error rate is roughly plus or minus one point per decade, which is sufficiently precise for a correction for the Flynn Effect. Jack M. Fletcher, Karla K. Stuebing, and Lisa C. Hughes, "IQ Scores Should be Corrected for the Flynn Effect in High-Stakes Decisions," 28(5) *Journal of Psychoeducational Assessment*, 494 (2010).

104. Dr. Fletcher's opinion was also based on the

WAIS-IV TECHNICAL AND INTERPRETIVE MANUAL. [DX 14, David Wechsler, WAIS-IV TECHNICAL AND INTERPRETIVE MANUAL 77 (4d ed. 2008), Table 5.6]. The creators of the manual gave both the WAIS-III and WAIS-IV to about 240 people. The ranges included on Table 5.6 in the manual were 95 percent confidence intervals updated for examinees administered both tests in counterbalanced order. Dr. Fletcher testified that the scores were corrected by three points plus or minus one on either side of the confidence interval. [H.T. Vol. 5: 45-47].

105. The State's expert Dr. Hagan agreed that there is a known or potential error rate for the Flynn Effect. [H.T. Vol. 7: 118]. Dr. Proctor made no mention of the error rate. The State did not provide further evidence or any explanation as to the error rate.

106. The Court finds that there is a known error rate for the Flynn Effect of 0.1 per year and that the proposed correction of 0.3 points per year is sufficiently precise to be applied.

#### **V. PRONG ONE: "SIGNIFICANT LIMITATIONS" IN GENERAL INTELLECTUAL FUNCTIONING**

107. Mr. Cathey's IQ score establishes that he has "significant limitations" in intellectual functioning.

##### **A. IQ Test Administered by Dr. Yohman in 1996**

108. Dr. J. Robert Yohman, a licensed Texas psychologist with specialty certification in clinical neuropsychology, administered the Wechsler Adult Intelligence Scale-Revised ("WAIS- R") to Mr. Cathey on December 26, 1996. Mr. Cathey's scaled score on

that test was a 77. [DX 40]. Dr. Yohman made no correction to Mr. Cathey's score for the Flynn Effect. If the Flynn Effect is taken into account, along with the standard error of measurement, Mr. Cathey's true IQ score falls within the range necessary for diagnosing mental retardation.

### **1. Applying the Flynn Effect and the standard error of measurement**

109. To apply the Flynn Effect to Mr. Cathey's score of 77, Dr. Fletcher testified that an estimate of the age of the normative sample must first be calculated. The WAIS-R, administered by Dr. Yohman in 1996, was normed in 1978. At the time it was administered to Mr. Cathey, the norms for the WAIS-R were eighteen years old. Dr. Fletcher stated that to apply the Flynn Effect in this case, a practitioner must multiply 0.3 by eighteen, which is 5.4 points. Correcting the full- scale score of 77 for the Flynn Effect results in a score of 71.6. [H.T. Vol. 5: 43].

110. Dr. Proctor conceded that there is some inflation in Mr. Cathey's score of 77 and that the Flynn Effect has had an impact on the score. [H.T. Vol. 7: 29]. Dr. Proctor also submitted that were he asked to correct the score of 77 for the Flynn Effect, he would multiply 0.3 by eighteen years for a correction of 5.4 points, computing the score to a 71.6, the same procedure and result testified to by Dr. Fletcher, [H.T. Vol. 7:64].

111. Dr. Fletcher testified that the standard error of measurement must be applied to the score of 71.6, calculating a range of 66.6 to 76.6, after accounting for the five points of measurement error. [H.T. Vol. 5: 49].

### **2. Reliability of Dr. Yohman's Score**



112. Dr. Yohman is a licensed psychologist in Texas with specialty certification in clinical neuropsychology and is a diplomate of the American Board of Professional Psychology and American Board of Clinical Neuropsychology. He has been licensed to practice in the state of Texas since 1998. [DX 40]. Dr. Yohman administered the WAIS-R in the Harris County jail under acceptable conditions. [DX 48, Trial Transcript, Vol. 23: 16]. The Court finds Dr. Yohman was qualified to administer the intelligence test and that the test was scored correctly.

113. The State had opportunity and good reason to administer an IQ test to Mr. Cathey in 1996, and it failed to do so. Additionally, the State was given the right to fully cross-examine Dr. Yohman and his testing methodology at the punishment phase of Mr. Cathey's trial, and it has not ever questioned or objected to the validity of the test, Dr. Yohman's qualifications, or Mr. Cathey's score of 77. Because Mr. Cathey's experts relied on Dr. Yohman's score during the evidentiary hearing and did not present testimony based on a new intelligence test, retesting was not necessary." <sup>11</sup> See *Lagrone v. State*, 942 S.W.2d 602, 610-11 (Tex. Crim. App. 1997) (holding that when the defense intends to produce expert

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<sup>11</sup> The State should be collaterally stopped from objecting now to Dr. Yohman's testing and score because it failed to object on these grounds at Mr. Cathey's trial. The issue of cognitive disability was placed before the jury during the punishment phase of trial, and the State had ample reason, at that time, to request testing of Mr. Cathey. Any retesting of Mr. Cathey now raises issues under the Fifth and Sixth Amendments, as well as the Fourteenth Amendment, that protect a defendant from the State's effort to interrogate him without his consent. *Fields v. State*, 627 S.W.2d 714, 718 (Tex. Crim. App. 1982).

testimony, “trial courts may order defendants to submit to an *independent, state-sponsored* psychiatric exam...” (emphasis added).

114. Dr. Fletcher testified that examining Mr. Cathey with another IQ test would not add to his ability to identify him with or without mental retardation. [H.T. Vol. 5: 112-113]. Dr. Fletcher stated that his opinion of mental retardation is valid and reliable regardless of the fact that he did not interview or retest Mr. Cathey, [H.T. Vol. 5: 88]. Although the Psychologist Licensing Act includes a provision on the need to examine an individual before rendering an opinion on mental retardation, Dr. Fletcher testified it was understood that he did not examine Mr. Cathey and that it was not necessary for his conclusion given the circumstances, [H.T. Vol. 5: 86-88].

115. Further, Dr. Kaufman, an expert in IQ testing and methodology, whose testimony was not rebutted by the State, testified that IQ test norms are not appropriately applicable to individuals whom have been incarcerated for as many years as ten, twelve, or fourteen years because the normative sample does not include a person who has been incarcerated for that long. Makers of IQ tests do not include incarcerated individuals in their sampling for determining norms. Therefore, Dr. Kaufman testified that it would not be proper procedure to test an inmate, like Mr. Cathey, unless no other test was available. Further, Dr. Kaufman stated that because intelligence tests are not accurate when administered to inmates who have been incarcerated for several years, it is best practice to rely on a valid IQ score obtained before the inmate was on death row for nearly fourteen years. [H.T. Vol. 6: 35-37].

**B. IQ Test Administered by the TDCJ**

116. Mr. Cathey's tests scores from the intake assessment at the Polunsky Unit lend weight to the determination that Mr. Cathey meets the first prong of mental retardation. [DX 57, Texas Department of Criminal Justice ("TDCJ") Service Investigation Worksheet].

117. A 1998 Service Investigation Worksheet included in the TDCJ records indicated Mr. Cathey had an "EA score below 5 and an IQ below 73." [DX 57, TDCJ Service Investigation Worksheet; H.T. Vol. 8:63]. Captain Bryant, captain at the Polunsky Unit where Mr. Cathey is housed, testified that inmates undergo a psychological assessment at intake. He verified that the official TDCJ record in Mr. Cathey's file and in the State's own records indicated that Mr. Cathey had an IQ below 73. [H.T. Vol. 8:63].

118. The State learned of this test score for the first time at the evidentiary hearing, and this pre-*Atkins* IQ score, although found in the records the State produced, was not provided to or relied on by its experts. [H.T. Vol. 8: 92-93].

**VI. PRONG TWO: "SIGNIFICANT LIMITATIONS" IN ADAPTIVE BEHAVIOR**

119. According to the AAIDD Manual, "[significant limitations in adaptive behavior are established through the use of standardized measures and, like intellectual functioning, significant *limitations in adaptive behavior* are operationally defined as performance that is appropriately two standard deviations below the population average on one of the three adaptive skills domains of conceptual, social, or practical." [DX 4, AAIDD Manual at 47]. Adaptive

behavior measures what a person actually does on a habitual everyday basis and not what they are capable of doing. [H.T. Vol. 7: 185]. The DSM-5 recognizes that people with mild intellectual disability “may function age-appropriately in personal care,” possess “recreational skills resembl[ing] those of age-mates,” and be employed in “jobs that do not emphasize conceptual skills,” and may be capable of performing a skilled vocation or raising a family with the appropriate support. DSM-5 at 34. The focus of an adaptive behavior assessment, therefore, is “on documenting the individual’s deficits, not his strengths,” [DX 29, J. Gregory Olley, “Knowledge and Experience Required for Experts in Atkins Cases,” 16 *Applied Neuropsychology* 135-140 (2009)], and the “focus in evaluations and ultimately adjudications under the adaptive prong must remain focused on the individual’s limitations, rather than any skills he or she may also possess.” [DX 16, James Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11 (2003)]. Focusing the adaptive behavior inquiry on adaptive deficits, rather than any adaptive strengths, is required in light of the United States Supreme Court’s holdings in *Moore I* and *Moore II*. *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Moore v. Texas*, 586 U. S. \_\_\_\_ (2019).

120. Dr. Fletcher described the three major domains: conceptual, social, and practical. A person meets the definition of mental retardation for the adaptive behavior prong if there is a deficiency in one of these areas or if the composite score across the three areas is deficient. [H.T. Vol. 5: 52].

121. There are standardized measures that are

commonly used, including the Vineland Adaptive Behavior Scales (“Vineland”), the Adaptive Behavior Scales (ABS), the Scales of Independent Behavior, the Comprehensive Test of Adaptive Behavior-Revised, and the Adaptive Behavior Assessment System-II (ABAS). The AAIDD Manual advises that an administrator should obtain information regarding the individual’s adaptive behavior “from a person or persons who know the individual well. Generally, individuals who act as respondents should be very familiar with the person and have known him/her for some time and have had the opportunity to observe the person function across community settings and times. Very often, these respondents are parents, older siblings, other family members, teachers, employers, and friends.” [DX 4, AAIDD Manual at 47].

122. Dr. Fletcher testified that practitioners generally do not, and should not, assess criminal behavior as part of the criterion for an adaptive behavior problem. He described incarceration as “a highly structured and very atypical social situation.” Criminal behavior and facts of the underlying crime are not used to identify adaptive behavior weaknesses because this is evidence of maladaptive behavior, and adaptive behavior and maladaptive behavior are entirely different phenomenon. [H.T. Vol. 5: 74-75]. Dr. Proctor agreed with Dr. Fletcher that adaptive behavior and maladaptive behavior are separate and distinct concepts. [H.T. Vol. 7:244].

123. Marc Tasse, Ph.D., an expert on the assessment of adaptive behavior, in an article titled “Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases,” published in the peer-reviewed journal *Applied Neuropsychology*,

also recommends that correctional officers not be interviewed as respondents for adaptive behavior assessment:

**Correctional officers and other prison personnel should probably never be sought as respondents** to provide information regarding the adaptive behavior of an individual that they've observed in a prison setting. The only extreme circumstance when one might consider interviewing a member of the prison personnel regarding an inmate's adaptive behavior would be if there is absolutely no one alive who can provide any information regarding the individual's functioning prior to incarceration.

[DX 31, Marc J. Tasse., "Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases," 16 *Applied Neuropsychology* 114 (Mar. 2009)] (emphasis added).

124. Greg Olley, Ph.D., an expert psychologist and chair of the Division 33 American Psychological Association Committee on Mental Retardation, confirms in his article:

Typical community functioning is difficult to assess in an individual who is incarcerated; the essential information is the individual's performance in the community before incarceration—not behavior in the structured environment of a jail or prison where a person with mental retardation may function quite

well. Therefore, **observation of the defendant's prison functioning and reports by correctional officers do not provide the necessary information** for a valid diagnosis.

[DX 29, J. Gregory Olley, "Knowledge and Experience Required for Experts in *Atkins* Cases," 16 *Applied Neuropsychology* 137 (2009)] (emphasis added).

125. Dr. Proctor agreed that an adaptive behavioral assessment should occur in the context of the individuals' typical community environment and that prison adaptive behavior is not valid for assessing adaptive ability in the free world. [H.T. Vol. 7: 102]. He also agreed with the statement that "[t]he evidence for adaptive behavior strengths or deficits must illustrate typical community functioning." [H.T. Vol. 6: 231, DX 30, Daniel J. Rechsly, *Documenting the Developmental Origins of Mild Mental Retardation*, *Applied Neuropsychology* 16, 124-134 (2009)]. Dr. Proctor has not published peer-reviewed literature on the subject. [H.T. Vol. 6: 234].

126. Dr. Proctor agreed that "the sole purpose of the adaptive prong of the definition for the criminal justice system is to ascertain that the measured intellectual impairment has had real life consequences, and that the presence of confirming deficits must be the diagnostician's focus." [H.T. Vol. 6: 212-214].

#### **A. Dr. Fletcher's Adaptive Behavior Assessment**

127. Dr. Fletcher used the Vineland test procedure to analyze adaptive behavior. He testified that the Vineland is a standardized procedure, and he used a

form of the Vineland that represents a semi-structured interview. The Vineland is an appropriate assessment identified in the AAIDD Manual and also recognized and accepted by courts <sup>12</sup> in this jurisdiction. To minimize bias of the answers he received from his respondents, Dr. Fletcher used an interview form rather than a checklist. [H.T. Vol. 5: 60-61]. This form generates a set of scores from which Dr. Fletcher then compared the scores to normative tables. [H.T. Vol. 5: 54-55]. Dr. Fletcher has administered hundreds of Vineland tests, followed proper protocol, and has used retrospective assessments in the past. [H.T. Vol. 7: 190]. He did not record his conversations with the respondents but took notes on the forms because he has become very familiar with the protocol through his practice. [H.T. Vol. 5: 131].

128. Dr. Fletcher testified that when administering adaptive behavior assessments, practitioners look for limitations that make it difficult for a person to function independently in society. He explained that people with mental retardation have strengths in certain areas and can do things like learn to drive cars, work, and get married but that the

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<sup>12</sup> See, e.g., *Wiley v. Epps*, 625 F.3d 199, 217 (5th Cir. 2010) (recognizing that “the authors of the Vineland test expressly state that retrospective interviews to obtain information about a subject’s behavior at an earlier stage is permissible in certain circumstances, including when the subject is in a restricted environment, *such as a prison*, and there is a question about the subject’s adaptive functioning before coming to that environment”); *Chester v. Quarterman*, No. 5:05-cv-29, 2008 U.S. Dist. LEXIS 34936, at \*5 (E.D. Tex. Apr. 28, 2008) (stating the Vineland test is “an accepted instrument for measuring limitations in adaptive behavior”).



purpose of an assessment is to focus on the weaknesses. [H.T. Vol. 5: 51].

129. In determining who to interview, Dr. Fletcher looked for people who knew Mr. Cathey best during his developmental period and prior to incarceration. Mr. Cathey's parents are deceased, but his older sister was in the home until she left at the age of eighteen and when Mr. Cathey was twelve or thirteen. Mr. Cathey married in his teens, and Ms. Bryant was also a suitable respondent. [H.T. Vol. 5: 55-56]. Although "a retrospective adaptive behavior assessment can be challenging," literature confirms that it is "often considered as the only viable option when the assessed individual is incarcerated. Interviewing a respondent while asking them to recall a time prior to the individual's incarceration is the proposed means of capturing the individual's typical adaptive behavior in the community and establishing a retrospective diagnosis." [DX 31, Marc J. Tasse, "Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases," 16 *Applied Neuropsychology* 120 (Mar. 2009)]; see DX 29A, J. Gregory Olley and Ann W. Cox, "Assessment of Adaptive Behavior in Adult Forensic Cases: The Use of the Adaptive Behavior Assessment System-III," in ADAPTIVE BEHAVIOR ASSESSMENT-II: CLINICAL USE AND INTERPRETATION 381, 387 (Thomas Oakland and Patti L. Harrison eds, 2009) ("Thus, the focus should be on the proper use of all available assessment methods and sources of information. With the best available information in hand, the expert can exercise clinical judgment to reach a conclusion.")].

130. Dr. Fletcher also followed guidelines laid out by Dr. Mark Tasse for the conduct of retrospective

assessment when he performed the Vineland exams. Dr. Tasse recommends that a practitioner very carefully define the time period in which the interview will occur and then conduct the interview and establish with the respondent what that time period is going to be. [DX 31, Marc J. Tasse, “Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases,” 16 *Applied Neuropsychology* 114 (Mar. 2009)].<sup>13</sup>

131. Dr. Fletcher contacted the developer of the Vineland, Dr. Sara Sparrow, and asked her if she felt that retrospective interviews were appropriate and also whether telephone interviews were appropriate. Dr. Sparrow responded that both methods were sound. She indicated there was no difference in conducting a face-to-face as comparable to telephone

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<sup>13</sup> These guidelines were updated in 2018 and reaffirm the actions Dr. Fletcher took in performing the Vineland exams. See Marc J. Tasse & John H. Blume, INTELLECTUAL DISABILITY AND THE DEATH PENALTY (2018) [Attachment 3, Exhibit 3-9]. Other scholars have written recent publications on the Vineland and retrospective assessments. See Greg Olley, “Adaptive Behavior Instruments,” in E. A. Polloway (Ed.), THE DEATH PENALTY AND INTELLECTUAL DISABILITY 187-200 (2015) (identifying the Vineland as one of the four acceptable instruments available for the assessment of adaptive behavior and supporting the use of a retrospective assessment in *Atkins* cases because such assessments are “inherently retrospective because of the need to interview multiple respondents who knew the individual in the developmental period and before the crime took place.”) [Attachment 3, Exhibit 3-10]; Denis W. Keyes & David Freedman, “Retrospective Diagnosis and Malingering,” in E. A. Polloway (Ed.), THE DEATH PENALTY AND INTELLECTUAL DISABILITY (2015) (noting that retrospective assessments are necessary when an individual is older than the developmental period indicated by the third prong) [Attachment 3, Exhibit 3-11].

interview as a result of one of her prior studies. [H.T. Vol. 5: 57-58].

132. Using the Vineland, Dr. Fletcher interviewed Mr. Cathey's older sister, Charlotte Ross, and former wife, Noaella Bryant, to learn about Mr. Cathey's childhood, family history, and development. Dr. Fletcher reviewed all materials provided to him, including the trial transcript, affidavits from family members, which he found consistent with his independent assessment, the school records, and formal assessments, through the Vineland, of Mr. Cathey's former wife, Noaella Bryant, and older sister, Charlotte Ross. [H.T. Vol. 5: 53]. He did not review the offense report, the guilt-innocence testimony, the punishment testimony, prison records, commissary records, or prison correspondence because he found these records irrelevant to adaptive behavior assessment and not indicative of Mr. Cathey's adaptive behavior before the age of eighteen [H.T. Vol. 5: 97-98]. Dr. Fletcher did not examine or interview Mr. Cathey because outside sources provide a more reliable basis for assessment than the individual himself, who may as a result of socialization, or a desire to please, over or underestimate his abilities.<sup>14</sup> [DX 4, AAIDD Manual at 51]. Dr. Fletcher's decision is confirmed by Dr. Tasse, who in one of his articles, states that "as many researchers have documented numerous times,

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<sup>14</sup> During his testimony at the punishment phase of trial, Dr. Yohman testified that Mr. Cathey, in response to the personality tests Dr. Yohman administered, was "portraying himself in a better light probably than is likely to be found on objective evidence...He wanted to look good." [DX 48, Trial Transcript, Vol. 23: 35].

individuals with low IQ may not always be reliable self-reporters.” [DX 31, Marc J. Tasse, “Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases,” 16 *Applied Neuropsychology* 114 (Mar. 2009)].

133. Dr. Proctor testified that Dr. Fletcher’s adaptive behavior assessment used the best possible information. Authoritative sources in the field of forensic psychology instruct those assessing adaptive behavior to either use a standardized measurement device or to collect information from other sources. [H.T. Vol. 6: 178]. The best and most reliable informants are those who are around the person the most, including teachers, spouses, and family members. [H.T. Vol. 6: 184]. Dr. Fletcher interviewed people who had most opportunity to interact with Mr. Cathey. [H.T. Vol. 6: 238]. Dr. Proctor, on the other hand, reviewed only records and did not conduct any interviews.

134. Dr. Fletcher interviewed Mr. Cathey’s older sister, Charlotte Ross, and his notes and observations in the form of the Vineland are admitted as an exhibit. [DX 39, Vineland-II Adaptive Behavior Scales Test of Charlotte Ross (January 22, 2010)]. In discussing what Dr. Fletcher characterized as conceptual skills, Ms. Ross said she would have to repeat things to Mr. Cathey and could not leave him to do anything Mr. Cathey was easily distracted and would believe anything he was told. He did not talk very much, talked in a monotone, rarely initiated conversation, and was probably at a sixth grade reading ability. [H.T. Vol. 5: 60-61]. In discussing what Dr. Fletcher described as practical skills, Ms. Ross said Mr. Cathey needed help with lots of things, and she would have to

watch him or things would not get done. He never used tools. He knew coin denominations but did not have much experience with money, [H.T. Vol. 5: 61]. In discussing what Dr. Fletcher described as social skills, Ms. Ross explained that Mr. Cathey did not play sports, was not very expressive, could play simple games but not complex ones, and was teased frequently by other children. [H.T. Vol. 5: 63]. Based on his interview with Ms. Ross, Dr. Fletcher computed the adaptive behavior composite score as 66, which he testified is at the first percentile. Mr. Cathey received a score of 66 in socialization, a 68 in daily living skills, and a 69 in communication, scores the Court finds indicative of mental retardation. [H.T. Vol. 5, p. 63].

135. Dr. Fletcher also interviewed Mr. Cathey's former wife, Ms. Noaella Bryant, who married Mr. Cathey when he was a teenager but then divorced him a few years later. [DX 38, Vineland-II Adaptive Behavior Scales Test of Noaella Bryant (January 22, 2010)]. Ms. Bryant told Dr. Fletcher that Mr. Cathey would not talk with her or communicate very much, he was not very cooperative, and she could not trust him to watch any of the children. [H.T. Vol. 5: 65]. Dr. Fletcher computed the adaptive behavior composite as 59, which is at the less than the first percentile for his age. Mr. Cathey had a standard score of 61 in communication, 61 in daily living, and 60 in socialization, scores the Court finds consistent with the presence of mental retardation. [H.T. Vol. 5: 66].

136. The interviews of Ms. Ross and Ms. Bryant corroborated the affidavits Dr. Fletcher reviewed, and Dr. Fletcher found the affidavits from Mr. Cathey's family members reliable evidence. [H.T. Vol. 5: 98]. Dr. Proctor, by contrast, did not consider the affidavits

nor attempt to interview the family members, although he had full opportunity to do so. [H.T. Vol. 6: 214, 223]. The Court finds the affidavits submitted by Mr. Cathey's family members reliable and indicative of adaptive behavior deficits.

137. From the Houston Independent School District records, Dr. Fletcher learned that Mr. Cathey had serious academic problems, that he had failed the ninth grade, and that he had dropped out of school. [DX 41, Houston Independent School Records]. He also read the trial transcript of Mr. Cathey's teacher's testimony who characterized him as seriously behind in middle school. [H.T. Vol. 5: 72]. Dr. Fletcher found the records consistent with his assessment that Mr. Cathey has adaptive behavior deficits.

#### **B. Conceptual Skill Area**

138. The Court finds that Mr. Cathey has the following deficits in the conceptual skill area:

139. Language. Mr. Cathey's family, who witnessed him growing up and who have intimate personal knowledge of his abilities, remember his difficulties expressing himself. His younger brother, Robert Charles Cathey, Jr., [DX 43, Affidavit of Robert Charles Cathey, Jr.], remembers Mr. Cathey's communication problems very clearly:

Eric had problems expressing himself and didn't speak often. He talked with me more than anybody else. I would understand what he was trying to say even when the words didn't make perfect sense. He felt most comfortable talking when he was doing something he

understood, like playing basketball. He always used simple sentences and words.

Eric didn't have the confidence to verbally confront people because he didn't feel that he would get it right. He would get frustrated when he couldn't find the right words or when people didn't understand what he was saying. Sometimes when Eric got into trouble with other kids, I would step in because I was much better at talking to people than he was. He was physically strong but he was not good at verbal arguments.

Eric was not very good at talking about his emotions and reacted physically instead. On several occasions, he punched holes in the wall because he was upset and frustrated. I remember this happening both in his childhood and during his marriage to Noaella.

140. Mr. Cathey's older sister, Charlotte Ross, confirms and similarly recounts Mr. Cathey's communicative deficits [DX 42, Affidavit of Charlotte Ross]:

When we were growing up, Eric was always very quiet. If you talked to him he would talk back but he would never initiate conversations. If Eric did ever speak, what he said would be short and straight to the point. I never heard him use long words. He would usually go without instead of asking for anything. If

it wasn't provided for him, he wouldn't ask for it.

141. Even Mr. Cathey's younger sibling, Celecia Baker, states that Mr. Cathey had difficulties expressing himself [DX 45, Affidavit of Celecia Baker]:

As a child, Eric was slower than the rest of us and didn't catch onto things quickly. I don't think he understood lots of the things that people said to him. I remember always having to repeat myself. Sometimes he would drift off and wander off to play by himself.

142. Money, time, and number concepts. Mr. Cathey failed to manage his money. His older sister recounts that "Eric never had a bank account for his earnings to go in. He gave all his money and earnings to Noaella and she paid all the bills." [DX 42, Affidavit of Charlotte Ross].

143. The fact that Mr. Cathey was provided commissary money and used it to make purchases while on death row does not contradict this finding. Under *Moore I* it is generally inappropriate to rely on adaptive strengths developed in a controlled setting such as prison. *Moore I*, 137 S. Ct. at 1050 (citing AAIDD Manual and DSM-5). Further, in *Moore II* the Supreme Court specifically criticized the Court of Criminal Appeals' reliance on prison commissary purchases as evidence of adaptive strengths. *Moore II*, 586 U.S. \_\_\_, \_\_\_ (2019) (slip op., at 8). Even at Polunsky, Mr. Cathey was unable to manage the \$85 he was given every two weeks. [H.T. Vol. 8: 70]. Mr. Cathey spent over his spending limit on several



purchases. [DX 59, Commissary Purchase Receipts; H.T. Vol. 8: 70-71]. Additionally, there is evidence and a declaration from an inmate, Mr. Faryion Wardrip, that Mr. Cathey was assisted on several occasions in totaling and managing his purchases. [DX 50, Declaration of Faryion Wardrip].

144. Reading and writing. Mr. Cathey's school records indicate limited functioning in reading and writing. It is clear that he performed poorly in school and on standardized tests during his academic career, failed ninth grade, and dropped out the following year. [DX 41, Houston Independent School District Records]. In the seventh grade, Mr. Cathey received D's in math, history, and science. The next year he scored below 70 percent in history, science, and one semester of typing, and received D's in English, language arts, reading, math, and one semester of typing. In his first year of high school, he failed one semester of English and Spanish. He did not score higher than a 72 in any subject. [DX 41, Houston Independent School Records]. Experts in adaptive behavior assessment recognize that "[g]rading standards vary from school to school. Information on the grades earned by other students in the same education settings can be enlightening. It is important to understand the grading standards in a specific school context." [DX 30, Daniel J. Rechsly, "Documenting the Developmental Origins of Mild Mental Retardation," 16 *Applied Neuropsychology*, 129 (2009)]. Important then, although Dr. Fletcher has worked with the Houston Independent School District and is familiar with Ryan Middle School and Yates High School, Dr. Proctor, who practices and lives in Dallas, Texas, admitted that he has no similar

knowledge of the schooling system. [H.T. Vol. 6: 257].

145. Mr. Cathey's standardized test scores also show objective evidence of functional academic impairment. In the spring semester of his ninth grade year, Mr. Cathey's Metropolitan Achievement Test ("MAT") scores were 5.6 grade level in math, 5.7 grade level in spelling, 5.4 grade level in language, 6.9 grade level in science, 5.9 or 6.9 (difficult to read) grade level in social studies, 5.7 grade level in research skills, 7.1 grade level in total reading, 6.0 grade level in total math, 5.6 grade level in total language, 6.3 grade level in total basic battery, and 6.5 grade level in total comprehensive battery. Mr. Cathey underperformed by multiple grade levels. [DX 41, Houston Independent School Records].

146. At the punishment phase of his trial, Mr. Cathey's teacher at Ryan Middle School, Ms. Anne Smith, testified that on grade placement tests for high school, "[o]n the math test, [Mr. Cathey] functioned basically in the 30th/40th percentile. He passed all three sections of the math, the reading, and writing of the Teams Test, but he was still seriously below grade level." [DX 48, Trial Transcript, Vol. 22: 235].

147. Although Mr. Cathey passed the TEAMS test in the ninth grade, this is no indication that he is not mentally retarded. Dr. Fletcher testified the TEAMS test is an achievement test and that even people with mental retardation can pass the TEAMS test. TEAMS is a minimal standards test that was dropped by the State in 1989 and replaced by the TAKS and TAAS tests that test basic competency. [H.T. Vol. 7: 183]. The TEAMS test was widely criticized for its failure to accurately measure achievement relative to state standards. [H.T. Vol. 5: 158].

148. Although Mr. Cathey's older sister Charlotte Ross testified at trial that Mr. Cathey was a good student, in speaking to Dr. Fletcher, she explained that this meant he was well-behaved and did not get any detentions. [H.T. Vol. 5: 120]. Ms. Ross also testified at trial that Mr. Cathey was a "nerd" but this meant he would read comic books, including Spiderman. Dr. Fletcher testified that Spiderman was not a graphic and intricate novel when Mr. Cathey read it during his childhood and that reading of such comic books, even today, is consistent with mental retardation. [H.T. Vol. 5: 121, 161].

149. The fact that Mr. Cathey was not placed in special education classes because of a disability is still consistent with a finding of mental retardation. Literature in the area of mental retardation supports that "[s]chool diagnoses of [mental retardation] have become increasingly rare over the last 30 years...Schools increasingly become reluctant to diagnose [mental retardation] even with persons who were clearly eligible on relevant criteria." [DX 30, Daniel J. Rechsly, "Documenting the Developmental Origins of Mild Mental Retardation," 16 *Applied Neuropsychology* 128 (2009)].

150. Dr. Yohman administered to Mr. Cathey a series of achievement tests, including the Wide Range Achievement Test-Revised ("WRAT-R") and the Woodcock Johnson-Revised. [DX 49, Additional Score Sheets Provided by Dr. Yohman]. On the WRAT-R, Mr. Cathey's score indicated he is in the fourth percentile for spelling and in the eighth percentile for letter-word identification and passage

comprehension.<sup>15</sup> *Id.* Dr. Yohman also concluded from a series of memory tests that Mr. Cathey was “moderately deficient at about the second percentile level.” [DX 48, Trial Transcript, Vol. 23: 21]. The Court finds these results are consistent with and indicative of deficits in conceptual skills.

151. Additionally, Dr. Yohman administered to Mr. Cathey a Categories Test and the California Verbal Learning Test (“CVLT”), tests that are not intelligence tests, like the WAIS-R, but that are most related to IQ. [H.T. Vol. 7: 192; DX 49, Additional Score Sheets Provided by Dr. Yohman]. Dr. Fletcher testified that the Categories Test is a concept formation test that has different trials in which a person has to do problem solving. On this test, Mr. Cathey obtained a percentile score at the eighth percentile. [H.T. Vol. 7: 193]. Dr. Fletcher testified that the CVLT is a verbal memory test and is designed to examine a person’s ability to organize and encode information. On the CVLT, Mr. Cathey received a T score of 26. Dr. Fletcher testified that a T score has a mean of 50 and a standard deviation of 10. A score of 26 is about two and a half standard deviations below average, putting Mr. Cathey below the second percentile. [H.T. Vol. 7: 192-193]. The Court finds these results consistent with Mr. Cathey’s deficits in

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<sup>15</sup> At the punishment phase of Mr. Cathey’s trial, Dr. Yohman testified that Mr. Cathey “may possibly have a learning disorder which we’d call a learning disorder not otherwise specified, which means he has impairment in a variety of academic areas which certainly led to poor academic achievement, but not particularly in one area enough of a deficiency to warrant a selective learning disorder in that area. In other words, he was borderline to mildly deficient in most academic areas.” [DX 48, Trial Transcript, Vol. 23: 20].

conceptual and memory skills.

152. Dr. Yohman also administered to Mr. Cathey the Minnesota Multiphasic Personality Inventory (“MMPI”), which Dr. Fletcher testified is not a neuropsychological test but is a personality questionnaire. [H.T. Vol. 7: 195]. Dr. Fletcher stated the MMPI is not a reading test, and contrary to Dr. Proctor’s opinion, the MMPI’s test manual and publisher, Pearson, advises that the average reading level for the test is a fifth grade level. [H.T. Vol. 7: 195-196]. Dr. Fletcher further testified, to which Dr. Proctor conceded, that the MMPI does not require a full reading of all its items. *Id.* Dr. Yohman’s reports also indicate that he administered to Mr. Cathey a Trail Test, which Dr. Fletcher testified requires no abstraction or judgment but is a vocabulary-based test. [H.T. Vol. 7:198]. Dr. Fletcher, unlike Dr. Proctor, is a board certified neuropsychologist, and in his opinion, the scores Mr. Cathey received on these tests are consistent with mental retardation.<sup>16</sup>

153. The fact that Mr. Cathey’s signature appears on letters and TDCJ forms does not prove that he did not have adaptive deficits before age 18 and does not show that he is without deficits today. Captain Bryant

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<sup>16</sup> Dr. Fletcher testified that although the tests, besides the WAIS-R, that Dr. Yohman administered to Mr. Cathey are neuropsychological tests, and not intelligence tests, the Flynn Effect also effects these scores. [H.T. Vol. 7: 198]. Dr. Fletcher stated that articles, such as the one admitted into evidence titled “The Flynn Effect and its Relevance to Neuropsychology,” explains to neuropsychologists the relevance of the Flynn Effect and how the phenomenon of norm obsolescence affects neuropsychological assessments. *Id.* [DX 52, Merrill Hiscock, The Flynn Effect and its Relevance to Neuropsychology,” 29(5) *Journal of Clinical and Experimental Neuropsychology* (2007)].

admitted that he had not personally seen Mr. Cathey fill out TDCJ forms. [H.T. Vol. 8: 65]. Further, the following grievance forms, admitted through Applicant's Exhibit 53 <sup>17</sup>, included notations indicating that Mr. Cathey received help <sup>18</sup> in completing TDCJ Offender Grievance Forms:

- TDCJ Offender Grievance Form, received November 2, 2009, including notation "assisted by";
- TDCJ Offender Grievance Form, received April 8, 2009, including notation "This Complaint was assisted by and with the help of Offender";
- TDCJ Offender Grievance Form, received March 5, 2009, including notation "This was assisted by offender"; and
- TDCJ Offender Grievance Form, received February 13, 2009, including notation "Assisted by Offender."

154. Several of the TDCJ forms, with Mr. Cathey's name and information, were also filled out in different handwritings, which confirms the finding that Mr. Cathey received help from other people. [DX 58, TDCJ Visitor Forms; H.T. Vol. 8: 67]. From State's Exhibit

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<sup>17</sup> Applicant's Exhibit 53 includes an affidavit from counsel for Applicant, clarifying that the grievance forms were received after she submitted an open records request to the TDCJ. The records were included in Mr. Cathey's offender's file, but the State had not received a copy of the same through their subpoena to the TDCJ.

<sup>18</sup> The names of the people, mostly offenders, who assisted Mr. Cathey were redacted.

15, but entered as Applicant's Exhibit 58, the following visitor change forms, verified by Captain Bryant, were written in different script:

- TDCJ Visitor Change Form, dated April 30, 1997;
- TDCJ Visitor Change Form, dated July 20, 1998;
- TDCJ Visitor Change Form, dated May 27, 1998; and
- TDCJ Visitor Change Form, dated June 22, 2005.

Leah Madison, a correctional officer at the Polunsky Unit, admitted she did not personally see Mr. Cathey writing the romantic letter he allegedly gave her that also caused Mr. Cathey disciplinary problems. [H.T. Vol. 8: 82]. Dr. Proctor testified that one of the poems in Mr. Cathey's letters was plagiarized, and he also acknowledged that some of the material in the letters was copied directly from the internet. [H.T. Vol. 6: 140, H.T. Vol. 7: 271]. Dr. Proctor did not see Mr. Cathey write the letters, and he did not interview anyone who had seen Mr. Cathey write the letters. [H.T. Vol. 6: 268]. Although Mr. Cathey spells at the fourth percentile level, although his full-scale IQ score was 77 even without correcting for the Flynn Effect, although Dr. Proctor has never seen Mr. Cathey use a dictionary, although Dr. Proctor would not expect someone who spells at a fourth percentile level to be able to spell the word "renaissance" found in Mr. Cathey's letters, which Dr. Proctor admitted not being able to spell, Dr. Proctor testified that he believes it is likely that Mr. Cathey wrote the letters. [H.T. Vol. 7:31]. If, however, Mr. Cathey did not write the letters

or the grievance forms, Dr. Proctor stated that his opinions on mental retardation would change. [H.T. Vol. 6: 252].

155. There is evidence that inmates in neighboring cells assisted Mr. Cathey in writing letters. [DX 50, Declaration of Faryion Wardrip and DX 51, Declaration of Ronald Hamilton]. Mr. Wardrip, for example, verified that he lived next to Mr. Cathey at the Polunsky Unit, read to Mr. Cathey his letters, and helped Mr. Cathey write letters that related to political topics, which Mr. Cathey would then copy and mail. [DX 50, Declaration of Faryion Wardrip]. Mr. Hamilton provided confirming statements, affirming in his declaration that he read to Mr. Cathey his letters and helped Mr. Cathey write letters that related to romantic topics, which Mr. Cathey would then copy and mail. [DX 51, Declaration of Ronald Hamilton]. Dr. Fletcher confirmed that adult men with learning disabilities often ask other men for help writing romantic letters. [H.T. Vol. 7: 182], Dr. Proctor was not aware that Mr. Cathey was assisted by neighboring inmates, but he conceded that this fact would impact his assessment of Mr. Cathey's writing skills. [H. T. Vol. 6: 275].

156. Dr. Fletcher testified that he believed Mr. Cathey could not have authored the letters included in the prison records on his own. [H.T. Vol. 7: 175]. He stated that it was not possible for someone who was spelling and writing at a fifth grade level to write the letters that were described, unless there was some intensive intervention program. [H.T. Vol. 7: 182]. There is no program for death row inmates that could accelerate development of an individual whose spelling is in the fourth percentile. *Id.*



157. Dr. Proctor agreed with the DSM-IV and admitted that individuals with mild mental retardation can acquire academic skills up the sixth grade level by their late teens. [H.T. Vol. 7: 86-87]. To a certain extent, people with mild mental retardation are educable, teachable, trainable, and can improve their writing skills with rote practice. [H.T. Vol. 6: 225].

158. Even if Mr. Cathey had prepared letters on his own with no assistance, under *Moore I* it is generally inappropriate to rely on adaptive strengths developed in a controlled setting such as prison. *Moore I*, 137 S. Ct. at 1050 (citing AAIDD Manual and DSM-5). Further, in *Moore II* the Supreme Court specifically criticized the Court of Criminal Appeals' reliance on prison correspondence as evidence of adaptive strengths, and failure to consider the possibility that the applicant had received outside help. *Moore II*, 586 U.S. \_\_\_, \_\_\_ (2019) (slip op., at 7-8).

### **C. Social Skill Area**

159. The Court finds that Mr. Cathey has the following deficits in the social skill area:

160. Gullibility and naiveté. On cross examination at the punishment phase of Mr. Cathey's trial. Dr. Yohman testified that Mr. Cathey is "a follower, who is very unsophisticated, who has limited intellectual resources, and who is going to gravitate to whoever will give him attention and affection, who is going to be easily manipulated." [DX 48, Trial Transcript, Vol. 23:35].

161. Dr. Yohman's testimony comports with history provided by Mr. Cathey's sisters and brother:

When Eric was young, other kids would tell him to do things and he would just agree. On one occasion, a group of kids convinced Eric to egg a car and he did. Another time, one of our cousins persuaded Eric to throw rocks at cars from a bridge. Eric wouldn't put up any kind of fight. I think he was trying to fit in and didn't want to be called chicken. When he got older, Eric started to be persuaded to stay out late and not tell people where he was going. [DX 42, Affidavit of Charlotte Ross].

Because Eric was slower, he was easily manipulated by others. He always wanted other people's approval and would do anything to please them. He always followed the lead of others and rarely made decisions for himself. [DX 43, Affidavit of Robert Charles Cathey, Jr.].

Eric didn't have a group of friends when he was young, so when he started to make friends as an adult he was very loyal and wanted to impress them. A lot of his friends used him and played on his weakness. They would get Eric to do favors for them, such as lending them money. [DX 43, Affidavit of Robert Charles Cathey, Jr.].

Eric wasn't very popular. He used to keep to himself. He had problems expressing himself. Eric was never a leader. He always followed. He told me

that he just wanted to fit in. [DX 44, Affidavit of Celecia Baker].

162. Dr. Proctor admitted, for example, that Mr. Cathey did not plan the kidnapping, was not a passenger of the car that was surveying the victim, did not drive either car involved in committing the crime, and did not ask any questions of the victim. [H.T. Vol. 7: 17].

163. Dr. Proctor submitted that it is possible that Mr. Cathey was asked to participate in the escape attempt because he is gullible, and Dr. Proctor also conceded that Mr. Cathey did not plan the escape. [H.T. Vol. 7: 13-14]. There is no evidence in the affidavits of Mr. Cathey's family members that indicated any leadership characteristics. [H.T. Vol. 7: 15].

164. Self-esteem. Mr. Cathey's adaptive deficits caused him to suffer a further impairment of his self-esteem. Mr. Cathey's brother explains that "Eric always felt that he wasn't as good as everybody else. He was often very hurt about the way other kids treated him and was upset that he didn't have many friends." [DX 43, Affidavit of Robert Charles Cathey, Jr.].

165. Charlotte Ross, Mr. Cathey's older sister, confirms and recounts first-hand experience with Mr. Cathey's low self-esteem [DX 42, Affidavit of Charlotte Ross]:

Eric got upset very easily. He never talked about his emotions, but I used to find him crying. He used to get really frustrated when we were doing something that Eric couldn't do as well

as us. For example, I was a tomboy when I was young and used to be better than him at football. This really upset him. He always looked to us siblings for reassurance and to tell him that things would be okay, especially when he got picked on or told off by his father.

166. Avoiding being victimized. Mr. Cathey was not able to avoid being a victim during his childhood. He was often bullied by other children, as described by his older sister:

Some kids picked on him at school once, and instead of fighting back or getting a teacher, he jumped out of a second story window and ran away. On another occasion, Eric was at the public pool and some older guys picked on him and he got a beating. He didn't fight back. [DX 42, Affidavit of Charlotte Ross].

167. Other children took advantage of his impaired functioning, as described by his brother:

Eric was often teased by other kids because they thought he was "weird" and because he was tall and skinny. Eric found it difficult to avoid fights because he always reacted to teasing and could never shrug off insults. Kids in the neighborhood knew how to wind him up and enjoyed provoking him. [DX 43, Affidavit of Robert Charles Cathey, Jr.].

168. Interpersonal relations. Mr. Cathey was severely impaired in terms of interpersonal relationships. Although Mr. Cathey quit school early

and married Ms. Bryant after she became pregnant with his child, Ms. Bryant divorced and left him for someone else. [DX 48, Vol. 23: 27]. Even Ms. Bryant recounted Mr. Cathey's limited functioning in the context of married life [DX 44, Affidavit of Noaella Bryant]:

What Eric thought was really funny annoyed me. He used to jump out at me when it was dark and when I was in the house and thought I was alone. I would tell him that he was scaring me, but he laughed and kept doing it. Eric didn't understand why it wasn't funny. We fought a lot about this.

169. Mr. Cathey's older sister also remembers her brother's interpersonal difficulties [DX 42, Affidavit of Charlotte Ross]:

I never knew Eric to have any friends. The only friends that he had were mine and his other sister's and brother's friends. Sometimes, when our friends came around, they would think he was weird at the beginning because he was tall, lanky, and never said anything. He would be quiet and stay in his own space.

170. Mr. Cathey's brother confirms and also provides further evidence of Mr. Cathey's impaired adaptive functioning [DX 43, Affidavit of Robert Charles Cathey, Jr.]:

Eric was not very social and did not speak to many people. When family friends and relatives visited the house, he did not want to be around them and

wandered off on his own. He would often ignore visitors when they spoke to him.

Eric was often teased by other kids because they thought he was “weird” and because he was tall and skinny. Eric found it difficult to avoid fights because he always reacted to the teasing and could never shrug off insults. Kids in the neighborhood knew how to wind him up and enjoyed provoking him.

Eric always felt that he wasn’t as good as everybody else. He was often very hurt about the way other kids treated him and was upset that he didn’t have many friends.

171. Dr. Walter Quijano, a licensed clinical psychologist who testified at the punishment phase of Mr. Cathey’s trial, administered to Mr. Cathey a Mallon Clinical Inventory on February 28, 1997 and testified at trial that Mr. Cathey has a dependent and compulsive type of personality. [DX 48, Trial Transcript, Vol. 23:42]. Dr. Quijano described these personality types as follows:

The dependent personality is one that uses the relationship to hang on to their relationship. Their relationship is not reciprocal like most normal relationships are, but the dependent person ingratiates, holds, does things for the other person not because the relationship is reciprocal but because you want to hold on to that relationship. So, you are bound to do things that you

don't otherwise want to do or to do humiliating things to purchase that relationship.

The compulsive is similar except that the trick used by the compulsive is to keep the distance, to not express true feelings, not express true opinions, less he displeases the other person and so he would appear very compliant with rules, regulations, will do everything properly, cross the t's and dot the i's, not because it's rewarding for him, but again because he wants that relationship to continue.

[DX 48, Trial Transcript, Vol. 23:42-43].

172. Dr. Proctor testified that he did not know if Mr. Cathey was good at making friends, and there is no evidence from the trial transcript that Mr. Cathey had this characteristic. The affidavits of Mr. Cathey's family members indicated Mr. Cathey was shy and did not make friends. Dr. Proctor admitted that this fact, if true, would indicate a deficit in social adaptive behavior. [H.T. Vol. 6: 207].

#### **D. Practical Skill Area**

173. The Court finds that Mr. Cathey has the following deficits in the practical skill area:

174. Activities of daily living. Mr. Cathey's ability to take care of his daily activities was significantly impaired by his mental retardation. Mr. Cathey's older sister, Charlotte Ross, verified that he was very dependent on others and unable to manage the simplest activities:

Eric could never do the washing or the cooking. I would always do that. He never helped me with chores around the house unless I asked him. I would always have to tell him what to do. He would never do anything like that on his own initiative. Sometimes, I would make the cleaning and washing up into a game, so that he would help me. I taught him how to use the microwave and how to clean around the house. [DX 42, Affidavit of Charlotte Ross].

175. As confirmed by Mr. Cathey's family, even with direction, Mr. Cathey was unable to manage his home life and marriage:

When he first moved in with me, he could hardly do anything around the house. I had to tell him how to wash clothes and cook. I remember he didn't even know how to flip a hamburger patty. I had to show him how to do everything. I often left notes for him around the house, so that he would remember to do chores and things for the kids, but he often didn't finish the chores that I left for him. Eric also didn't know how to fix anything around the house. I always had to call someone out to fix things. [DX 44, Affidavit of Noaella Bryant].

One time I went over to see Eric at their apartment. Noaella had post-it notes all over the place telling him what to do and when to do it. The walls were completely yellow with post-it notes, but he did not



finish what she told him to do. I noticed that the house was still very messy though. It was horrible in there. There were food and clothes everywhere. [DX 42, Affidavit of Charlotte Ross].

176. Dr. Proctor testified that people with mild mental retardation can master practical skills, can be aware of their pending execution, can be aware of the need to buy things, can ask for other people for money, can ask other people for help, and can be aware of future court hearings. [H.T. Vol. 6: 277]. Dr. Proctor agreed that it would be unsound and unreliable expert methodology to conclude that a person did not have adaptive behavioral deficits by pointing to his strengths. [H.T. Vol. 6: 213]. To rely on the fact that a person does not have adaptive behavioral deficits by focusing on their strengths is a position that is unsupported in peer-reviewed literature. [H.T. Vol. 6:214].

177. Use of safety. Mr. Cathey was significantly impaired in assessing risks and taking precautions. His sister and brother both recount several occasions when Mr. Cathey injured himself because of his failure to assess risk:

On one occasion, we were chasing each other around a wall. Eric hit his head so hard it knocked him down, but he got up and started running and laughing again. He ran into the wall and hit his head again, busting it open this time, but again just got up and carried on running. This continued until we had to stop him

and tell him that he was hurt. [DX 42, Affidavit of Charlotte Ross].

Eric was just not aware of risk. If what he was doing involved risks, he never made sure that he was safe. He wouldn't think to do anything if he got hurt, we would have to tell him to or do it for him. Eric got injured a lot. When he was 8 or 9, he cracked his head swinging on a clothes line. Once, he got spooked by a bug on the wall and fell off and bumped his head. Another time, at the age of 8, Eric fell off a merry-go-round and bumped his head so hard he passed out. Around the same age, he broke his arm swinging on some monkey bars. [DX 42, Affidavit of Charlotte Ross].

If anything was out of place in the house, we would immediately think it was Eric. For example, if there was blood on the walls, we would check Eric's head and see if there was a bruise. A saying developed in our house that it was just "typical Eric." [DX 42, Affidavit of Charlotte Ross].

Eric was especially accident-prone as a child and often tripped over things. When he was 9 or 10 years old, he fell off the porch and injured his head. I remember my mother and the rest of the family saying that Eric had "lost his mind" because of his dazed behavior after the accident. I also remember him breaking his arm in Emancipation Park.

[DX 43, Affidavit of Robert Charles Cathey, Jr.].

178. The incident in which Mr. Cathey fell from the monkey bars required surgery and a three-day hospital stay. [DX 46, Harris County Hospital District Medical Records].

179. Occupational skills. Mr. Cathey had difficulty obtaining and keeping a steady job. His former wife explains Mr. Cathey's impaired occupational skills [DX 44, Affidavit of Noaella Bryant]:

Our son Eric was born in 1989. Eric had to get a job to bring in the income. I had to look for jobs for Eric because he didn't look himself. He used to tell me that he didn't think that he could get a good job because he didn't have any skills. He had never learned any trades. He sat at home for a long time with no work. I told him that he had to get a job so that we could pay for rent. Eric eventually got a job as a security guard. He worked by himself at night, five nights a week. The only thing that he told me about the job was that he had a flashlight, and he might be getting a permit to carry a gun. Eric was fired from the job because he didn't wait to be relieved by the person who came to take over his shift.

180. Mr. Cathey's older sister also confirmed Mr. Cathey's impairment in occupational skills [DX 42, Affidavit of Charlotte Ross]:

When Eric was still living at home, my husband and I got Eric to come to work

with us. We felt like we needed to help him out. We never gave him any responsibility though, because Eric would mess it up. Eric would never have gotten stressed if we gave him any responsibility. He was so used to being told what to do. I always felt like he needed this guidance, because he couldn't cope with things by himself.

181. At the punishment phase of Mr. Cathey's trial, Mr. Luke Ezech, Ms. Charlotte Ross's former husband, testified that Mr. Cathey worked with him at his battery shop for two years. [DX 48, Trial Transcript, Vol. 22: 242-244]. Mr. Ezech stated that his business related to the reconditioning of car batteries and that he taught Mr. Cathey to check dead batteries and also asked him to watch the shop for him while he was away. *Id.* Dr. Proctor conceded that the work Mr. Cathey performed at the battery shop was work a person with mental retardation can perform. [H.T. Vol. 6: 227-228]. Although Dr. Proctor used evidence of Mr. Cathey's occupational skills to evaluate whether Mr. Cathey had adaptive behavior deficits, Dr. Proctor also admitted that he did not know how long Mr. Cathey held jobs, information that is important to his own evaluation. [H.T. Vol. 6: 226].

182. The fact that Mr. Cathey worked, although he was terminated, is consistent with mental retardation. Dr. Fletcher testified that even people with mental retardation are able to work and learn to replicate specific tasks, like the tasks Mr. Cathey performed at the battery shop. [H.T. Vol. 5: 51]. In his interview of Ms. Bryant, Dr. Fletcher also learned that when Mr. Cathey did find a job, often he could

not keep it. [H.T. Vol. 5: 159].

### **E. Testimony and Records from the TDCJ**

183. Reliance on evidence of improved adaptive behavior in prison is generally inappropriate in light of *Moore I* and *Moore II*. *Moore I*, 137 S. Ct. at 1050 (citing AAIDD Manual and DSM-5); *Moore II*, 586 U.S. at \_\_\_\_ (slip op., at 8). “Clinicians . . . caution against reliance on adaptive strengths developed ‘in a controlled setting,’ as prison surely is. DSM-5, at 38 (‘Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained.’); see AAIDD–II User’s Guide 20 (counseling against reliance on ‘behavior in jail or prison’).” *Moore I*, 137 S. Ct. at 1050 (quoting DSM-5 and AAIDD User’s Guide).

184. During the evidentiary hearing to determine whether Mr. Cathey meets the diagnostic criteria for mental retardation, the State called several Texas Department of Criminal Justice (“TDCJ”) correctional officers and officials. The State also admitted records from the TDCJ as evidence. The Court finds that the environment in which the correctional officers and officials observed Mr. Cathey is not indicative of typical community functioning. All inmates are housed in their cells twenty-three hours a day. The prison officials tell inmates when to shower, recreate, and eat. The prison system also supplies all necessities to inmates. [H.T. Vol. 8: 69].

185. Dr. Proctor agreed that prison guards are typically not used for evaluating adaptive behavior because their interaction with the assessed individual

is too limited. [H.T. Vol. 6: 185]. Dr. Proctor—the State’s only witness to offer an opinion on whether Mr. Cathey is a person with mental retardation—admitted that he did not use, interview, or rely on any communication with any prison guard or official for his opinions that Mr. Cathey is not mentally retarded. [H.T. Vol. 6: 241]. He also admitted that “the fact that an individual possesses one or more skills that might be thought by some laypersons as inconsistent with the diagnosis of mental retardation cannot be taken as disqualifying.” [H.T. Vol. 6: 212].

186. Although testimony from the State indicated Mr. Cathey had several books in his cell, Captain Bryant testified that he had not seen Mr. Cathey read a book. [H.T. Vol. 8: 63]. There is also evidence that inmates could easily pass, borrow, and share books through a “4-inch-by-4 inch hole at the bottom of the door...” [H.T. Vol. 8: 65]. Captain Bryant stated he had seen some rather large items such as small paperback books fit through the gaps, *id.*, and Leah Madison testified that inmates would pass papers, reading materials, and almost anything they are asked to pass. [H.T. Vol. 8: 81]. Dr. Fletcher also indicated that people with mental retardation try to impress others and make them think they know a lot more than they really do. Having books like *The Echelon Vendetta* [SX 21, State Inventory of Mr. Cathey’s Cell], *Tactics* and *Strategy of Chess* [SX 21, State Inventory of Mr. Cathey’s Cell], and *The Looking Glass* [SX 21, State Inventory of Mr. Cathey’s Cell], in one’s cell when one has a history of reading deficits, as Mr. Cathey has, is consistent with Dr. Fletcher’s testimony. [H.T. Vol. 7: 191]. Further, Mr. Faryion Wardrip, who lived next to Mr. Cathey at the Polunsky Unit, provided a

declaration that Mr. Cathey would hold books for him and for another inmate in his cell and that very often, inmates would trade books and even letters through the gaps in the cell doors. [DX 50, Declaration of Faryion Wardrip].

187. Similarly, although testimony from the State indicated Mr. Cathey had a chess board. Captain Bryant testified he had not seen Mr. Cathey play chess. [H.T. Vol. 8: 65]. Investigator Don Cohn admitted that he did not see any chess pieces in Mr. Cathey's cell. [H.T. Vol. 8: 21]. Dr. Proctor admitted that he and others had made assumptions that Mr. Cathey had been playing chess, when without evidence of Mr. Cathey even having chess pieces, he could have been playing checkers. [H.T. Vol. 7:97]. Further, Mr. Faryion Wardrip, who lived next to Mr. Cathey at the Polunsky Unit, provided in a declaration that Mr. Cathey did not play chess and only had a chess board because he wanted to trade it with another inmate. [DX 50, Declaration of Faryion Wardrip]. Although Leah Madison stated she had seen Mr. Cathey play chess, [H.T. Vol. 8: 77], her testimony is inconsistent with the overwhelming testimony and evidence that Mr. Cathey did not play chess. Ms. Madison did not testify as to how long Mr. Cathey played chess, how often he played chess, or whether the pieces being used were actually chess pieces.

188. Dr. Proctor admitted that inmates do not have access to the internet and that someone else must have posted the profile in Mr. Cathey's name. [H.T. Vol. 6: 278].

189. The State presented evidence of visitor records, including documentation of visits made to Mr.

Cathey by his attorneys and clergy. [SX 15, TDCJ records]. The State stated on record that use of the visitor records was solely to show what changes had been made to Mr. Cathey's visitor list, also stating the visitor records were received as part of the entire TDCJ file. [H.T. Vol. 6: 167]. The Court finds that these records are irrelevant to the issue of whether Mr. Cathey is a person of intellectual disability.

#### **VII. PRONG THREE: ONSET BEFORE THE AGE OF EIGHTEEN**

190. There is credible and reliable evidence that Mr. Cathey suffered from significant deficits in intellectual and adaptive functioning before the age of 18. Although the limitation in his functioning was not formally documented before the age of 18, all risk factors commonly associated with mental retardation were present prior to Mr. Cathey turning 18. No evidence was presented at the evidentiary hearing that established an intervening cause after the age of 18 that could account for Mr. Cathey's limitations in intellectual and adaptive functioning.

191. The Court finds that Mr. Cathey exhibited significant limitations in general intellectual functioning concurrent with deficits in adaptive behavior that originated before the age of 18.

#### **VIII. APPLICATION OF THE DSM-5**

192. In this Court's Findings of Fact and Conclusions of Law issued on December 31, 2012, the Court applied the *Briseno* factors for intellectual disability. But in *Moore I*, "the Supreme Court criticized [the CCA's] reliance on *Briseno's* evidentiary factors for assessing adaptive functioning." *Ex parte Moore*, 548 S.W.3d 552, 559 (Tex. Crim. App. 2018).



Accordingly, on remand from *Moore I*, the CCA concluded that “the DSM-5 should control our approach to resolving the issue of intellectual disability.” *Id.* at 559-60.

193. While the evidence herein is primarily discussed using the language of the AAIDD Manual, the language of the DSM-5 likewise supports a finding of intellectual disability. The DSM-5 describes the three-pronged definition of intellectual disability as follows: (1) “deficits in intellectual functions”, (2) accompanied by related “deficits in adaptive functioning”, (3) the onset of which occurs “during the developmental period,” i.e. prior to age eighteen. DSM-5 at 33, 37-38.

**A. Prong One: Deficits in Intellectual Functions**

194. Like the AAIDD Manual, the DSM-5 recognizes that an IQ score is indicative of intellectual disability if it is “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).” DSM-5 at 37. Further, the DSM-5 recognizes that the Flynn effect may affect test scores, resulting in “overly high scores due to out-of-date test norms.” DSM-5 at 37.

195. Based on the evidence of record the Court finds that Mr. Cathey’s IQ score, corrected for the Flynn Effect and the standard error of measurement, is within the range of intellectual disability, as defined by the DSM-5.

**B. Prong Two: Deficits in Adaptive**

### **Functioning**

196. Like the AAIDD Manual, the DSM-5 similarly states that the requirement for deficits in adaptive functioning is met “when at least one domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community.” DSM-5 at 38. These deficits are directly related to deficits in intellectual functioning. *Id.*

197. Based on the evidence of record the Court finds that Mr. Cathey suffers from deficits in adaptive functioning related to deficits in intellectual functioning, as defined by the DSM-5.

#### **C. Prong Three: Onset During the Developmental Period**

198. Like the AAIDD Manual, the DSM-5 does not require that a diagnosis of intellectual disability was made during the developmental period, but instead “refers to the recognition that intellectual and adaptive deficits are present during childhood or adolescence. DSM-5 at 38.

199. Based on the evidence of record the Court finds that Mr. Cathey exhibited deficits in intellectual functioning concurrent with related deficits in adaptive functioning that originated during the developmental period, i.e., before the age of 18.

### **IX. RISK FACTORS FOR INTELLECTUAL DISABILITY**

200. The AAIDD Manual sets forth risk factors commonly associated with intellectual disability. The

four categories of risk factors are: (1) biomedical: factors that relate to biologic processes; (2) social: factors that relate to social and family interaction; (3) behavioral: factors that relate to potentially causal behaviors; and (4) educational: factors that relate to the availability of educational supports that promote mental development and the development of adaptive skills. [DX 4, AAIDD Manual at 60]. Intellectual disability often reflects the cumulative or interactive effects of multiple risk factors.

201. The AAIDD Manual highlights that the etiology of intellectual disability may facilitate diagnosis. The AAIDD Manual states that “All relevant risk factors are identified, including those that are thought to be most important (such as trisomy 21 or Down syndrome) as well as those that are thought to be less important (such as social deprivation or lack of timely educational intervention). The presence of interactions between risk factors are then evaluated and described. Etiological diagnosis and classification thus consists of a comprehensive list of all of the risk factors and interactions among risk factors for which the available data provide sufficient evidence.” [DX 4, AAIDD Manual at 68].

202. Because of correlation between risk factors and intellectual disability, it is relevant to this Court to determine whether Mr. Cathey’s history contains any of the risk factors for intellectual disability identified by the AAIDD Manual. *See Moore I*, 137 S. Ct. at 1051 (traumatic experiences such as childhood abuse and suffering are risk factors for intellectual disability) (citing AAIDD Manual). There is ample evidence from the family history witnesses that

establish Mr. Cathey was exposed to all risk factors commonly associated with intellectual disability. The presence of these risk factors lends further weight to the diagnosis of intellectual disability in this case.

#### **A. Biomedical Risk Factors**

203. Traumatic brain injury is a risk factor included within the biomedical category. [DX 4, AAIDD Manual, Table 6.1 at 60]. Mr. Cathey presents numerous occasions of serious head trauma during his childhood. At age two, Mr. Cathey “allegedly fell & struck edge of table,” according to hospital records. [DX 46, Harris County Hospital District Medical Records]. His older sister Charlotte Ross recounts other head injuries for which Mr. Cathey did not receive medical attention [DX 42, Affidavit of Charlotte Ross]:

On one occasion...Eric hit his head so hard [on a wall] it knocked him down...He ran into the wall and hit his head again, busting it open this time.

Once, he got spooked by a bug on the wall and fell off and bumped his head. Another time, at the age of 8, Eric fell off a merry-go-round and bumped his head so hard he passed out.

204. Mr. Cathey’s younger brother confirms and recalls two more serious blows to the head [DX 43, Affidavit of Robert Charles Cathey, Jr.]:

When he was 9 or 10 years old, he fell off the porch and injured his head. I remember my mother and the rest of the family saying that Eric had “lost his

mind” because of his dazed behavior after the accident.

[W]hen Eric was 15 or 16....[he was hit] in the face with a vase...The vase smashed, leaving him with a scar down his face.

205. Mr. Cathey’s younger sister remembers “He must have busted his head open at least twice but I can’t remember his exact age.” [DX 45, Affidavit of Celecia Baker].

### **B. Social Risk Factors**

206. An impaired child-giver and adult non-responsiveness are risk factors included within the social category of risk factors for mental retardation. [DX 4, AAIDD Manual, Table 6.1 at 60]. Mr. Cathey’s mother showed signs of impairment: “When I first started going with Eric, I thought his family was very weird. Their house was completely out of the order. It was disgusting. Everything was completely chaotic. Eric’s mother seemed very slow.” [DX 44, Affidavit of Noaella Bryant].

207. Mr. Cathey’s mother was also non-responsive: “Eric sometimes told me that he felt left out and different from Robert, my older sister Charlotte, and me. He often said that our mother didn’t like him as much and that she treated him differently.” [DX 45, Affidavit of Celecia Baker]. Mr. Cathey’s older sister also had to call the ambulance when he broke his arm, rather than his own parents. [DX 42, Affidavit of Charlotte Ross].

### **C. Behavioral Risk Factors**

208. Child abuse and neglect, domestic violence,

and social deprivation are included within the behavioral category of risk factors for mental retardation. [DX 4, AAIDD Manual, Table 6.1 at 60]; *Moore I*, 137 S. Ct. at 1051 (citing AAIDD Manual). As attested to by his family members, Mr. Cathey was exposed to extraordinary levels of violence and neglect once his father began dealing drugs from home:

While we were growing up, our father was a drug dealer... There was drug-dealing, drug use, and prostitution in our house. The house could be chaotic with people firing guns and shouting and cursing. Eric and I and our sister Lisa would run and hide in the bedroom. One time, we climbed out of the bedroom window to hide in the yard. [DX 43, Affidavit of Robert Charles Cathey, Jr.].

209. At the punishment phase of Mr. Cathey's trial, Mr. Cathey's older sister, Ms. Charlotte Ross, testified about the violent, chaotic, and abusive environment in the home. [DX 48, Trial Transcript, Vol. 22: 202-206] (testifying that Mr. Cathey's father was a drug dealer, their home was robbed twice, and the children would constantly be yelled at by their parents). Ms. Ross also testified that neither she nor her siblings would discuss the robberies because it was a "taboo" in the house. [DX 48, Trial Transcript, Vol. 22: 207].

210. During the punishment phase of his trial, Mr. Cathey's mother, Ms. Willie Lee Cathey, confirmed and testified that Mr. Cathey's father sold drugs for many years from the house. [DX 48, Trial Transcript, Vol. 23: 83]. Ms. Cathey also testified that her husband, Mr. Cathey's father, was robbed twice in the

house at gunpoint, and during one occasion, the entire family hid underneath a table. [DX 48, Trial Transcript, Vol. 23: 83-86].

#### **D. Educational Risk Factors**

211. Impaired parenting and inadequate family support leads to educational risk factors. [DX 4, AAIDD Manual, Table 6.1 at 60].

212. The affidavits of Mr. Cathey's family members indicate there was inadequate family support in the household. "There was drug-dealing, drug use, and prostitution in our house. The house could be chaotic with people firing guns and shouting and cursing." [DX 43, Affidavit of Robert Charles Cathey, Jr.].

#### **X. DETERMINATION CONCERNING INTELLECTUAL DISABILITY**

213. Mr. Cathey is a person with intellectual disability. His full scale obtained score of 77 on the WAIS-R, administered by Dr. Yohman, without correction for the Flynn Effect, demonstrates that his intellect is firmly in the range of mild intellectual disability, as recognized by the DSM-5 and AAIDD Manual. With correction for the Flynn Effect, Mr. Cathey's score on the WAIS-R is a 71.6, and after applying the standard error of measurement, his corrected score falls within the range of intellectual disability. The finding of intellectual disability is further supported by Dr. Fletcher's determination that Mr. Cathey has significant deficits in adaptive functioning in the conceptual, social, and practical realms that place him more than two standard deviations below the mean in adaptive functioning. Taking into account all of this evidence, Mr. Cathey meets the diagnostic criteria for intellectual

disability. [H.T. Vol. 3:57].

**Y. DECEMBER 2019 WRIT HEARING – DR.  
JACK FLETCHER**

214. Fletcher testified that his clinical opinion remains unchanged; that the applicant satisfies the ID criteria of the DSM-5 and the AAIDD-11 (I W.H.II. at 26-27).

215. Fletcher testified that it remains his clinical judgment that in order to take the Flynn Effect into account in the applicant's case it is appropriate to reduce the WAIS-R score by 5.4 points (18 x .3). Therefore, in his clinical judgment, the applicant's IQ score was 71.6 rounded up to 72 +/- 5 (I W.H.II. at 21).

216. In addition to offering Fletcher's testimony, the applicant introduced Fletcher's August 22, 2019 affidavit (II W.H.II at 298-304). In this affidavit Fletcher references and attaches eight scholarly articles published since the applicant's 2010 writ evidentiary hearing. These articles include his own scholarship. According to Fletcher, these articles support his position regarding the scientific validity of the Flynn Effect and the appropriateness of a retrospective diagnosis (II W.H.II. at 110-332).

217. Regarding the Flynn Effect, Fletcher testified that the DSM-5 "talks about a lot of the factors that influence the determination of a person's IQ, including the need to correct for. . . the Flynn Effect" (I W.H.II at 15)(emphasis added).

218. The Court finds that the DSM-5 does not say a clinician "need[s]" to correct for the Flynn Effect. Instead the DSM-5 directs a clinician to consider whether the Flynn Effect "may" have affected an IQ score. DSM-5 at 37.



219. The Court finds that, according to Fletcher's testimony and scholarship introduced into the habeas record at the hearing by the applicant, it was possible to calculate 12 variants of a Flynn Effect on the applicant's score ranging from 5.4 +/- 5 (the largest) to 3.93 +/- 4.5 (the smallest); that in Fletcher's clinical judgment the largest adjustment was appropriate even though the deduction involved a calculation contrary to (i) the *User's Guide's* guidance, (ii) the test-specific, WAIS-R SEM for the applicant's age group, and (iii) findings from his own scholarship regarding the size of the Flynn Effect (I W.H.II 27-50) (II W.H.II. at 341).

220. On cross-examination, Fletcher acknowledged the DSM-5 states, "Adaptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures," and that he did not conduct a clinical evaluation of the applicant (I W.H.II. at 51).

221. Before the evidentiary hearing, Fletcher prepared two draft "reports" for the applicant's counsel. In both "reports" Fletcher concludes "Atkins hearings are life or death. The idea that conventional clinical practice should be followed when life and death is on the table is an unreasonable standard." Respondent's Ex. A, *May 9, 2019 Report of Dr. Jack Fletcher*; Respondent's Ex. B, *Aug. 9, 2019 Report of Dr. Jack Fletcher*.

**Z. DECEMBER 2019 WRIT HEARING - DR.  
TIM PROCTOR**

222. Proctor testified that in his clinical judgment there remains insufficient evidence to support a diagnosis of ID applying the DSM-5 diagnostic

criteria; that a scholarly article by Lawrence G. Weiss introduced into evidence by the applicant, and cited approvingly by Fletcher, recognizes that it remains “controversial” to adjust an IQ score for the Flynn Effect in *Atkins* litigation; that he agrees with the conclusion of a scholarly article by Stephanie C. Black, introduced into evidence by the applicant, and cited approvingly by Fletcher, that concludes “practitioners need to ensure that the most current editions of IQ tests . . . are used”; that debate about application of the Flynn Effect to the applicant’s IQ score could have been mooted had the applicant been administered a new IQ test; that, in light of the DSM-5, contemporary professional norms do not recommend a diagnosis of ID if a clinician does not actually meet and interview that individual (I W.R.II. at 62-67).

#### **CONCLUSIONS OF LAW**

1. The preponderance of the evidence establishes that Mr. Cathey has significant limitations or deficits in general intellectual functioning.
2. The preponderance of the evidence properly before the court shows that Mr. Cathey suffers from significant limitations or deficits in adaptive behavior.
3. The preponderance of the evidence properly before the court shows that Mr. Cathey exhibited significant limitations or deficits in general intellectual functioning concurrent with significant limitations or related deficits in adaptive behavior that originated before the age of 18.
4. The preponderance of the evidence properly before the court shows several risk factors for intellectual disability present in Mr. Cathey’s history.
5. The preponderance of the evidence properly before

the court shows that Mr. Cathey is a person with intellectual disability. Accordingly, under the holdings of *Atkins v. Virginia*, 536 U.S. 304 (2002), *Moore v. Texas*, 137 S. Ct. 1039 (2017), and *Moore v. Texas*, 586 U. S. \_\_\_\_ (2019), he cannot be put to death. His death sentence must be modified to a sentence of life imprisonment.

6. The Flynn Effect is a scientifically valid and reliable phenomenon applied to correct for norm obsolescence.

7. The Flynn Effect is used by clinical practitioners in the diagnosis of intellectual disability and is used by practitioners outside the criminal justice system to correct for norm obsolescence.

8. The Flynn Effect should be applied to individual test results to correct for norm obsolescence when a test with aging norms is used, and it is a generally accepted scientific procedure.

9. The Flynn Effect has a known or potential error rate sufficiently precise to be applied.

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

Based on the foregoing, the Court hereby recommends relief.

SIGNED this 15 day of June, 2020.

/s/ Nikita V. Harmon

Nikita V. Harmon

Presiding Judge of the 176th Criminal  
District Court



**Cause No. 713189-B**

EX PARTE	§	IN THE 176 <sup>TH</sup> DISTRICT COURT OF HARRIS COUNTY, TEXAS
ERIC DEWAYNE CATHEY, Applicant.	§	

**ORDER**

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause no. 713189-B and transmit same to the Court of Criminal Appeals, as provided by Article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. all of the applicant's pleadings filed in cause number 713189-B, including his application for writ of habeas corpus;
2. all of the Respondent's pleadings filed in cause number 713189-B, including the Respondent's Original Answer and Supplemental Answer;
3. all affidavits and exhibits filed in cause no. 713189- B;
4. this court's findings of fact, conclusions of law and order denying relief in cause no. 713189-B;
5. any Proposed Findings of Fact and Conclusions of Law submitted by either the applicant or Respondent in cause no. 713189-B;
6. the transcripts of the writ hearings held on

January 22 – 26, 2010 and December 16, 2019 , in cause no. 713189-B; and,

7. the indictment, judgment, sentence, docket sheet, and appellate record in cause no. 713189, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of the court's findings of fact and conclusions of law, including its order, to applicant's counsel: Layne Kruse; Norton Rose Fulbright; 1301 McKinney, Suite 5100; Houston, Texas 77010; Dov Preminger; Norton Rose Fulbright; 1301 McKinney, Suite 5100; Houston, Texas 77010; and to the Respondent: Joshua Reiss; Harris County District Attorney's Office; 500 Jefferson Street, Suite 600; Houston, Texas 77002.

SIGNED this 15 day of June, 2020.

/s/ Nikita V. Harmon

Nikita V. Harmon



Presiding Judge of the 176th Criminal  
District Court

116a

APPENDIX C



IN THE COURT OF CRIMINAL APPEALS  
OF TEXAS

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NO. WR-55,161-02

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EX PARTE ERIC DEWAYNE CATHEY

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ON APPLICATION FOR WRIT OF HABEAS  
CORPUS IN CAUSE NO. 713189-B IN THE  
176<sup>th</sup> DISTRICT COURT OF HARRIS  
COUNTY

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*Per curiam.*

**ORDER**

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071.

In March 1997, a jury convicted Applicant of the offense of capital murder. The jury answered the special issues submitted pursuant to Code of Criminal Procedure article 37.071, and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Cathey v. State*, 992 S.W.2d 460 (Tex. Crim.

App. 1999). The Court denied Applicant’s initial post-conviction application for writ of habeas corpus. *Ex parte Cathey*, No. WR-55,161-01 (Tex. Crim. App. April 2, 2003)(not designated for publication). Applicant later filed a subsequent state habeas application, in which he alleged that he is intellectually disabled and ineligible for the death penalty under the United States Supreme Court’s holding in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). We denied that application in 2014. *Ex parte Cathey*, 451 S.W.3d 1 (Tex. Crim. App. 2014). In March 2015, we declined Applicant’s suggestion to reconsider our disposition of that application.

The United States Supreme Court thereafter issued its opinion in *Moore v. Texas*, 137 S. Ct. 1039 (2017). In *Moore v. Texas*, the Supreme Court rejected the use of the *Briseno*<sup>1</sup> factors to analyze adaptive deficits because they “creat[e] an unacceptable risk that persons with intellectual disability will be executed.” *Id.* at 1051. The Supreme Court held that this Court improperly “fastened its intellectual-disability determination to ‘the AAMR’s 1992 definition of intellectual disability that [it] adopted in *Briseno* for *Atkins* claims presented in Texas death-penalty cases.’”<sup>2</sup> *Id.* at 1053.

The Fifth Circuit authorized Applicant to file a successive habeas petition in federal court. *In re Cathey*, 857 F.3d 221 (5th Cir. 2017). The federal district court stayed its proceedings to give “the Texas

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<sup>1</sup> *Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004).

<sup>2</sup> See American Association on Mental Retardation (AAMR), *Mental Retardation: Definition, Classification, and Systems of Supports* (9<sup>th</sup> ed. 1992).

courts an opportunity to decide whether *Moore* requires reconsideration of [Applicant's] *Atkins* claim." *Cathey v. Davis*, No. H-15-2883 (S.D. Tex. July 28, 2017). Applicant has now submitted the instant "suggestion for [this] court to reconsider [this] case on its own initiative."

While the Rules of Appellate Procedure do not permit the filing of a motion for rehearing following the denial of a post-conviction application for writ of habeas corpus, we may on our own initiative choose to exercise our authority to reconsider our initial disposition of a capital writ. *See Ex parte Moreno*, 245 S.W.3d 419, 427-29 (Tex. Crim. App. 2008) (stating that we may choose to exercise this authority only "under the most extraordinary of circumstances"). In light of the Supreme Court's recent opinion in *Moore v. Texas*, we exercise our authority to reconsider this case on our own initiative.

This cause is remanded to the habeas court to consider all of the evidence in light of the *Moore v. Texas* opinion and make a new recommendation to this Court on the issue of intellectual disability. If the habeas court deems it necessary, then it may receive evidence from mental health experts and any witnesses whose evidence the court determines is germane to the question of intellectual disability. The habeas court shall then make findings of fact and conclusions of law regarding the issue of intellectual disability.

This cause will be held in abeyance pending the trial court's compliance with this order. The habeas court shall resolve the issue and make the required findings and conclusions within 60 days of the date of this order. Immediately thereafter, the clerk shall forward



to this Court a supplemental transcript containing the trial court's findings of fact and conclusions of law, any additional documents filed, and the transcripts of any hearings. Any extensions of time shall be obtained from this Court.

IT IS SO ORDERED THIS THE 7<sup>TH</sup> DAY OF NOVEMBER, 2018.

Do Not Publish

**APPENDIX D**



**IN THE COURT OF CRIMINAL APPEALS  
OF TEXAS**

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**NO. WR-55,161-02**

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**Ex Parte ERIC DEWAYNE CATHEY, Applicant**

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**ON APPLICATION FOR A WRIT OF HABEAS  
CORPUS IN CAUSE NO. 713189-B IN THE  
176th DISTRICT COURT  
HARRIS COUNTY**

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COCHRAN, J., delivered the opinion of the Court in which KELLER, P.J., and MEYERS, WOMACK, JOHNSON, KEASLER, HERVEY, and ALCALA, JJ., joined.

PRICE, J., joined Parts I and IIA and filed a concurring opinion.

**OPINION**

Applicant was convicted of capital murder and sentenced to death in 1997 for fatally shooting Cristina Castillo while kidnapping her. We affirmed his conviction and sentence in 1999,<sup>1</sup> and denied relief on his first application for a writ of habeas corpus in

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<sup>1</sup> *Cathey v. State*, 992 S.W.2d 460 (Tex. Crim. App. 1999).

2003.<sup>2</sup> On the day before his scheduled execution, applicant filed a subsequent writ alleging, for the first time, that he was mentally retarded and therefore exempt from the death penalty. The next day we stayed applicant's execution and issued an order finding that his claim satisfied the requirements of Article 11.071, § 5, and remanded the case to the trial court to conduct a hearing on his mental retardation claim.<sup>3</sup> The trial judge conducted a five-day hearing that included testimony from numerous expert witnesses. Both the State and applicant filed proposed findings of fact and conclusions of law on February 21, 2011. On December 31, 2012, almost two years after the hearing and on the last day of her term of office, the trial judge signed applicant's proposed findings of fact and conclusions of law. We filed and set this case and ordered briefing by the parties.

We hold that applicant has not established, by a preponderance of the evidence, that he is mentally

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<sup>2</sup> *Ex parte Cathey*, No. WR-55,161-01 (Tex. Crim. App. April 2, 2003) (not designated for publication).

<sup>3</sup> *Ex parte Cathey*, No. WR-55-161-02, 2008 WL 4927446 (Tex. Crim. App. Nov. 18, 2008) (not designated for publication).

retarded<sup>4</sup> under *Atkins v. Virginia*<sup>5</sup> and *Ex parte Briseno*;<sup>6</sup> therefore he is not exempt from the death penalty. We conclude that the record does not support the habeas judge's factual findings or legal conclusions. In short, the judge erred in finding,

- (1) The “Flynn Effect” authorized her to subtract 5.4 points from applicant’s IQ score of 77, and the standard measurement of error authorized her to subtract another 5 points from his IQ score, thus concluding that applicant’s “true” IQ score is as low as 66.6.
- (2) The State was not allowed to have applicant’s IQ retested with a more recently normed test when Dr. Flynn testified that his purpose in the “Flynn Effect” is to show that IQ tests should be normed and revised with greater frequency.<sup>7</sup>

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<sup>4</sup> The term “mentally retarded” has been changed to “intellectually disabled,” as mental health advocates decided that the former term had pejorative connotations. See Tomoe Kanaya, et al., *The Flynn Effect and U.S. Policies: The Impact of Rising IQ Scores on American Society Via Mental Retardation Diagnosis*, 58 AM. PSYCH. 778, 788 (2003) (noting that “the fact that the MR label carries with it an inherent negative stigma is no better illustrated than by the fact that a former label is continually supplanted by newer ones over time. For example, terms such as *imbecile* and *feeble-minded* were considered scientific and acceptable in the first quarter of the 20th century but were replaced after time with successive euphemisms.”). The terms may be used interchangeably.

<sup>5</sup> 536 U.S. 304 (2002).

<sup>6</sup> 135 S.W.3d 1 (Tex. Crim. App. 2004).

<sup>7</sup> Applicant’s Proposed Findings at 38 (“Because Mr. Cathey’s experts relied on Dr. Yohman’s score [77 I.Q.] during the evidentiary hearing and did not present testimony based on a new intelligence test, retesting was not necessary.”). A footnote

- (3) The Vineland test answers given by applicant's sister trying to retrospectively remember her brother's behavior twenty-six years earlier and that of his former wife some eighteen years earlier were scientifically valid.
- (4) The Vineland test answers given by applicant's sister and his former wife were reliable when, in fact, they contradicted their prior trial testimony at a time that they had no motive to exaggerate applicant's poor adaptive behavior.
- (5) The applicant is mentally retarded or intellectually disabled, because we conclude

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attached to this finding states that "[t]he State should be collaterally estopped from objecting now to Dr. Yohman's testing and score because it failed to object on these grounds at Mr. Cathey's trial." This makes no sense. Collateral estoppel applies only when an elementary issue has been fully and finally litigated. There was no "element" of mental retardation at applicant's trial, which took place before *Atkins* was decided. Furthermore, this footnote states that "[t]he issue of cognitive disability was placed before the jury during the punishment phase of trial, and the State had ample reason, at that time, to request testing of Mr. Cathey." No such issue was "placed before the jury" at trial in 1997, and Dr. Yohman did not testify at trial that applicant was mentally retarded or intellectually disabled.

As we explained in *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008), we normally defer to the habeas judge's factual findings, but "[w]hen our independent review of the record reveals that the trial judge's findings and conclusions are not supported by the record, we may exercise our authority to make contrary or alternative findings and conclusions." And, "[w]hen our independent review of the record reveals findings and conclusions that are unsupported by the record, we will, understandably, become skeptical as to the reliability of the findings and conclusions as a whole. In such cases, we will proceed cautiously with a view toward exercising our own judgment." *Id.*

that the evidence clearly demonstrates his intellectually competent adult behavior.

Although we agree that factfinders may “consider” the concept of the “Flynn Effect” in assessing the validity of a WAIS or WAIS-R IQ test score, they may consider that effect only in the way that they consider an IQ examiner’s assessment of malingering, depression, lack of concentration, and so forth. It is a generalized consideration that could detract from the over-all validity of the score obtained. The preferred solution to an outdated IQ score is not to start subtracting from that score, it is to retest with a more

recently normed IQ test.<sup>8</sup> As Professor James Flynn<sup>9</sup>

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<sup>8</sup> ALAN S. KAUFMAN, *IQ TESTING* 101, 203 (2009) (noting that publishers standardize IQ tests and determine the basis for calculating IQ scores at specific points in time; thus an IQ test grows outdated and its norms grow obsolete as time passes from the time when the publisher standardized the test, and obsolete norms inflate IQ scores because they measure test performances against the scores of test takers from the past, as opposed to the higher scores of test takers from the present); *see also* JAMES R. FLYNN, *WHAT IS INTELLIGENCE? BEYOND THE FLYNN EFFECT* 111-28 (Cambridge Univ. Press 2009). Professor Flynn notes that “the target percentage of about 2 percent” of children being diagnosed as mentally retarded “has been attained only fleetingly and then only by accident.” *Id.* at 128. *See also* James R. Flynn, *Individual Differences: Implications for Educational Policy: The Hidden History of IQ and Special Education: Can the Problem Be Solved?*, 6 *PSYCH. PUB. POL’Y & L.* 191, 191-98 (2000) (suggesting that a team of qualified psychologists gather a representative sample of MR children based on behavioral criteria and reform IQ tests every seven years); Tomoe Kanaya, et al., *The Flynn Effect and U.S. Policies*, 58 *AM. PSYCHOL.* 778, 780 (2003) (“As IQ norms age, fewer students receive MR services, but when a newly normed test is introduced, the number of students eligible for these services will suddenly increase.”).

<sup>9</sup> Professor Flynn is a Professor Emeritus of Political Studies at the University of Otago in New Zealand who conducts research on intelligence testing. After noting “massive” IQ gains of 5 to 25 points in 14 different countries within a single generation, Professor Flynn posited, “The hypothesis that best fits the results is that IQ tests do not measure intelligence but rather correlate with a weak causal link to intelligence.” James R. Flynn, *Massive IQ Gains in 14 Nations: What IQ Tests Really Measure*, 101 *PSYCH. BULL.* 171, 171 (1987). That is, IQ tests measure abstract problem-solving ability (APA), but that abstract ability does not necessarily correlate strongly to one’s competency to survive and succeed in the real world. *Id.* at 188. As Professor Flynn notes, if rising IQ scores really were an indication that Americans were getting significantly “smarter” with each generation, then their SAT scores should be increasing

stated at the writ hearing, “[T]here would be no competent clinical psychologist today, if they inherited a score from a school psychologist that was ten years obsolete, any competent one would throw that out and regive a test. That I will say flatly.”

In sum, the trial judge’s finding that Dr. Yohman’s 1997 IQ test score was reliable after subtracting ten points was contradicted by the evidence and led to further factual findings errors, including an error in the ultimate factual finding that applicant is intellectually disabled under *Atkins*.

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as well. But SAT scores have been declining over the past several generations. *Id.* at 189. He explained,

Thanks to gains on Wechsler-Benet tests, it seemed that those entering American high schools were getting more and more intelligent, and yet they were leaving high school with worse and worse academic skills. Unless nonintellectual traits, such as motivation, study habits, and self-discipline were deteriorating at an incredible rate, how could more intelligent students be getting so much less education? Now the solution is apparent: High school students in 1981 did not necessarily have higher intelligence than their counterparts in 1963, they merely had higher APSA [abstract problem solving ability].

*Id.* One possible explanation of why IQ test scores rose immediately after WWI and then again during the post-WWII era is that, as nations moved from a relatively agrarian society into the industrial age and then from the industrial age into the technological age, the emphasis on abstract problem-solving increased, but over-all academic achievement, as measured by instruments such as the SAT, did not. As Professor Flynn notes, an IQ test score is probably less predictive of “success” in society than are other measurements of social and academic skills.



**I.**

Applicant was charged with capital murder for fatally shooting twenty-year-old Cristina Castillo while kidnapping her on September 12, 1995. The evidence at trial showed that applicant, along with five other men, planned to rob Cristina and her boyfriend, Hector Alicia, because they thought the two had drugs and money in their apartment. According to one of the conspirators, applicant was the only person armed. He had a 9 mm pistol and grabbed Cristina as she was getting out of her car at the apartment complex. Applicant held Cristina at gunpoint and forced her into a red car occupied by several of the conspirators, who then tied her up with duct tape. Applicant called the other conspirators, who were in a white car, and told them to meet at his mother's house on Palmer Street.

Once at the Palmer Street house, all six men questioned Cristina in an attempt to find the drugs and money. Even though they began to beat her, Cristina continued to deny any knowledge of drugs or money and told them that she was pregnant. Applicant and two others continued kicking and beating Cristina for about fifteen minutes. Finally, they took her to a remote location to abandon her. As one set of conspirators drove off, leaving Cristina with applicant, they heard a gunshot. Applicant later told his cohorts that he had shot her. Cristina's decomposed body was found almost two weeks later in a field. She had been shot three times in the head, and three 9-mm Luger casings were recovered from underneath her body. Police were able to match the shell casings to a 9 mm pistol that Mark Young had

snatched from applicant over a month after the murder.

At the punishment phase, evidence of applicant's prior acts of violence was admitted, including evidence of the kidnapping of Mark Young and two little girls at a Chevron station. Evidence showed that applicant was accompanied by two other men, and he was armed and in charge. He made Mr. Young get into the back seat of his own car while applicant drove that car with the two little girls jammed in the front seat. He demanded money from Mr. Young and wanted to know where he lived, but, when the car stopped near some semi-abandoned apartments, Mr. Young was able to snatch applicant's semi-automatic pistol away from him. Then applicant and his two cohorts ran off.

In a different incident, Frank Condley testified that he was walking from his apartment near the Sherwood Forest Apartments to a convenience store when he saw some men with cocked guns in a nearby parked van. Mr. Condley turned away, but applicant came after him, armed with a .38 or 9 mm gun in each hand. Applicant ordered Mr. Condley to lie down and then shot the prostrate man four times as he begged for his life. He still has three bullets in his body because they were lodged so close to his spine.

Antonio Glenn testified that he lived across the street from applicant during 1995 and sold cocaine to him in the Sherwood Forest Apartments. Applicant would then cut it and resell it for a 50% profit. One time applicant came to Glenn's apartment with a sawed-off shotgun, forced Glenn to undress, tied him up, and held his shotgun to Glenn's head, demanding drugs. When Glenn said that he didn't have any drugs

right then, applicant beat him up with the stock of the shotgun.

Albert Garcia testified that applicant knocked on the door of his Sherwood Forest townhouse one night in October 1995 and demanded to be let in. Mr. Garcia refused to open his door and told applicant to leave. Applicant then began banging on the sliding glass patio door. The door broke while Mr. Garcia was calling 911, and applicant came into his bedroom, demanding to know where “the dope” was kept. He left through the front door with another man when Mr. Garcia told him that he was on the phone with the police.

Applicant’s sister, Charlotte, testified that he went to Blackshear Elementary School, Brian Middle School, and Yates High School. He was “average” and played a little football and a little baseball while growing up. According to Charlotte, he was a “nerd” because he “read a lot of books, stayed to himself a lot, [and] did a lot of drawing.” Applicant and his brother were kind of “spoiled,” and “they never went without.” Applicant was shy but “he opened up more to older people.” As far as she knew, applicant did well in school, but he dropped out when he was seventeen to marry Noaella. They had two children, but later divorced. While he was married, applicant sometimes worked for Charlotte’s former husband, Luke Ezech, at Dynamic Battery Exchange.

Mr. Ezech testified that applicant worked for him “off and on” between 1991 and 1993, when applicant was twenty to twenty-three-years old. Mr. Ezech said that applicant was a technician and a good, trustworthy worker who could also watch the shop when Mr. Ezech

made deliveries. Applicant was twenty-four when he committed this capital murder.

Applicant's school records showed that he was home schooled during most of third grade because he had tuberculosis, but he kept up with his class work.<sup>10</sup> Applicant's former middle-school teacher, Anne Smith, testified that she taught him Texas history and she remembered him as "such a very well behaved, very nice, very sweet young man." He was shy, but well-liked by both boys and girls. He had "very good home training . . . he was a very mannerable child." In reviewing applicant's school records, Ms. Smith noted that his conduct was always "[v]ery good to excellent." She stated that applicant, like most of his schoolmates, "was functioning slightly below grade level."<sup>11</sup> His high school records showed that he functioned at about the 30th/40th percentile in math; "[h]e passed all three sections of the math, the reading, and writing of the TEAMS Test, but he was still seriously below grade level." Ms. Smith noted that when grades drop in the 9th or 10th grades, it is frequently because of the child's poor adjustment from middle school to high school. Applicant's grades dropped dramatically in 9<sup>th</sup> grade, and he quit school the following year to get married.

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<sup>10</sup> This program was called "special ed," but it was based on a medical problem, not academics. He got 2 B's and 2 C's for his work in Math, Spelling, Language, and Reading during the first semester and all B's during the second semester. At the end of the year, his supervising teacher said that applicant "is a very good student. I feel he will do well in 4<sup>th</sup> grade."

<sup>11</sup> Applicant's grades in 6<sup>th</sup> grade were mainly B's and C's, but by 7<sup>th</sup> grade, most of those B's had dropped to C's and D's. By 8<sup>th</sup> grade, most of applicant's grades were D's.

Applicant's mother testified that his father was in construction work, but then turned to "selling drugs." When applicant, his two sisters, and his brother were young, two men came to their home to rob their father of his money and drugs. The kids hid, but they saw the robbers and their guns. They took applicant's father's money and drugs. The kids were outside during a second home robbery with different gunmen looking for drugs and money. Applicant's mother said that, after applicant was divorced, he started using drugs, mainly cocaine, because he was depressed.

Before trial, Dr. Robert Yohman, a clinical neuropsychologist, interviewed applicant for six hours in the Harris County Jail to evaluate his cognitive and emotional functioning. He was careful to ensure that applicant was not malingering or faking, so he gave him about two dozen tests. Applicant scored a 77 IQ on the WAIS-R, which was "borderline intellectual functioning."<sup>12</sup> In other achievement tests, applicant functioned in the borderline to mildly deficient range—about the 8<sup>th</sup> percentile. He did not have a specific learning disorder, but he was mildly deficient in most academic areas, and in the memory test, dealing with the ability to recall a short story, he was "low average to average." On the word association test, applicant scored in the high average range of the 81<sup>st</sup> percentile. That is, 81% of the population would score lower than

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<sup>12</sup> However, Dr. Yohman's 1996 scoring sheet for applicant's test contains a written notation concerning the Barona Index with an estimated Full Scale IQ of 83. The Barona Index estimates IQ taking into account various demographic and cultural features, including age, education, race, and occupational history.

applicant. On the “Trails B” test, applicant scored in the 75<sup>th</sup> percentile.

Dr. Yohman gave applicant several personality tests, including the MMPI, which indicated that applicant was within normal limits for anxiety and depression, but was a “fairly naive individual, psychologically naive, unsophisticated.” Applicant “wanted to look good . . . wants to be well thought of, be liked.” Dr. Yohman did not, however, find anything in his testing that indicated “any impulse disorder, explosive disorder, anything of that nature.” Although applicant had had a couple of “blows to the head as a youngster,” nothing suggested any focal or localized brain damage. Dr. Yohman noted that applicant had a behavioral change after his wife left him. Overall, applicant fit in the borderline intelligence function, a category that covers about 8% of the population.<sup>13</sup>

Dr. Walter Quijano, a clinical psychologist, also interviewed applicant for an hour and a half in the jail. He gave him the MCMI 2, a personality test, and determined that he was excessively dependent and compulsive. Dr. Quijano said that applicant did not meet the definition of “a full-blown antisocial personality,” but he exhibited some antisocial features. Dr. Quijano originally thought that applicant was “psychologically functioning okay,” but

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<sup>13</sup> According to the standardized IQ Bell Curve, only the lowest 2.2% of the population score at or below a 70-75 IQ and are considered mentally retarded or intellectually disabled. *See Atkins*, 536 U.S. at 309 n.5 (“It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.”).

he had not known about the robberies, shootings, and murder that applicant had committed. If applicant had a history of those offenses, then Dr. Quijano believed that he would fit the “antisocial personality disorder” category.

No one at trial intimated that applicant was mentally retarded or intellectually disabled. No one suggested that he was mentally “slow” or had any adaptive deficiencies. His elementary school grades were entirely normal, even though he spent much of his 3<sup>rd</sup> grade being home-schooled because he had TB. His middle-school history teacher never suggested any intellectual disabilities; she attributed his plummeting grades to the difficulties of making the transition from middle school to high school. Still, applicant passed all three sections of the TEAMS Test in high school. Both applicant’s mother and sister thought he was entirely normal, if a bit “nerdy,” as a child. Applicant worked as a technician in a battery-replacement shop, and his ex-brother-in-law left him in charge while he made deliveries.

Neither applicant nor any mental health professional identified applicant as mentally retarded until ten years after he was sentenced to death for capital murder and six years after the Atkins decision exempted from execution those who are found to be mentally retarded.

## II.

Applicant filed this subsequent writ application on November 17, 2008, the day before he was scheduled to be executed. Because the legal basis for his claim was unavailable on the date he filed his previous application, we granted his motion to stay the

execution and remanded his application to the trial court for a live evidentiary hearing on his mental-retardation claim.<sup>14</sup> Under Texas law, applicant is required to prove, by a preponderance of the evidence, that he is intellectually disabled under a three-pronged test: (1) “significantly subaverage general intellectual functioning,” (2) “that is concurrent with deficits in adaptive behavior,” and (3) “originates during the developmental period.”<sup>15</sup> We conclude that the record does not support the trial judge’s factual findings<sup>16</sup> that applicant has proven all three prongs. He has not proven any of those three prongs by a preponderance of the evidence.

Although psychology and psychologists inform the factual decision, they do not determine whether an inmate is exempt from execution under *Atkins*.<sup>17</sup> We

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<sup>14</sup> The Texas Legislature has changed the applicable term from “mental retardation” to “intellectual disability” but the definition is still the same. TEX. HEALTH & SAFETY CODE § 591.003 (7-a), (13). *See supra* note 4.

<sup>15</sup> *Briseno v. State*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004) (adopting AAMR and Texas Health and Safety Code definitions of intellectual disability).

<sup>16</sup> The trial judge signed applicant’s Proposed Findings of Fact and Conclusions of Law on December 31, 2012, her last day in office. In this case, Applicant’s proposed findings are so adversarial and slanted that they are hard to credit. Many are not supported by the record.

<sup>17</sup> *See Ortiz v. United States*, 664 F.3d 1151, 1168 (8th Cir. 2011) (“[P]sychology informs, but does not determinately decide, whether an inmate is exempt from execution.”); *see also Hooks v. Workman*, 689 F.3d 1148, 1172 (10th Cir. 2012) (*Atkins* could have adopted the clinical standard but explicitly declined to do so.”); *Clark v. Quarterman*, 457 F.3d 441, 445 (5th Cir. 2006) (*Atkins* “did not dictate that the approach” to defining mental



must apply our own judgment on the “appropriate ways” to enforce the ultimately legal prohibition on executing mentally retarded offenders.<sup>18</sup> *Atkins* did not conclude that there was a national consensus concerning the *definition* of mental retardation; rather, the Supreme Court concluded that there was a national consensus against execution of those offenders who fit within a given state’s definition of mental retardation, while permitting the states to continue to refine the contours of that definition in their own ways.<sup>19</sup>

With the understanding that juries and judges, not psychologists, decide the factual question of whether a particular person is “intellectually disabled” so as to be exempt from the death penalty, we turn to the Texas definition of “intellectual disability.”

**A. “Significantly subaverage general intellectual functioning.”**

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retardation “*must* track the approach of the [AAIDD] or the APA exactly”); *United States v. Bourgeois*, Nos. C-02-CR-216 and C-07-223, 2011 WL 1930684, at \*24 (S.D. Tex. May 19, 2011) (not designated for publication) (*Atkins* “left the contours of the constitutional protection to the courts”); *Briseno*, 135 S.W.3d at 9 (“Although experts may offer insightful opinions on the question of whether a particular person meets the psychological diagnostic criteria for mental retardation, the ultimate issue of whether this person is, in fact, mentally retarded for purposes of the Eighth Amendment ban on excessive punishment is one for the finder of fact, based upon all of the evidence and determinations of credibility.”).

<sup>18</sup> *Atkins*, 536 U.S. at 317.

<sup>19</sup> See *id.*; see also *United States v. Wilson*, 922 F. Supp. 2d 334, 340 (E.D. N.Y. 2013).

As we noted in *Ex parte Briseno*, “[s]ignificantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean).”<sup>20</sup> As we explained, mental health professionals are flexible in their assessment of intellectual disability; sometimes a person whose IQ has tested above 70 may be diagnosed as intellectually disabled while a person whose IQ tests below 70 may not be disabled.<sup>21</sup> In the new DSM-5, an IQ score is even vaguer and of less critical importance to the diagnosis than in earlier versions of the DSM,<sup>22</sup> thus making the

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<sup>20</sup> *Ex parte Briseno*, 135 S.W.3d at 7 n.24 (quoting DSM–IV at 39; see also AMERICAN ASSOCIATION ON MENTAL DEFICIENCY (AAMD), CLASSIFICATION IN MENTAL RETARDATION 1 (Grossman ed. 1983)).

<sup>21</sup> *Id.* (quoting AAMD at 23); see also *Hall v. Florida*, 134 S.Ct. 1986, 1994-95 (2014) (rejecting State’s position that a firm cut-off IQ test score above 70 disqualifies a capital defendant from offering other evidence of possible intellectual disability; “Florida’s rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant’s intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant’s abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.”).

<sup>22</sup> American Psychiatric Association, DSM-5 Intellectual Disability Fact Sheet, *available at* <http://www.dsm5.org/documents/intellectual%20disability%20fact%20sheet.pdf>. As the fact sheet explains,

DSM-5 emphasizes the need to use both clinical assessment and standardized testing of intelligence when diagnosing intellectual disability, with the severity of impairment based on adaptive functioning rather than IQ test scores alone. By removing IQ test scores from the

“intellectually disabled” diagnosis even more of a subjective battle of the experts than it had been formerly.<sup>23</sup>

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diagnostic criteria, but still including them in the text description of intellectual disability, DSM-5 ensures that they are not overemphasized as the defining factor of a person’s overall ability, without adequately considering functioning levels. This is especially important in forensic cases.

It is important to note that IQ or similar standardized test scores should still be included in an individual’s assessment. In DSM-5, intellectual disability is considered to be approximately two standard deviations or more below the population, which equals an IQ score of about 70 or below.

This change in the definition of intellectual disability turns an *Atkins* hearing into that much more of a subjective battle between dueling forensic experts. Thus, factfinders may choose to rely more upon the existence of objective, contemporaneous evidence of a person’s intellectual abilities to assess the reliability of conflicting psychological expert opinions.

This definitional subjectivity is the primary reason why we developed the seven, more objective, *Briseno* factors as a possible guide to assessing the type of intellectual-disability concerns raised by the *Atkins* Court. Of course, those factors are not part of the definition of “intellectual disability,” and trial and appellate courts may ignore some or all of them if they are not helpful in a particular case.

<sup>23</sup> See *Wiley v. Epps*, 625 F.2d 3d 199, 215 (5th Cir. 2010) (noting that most *Atkins* cases involve “essentially a battle of the experts, who gave competing opinions as to [an inmate’s] IQ and intellectual functioning”). Part of the problem of relying too heavily upon the psychological community in determining whether an inmate is mentally retarded under *Atkins* is that the psychological community’s “understanding of mental retardation is evolving. The few short years since the *Atkins* decision has

To prove this first prong, applicant relied upon his 1996 WAIS-R IQ score of 77 to establish that he was intellectually disabled by arguing that (1) his score should be lowered five points to account for the SEM or standard error measurement, and (2) his score should be lowered another 5.4 points to account for “the Flynn Effect.” Therefore, what started as an IQ test of 77, with an SEM range of 72 to 82, well within the borderline intelligence category, but outside the mentally retarded or intellectually disabled category, became, according to applicant, an IQ score with a range of 66.6 to 76.6, which he argues satisfies the initial prong of intellectual disability.<sup>24</sup>

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seen change in the definition of mental retardation, renovation of the name of the most prominent advocacy organization, and even abandonment of the very term mental retardation. Adoption of the phrase ‘intellectual disability’ is only the most-recent terminology in the psychological community’s developing understanding of mental retardation.” *United States v. Bourgeois*, 2011 WL 1930684, at \*24 n.29 (S.D. Tex. May 19, 2011) (not designated for publication).

<sup>24</sup> The trial judge’s finding number 205 states, in part, that “[w]ith correction for the Flynn Effect, Mr. Cathey’s score on the WAIS-R is a 71.6, and after applying the standard error of measurement, his corrected score falls within the range of mental retardation.” However, even under the most generous view of the SEM and even if courts were permitted to subtract points for the Flynn Effect, applicant’s IQ would fall within the range of 66.6 to 76.6; only 1/3 of this range falls two standard deviations below the average. Because there might be some possibility, however small, that applicant’s “true” IQ could fall below 70, the factfinder may consider other indicia of intellectual functioning, such as school records, in deciding whether applicant has proven this prong by a preponderance of the evidence.

When we remanded this case for an evidentiary hearing, we ordered the trial judge to evaluate evidence concerning the following four issues:

- (1) the scientific validity and reliability of the “Flynn Effect”;
- (2) whether clinical practitioners who are ordinarily called upon to diagnose mental retardation for purposes outside of the criminal justice system use and apply the “Flynn Effect” to I.Q. test results when making their particularized diagnoses of mental retardation;
- (3) whether the application of the “Flynn Effect” to individual test results is generally accepted scientific procedure in the pertinent professional community outside of the criminal justice system; and
- (4) the known or potential “error rate” of the “Flynn Effect” as it applies to a specific I.Q. test result.<sup>25</sup>

1. The “Flynn Effect” exists and is generally considered valid.

The trial judge heard extensive evidence concerning the “Flynn Effect,” including testimony from Professor Flynn himself. It was generally agreed by all of the experts that the “Flynn Effect” does exist and is valid. Put simply, the “Flynn Effect” refers to the tendency for scores on an IQ test normed for one particular age group on one date to increase when that same test is

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<sup>25</sup> *Ex parte Cathey*, No. WR-55,161-02, 2008 WL 4927446, at \*1 (Tex. Crim. App. Nov. 18, 2008) (not designated for publication).

given to others many years later.<sup>26</sup> The aggregate average gain is approximately .3 IQ points per year from the time that an IQ test is originally normed. There is considerable debate as to precisely why such an effect occurs and equally robust debate as to whether that effect is increasing, decreasing, or changing in different populations.<sup>27</sup>

Although we remanded this case in part to consider the known error rate of the Flynn Effect as applied to a specific test result, we agree with the testifying experts that this is not really an appropriate question because the Flynn Effect deals with IQ test score averages, not individualized scores.<sup>28</sup> Although the past average increase had been .3 IQ points per year after an IQ test is formed, there is considerable debate about the appropriateness of that number for all IQ tests (as opposed to simply Wechsler and Benet tests)

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<sup>26</sup> According to the writ-hearing expert witnesses, “norming a test” means that the test is given to a sample group that reflects the demographics of the population for which the test is intended (e.g., English-speaking Americans in 2010), such as age, gender, ethnicity, socioeconomic background, and geographical region, so that if 15% of the population has college degrees, then 15% of the same group used for norming would have college degrees.

<sup>27</sup> See generally THE RISING CURVE: LONG-TERM GAINS IN IQ AND RELATED MEASURES (Ulric Neisser ed., 1998) (collecting chapters by psychologists addressing the Flynn Effect and its possible causes). Taken all together, the experts seem to agree that nobody really knows what causes this phenomenon. *Id.*

<sup>28</sup> Professor Flynn acknowledged that he reached the .3 number in his research by averaging the rates of increase even though the rates of increase differ depending on the specific test, country, and year, and that .3 is not a static number. He admitted that the rate of increase appears to have slowed for the current generation.

and even greater debate concerning whether that effect exists at all in the WAIS-III or WAIS-IV versions.<sup>29</sup>

The general notion is that IQ scores on a specifically normed test tend to rise over time, at least in part, because modern societies and cultures have tended to emphasize abstract, problem-solving skills more with each passing generation over concrete, knowledge-based, skills. But test-takers should be normed against their own generational cohort, not against an earlier one.<sup>30</sup> Thus, the “Flynn Effect” does not mean

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<sup>29</sup> Because of that scientific uncertainty, we are highly skeptical that testimony about the Flynn Effect would be admissible when considering the WAIS-III or WAIS-IV IQ tests.

<sup>30</sup> As one expert has explained,

In discussions about FE [“Flynn Effect”] adjustments, the key issue centers on which generation constitutes an appropriate normative reference group for the individual being tested. A person who was born in 1978 and tested in 2010 at age 32 using a current IQ test will be compared with a normative reference group of 30-34-year-olds born between 1976 and 1980. In this case, the person is being compared with the generation to which he or she belongs. If the test used was 20 years old at the time the person was tested, then he or she would be compared with a group of 30-34-year-olds who were born between 1956 and 1960—clearly not the same generation. If generational effects exist—as all contributors to this special issue agree they do—then this is clearly not the optimal normative reference group for this individual. Consequently, an adjustment to the person’s score that takes into account changes in the normative reference group may be appropriate. This example makes clear that the FE is related to changes in the score distribution of the reference sample.

Lawrence G. Weiss, *Considerations on the Flynn Effect*, 28 J. PSYCHOEDUC. ASSESSMENT 482, 489 (2010). This article, along with ten others concerning the existence, significance, consideration, and use of the “Flynn Effect” were compiled in a

that young people today are “smarter” than their parents who are, in turn, “smarter” than their grandparents, it simply means that the questions used on intelligence tests change from one generation to another as does the testing environment and the

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special issue of the Journal of Psychoeducational Assessment. Some of these articles challenged Flynn’s theory, others agreed with it; some questioned whether the effect will continue into the future, others questioned whether IQ scores should be used at all to determine mental retardation. *See, e.g.,* Robert J. Sternberg, *The Flynn Effect: So What?*, 28 J. PSYCHOEDUC. ASSESSMENT 434 (2010) (concluding that the use of IQ scores for mental retardation determinations is limited and ignores ethical considerations because those scores measure only cognitive intelligence and not the more significant “ethical intelligence”). All of these articles were introduced into evidence at the writ hearing.



instructions for the test.<sup>31</sup> The “Flynn Effect” gains simply reflect the obsolete norms of outdated tests.<sup>32</sup>

As the expert witnesses explained at the writ hearing,<sup>33</sup> IQ scores are, after all, relative, not

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<sup>31</sup> The “Flynn Effect” seems to be much more apparent for “fluid” intelligence—abstract reasoning and problem solving—than it is for more concrete, knowledge-based intelligence. As one expert explained:

The third clue [in attempts to understand what cognitive ability is actually rising], which has been discussed above, consists of findings that the scores on culture reduced tests, or tests of fluid intelligence, show an increase twice as large as that observed for tests of learned information, or tests of crystallized intelligence. The increase represents largely an enhancement of people’s ability to solve certain kinds of problems rather than their acquisition of more information from the culture in which they live.

Merrill Hiscock, *The Flynn Effect and Its Relevance to Neuropsychology*, 29 J. CLINICAL & EXPER. NEUROPSYCH. 514, 517 (2007). The author notes that “IQ gains since World War II, according to Flynn, can be attributed to a shift of emphasis from reading, writing, arithmetic, and other ‘disciplined’ learning to ‘on-the-spot problem-solving skills.’ This educational shift seems to be associated with several demographic trends, such as greater urbanization and affluence, decreasing family size, changes in the kinds of work that people do, and the increasing importance of leisure activities.” *Id.* at 520.

<sup>32</sup> KAUFMAN, *supra* note 5, at 203; James R. Flynn, *The Mean IQ of Americans: Massive Gains 1932 to 1978*, 95 PSYCHOL. BUL. 29, 32–34 (1984).

<sup>33</sup> Numerous expert treatises and journal articles were introduced into evidence at the writ hearing. They, rather than the experts’ courtroom testimony, are referred to whenever possible as the bench and bar may consult these published and

absolute, and one's IQ should be determined by using a scale based on the scores of other test-takers of similar age taking the test at approximately the same time.<sup>34</sup> After selecting and testing a representative standardization sample, test developers create a bell curve based on the scores of the representative sample with the average of the scores normed at 100, meaning that a score of 100 represents "average" performance on the IQ test. Additionally, IQ tests generally have a standard deviation of fifteen or sixteen points.<sup>35</sup> And the MR or Intellectual Disability category is approximately two standard deviations below the average, about an IQ score of 70. Approximately two percent of the population falls into this category and approximately two percent fall into the "gifted" category with an IQ score of about 130 or higher.<sup>36</sup>

In sum, the Flynn Effect, its possible causes, and its meaning have been studied extensively since the 1980s, but it was not until the *Atkins* decision in 2002

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widely available scientific articles without the need to find a copy of the writ hearing testimony in this particular case.

<sup>34</sup> KAUFMAN, *supra* note 8, at 130 (noting that the performance of others of the same age or age group on an IQ test at a specific point in time defines a person's score on the same IQ test).

<sup>35</sup> *Id.* at 119–23. While Wechsler IQ tests use fifteen points as the standard deviation, Stanford-Binet IQ tests have used sixteen points until recently. *Id.* at 107, 119–23. The Stanford-Binet Intelligence Scales, Fifth Edition now uses fifteen as its standard deviation. GALE H. ROID & ANDREW BARRARA, ESSENTIALS OF STANFORD-BINET INTELLIGENCE SCALES (SB5), Assessment 3 (2004).

<sup>36</sup> *What Is an IQ Test? What Is a High IQ Score?* <http://www.i3mindware.com/what-is-an-iq-test-and-iq-score> (last visited Nov. 4, 2014).

that it took on practical significance in state and federal courts. The question for courts is whether psychologists or factfinders should adjust IQ scores for the Flynn Effect in making a determination of intellectual disability under *Atkins*. The answer to that question would seem to depend on whether clinicians adjust IQ scores in their normal working world outside the courtroom.

2. There is insufficient evidence that clinical practitioners outside the criminal justice system normally use and apply the “Flynn Effect” to IQ test results.

Although many psychologists agree that the historical data have shown that IQ test scores on a given type of IQ test have risen on an average of .3 points a year between 1972 and 2002,<sup>37</sup> they disagree on whether clinicians normally do or should adjust individual IQ scores in their daily work. In making a determination of intellectual disability under *Atkins*, the factfinder should certainly be aware of how the clinical practitioner makes these determinations in the real world and may follow that procedure,<sup>38</sup>

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<sup>37</sup> The experts disagree on whether the Flynn Effect continues to exist for the most recent IQ test revisions and, if it does, what effect it still has. See the ten articles contained in the 2010 symposium issue of the *Journal of Psychoeducational Assessment* referred to in note 30.

<sup>38</sup> See *Hall v. Florida*, 134 S. Ct. 1986, 1993 (2014) (noting that courts are informed by the work of medical experts and their “learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue.”). Those clinicians who actually administer IQ tests to a wide range of subjects for

unless there are special reasons why that general routine should not be followed in a specific case.<sup>39</sup>

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a wide variety of reasons are best positioned to know and apply the appropriate professional standards.

<sup>39</sup> See, e.g., *Coleman v. State*, 341 S.W.3d 221, 242 (Tenn. 2011) (stating that “[i]n formulating an opinion regarding a criminal defendant’s I.Q. at the time of the offense, experts may bring to bear and utilize reliable practices, methods, standards, and data that are relevant in their particular fields.”). The court explained,

[I]f the trial court determines that professionals who assess a person’s I.Q. customarily consider a particular test’s standard error of measurement, the Flynn Effect, the practice effect, or other factors affecting the accuracy, reliability, or fairness of the instrument or instruments used to assess or measure the defendant’s I.Q., an expert should be permitted to base his or her assessment of the defendant’s “functional intelligence quotient” on a consideration of those factors.

*Id.* at 242 n.55; see also *State v. Ball*, 2014 WL 2547721, at \*36 (Tenn. Crim. App. May 30, 2014) (not designated for publication) (stating that it was following *Coleman* in concluding that a trial court “may reject the application of the Flynn Effect to adjust I.Q. scores based upon evidence of its lack of validity and consider the I.Q. score of 75 as the defendant’s functional I.Q.”) (internal quotation marks omitted); *Jahi v. State*, 2014 WL 1004502, at \*106 (Tenn. Crim. App. March 13, 2014) (not designated for publication) (declining to apply Flynn Effect when defense expert “acknowledged that the application of the Flynn Effect was not considered an acceptable practice by either the APA or the AAIDD and that the Wechsler series did not allow for the results to be adjusted pursuant to the Flynn Effect. Dr. Bishop stated that, to her knowledge, capital litigation is the only area of the law addressing intellectual disability where the Flynn Effect was being applied.”); *Ledford v. Head*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 793466, at \*2-3 (N.D. Ga. 2014) (declining to “apply the Flynn Effect because the phenomenon is not used in clinical practice

The American Association on Intellectual and Developmental Disabilities (AAIDD) Manual states that “best practices” warrant recognition of the Flynn Effect when older versions of an IQ test are used.<sup>40</sup> It notes, “In cases of tests with multiple versions, the most recent version with the most current norms should be used at all times. In cases where a test with aging norms is used, a correction for the age of the norms is warranted.”<sup>41</sup> The term used is “warranted,” not “required.” But applicant has failed to offer sufficient data to support a finding that ordinary clinicians in their normal work actually do subtract points from IQ scores to account for the Flynn Effect.<sup>42</sup>

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and the Court was ‘hesitant to apply a theory that is used solely for the purpose of lowering IQ scores in a death penalty context.’”).

<sup>40</sup> The AAIDD is a professional non-profit association, much like the American Bar Association or American Association of Retired Persons, that advocates for the rights of the mentally impaired and those with developmental disabilities. It does not develop, administer, or score IQ tests.

<sup>41</sup> ROBERT L. SCHALOCK, ET AL., USER’S GUIDE 23 (11th ed., AAIDD 2012). The User’s Guide accompanies ROBERT L. SCHALOCK, ET AL., INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (11th ed., AAIDD 2010) (AAIDD Manual).

<sup>42</sup> Professor Flynn stated that clinicians need not adjust their IQ scores in routine examinations to decide if a child qualifies for extra tutoring or special education because there is no real concern with whether the score is 69, 70, or 71. But he advocates adjusting IQ scores when the death penalty is at stake because then an IQ score may be a matter of “life or death.” He admitted that he was adjusting the data to fit a desired result, but justified doing so because the consequence “might kill somebody.” He would adjust individual IQ scores if there is a benefit at stake

Many experts disagree with Professor Flynn's "correction" of IQ scores.<sup>43</sup> Indeed, Dr. Lawrence

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"that will keep them alive." According to one article introduced by applicant at the writ hearing, Professor Flynn advises psychologists to either "select the version of the IQ test that is more likely to yield the desired classification, or they can disregard IQ testing and classify individuals solely on the basis of adaptive functioning." Merrill Hiscock, *The Flynn Effect and Its Relevance to Neuropsychology*, 29 J. CLINICAL & EXPER. NEUROPSYCH. 514, 525 (2009). This would appear to be result-oriented reasoning at its apogee.

<sup>43</sup> Many courts also disagree with him. A few courts adjust IQ scores downward to account for the Flynn Effect, *see, e.g., United States v. Hardy*, 762 F. Supp. 2d 849, 866-68 (E.D. La. 2010) (noting that the Flynn Effect is "well established scientifically" and that adjusting for it is a "best practice"); *United States v. Lewis*, 2010 WL 5418901, at \*11 (N.D. Ohio Dec. 23, 2010) (not designated for publication) (recognizing the Flynn Effect "as a best practice for an intellectual disability determination" and adjusting IQ score accordingly), but many more courts have declined to subtract points from IQ scores based on the Flynn Effect. *See, e.g., United States v. Candelario-Santana*, 916 F. Supp. 2d 191, 207-08 (D. P.R. 2013) (collecting cases and concluding that "the Flynn Effect remains highly controversial and many courts have declined to accept its application"); *United States v. Salad*, 959 F. Supp. 2d 865, 872 n.10 (E.D. Va. 2013) ("Because the Fourth Circuit does not necessarily instruct courts to apply an adjustment to account for the Flynn Effect, and because any such adjustments at this juncture would require unsubstantiated speculation, the court declines to apply any Flynn adjustments to the scores in this case."); *United States v. Jimenez-Bencevi*, 934 F. Supp. 2d 360, 370 (D. P.R. 2013) ("The Flynn Effect remains controversial among scientific experts. Courts of law are not in the business of endorsing one side or the other in a scientific controversy. Instead, we look to ground our decisions on reliable sources. The Flynn Effect is sufficiently controversial as to be unreliable. Under such circumstances, the Flynn Effect has no relevance to our inquiry and we agree with the government's experts that it should not apply here."); *Hooks v. Workman*, 689 F.3d 1148, 1170 (10th Cir. 2012) (noting that

Weiss, senior psychologist of the Wechsler test group (the drafters of the WAIS-R, the WAIS-III, and the 2008 WAIS-IV), stated that “[a]s the publisher of the Wechsler series of tests, Harcourt Assessment does not endorse the recommendation by Flynn to adjust WAIS-III scores.”<sup>44</sup> The single most important

“*Atkins* does not mandate an adjustment for the Flynn Effect” and that there is no uniform consensus concerning the application of the Flynn Effect in death penalty cases); see generally, Geraldine W. Young, Note, *A More Intelligent and Just Atkins: Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability*, 65 VAND. L. REV. 615, 630 (2012) (summarizing the inconsistent treatment of the Flynn Effect in *Atkins* cases).

<sup>44</sup> Lawrence G. Weiss, *WAIS-III Technical Report: Response to Flynn* (2007) available at: [http://images.pearsonclinical.com/images/products/wais-iii/wais-iii\\_tr\\_lr.pdf](http://images.pearsonclinical.com/images/products/wais-iii/wais-iii_tr_lr.pdf). Although Dr. Weiss was speaking only of the WAIS-III, his thrust was that more modern IQ test development and norming may have slowed or stopped the “Flynn Effect” of rising IQ scores as the tests became “obsolete.” As Dr. Weiss explained, Professor Flynn’s only evidence to support his suggestion that WAIS-III scores should be adjusted by 2.34 “is that WAIS-III scores do not fit expectations made based on the Flynn Effect. However, the progress of science demands that theories be modified based on new data. Adjusting data to fit theory is an inappropriate scientific method, regardless of how supported the theory may have been in previous studies.” *Id.* Dr. Weiss elaborated:

There are many reasons why the WAIS-III, SB5 and DAS-II tests do not show the .3 point per year rise in IQ scores predicted by Flynn including a possible slowing of the effect, better representation of low SES subjects in more recent standardization projects, and construct changes in the newer versions of these tests. As Flynn observes, his effect is not consistent across all subtests. As test developers add or delete subtests when revising existing intelligence test

question relative to “real world” use of the Flynn Effect by ordinary clinicians is whether the IQ test manuals themselves require or recommend that every IQ test be adjusted downward by .3 points per year.<sup>45</sup> That would be the advice that the ordinary clinician is most likely to follow.

The authors of one recent psychology article in a professional symposium journal concerning the “Flynn Effect” stress that adjusting IQ scores based on the Flynn Effect “does not comport with the standard of forensic psychological practice.”<sup>46</sup> The

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batteries based on newer theories of cognition and brain functioning, the pattern of IQ increases across time will vary from expectations based on Flynn’s original data. Although such construct changes are necessary to advance the field of intellectual assessment, these same changes make it difficult to study changes in intelligence across the generations.

*Id.* In sum, although the Flynn Effect seems to have been valid, on average, for many prior IQ tests, beginning with the WAIS-III, its existence and dimension is considerably less certain.

<sup>45</sup> The AAIDD User’s Guide is not a manual for giving or scoring IQ tests, rather its purpose is “to provide that clear understanding of ID [Intellectual Disability] and summarize best practices in the field.” USER’S GUIDE, *supra* note 41, at 1. Like the American Bar Association (ABA), the American Association on Intellectual and Developmental Disabilities is a professional organization. Just as the ABA does not administer the bar exam, the AAIDD does not administer IQ tests.

<sup>46</sup> Leigh D. Hagan, et al., *IQ Scores Should Not Be Adjusted For the Flynn Effect in Capital Punishment Cases*, 28 J. PSYCHOEDUC. ASSESSMENT 474, 475 (2010); *see also* Roger B. Moore, Jr., Letter to the Editor, *Modification of Individual’s IQ Scores is Not Accepted Professional Practice*, PSYCHOLOGY IN MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES (American Psychological Association/ Division 33, Washington,



authors cite a 2008 research article about a survey of program directors of APA-approved psychology programs, graduate faculty, and clinicians who were certified school psychologists.<sup>47</sup> These are the people who actually use IQ tests and score them as a part of their everyday line of work, and they do not adjust for

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D.C.) Fall 2006, at 11, 12 (“If there are factors that lead the psychologist to believe that the scores do not represent an accurate or reliable measure of the individual’s functioning, such issues are delineated in the discussion and interpretation of the scores; the scores themselves are not changed. Modification of individual scores is not accepted professional practice, for good reason, and should not be introduced into the court as such.”).

<sup>47</sup> Leigh D. Hagan, et al., *Adjusting IQ Scores for the Flynn Effect: Consistent with the Standard of Practice?*, 39 PRO. PSYCHOL.: RES. & PRAC. 619, 620-21 (2008). Dr. Hagan testified at the writ hearing about his national survey, and that his study reached the following conclusions: (1) adjusting obtained IQ scores and recalculating them on the basis of the Flynn Effect does not represent the conviction and custom in psychology; (2) recalculating an individual’s actual data likely violates the standardization procedures and departs from training practices, prevailing canons, guidelines, most treatises, and test instruction manuals; and (3) noting, in the narrative part of the report, any issues that may compromise the findings, is appropriate (including issues about out-of-date norms).

Dr. Hagan testified that, in a review of 5,000 special education IQ reports, only six mentioned the Flynn Effect and none of those six adjusted the IQ scores. This is potent real-world evidence that the Flynn Effect is an abstract intellectual concept that influences how frequently IQ tests should be renormed and redesigned, but that it is not to be used to “change” a specific person’s IQ test score. Similarly, Dr. Proctor testified that he has reviewed a large number of reports for the Social Security Administration and that he had never seen an individual IQ test report (except in the *Atkins* setting) that mentioned the Flynn Effect.

the Flynn Effect in their practices.<sup>48</sup> The survey authors also found that IQ-test manuals, Social Security Administration reports and manuals, and APA ethical and testing guidelines did not refer to the Flynn Effect or suggest making any adjustments because of it.<sup>49</sup> Instead, all of these sources recommended that clinicians and psychologists—including forensic psychologists—rely on up-to-date test norms and use regularly updated IQ tests.<sup>50</sup> That is precisely what Professor Flynn said at applicant’s writ hearing: Do not rely on outmoded IQ tests; instead, retest with the most recent version.<sup>51</sup> There is, however, a certain tension, in death-penalty cases, between the reliability of using the most recently normed IQ test versus the reliability of using a pre-*Atkins*, pre-age-18 IQ test. The former may be discounted for potential malingering and the latter discounted for the “Flynn Effect.”

When it is impossible to retest using the most current IQ test available, then factfinders may consider the Flynn Effect and its possible impact on IQ scores generally, just as they may consider the practice effect, potential malingering, the examiner’s behavior, and so forth.<sup>52</sup> These considerations should

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 622-23.

<sup>50</sup> *Id.*

<sup>51</sup> Professor Flynn’s advice was echoed by applicant’s other experts, Dr. Kaufman and Dr. Fletcher, as well as the State’s experts, Dr. Proctor and Dr. Hagan.

<sup>52</sup> AAIDD USER’S GUIDE, *supra* note 41, at 36 (“An IQ score is subject to variability as a function of a number of potential sources of error, including variations in test performance,

be noted in the interpretative narrative, but the IQ test score itself may not be changed.<sup>53</sup>

We therefore reject the habeas judge’s finding that the evidence shows that the Flynn Effect is used in determining special education benefits and social-security benefits and that clinical practitioners use

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examiner’s behavior, cooperation of the test taker, and other personal and environmental factors.”).

<sup>53</sup> Dr. Timothy Proctor testified that he recommends “considering the impact of the Flynn Effect in the framework of interpreting the score but not doing a correction or an adjustment to the score.” He noted that there are “lots of other contaminants” that do not require an adjustment; in this case, for example, jail conditions and distractions might have artificially depressed his IQ score. Articles introduced at the writ hearing reiterate that a person’s IQ score should not be changed to accommodate the Flynn Effect. *See* Robert J. Sternberg, *The Flynn Effect: So What?*, 28 J. PSYCHOEDUC. ASSESSMENT 434, 435 (2010) (the Flynn Effect “is not equally distributed across ability levels. If one were to try to adjust an individual’s IQ level by the FE, one would be embarking on a hazardous mission, because the effect varies in magnitude across the distribution of IQs. . . . The FE seems to apply in the aggregate, but it is extremely difficult to apply it in individual cases.”); Stephen J. Ceci & Tomoe Kanaya, “*Apples and Oranges Are Both Round: Furthering the Discussion on the Flynn Effect*,” 28 J. PSYCHEDUC. ASSESSMENT 441, 446 (2010) (concluding that “it is not appropriate to merely subtract 0.3 points for every year that a norm has aged until we know that everyone experiences the same gains on the same subtests and at the same time”); Leigh D. Hagan, et al., *IQ Scores Should Not Be Adjusted For the Flynn Effect in Capital Murder Cases*, 28 J. PSYCHOEDUC. ASSESSMENT 474, 475 (2010) (“Altering obtained IQ scores based on the FE does not comport with the standard of forensic psychological practice, . . . the current state of psychological science—particularly in light of the established variability of individual cases—does not support devising some other score based on the FE and then substituting that score for the one obtained.”).

the Flynn Effect outside of the criminal-justice system. We conclude that the habeas judge erred in changing applicant's IQ score from 77 to 71.6 based on the Flynn Effect. We agree that, taking the SEM into account, applicant's IQ score range is between 72 and 82.

The fact that applicant took an outmoded<sup>54</sup> version of the WAIS-R in 1996 might tend to place his actual IQ in a somewhat lower portion of that 72-82 range, while the fact that he took the test under adverse circumstances, while in jail and awaiting trial in a capital murder case, might tend to place his actual IQ in a somewhat higher portion of that 72-82 range. Taken altogether, there is no reason to think that applicant's obtained IQ score of 77 is inaccurate or does not fairly represent his borderline intelligence during the developmental stage.<sup>55</sup> Applicant could have taken the most recently revised and renormed IQ test (the WAIS-IV normed in 2008) if he had wanted to validate or dispute his 1996 IQ score, but he did not wish to, and he refused to allow the State's

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<sup>54</sup> "Outmoded" in this context means simply that the test was designed and normed several years earlier; it does not mean that there was a newer, "better" test available. In 1996, the WAIS-R was the "best" test available even though it was "outmoded."

<sup>55</sup> Applicant's school records and TEAMS testing appear to validate the accuracy of that score, while a TDCJ "Service Investigation Worksheet" for a 1998 prison disciplinary hearing indicates that one of the reasons a "Counsel Substitute" was appointed for that hearing was because of an "EA score below 5 and an IQ below 73," would dispute the accuracy of that score. We know nothing more about this TDCJ entry, however, and therefore, given its unknown reliability, will not consider it.

experts to do so.<sup>56</sup> Applicant failed to carry his burden to prove that he has “significantly subaverage” general intellectual functioning, the first prong of the three-part test for intellectual disability under *Atkins* and *Briseno*.

### **B. “Deficits in Adaptive Functioning.”**

The second prong of the intellectual disability definition is that of significant deficits or limitations in adaptive functioning. Adaptive behavior refers to the ordinary skills that are required for people to function in their everyday lives. Mental retardation or intellectual disability has been described as “the failure to carry out everyday activities at the level

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<sup>56</sup> A question that is not directly before us is whether a capital murder defendant or death row inmate who wishes to assert an *Atkins* claim may rely on expert testimony if he refuses to allow the State’s experts to test his IQ and interview him concerning adaptive behavior. Normally, one ought not be able to use an IQ test or an adaptive functioning test as both a sword and a shield. The State argued that the *Lagrone* rule should apply to claims of mental retardation just as it applies to other psychiatric or mental-state defenses. See *Lagrone v. State*, 942 S.W.2d 602, 610 (Tex. Crim. App. 1997) (citing *Soria v. State*, 933 S.W.2d 46, 57–59 (Tex. Crim. App. 1996)) (when the defense plans to introduce testimony based on a psychiatric examination of defendant, the trial court may compel a psychiatric examination by a State’s expert, and if the defense introduces expert testimony based on the defense expert’s examination, the State may present expert rebuttal testimony); see also *Hernandez v. State*, 390 S.W.3d 310, 321–22 (Tex. Crim. App. 2012) (“When a defendant intends to present mental-health expert testimony, the State is entitled to compel the defendant to undergo examination by the State’s expert for rebuttal purposes.”). We need not resolve that issue, however, because the resolution of this case does not depend on that issue.

expected of adults.”<sup>57</sup> Similarly, the Texas Health and Safety Code defines adaptive behavior as “the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person’s age and cultural group.”<sup>58</sup>

However, unlike medicine, education, or social services, criminal law is concerned with what *was* rather than what currently *is*. The point of an *Atkins* hearing is to determine whether a person was mentally retarded during his developmental period and at the time of the crime and therefore ineligible for the death penalty, not whether a person is currently mentally retarded and therefore in need of special services. Because of this, the determination of mental retardation in the *Atkins* context is always complicated by the problems associated with retrospective assessment and the well-known consequence of a diagnosis of mental retardation—exemption from the death penalty. Both experts and those answering questions about a person’s adaptive functioning may exhibit significant conscious or unconscious bias in addressing this issue.

The habeas judge found that applicant proved that he had significant deficits in adaptive behavior. The judge relied almost exclusively on a Vineland Adaptive Behavior Scales test that one of his experts,

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<sup>57</sup> Gregory Olley, *The Assessment of Adaptive Behavior in Adult Forensic Cases: Part 3, Sources of Adaptive Behavior Information*, PSYCHOLOGY IN MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES (American Psychological Association/Division 33, Washington, D.C.) Summer 2007, at 3-4.

<sup>58</sup> TEX. HEALTH & SAFETY CODE § 591.003(1).

Dr. Fletcher, administered by telephone <sup>59</sup> to applicant's sister and his ex-wife. We cannot credit the results of this retrospective test because

- (1) the Vineland test was not designed to be administered retrospectively decades after the relevant time frame—here, when applicant was 18 or younger—and long after the reporters had significant daily contact with applicant;
- (2) the Vineland reporters—applicant's sister and his former wife—were highly motivated to misremember his adaptive abilities from some ten to twenty years earlier, knowing that a finding of intellectual disability would make him exempt from the death penalty;<sup>60</sup> and
- (3) the adaptive behavior applicant's sister reported to the expert as part of the Vineland test was contradicted by her trial testimony (before Atkins had been decided and any issue of mental retardation had arisen) that applicant was “average,” “nerdy,” and read books all the time.<sup>61</sup>

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<sup>59</sup> The Vineland is normally administered in a face-to-face interview with the reporters. In this case, applicant's expert admitted that the reporters knew that he would be calling them to conduct an interview about applicant's adaptive behavior while growing up because applicant's lawyers had called them and prepared them for his telephone interview.

<sup>60</sup> Applicant's sister married and moved out of the family home when applicant was just twelve. Applicant's former wife had married him when he was fifteen and left him about three or four years later. Neither had had significant personal contact with applicant in recent decades, although applicant corresponded regularly with his sister from prison.

<sup>61</sup> Applicant's sister's trial testimony is consistent with applicant's present level of comprehension, reading, and writing

No one who testified at trial suggested that applicant was intellectually disabled or suffered from adaptive deficiencies. It is difficult to credit that a developmental intellectual disability can lie dormant and undiscovered for thirty-seven years and then spring full-grown, like Minerva from Zeus's forehead, only when that person would be exempted from the death penalty if found so disabled.

A 2008 affidavit filed by applicant's sister stated that she was nine years older than applicant and left home when he was about twelve. She stated that applicant did not get along with his father and, when his father asked applicant to do something, he "would often be very slow at doing it." Applicant never helped her with household chores unless she asked him to do so, and she had to teach him to use the microwave and clean the house.<sup>62</sup>

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abilities in prison. In her post-*Atkins* Vineland interview, applicant's sister says that applicant "believed anything that he was told and would do things—if he watched Spiderman, he believed that he could fly from buildings." But applicant's handwritten prison letters show a sophisticated writer who certainly knows the difference between "play-acting" and reality, and indulges in "play-acting" as seduction. For example, in one letter to pen-pal Amanda Grant, applicant claims that he won \$240 million in the Texas Lottery, but then he tells her, "Alright, alright, I didn't win 240 million, it was only 15 million. ☺ Seriously, though, if I did hit the Jackpot of \$240 million, I bet your pretty little ass would say something like 'Wayne, Baby, you know it was always meant for me and you to be together' . . . Yeah, yeah, I know, I need to stop being silly. But don't worry, if I ever win, I will most definitely take care of my girl."

<sup>62</sup> This behavior, although it might be indicative of an intellectual disability, is also consistent with that of twelve-year-old boys who are of average or above average intelligence. Pre-



By the time of the 2010 interview with Dr. Fletcher, she remembered that she had to tell applicant “over and over” to do something, that he was easily distracted, that he rarely initiated conversations (but his speech was clear and understandable), that he did not know his telephone number, and that she “thought” he had a sixth-grade reading level. She told Dr. Fletcher that her former husband never gave applicant any responsibility at the battery-replacement shop because he would “mess it up,” but her husband had testified at trial that he often left applicant, his technician, in charge of the shop when he made deliveries because applicant was a good, trustworthy worker. Applicant’s sister told Dr. Fletcher that applicant was “bullied” at school and had no friends, but that contradicted the trial testimony of applicant’s teacher who said that he was well-liked by his classmates and got along with everyone.

Applicant’s former wife told Dr. Fletcher in a 2010 interview that she had to show applicant how to wash clothes, cook, and do chores around the house. She was “still sort of angry” about how he wouldn’t help her much and about the friends that he “hung out” with.

Based on his telephone interview with applicant’s former wife, Dr. Fletcher scored applicant with a 61 in communication, 61 in daily living, and 60 in socialization. Based on his telephone conversation with applicant’s sister, he scored applicant with a 69 in communications, 68 in daily living, and 66 in

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teens and teenagers do not like to be told to “take out the papers and the trash, yakety-yak.”

socialization. All of these scores are consistent with the presence of mild mental retardation.

Dr. Proctor, the State's expert, said that he would put very little stock in a retrospective Vineland test that asked applicant's family members to think back to his behavior eighteen to twenty-six years earlier. Furthermore, there were issues of potential bias in giving the Vineland test to applicant's family members who had a motive to underestimate his abilities and activities.<sup>63</sup> Further, Dr. Proctor said that clinicians question the validity of any retrospective use of a formal instrument such as the Vineland Scale because the norms were not designed for doing this kind of backward-looking analysis and looking to behavior more than a decade earlier.<sup>64</sup> The

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<sup>63</sup> The Fifth Circuit has commented on the potential bias of an inmate's relatives in attempting to make a retrospective behavior assessment. *Clark v. Quarterman*, 457 F.3d 441, 447 (5th Cir. 2006) (noting that state court had found an adaptive assessment based on the inmate's self-reporting coupled with his ex-wife's memories about what he could and could not do nine years earlier "unreliable because it did not account for the incentive of Clark and his ex-wife to misreport Clark's adaptive skills").

<sup>64</sup> Experts in other *Atkins* cases have expressed the same concern. See, e.g., *United States v. Montgomery*, \_\_ F. Supp. 2d \_\_, 2014 WL 1516147, at \*12, 52 (W.D. Tenn 2014) ("Dr. Marcopulos delivered a persuasive argument for why the Vineland Adaptive Behavior Scales ("VABS") administered by Dr. Reschly in this matter are unreliable based on their discrepant scores and retrospective application, and thus, why the Court must examine other sources of evidence to consider Defendant's adaptive functioning"; noting that expert concluded that "these Vineland 'scores are not reliable, and I don't feel that I can trust them as being reliable indices of [Defendant's] adaptive functioning because they are not reliable within the person, they're not reliable across the persons, and the test was

record does not support the habeas judge's uncritical acceptance of Dr. Fletcher's opinion concerning applicant's adaptive deficits based on the Vineland test.<sup>65</sup>

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administered in an unstandardized way using retrospective data.”); *United States v. Jiménez-Benceví*, 934 F. Supp. 2d 360, 372 (D. P.R. 2013) (criticizing a “fundamentally unreliable” VABS administration to the defendant’s sister, who “had a clear incentive to provide answers that were helpful to her brother” and derived from memories that “were at least ten years old, raising doubts about their reliability.”); *United States v. Candelario-Santana*, 916 F. Supp. 2d 191, 215-16 (D. P.R. 2013) (testifying expert described the use of retrospective use of Vineland test “controversial”); *Thorson v. State*, 76 So.3d 667, 673 (Miss. 2011) (trial court, in addressing *Atkins* mental-retardation case, found “the application of retrospective Vineland tests unreliable and unpersuasive”); Mark Tasse, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 APPLIED NEUROPSYCHOLOGY 114, 120 (2009) (“It should be noted that there is no research available examining the reliability or error rate of adaptive behavior assessments obtained retrospectively. At issue is the respondent’s ability to correctly recall from memory the assessed individual’s actual performance. Memory degradation is a real issue and we do not have any solid research regarding the forgetting curve regarding someone’s recollection of another person’s adaptive behavior.”). *But see Wiley v. Epps*, 625 F.3d 199, 216-18 (5th Cir. 2010) (recognizing that the authors of the Vineland test express that retrospective interviews are permissible in certain circumstances).

<sup>65</sup> One of the *Briseno* factors asks whether “those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?” 135 S.W.3d at 8. Indeed, close family and friends, as well as teachers, are the most likely to contemporaneously spot a developmental disability, express concern about it, and to act upon that determination. What matters is what family and friends thought of the person *during*

Even if the Vineland had been administered with reliable subjects reporting on their contemporaneous knowledge of applicant's behavior, the Vineland would be only one part of a person's overall adaptive behavior profile. "[T]he process of assessing adaptive behavior, particularly on a retroactive sense, 'is a matter of drawing information from many sources, all of which are imperfect.'" <sup>66</sup> Given the vague and

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the developmental period, not what they "remember" when they know that their retrospective memories of disabilities and limitations may exempt their loved one from the death penalty. We would be expecting too much of human nature if we thought that a mother or other loved one, knowing that her memories suggesting intellectual disability would save her son from execution, would resolutely assert that he was perfectly normal in every respect. Clinical psychologists must take into account both "cognitive bias" and "confirmation bias." See R. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. OF GEN. PSYCH., 175, 177 (1998) (explaining that people tend to seek information that they consider supportive of favored hypotheses or existing beliefs and to interpret information in ways that are partial to those hypotheses or beliefs; conversely, they tend not to seek and perhaps even to avoid information that would be considered counterindicative with respect to those hypotheses or beliefs and supportive of alternative possibilities); see also Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 632 (1999) (providing an overview of findings from cognitive psychologists and decision theorists suggesting that humans frequently behave in nonrational ways, and that these "cognitive biases" are largely incapable of being unlearned).

For these reasons, we cannot accept, at face value, the habeas judge's finding 126 that "the affidavits submitted by Mr. Cathey's family members [are] reliable and indicative of adaptive behavior deficits."

<sup>66</sup> *United States v. Candelario-Santana*, 916 F. Supp. 2d 191, 216 (D. P.R. 2013) (internal citation omitted) (quoting J. Gregory

amorphous nature of the definition of adaptive behavior in the relevant statutes and treatises, courts have adhered to the “relative consensus that the best way to retroactively assess [an inmate’s] adaptive functioning is to review the broadest set of data possible, and to look for consistency and convergence over time.”<sup>67</sup> A significant impairment in adaptive behavior may be thought of as “the extent to which the

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Olley, *The Assessment of Adaptive Behavior in Adult Forensic Cases: Part 2*, PSYCHOLOGY IN MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES (American Psychological Association/ Division 33, Washington, D.C.) (Fall 2006)).

<sup>67</sup> *Candelario-Santana*, 916 F. Supp. 2d at 216; see also *Ex parte Butler*, 416 S.W.3d 863, 874-75 (Tex. Crim. App. 2012) (Cochran, J., concurring) (“Assessing adaptive deficits in a retrospective *Atkins* hearing is an extremely difficult task. First, there is a tremendous incentive for those closest to the defendant to remember him as being deficient. Because a finding of mental retardation will prevent imposition of a death sentence, it is understandable that those who wish to spare the defendant’s life recall and focus on previously unnoted deficits or downplay competencies, consciously or otherwise. Second, the guidelines for assessing adaptive deficits are so vague and subjective that beauty frequently is in the eye of the beholder. In the context of *Atkins* hearings, experts routinely disagree about which behaviors to focus on and what significance different behaviors have. . . . It was partly for this reason that we adopted the *Briseno* factors to assist the factfinder —both the trial judge and this Court in the context of habeas cases —in considering preexisting objective data that has not been collected for the sole purposes of deciding the question of mental retardation in the context of an *Atkins* hearing. Those factors focus on the defendant’s behavior and competency in ‘the real world’ before people are seeking specific evidence for (or against) a finding of mental retardation that would bar the defendant’s execution.”).

individual has required assistance to carry out age-appropriate activities.”<sup>68</sup>

The best source of retrospective information concerning adaptive behavior during the developmental period is usually school records. Such records provide an objective, unbiased documentation of a person’s abilities at the most pertinent time—a time at which mental retardation or intellectual disability is most likely to be diagnosed if it exists.

Applicant’s school records show that he was performing above grade level during the third grade when he was home-schooled. His grades that year started with two B’s and two C’s, but he ended the year with straight B’s.

Applicant was always placed in regular classes and generally received passing grades. He made a B in reading lab in the 6<sup>th</sup> grade, a 72 in Algebra I in the 7<sup>th</sup> grade, a 72 in physical science, a 70 in history, an 83 in World History, and a 68 in English. In the 9<sup>th</sup> grade, he passed all three sections of the standardized TEAMS test (a test that mentally retarded students were usually exempt from taking in the late 1980’s). Applicant’s former middle school history and homeroom teacher saw him every day. She thought that he functioned “slightly” below grade level, but she never suggested that he was intellectually disabled. Applicant was well behaved, liked by other students, and got along well with everyone. She felt that applicant’s falling grades (and his eventual dropping out) were the result of not making a smooth transition to high school. All in all, this is not the academic portrait of an intellectually disabled person.

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<sup>68</sup> Olley, *supra* note 57, at 3-4.

And the inventory of applicant's death-row cell appears to validate his middle school teacher's assessment. Shortly after applicant filed his Atkins claim of mental retardation, the contents of his cell were photographed and inventoried. Those contents are not typical of a person who is intellectually disabled:

- Applicant's cell contained numerous books; a copy of *The Echelon Vendetta* by David Stone was open and face-down on applicant's bed; other books included *Tactics and Strategy of Chess*, *The Complete Jewish Bible* (including a bookmark with the word "redundant" written on it); Harper Collins *Spanish Dictionary*; *The Audacity of Hope* by Barack Obama; *AIDS in America*, by Susan Hunter; *Mein Kampf*, by Adolf Hitler; *The Pocket Oxford English Dictionary*; *The Source*; *Larousee Concise Dictionary*; *Great Speeches by African Americans*; *A Call to Spiritual Reformation*; and *Tom Clancy's Ghost Recon*, by David Michaels (with applicant's name and TDCJ number handwritten on its inside cover).
- Applicant also had an Amazon.com invoice addressed to him, listing the books *The Looking Glass Wars*, *The Looking Glass Wars–Book Two*, *Seeing Redd*, and *ArchEnemy*, all to be shipped to applicant at the Polunsky Unit.
- A composition book containing approximately 80 handwritten names

and addresses of his pen pals and other correspondents.

- A TDCJ Offender Grievance Form containing applicant's handwritten name and TDCJ number with his handwritten grievance complaining that "within the last few years and essentially within the previous months the quality of food served has deteriorated drastically to a level on the verge of indecency."<sup>69</sup>

An unrelated property inventory of applicant's cell on March 27, 2009, listed the following items: 55 magazines, 12 books, stamps, ink pens, tables, headphones, and a game board. Although some mentally retarded persons try to cover up their disabilities, the notion of a death-row inmate keeping 55 magazines and 12 books in his cell as "cover," as well as spending his scarce financial resources ordering more books from Amazon.com, is inconsistent with a mentally retarded person attempting to cover up his disability.

Applicant is not only a prison reader, he is a prison writer. One pen-pal letter, dated October 22, 2009, to a woman in Belgium states, "As for myself, well, yesterday after I found out that Bobby Woods had another execution date it really troubled my spirit

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<sup>69</sup> Four other grievance forms, dated after applicant had filed his *Atkins* claim, contained the notation "assisted by" other inmates. It does not appear that applicant needed any such assistance in filling out forms until *after* filing his *Atkins* claim. Likewise, he apparently never needed assistance in writing letters to his pen pals discussing his thoughts on the death penalty and his pending *Atkins* claim.



because he and I basically have similar claims.”<sup>70</sup> In a letter to Meg Harper in the United Kingdom, applicant writes, “Get together and draft up a letter addressing the injustice of the D/P, and lets send it to the U.S. attorney general Eric Holder and the president[.]” He also recounts the number of “blacks,” “Mexicans,” and “whites” who had been subject to “legal lynchings here in Texas,” and states, “Now I elucidated this because Ruth felt like it would be a good idea to write the Obama administration to address the issue of the death penalty. And I agree. But the voices from the people on the outside will have a more powerful effect when injustice is declared, than when it comes from those who are incarcerated.” Another of his pen-pal letters inquires,

And speaking of news, what is your opinion of the racial incident that transpired with Professor Gates a few weeks ago? Now I did like the fact that the ole racist ass cop lied and falsified his police report. But I did find it kind of funny that President Obama offered to have a beer with both guys at the White House!<sup>71</sup>

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<sup>70</sup> The evidence at the writ hearing showed that Bobby Wayne Woods had made an *Atkins* claim that also relied on the Flynn Effect.

<sup>71</sup> Applicant is referring to the Boston incident in which Harvard Professor Henry Louis Gates was arrested at his home based on a 911 call that a burglar was breaking into it. That incident, in July 2009, received considerable media attention. See *Wikipedia, Henry Louis Gates Arrest Controversy*, [http://en.wikipedia.org/wiki/Henry\\_Louis\\_Gates\\_arrest\\_controversy](http://en.wikipedia.org/wiki/Henry_Louis_Gates_arrest_controversy) (last visited Oct. 6, 2014).

In a letter to Sari Kauppinen in Finland, applicant gives a detailed description of reading *The Gates of Rome*, about Julius Caesar.

Dr. Proctor testified that applicant's letter to Amanda Grant, instructing her on how to get an I-60 form for visitation, showed that applicant understood his environment and how to use forms, and that he could solve a problem using multiple steps. In another letter to Ms. Grant, applicant describes his upcoming January 2010 *Atkins* hearing and says, "So my lawyers are interviewing doctors, and others that may testify on my behalf as well as collecting medical and school records that are needed." In a letter to *The Prison Journal*, applicant stated that he wanted to submit two poems and a drawing that he hoped the journal would publish.<sup>72</sup>

After examining more than 100 letters written by applicant,<sup>73</sup> Dr. Proctor testified that these letters

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<sup>72</sup> The P.U.R.E. Report Newsletter of June 2011, published one of applicant's four stanza poems, the first stanza of which reads as follows:

Bombarded by the cultivation  
to ensnare a phantom destiny  
of a parents dream lost  
to the adversity of change.  
Now Precious Angels of a cradle's caress  
are forgotten, as their wrath of heaven  
cast out its rebellious demons . . .

<sup>73</sup> These one hundred letters contain very few spelling errors, although the "punctuation police" might well suggest more commas and hyphens. All of the letters are intelligent, coherent,

showed that applicant was aware of current events, capable of giving sound advice, capable of planning and abstract thinking, has political awareness, is concerned about how the death penalty is applied, and has ideas addressing the issue. According to Dr. Proctor, applicant uses humor, speaks in the abstract, talks about what he wants, expresses his feelings, and narrates events in his life. These letters demonstrate applicant's normal conceptual abilities and social interactions. We therefore cannot accept the habeas judge's findings that applicant had (1) "communicative deficits" and "difficulties expressing himself" based on his family members' recent recollections; (2) "failed to manage his money," in part because he overspent his inmate trust account at the commissary for "several purchases"; (3) "limited functioning in reading and writing," despite his vast wealth of reading materials and handwritten letters in his cell.

A TDCJ guard, Leah Madison, testified that applicant gave her a handwritten letter that began, "Hello Sunshine," described applicant's attraction to her, and included the following: "Because since the first several time[s] we initially came in contact with each other, I felt a sense of a kindred spirit between us. And I'm sure you can relate to what I speak of, simply because of the compassionate, gentle, loving, and caring attributes, that we both have in common." Ms. Madison reported the letter to the proper authorities and applicant was moved to a different pod and level. Applicant told her that he didn't think she would turn him in for writing the letter, but that

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and consistent. This man intends to communicate with great grace, and he succeeds.

he understood and knew the consequences. This letter demonstrates applicant's well-developed writing and reasoning abilities, although it also demonstrates his chutzpah and penchant for flouting the rules.

Speaking of flouting the rules, applicant participated in a notorious 1998 prison breakout shortly after he was sent to death row. Applicant was assigned as a sewing machine operator in the garment factory. He and several other inmates dyed some clothes to look like prison guard uniforms, left paper maché dummies in their cell bunks, and scaled the inner perimeter fence at the Ellis Unit. With the exception of the one inmate who got over the fence and drowned in a creek, they all stopped when guards began shooting at them. Dr. Proctor testified that the prison-escape plan contained some "elaborate" elements and that prisoners organizing a daring escape would not bring along a mentally retarded inmate.

Applicant is also an active member of P.U.R.E. (Panthers United for Revolutionary Education), a group associated with the Black Panthers. The P.U.R.E. Newsletter of December 2010, contained an article written by applicant titled *The Echolon Privilege*, arguing that juries find police officers "not guilty" of murder or "felony brutality" because

[m]any of us in society have been indoctrinated with trusting those in authority and placing them on a high level of esteem. Therefore a common belief have been embedded in our subconscious that if we are good law abiding citizens, then we have nothing to fear from law enforcement officials. So

when a jury encounters a situation where a police officer has used force (deadly or otherwise) their sympathy gravitates to the officer.

One may agree or disagree with applicant's position, which he goes on to explain at great length, but it is surely cogently articulated. That newsletter also states, "Panthers United for Revolutionary Education, founded by Eric Cathey, a Texas death row Prisoner," and contains a picture of applicant along with his TDCJ contact information.

Some psychologists argue that factfinders should not consider prison behavior in assessing whether a death row inmate is intellectually disabled because prison is such a highly regimented society in which inmates are required to perform rote and simple activities.<sup>74</sup> But courts should not become so entangled with the opinions of psychiatric experts as

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<sup>74</sup> AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 38 (5th ed. 2013) ("DSM-5") ("Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained."). *See, e.g., Holladay v. Allen*, 555 F.3d 1346, 1358 n.16 (11th Cir. 2009) ("Both experts agreed that Holladay's adaptive functioning cannot be accurately assessed now because he has spent over 17 years in prison, a highly restricted and restrictive environment."); *Thomas v. Allen*, 614 F. Supp. 2d 1257, 1284 n.67 (N.D. Ala. 2009) ("The constraints of a maximum-security prison environment also limit the diagnostician's ability to assess the subject's adaptive skills consistently within the AAMR definition."); *see also Thorson v. State*, 76 So.3d 667, 672 n.8 (Miss. 2011) ("Experts for each side agreed that being on death row for twenty years could have had an effect, either positively or negatively, on . . . adaptive functioning.").

to lose sight of the basic factual nature of the *Atkins* inquiry: Is this person capable of functioning adequately in his everyday world with intellectual understanding and moral appreciation of his behavior wherever he is? Or is he so intellectually disabled that he falls within that class of mentally retarded inmates who are exempt from the death penalty? In that inquiry, we should not turn a blind eye to the inmate's ability to use society and his environment to serve his own needs. And sound scientific principles require the factfinder to consider all possible data that sheds light on a person's adaptive functioning, including his conduct in a prison society, school setting, or "free world" community.<sup>75</sup>

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<sup>75</sup> See *United States v. Montgomery*, \_\_ F. Supp. 2d \_\_, 2014 WL 1516147, at \*49 (W.D. Tenn. 2014) (noting that some psychologists decline to give weight to an inmate's behavior in jail or prison in assessing mental retardation, but concluding that "[t]he fact that post-incarceration observers of Defendant's adaptive behavior would be inadequate reporters for a standardized adaptive behavior scale does not mean that all information regarding Defendant's post-incarceration behavior should be ignored entirely."). In *Montgomery*, the federal district judge noted that one expert in that case

disagrees with the statements in the AAIDD User's Guide instructing examiners not to consider past criminal behavior in their assessment of adaptive functioning. According to Dr. Welner, "the essence of an ethical practice of forensic psychiatry is that you don't pick and choose your data. You rely on all available sources of data, ... the idea of just ignoring behavior altogether is something that has no foundation in the practice of forensic psychiatry." He further testified that he disagrees with the User's Guide's statement that diagnosis of

Some psychologists also say that factfinders should not consider a person's strengths, but only his weaknesses, when deciding the question of intellectual disability.<sup>76</sup> Most courts, however, consider all of the person's functional abilities, those that show strength as well as those that show weakness.<sup>77</sup> For example, it would seem foolhardy to say that a person who has obtained a graduate law

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MR/ID is not based on a person's street smarts, behavior in jail, or criminal adaptive functioning.

*Id.* at \*49 (record citations omitted). Thus, the district court refused to disregard the inmate's "criminal and post-incarceration behavior that may lend support one way or another to Defendant's adaptive functioning profile." *Id.* at \*50. The *Montgomery* judge noted that this was the approach of some federal courts as well, including the Fifth Circuit. *Id.*; see *Clark v. Quarterman*, 457 F.3d 441, 447 (5th Cir. 2006) (relying on evidence that inmate's "behavior in prison casts serious doubts on his claims of adaptive limitations as evidence collected from his cell" showed handwritten letters, complaints, diet plans, notes about the effects of various chemicals, handwritten puzzles "including the decipherment of several extremely complicated codes").

<sup>76</sup> See AAIDD Manual, *supra* note 41, at 94 (advocating an approach that "focuses on the individual's limitations").

<sup>77</sup> See *Hooks v. Workman*, 689 F.3d 1148, 1172 (10th Cir. 2012) (rejecting defendant's contention that *Atkins* requires courts to focus solely on a person's limitations, and concluding that adaptive functioning means, "What is a given defendant able and unable to do? Both strengths and deficiencies enter into this equation because they make up the universe of facts tending to establish that a defendant either has 'significant limitations' or does not. Not only does *Murphy* not require the [state court] to focus on deficiencies to the exclusion of strengths but—most relevant to our inquiry here—neither does *Atkins*"; relying, in part, on defendant's prison letters in concluding that he did not suffer adaptive deficits under *Atkins*).

degree (demonstrating his conceptual abilities), who is a television talk-show host (demonstrating his social skills), but who simply cannot learn to drive properly and has multiple automobile accidents (demonstrating a limitation in practical skills), meets the adaptive-deficits prong of intellectual disability by ignoring all of his educational and social strengths and focusing exclusively on his deficiencies.

Given the entire body of evidence taken from the trial and the habeas hearing, including applicant's school records and the death-row cell exhibits of his pen-pal letters and P.U.R.E. articles and poems, we conclude that applicant has failed to prove, by a preponderance of the evidence, that he suffers from significant adaptive deficits or limitations. We must therefore also conclude that applicant did not establish the third and final prong of intellectual disability—its onset during the developmental period. If applicant has failed to prove that he is intellectually disabled, he clearly did not prove that he was intellectually disabled before the age of approximately eighteen. For these reasons we reject applicant's *Atkins* claim and deny relief on his subsequent application for a writ of habeas corpus.

Delivered: November 5, 2014

Publish



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APPENDIX E



IN THE COURT OF CRIMINAL APPEALS  
OF TEXAS

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NO. WR-55,161-02

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Ex Parte ERIC DEWAYNE CATHEY, Applicant

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ON APPLICATION FOR A WRIT OF HABEAS  
CORPUS IN CAUSE NO. 713189-B IN THE  
176th DISTRICT COURT HARRIS COUNTY

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PRICE, J., filed a concurring opinion.

CONCURRING OPINION

I join Parts I and IIA of the Court's opinion today and otherwise concur in the result. I do not join Part IIB. For present purposes, suffice it to say that I continue to disagree with the Court's decidedly non-diagnostic approach to evaluating the adaptive-deficits prong of the standard for determining intellectual disability *vel non*.<sup>1</sup> Particularly after the

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<sup>1</sup> See Peggy M. Tobolowsky, *Different Path Taken: Texas Capital Offenders' Post-Atkins Claims of Mental Retardation*, 39 HASTINGS CONST. L.Q. 1, 123-25, 163-66 (Fall 2011) (discussing and quoting extensively from my unpublished dissenting opinion

recent opinion of the United States Supreme Court in *Hall v. Florida*,<sup>2</sup> I should think that the writing is on the wall for the future viability of *Ex parte Briseno*.<sup>3</sup>

FILED: November 5, 2014

PUBLISH

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in *Lizcano v. State*, No. AP-75,879, 2010 WL 1817772 (Tex. Crim. App. delivered May 5, 2010) (not designated for publication)).

<sup>2</sup> 134 S.Ct. 1986 (2014). *Hall* found Florida's approach to determining the first prong of the standard for intellectual disability, the significantly-subaverage-general-intellectual-functioning prong, to be unconstitutionally narrow. In my view, Texas's approach to determining the second prong, the adaptive-deficits prong, is unconstitutionally *over-inclusive*—insufficiently tied to the clinical diagnostic criteria and all too open to non-scientific, impressionistic considerations to withstand Eighth Amendment scrutiny. Tobolowsky, 39 HAST. CONST. L.Q. at 163-66 (citing and quoting from *Lizcano v. State*, 2010 WL 1817772, at \*32-40 (Price, J., dissenting)).

<sup>3</sup> 135 S.W.3d 1 (Tex. Crim. App. 2004). See Tobolowsky, 39 HAST. CONST. L.Q. at 173 (“[T]he *Briseno* factors remain a leading candidate for [Supreme] Court scrutiny.”).

**FILED**

CHRIS DANIEL

DISTRICT CLERK

Feb 21 2011

Time: \_\_\_\_\_  
Harris County, Texas

By: \_\_\_\_\_  
Deputy

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**APPENDIX F  
IN THE 176TH JUDICIAL DISTRICT COURT  
OF HARRIS COUNTY, TEXAS**

EX PARTE ERIC	§	
DEWAYNE CATHEY,	§	TRIAL NO.
Applicant.	§	713189-B
	§	CCA NO. WR-
	§	55,161-02

**APPLICANT ERIC DEWAYNE CATHEY'S  
PROPOSED FINDINGS OF FACT AND  
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**IN THE 176TH JUDICIAL DISTRICT COURT  
OF HARRIS COUNTY, TEXAS**

EX PARTE ERIC	§	
DEWAYNE CATHEY,	§	TRIAL NO.
Applicant.	§	713189-B
	§	CCA NO. WR-
	§	55,161-02

**APPLICANT ERIC DEWAYNE CATHEY'S  
PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

On November 18, 2008, the Court of Criminal Appeals remanded this cause to the Court for a hearing on Applicant Eric DeWayne Cathey's ("Mr. Cathey") claim in his Application for Post-Conviction Writ of Habeas Corpus. In this claim, Mr. Cathey alleged that he is a person of mental retardation<sup>1</sup> and

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<sup>1</sup> The term mental retardation is replaced by the term intellectual disability in the American

thus entitled to habeas relief under the requirements of the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the execution of defendants with mental retardation violates the Eighth Amendment to the U.S. Constitution. Mr. Cathey also alleged that his execution would violate his due process rights unless he was afforded a full and fair hearing on his claim of mental retardation.

This Court held an evidentiary hearing to determine whether Mr. Cathey is a person of mental retardation and also for evaluating evidence concerning the following four issues presented by the Texas Court of Criminal Appeals:

- (1) the scientific validity and reliability of the 'Flynn Effect;'
- (2) whether clinical practitioners who are ordinarily called upon to diagnose mental retardation for purposes outside of the criminal justice system use and apply the 'Flynn Effect' to I.Q. test results when making their particularized diagnoses of mental retardation;
- (3) whether the application of the 'Flynn Effect' to individual test results is generally accepted scientific procedure in the pertinent professional community outside of the

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Association on Intellectual and Developmental Disability Manual, INTELLECTUAL DISABILITY: DEFINITIONS, CLASSIFICATION, AND SYSTEMS OF SUPPORT (11th ed. 2010) ("AAIDD Manual"). For ease of reference, however, the term mental retardation will be used.

criminal justice system; and

- (4) the known or potential ‘error rate’ of the ‘Flynn Effect’ as it applies to a specific IQ. test result.

*Ex Parte Cathey*, 2008 Tex. Crim. App. Unpub. LEXIS 850 (Tex. Crim. App. Nov. 18, 2008) (per curiam) (unpublished).

After reviewing the testimony of witnesses and the evidence presented at the hearing, the Court finds that Mr. Cathey has proven by a preponderance of the evidence that he is a person with mental retardation and also finds that the Flynn Effect is a scientifically valid and real phenomenon that should be applied to intellectual functioning test scores in death penalty cases to correct for norm obsolescence, and issues these Findings of Fact and Conclusions of Law in support.

## **FINDINGS OF FACT**

### **I. PROCEDURAL HISTORY**

1. Applicant Eric De Wayne Cathey (“Mr. Cathey”) was convicted of capital murder in the 176th Criminal District Court of Harris County, Texas in Cause No. 713189 on March 12, 1997, and sentenced to death on March 14, 1997.

2. On March 20, 1997, Mr. Cathey filed a notice of appeal to the Texas Court of Criminal Appeals. The Court of Criminal Appeals affirmed the conviction and sentence on direct appeal on April 21, 1999. *Cathey v. State*, 992 S.W.2d 460 (Tex. Crim. App. 1999).

3. On September 16, 1999, Mr. Cathey filed a review petition to the Supreme Court. The Supreme Court denied Mr. Cathey’s petition for writ of certiorari on



January 10, 2000. *Cathey v. Texas*, 528 U.S. 1082 (2000).

4. On March 15, 1999, Mr. Cathey filed an application for state post-conviction relief under Tex. Code Crim. Proc., art. 11.071. The Court of Criminal Appeals denied the application on April 2, 2003. *Ex Parte Cathey*, Writ. No. 55,161-01 (Tex. Crim. App. Apr. 2, 2003) (unpublished).

5. On April 2, 2004, Mr. Cathey filed his federal habeas petition in the United States District Court for the Southern District of Texas under 28 U.S.C. § 2254. The district court denied habeas relief on December 23, 2004.

6. On May 5, 2005, Mr. Cathey filed an application for certificate of appealability to the Fifth Circuit. The Fifth Circuit denied Mr. Cathey's application on April 7, 2006. *Cathey v. Dretke*, 174 Fed. App'x 841 (5th Cir. 2006).

7. On November 17, 2008, Mr. Cathey filed an Application for Postconviction Writ of Habeas Corpus and Motion for Stay of Execution under Tex. Code Crim. Proc., art. 11.071. By order dated November 18, 2008, the Court of Criminal Appeals granted Mr. Cathey's motion to stay and remanded the writ to the 176th Criminal District Court, Harris County, Texas for a hearing on Mr. Cathey's claims. *Ex Parte Cathey*, 2008 Tex. Crim. App. Unpub. LEXIS 850 (Tex. Crim. App. Nov. 18, 2008) (per curiam) (unpublished). As a part of the factual inquiry on the issue of mental retardation, the Court of Criminal Appeals required the trial court to evaluate evidence concerning the Flynn Effect. *Id.*

## II. THE EVIDENTIARY HEARING

8. On January 25-29, 2010, this Court conducted an evidentiary hearing to determine whether Mr. Cathey is a person of mental retardation and also to address the four issues specific to the application of the Flynn Effect mandated for review by the Texas Court of Criminal Appeals. Mr. Cathey appeared in person and through his counsel of record.

9. Mr. Cathey presented live testimony from the following experts:

- a. James Robert Flynn, Ph.D., the discoverer of and world-renowned expert on the scientific phenomenon known as the Flynn Effect;
- b. Jack M. Fletcher, Ph.D., an expert clinical neuropsychologist with specific expertise in classification and measurement issues pertaining to the diagnosis of people with disabilities; and
- c. Alan Steven Kaufman, Ph.D., an expert psychologist and a top scholar on the development and interpretation of intelligence tests.

Mr. Cathey presented testimony by affidavit<sup>2</sup> from the following people:

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<sup>2</sup> The Court admitted the affidavits as exhibits during the evidentiary hearing. "The Court of Criminal Appeals will defer to the trial court's findings of fact even when those findings are based on affidavits rather than live testimony." *Ex parte*

- a. Greg Olley, Ph.D., an expert psychologist and chair of the Division 33 American Psychological Association Committee on Mental Retardation (DX 47)<sup>3</sup>;
  - b. Charlotte Ross, Mr. Cathey' s older sister (DX 42);
  - c. Robert Charles Mr. Cathey, Jr., Mr. Cathey's brother (DX 43);
  - d. Noaella Bryant, Mr. Cathey's former wife (DX 44);
  - e. Celecia Baker, Mr. Cathey's younger sister (DX 45);
  - f. Faryion Wardrip, an inmate at the Polunsky Unit (DX 50); and
  - g. Ronald Hamilton, an inmate at the Polunsky Unit (DX 51 ).
10. The State presented live testimony from the following:

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*Thompson*, 153 S.W.3d 416, 418 (Tex. Crim. App. 2005).

<sup>3</sup> "DX" refers to exhibits admitted by the Applicant at the evidentiary hearing. "SX" refers to exhibits admitted by the State at the evidentiary hearing. "H.T." refers to the transcript taken at the evidentiary hearing.

- a. Timothy Proctor, Ph.D., an expert forensic psychologist;
- b. Leigh Hagan, Ph.D., an expert psychologist who offered opinion only on the validity of the Flynn Effect and not on whether Mr. Cathey is a person of mental retardation;
- c. Don Cohen, an investigator employed by the Harris County District Attorney's office for post-conviction writs;
- d. Captain Steven Bryant, a captain at the Polunsky Unit, Texas Department of Criminal Justice Correctional Institution Division;
- e. Leah Madison, a correctional officer at the Polunsky Unit, Texas Department of Criminal Justice Correctional Institution Division; and
- f. William Cook, a correctional officer at the Polunsky Unit, Texas Department of Criminal Justice Correctional Institution Division.

11. Mr. Cathey presented and the Court admitted a total of 59 exhibits. The State presented and the Court admitted a total of 21 exhibits.

### **III. THE LEGAL STANDARD**

12. Following the decision of the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that it is "cruel and unusual" to execute the mentally retarded, the Courts of this and other states have grappled with the appropriate procedures and standards by which this straightforward declaration of constitutional principle

is to be applied. In Texas, the procedure is for the Court, without a jury, to consider appropriate evidence, including affidavits, and for the applicant to prove by a preponderance of the evidence that he is a person of mental retardation. The preponderance of the evidence means proof “by the greater weight and degree of credible evidence.” *Compton v. Henrie*, 363 S.W.2d 179, 182 (Tex. 1963).

13. In determining whether Mr. Cathey is a person of mental retardation, the Court has been guided by the scientific and clinical definitions of mental retardation developed by the American Association on Mental Retardation (“AAMR”), now the American Association on Intellectual and Developmental Disabilities (“AAIDD”), and the American Psychiatric Association (“APA”). Both organizations recognize that mental retardation is a disability characterized by (1) “significantly subaverage” general intellectual functioning, (2) accompanied by “related” (AAMR) or “significant” (APA) limitations in adaptive functioning, (3) the onset of which occurs prior to the age of eighteen. [DX 4, AAIDD Manual and DX 5, American Psychological Association, DIAGNOSIS AND STATISTICAL MANUAL OF MENTAL DISORDER (“DSM-IV”) (1994)].

14. In *Ex Parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004), the Texas Court of Criminal Appeals noted that Texas had adopted the “AAMR three-part definition of mental retardation” in the “Persons With Mental Retardation Act,” citing *Ex parte Tennard*, 960 S.W.2d 57, 60 (Tex. Crim. App. 1997) and Texas Health & Safety Code §§ 591.003(13) & (16). The Court then applied that definition in determining whether the applicant presented

sufficient evidence of mental retardation.

### **A. Three Prongs Of Mental Retardation**

15. Each component of the definition of mental retardation requires additional explanation. First, the consensus among mental health professionals and the AAIDD manual is that the requirement of significantly subaverage general intellectual functioning is satisfied by “an IQ score that is approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments’ strengths and limitations.”<sup>4</sup> [DX 4, AAIDD Manual at 27]. The AAIDD Manual also states that “[a]n IQ score should be reported with confidence intervals rather than a single score. [DX 4, AAIDD Manual at 40]. The DSM-IV recognizes that “there is a measurement error of approximately 5 points in

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<sup>4</sup> The AAIDD does not intend for a fixed cutoff point to be established for diagnosing a person with mental retardation. [DX 4, AAIDD Manual at 39-40]. The diagnosis is “intended to reflect a clinical judgment rather than an actuarial determination.” *Id.* The AAIDD Manual explains that “it is important to use a range as reflected in the test’s standard error of measurement” because of variations in test performance, examiner’s behavior, or other undetermined factors. [DX 4, AAIDD Manual]. Accordingly, a “standard error of measurement” must be taken into account in interpreting the IQ score obtained on any test. *Id.* The standard error of measurement is the range of IQ score of plus or minus five points within which there is a high level of confidence that a person’s “true” IQ resides. *Id.* Thus, obtained IQ scores up to 75 can satisfy the first component of the definition of mental retardation, for the true IQ score of a person who obtains a score of 75 is within the range of 70-80. *See Atkins v. Virginia*, 536 U.S. at 309 (“an IQ between 70 and 75 or lower .. is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition”).

assessing IQ, although this may vary from instrument to instrument.” [DX 5, DSM-IV at 39].

16. Next, with respect to adaptive functioning, the AAIDD Manual recognizes deficits in adaptive behavior as “performance on a standardized measure of adaptive behavior that is normed on the general population including people with and without [intellectual disability] that is approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, and practical, or (b) an overall score on a standardized measure of conceptual, social, and practical skills.” [DX 4, AAIDD Manual at 43].

17. Third, with respect to the requirement that the onset of subaverage intellectual functioning and deficits in adaptive functioning occur before the age of eighteen, it is not required that there be a diagnosis of mental retardation before the person’s eighteenth birthday. [DX 4, AAIDD Manual at 27-28]. Rather, it is necessary only that the limitations in adaptive functioning be apparent before the age of eighteen, that IQ testing sometime during the person’s life reliably establish an IQ of 75 or below, and that there be no intervening reason, such as a traumatic head injury, for the person’s IQ to have diminished since the age of eighteen. [DX 4, AAIDD Manual at 32].

#### **B. Additional Guidance by the AAIDD Manual**

18. Both the Supreme Court and the Texas Court of Criminal Appeals have applied the definition of mental retardation as set forth by the AAIDD, formerly known as the American Association on Mental Retardation. *See Atkins v. Virginia*, 536 U.S.

304, 309 n.3 (2002); *Ex parte Briseno*, 135 S.W.3d at 7. The AAIDD Manual definition of mental retardation focuses on the presence of adaptive behaviors before the age of 18:

Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.

[DX 4, AAIDD Manual at 6]; *see also Ex Parte Briseno* at 6-8. The AAIDD Manual also lists the following five assumptions “which are essential to the application of the definition”:

*Assumption 1*: “Limitations in present functioning must be considered within the context of community environments typical of the individual’s peers and culture.”

*Assumption 2*: “Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.”

*Assumption 3*: “Within an individual, limitations often coexist with strengths.”

*Assumption 4*: “An important purpose of describing limitations is to develop a profile of needed supports.”

*Assumption 5*: “With appropriate personalized supports over a sustained



period, the life functioning of the person with ID generally will improve.”

[DX 4, AAIDD Manual at 7].

#### IV. THE FLYNN EFFECT

19. The Flynn Effect is a scientifically valid and reliable phenomenon. It is applied by clinical practitioners in the diagnosis of mental retardation and is used by practitioners outside the criminal justice system to correct for norm obsolescence. The Flynn Effect should be applied to individual test results to account for norm obsolescence and is a generally accepted scientific procedure. The Flynn Effect is sufficiently precise to make corrections to individual IQ scores because it has a known error rate.

##### **A. The Flynn Effect is a scientifically valid and real phenomenon.**

20. All of the experts presented by the State and the Applicant recognized the Flynn Effect as a real phenomenon. The existence of the Flynn Effect, therefore, is uncontested.

21. James Flynn, Ph.D. is the foremost expert on IQ norm obsolescence over time, also known as “the Flynn Effect.”<sup>5</sup> Dr. Flynn is currently an emeritus professor and lecturer at the University of Otago in New Zealand. He attended the University of Chicago where he received his bachelor’s, master’s, and

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<sup>5</sup> Dr. Flynn explained that although the Flynn Effect is named after him, the use of the term was coined in 1994 by authors Richard Herrnstein and Charles Murray in their book, *The Bell Curve*. Dr. Flynn had been studying the Flynn Effect beginning 1983 and labeled it in his research as “IQ gains over time due to norm obsolescence.” [H.T. Vol. 4: 31].

doctoral degrees in political science. Before joining the University of Otago faculty, Dr. Flynn taught psychology at Cornell University and created a research project based on his work. Dr. Flynn has been a distinguished visiting speaker at the universities of Cornell, Chicago, Harvard, and Princeton where he lectured on his research in intelligence and IQ testing. Dr. Flynn was a visiting scholar at the Sage Foundation in 2008 and 2009 and was a visiting scholar at the Hoover Institution at Stanford. Dr. Flynn has been profiled by the *Scientific American*. [DX 21, Profile of James Flynn, "Flynn's Effects," *SCIENTIFIC AMERICAN* 37 (2000)]. In 2007, the International Society For Intelligence Research recognized Dr. Flynn as being the most distinguished researcher in the area of intelligence. The New Zealand Psychological Society honored Dr. Flynn as its first honorary fellow for life, and the University of Otago awarded him an honorary doctorate of science. Dr. Flynn is one of two distinguished associates of the Psychometrics Center at Cambridge, which sought Dr. Flynn's expertise in designing its IQ tests. Dr. Flynn delivered the keynote address at the American Psychological Association's symposium on the Flynn Effect at Emory University in 1996 and at Cambridge University in 2006, leading to his 2007 book with Cambridge University Press, *WHAT IS INTELLIGENCE?* [DX 6, James R. Flynn, *WHAT IS INTELLIGENCE?* (2009)]. Dr. Flynn has published 67 articles in peer-reviewed journals, with roughly 50 publications addressing the topic of IQ. He has contributed to Sternberg's *THE ENCYCLOPEDIA OF INTELLIGENCE*, the *CAMBRIDGE HANDBOOK OF INTELLIGENCE*, and the *OXFORD HANDBOOK OF DEVELOPMENTAL PSYCHOLOGY*. [H.T. Vol. 4: 31-38].

22. Dr. Flynn authored “The WAIS-III and WAIS-IV: Daubert Motions Favor the Certainly False over the Approximately True,” published in the journal *Applied Neuropsychology*. [DX 18, James R. Flynn, “The WAIS-III and WAIS-IV: Daubert Motions Favor the Certainly False over the Approximately True,” 16 *Applied Neuropsychology* 98-104 (2009)]. In this article, the results of Dr. Flynn’s comparative study of individually administered tests from 1972 to the present were released. After administering tests with obsolete norms, alongside tests with current norms, and comparing the results, Dr. Flynn observed that there are significant IQ gains over time. Dr. Flynn’s comparison of these tests was scientific and valid and included a sound method for translating tests having different scales, such as the Stanford-Binet and the Wechsler, so that overall changes in scores over time could be accurately quantified. [H.T. Vol. 4: 53, 55-56, 58, 60].

23. Dr. Flynn also conducted a study with psychologist Lawrence F. Weiss, Ph.D., the senior psychologist in psychometrics at Psychological Corporation, who is responsible for standardizing and norming the Wechsler and other intelligence tests. Dr. Flynn and Dr. Weiss co-authored an article addressing the Flynn Effect titled “American IQ Gains from 1932 to 2002: The WISC Subtests and Educational Progress,” published in the *International Journal of Testing*. [DX 19, James R. Flynn & Lawrence G. Weiss, “American IQ Gains from 1932 to 2002: The WISC Subtests and Educational Progress,” 7(2) *Int’l Journal of Testing* 209-224 (2007)]. Dr. Weiss collaborated with Dr. Flynn and recognized the Flynn Effect in this article, acknowledging that IQ test

norms become obsolete over time. Specifically, Dr. Weiss found that American IQ gains have occurred at a rate of 0.3 points per year from 1932 to 2002. [H.T. Vol. 4: 61-62].

24. Dr. Flynn testified that when a test administrator administers to the same group of subjects a recently normed IQ test and a less recently normed test, subjects will make relatively better scores on the older test and worse scores on the new test. [H.T. Vol. 4: 18]. This posed a conundrum because the recognized theory of intelligence is that IQ is static. Upon reaching majority, an individual IQ does not improve over time. [DX 4, AAIDD Manual at 28]. The Flynn Effect has been so well accepted by the scientific community that as a result, test-makers now update their intelligence tests more frequently. [H.T. Vol. 4: 49, 82]. Applying the Flynn Effect to individual test results is accepted as a valid scientific procedure. [H.T. Vol. 4: 74].

25. Dr. Flynn testified that administering a test with outdated norms is comparable to measuring a person's height with a shrunken measuring tape, resulting in a readout that the person is 6'0" tall when the person is actually 5'6" tall. [H.T. Vol. 4: 47].

26. Dr. Flynn concluded that the Flynn Effect is a scientifically valid, reliable, and observable fact. The scientific community has accepted that IQ inflation is a real phenomenon. [H.T. Vol. 4: 43, 47-48, 50-51, 74].

27. Alan Steven Kaufman, Ph.D. is one of the top scholars in the United States today on the development and interpretation of IQ tests. Dr. Kaufman is a clinical professor of psychology at the Yale University School of Medicine in the Yale Child

Studies Center and has been associated with Yale since 1997. Dr. Kaufman also is an academic research psychologist specializing in areas of educational and school psychology and is specifically trained in test development, interpretation, and research. Dr. Kaufman holds a bachelor's degree from the University of Pennsylvania, a master's degree from Columbia University, and a doctorate degree in psychology from Columbia University with a specialty of measurement research and statistics. Before joining the faculty at Yale University, Dr. Kaufman held the position of professor at the University of Georgia, the University of Alabama, and the California School of Professional Psychology. Dr. Kaufman has written more than twenty books and holds a patent for a test device related to testing the ability to process information visually on the subtest called Magic Window. Dr. Kaufman has authored over 150 articles that have been published in peer-reviewed journals. Most of these articles relate to the interpretation of intelligence tests, the structure and properties of intelligence tests, and neuropsychological tests and their application in general. Dr. Kaufman has authored 14 IQ tests and has worked in test development since 1968 when he took a position at the Psychological Corporation, which publishes the Wechsler tests. [H.T. Vol. 6: 7-10, 12].

28. Dr. Kaufman has extensive experience creating, developing, and standardizing IQ tests. Dr. Kaufman worked closely with David Wechsler, Ph.D. from 1970-1974 to revise the Wechsler Intelligence Scale for Children ("WISC") and re-standardize the test to get a new normative sample. Dr. Kaufman was

also in charge of supervising the Weschler Intelligence Scale for Children-Revised (“WISC-R”) which was published in 1974. Dr. Kaufman has written about 12 books about the Wechsler exams. [H.T. Vol. 6: 10-11].

29. One such book, ASSESSING ADOLESCENT AND ADULT INTELLIGENCE [DX 10, Elizabeth Lichtenberger & Alan Kaufman, ASSESSING ADOLESCENT AND ADULT INTELLIGENCE (3d ed. 2006)], devotes a section to the Flynn Effect that summarizes the research by Dr. Flynn and others in the field, research within the United States, research cross-cultural in nature, and integrates the findings. Dr. Kaufman has also independently, and around the same time as Dr. Flynn’s earlier research, researched norm obsolescence as well. Dr. Kaufman’s research provides persuasive evidence that the Flynn Effect is scientifically reliable. The Flynn Effect is repeatable within the United States at an average rate of three points per decade, plus or minus a small margin, from preschool children to old-age, and it has also been found for different levels of ability and using different tests and tasks both verbal and nonverbal as well as working memory. The Flynn Effect is a reliable and valid scientific finding that has been true for quite some time. [H.T. Vol. 6: 16-17].

30. Dr. Kaufman’s book, IQ TESTING 101, [DX 7, Alan Kaufman, IQ TESTING 101 (2009)] published in 2009, was written as a primer to understand the important concepts related to IQ tests. IQ TESTING 101 discusses the malleability of IQ and the newly realized fact that it is not static or constant but is constantly changing over time in accord with the Flynn Effect. Dr. Kaufman also discusses the use of IQ tests in the public domain, including a discussion of the Flynn

Effect in relation to *Atkins* cases. [H.T. Vol. 6: 17-18].

31. In his other publication, *ESSENTIALS OF WAIS-IV ASSESSMENT*, Dr. Kaufman recognizes the Flynn Effect as “well-known,” describing that “a person’s standard scores on an old test, with outdated, norms (e.g., the WAIS-III), will tend to be spuriously high. [DX 8, Elizabeth Lichtenberger & Alan Kaufman, *ESSENTIALS OF WAIS-IV ASSESSMENT* 33 (2009)].

32. Dr. Kaufman testified that based on scientific research, the Flynn Effect is scientifically valid and reliable in the United States. [H.T. Vol. 6: 38, 40].

33. Jack Fletcher, Ph.D. is a full professor in the Department of Psychology at the University of Houston. For the past thirty years he has completed research on children and adults with developmental disabilities. He received a degree in clinical psychology from the University of Florida in 1978, is a licensed psychologist in the State of Texas, and is board certified as a clinical neuropsychologist by the American Academy of Clinical Neuropsychology and American Board of Professional Psychology. At the University of Houston he teaches courses on the assessment of adults and children, including those with developmental disabilities. He also teaches advanced courses on intellectual and neuropsychological assessment. He routinely conducts assessment for mental retardation and other developmental disabilities in children and adults. He has worked with the government’s Social Security Administration as well as schools in the Houston Independent School District to evaluate intellectual functioning. He has’ specific expertise in classification and measurement issues pertaining to the diagnosis of people with disabilities. He served on the

President's Commission on Special Education, a commission that was charged by the President to review the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, in preparation for its reauthorization. Dr. Fletcher has published 200 articles in peer-reviewed journals. [H.T. Vol. 5: 7, 8, 10-13].

34. Dr. Fletcher testified that the Flynn Effect is a widely recognized discovery. He stated that the Flynn Effect is the phenomenon identified by increased scores on IQ tests where people perform at higher levels. [H.T. Vol. 5: 21].

35. Dr. Fletcher observed that the Flynn Effect is universal, and although people disagree about what causes it, nobody disputes whether it is real or not. [H.T. Vol. 5: 43]. He testified that "The Flynn Effect is a real and novel discovery. It is widely accepted around the world as an explanation for why IQ scores change over time." [H.T. Vol. 5: 77].

36. Timothy Proctor, Ph.D. is a private practitioner in forensic psychology in Dallas, Texas. Dr. Proctor received a bachelor's degree in psychology from Texas A&M University and a doctorate degree from the University of Texas Southwestern Medical Center. He also completed a post-doctoral fellowship in forensic psychology at the University of Southern California, Institute of Psychiatry, Law, and Behavioral Science and completed post-doctoral training in psychopharmacology. Dr. Proctor is board certified in forensic psychology. [H.T. Vol. 6: 77]. Dr. Proctor is not board certified in neuropsychology. Dr. Proctor devotes about one or two percent of his time attending to patients, and most of his practice relates to assessing applicants for disability benefits and



assessing applicants in the civil and criminal justice system. He has not published any articles on the Flynn Effect or on mental retardation. (H. T. Vol. 7: 68-72).\

37. Dr. Proctor, who was called by the State, testified that the Flynn Effect is real and that there are recognizable IQ gains over time. [H.T. Vol. 7: 43]. Dr. Proctor agrees with the Applicant's experts that it is the best practice to recognize the Flynn Effect. (H.T. Vol. 7:61]. Dr. Proctor further agrees with the WAIS-III/WMS III TECHNICAL MANUAL in that there is a real phenomenon of IQ inflation over time and that an examinee's IQ score will generally be higher when outdated norms are used. (H.T. Vol. 7:54].

38. Leigh Hagan, Ph.D. is a solo practitioner of clinical and forensic psychology in Virginia. He is licensed as a clinical psychologist in Virginia. Dr. Hagan received an undergraduate master's degree from the University of Virginia and a doctorate degree in counseling psychology from the University of Missouri at Columbia. He completed his postdoctoral training in Georgia. Dr. Hagan is a diplomate of the American Board of Forensic Psychology. He conducts evaluations for a number of forensic purposes. About 90%-95% of people he evaluates have a matter before the justice system. [Vol. 7: 104-109]. Dr. Hagan has testified 50 times in the last four years in *Atkins* cases, admitting that he has not found or testified that any death row inmate was a person of mental retardation. Dr. Hagan also conceded that he had prepared and provided the State's counsel with an outline of topics she should address with him. [Vol. 7: 138-139].

39. Dr. Hagan, who was called by the State, agreed that there is a "genuine statistical

observation” known as the Flynn Effect. [H. T. Vol. 7: 118]. He also acknowledged that in the WAIS-IV TECHNICAL AND INTERPRETIVE MANUAL, published by those who develop the Wechsler tests, the manual states that a group that scored 100 on the Wechsler Adult Intelligence Scale-III (“WAIS-III”) was expected to score between 96 and 98 on the Wechsler Adult Intelligence Scale-IV (“WAIS-IV”). [H.T. Vol. 7: 142]. This is unequivocal acknowledgement of the practical impact of the Flynn Effect.

40. Manuals guiding the determination of mental retardation also recognize the Flynn Effect as a real phenomenon.

41. The WAIS-III/WMS-III TECHNICAL MANUAL is authoritative and reliable. This manual recognizes the Flynn Effect and explains that “average IQ scores will gradually drift upward and give a progressively deceptive picture of an individual’s performance relative to the expected scores in his or her own age group.” [DX 13, WAIS-III/WMS-III TECHNICAL MANUAL (3d ed. 1997)] For example, “if the mean of the U.S. population on the WAIS-R was 100 in 1981, the inflation might cause it to be about 105 in 1997.” *Id.* This increase corresponds to applying the Flynn Effect’s 0.3 points inflation per year over the sixteen year period, and the conclusion of this manual is that because of the Flynn Effect, if an outdated test is given, an individual’s IQ score will be inflated. This application is a correction for the obsolescence of the norms. [H.T. Vol. 4: 43, 45-46; H.T. Vol. 6: 31].

42. The 2010 AAIDD Manual is authoritative and also supports the Flynn Effect, stating that “in cases where a test with aging norms is used a correction for the age of the norms is warranted.” [RT. Vol. 4: 73-74].

The AAIDD Manual devotes an entire page and section to the Flynn Effect, recognizing it as an increase in IQ scores over time:

The Flynn Effect refers to the observation that every restandardization sample for a major intelligence test from 1932 through 1978 resulted in a mean IQ that tended to increase over time. Flynn (1987) reported that this effect was also observed in samples from other countries.

[DX 4 at 37].

43. The Court finds that the Flynn Effect is a scientifically valid and real phenomenon.

**B. The Flynn Effect results in about 0.3 points inflation per year.**

44. It is uncontested that the experts testifying on behalf of the State and the Applicant recognized that the Flynn Effect results in about 0.3 points inflation per year or 3 points per decade.

45. Dr. Flynn testified that analysis of independently verifiable data establishes that during the World War I era, the IQ inflation rate was about 0.4 points per year, between WWI and 1972 about 0.33 points, with IQ inflation for the current generation at about 0.3 points per year. [H.T. Vol. 4: 4, 44]. IQ test data from the 1970s to the present shows that IQ gains occur at about 0.30 points per year. [H.T. Vol. 4: 41, 44, 52, 62, 66-70, 105]. Dr. Flynn stated that psychologists who submit their studies to peer-reviewed journals and correct IQ scores for the Flynn Effect in the amount of 0.3 points per year are more

often published, whereas those who submit articles to peer-reviewed journals articles and do not correct obsolete IQ tests for the Flynn Effect will not have their articles published. [H.T. Vol. 4, p. 101-102, 111]. For Wechsler tests, the 0.3 points per year average gain is consistently within the margin of error for such a number. [H.T. Vol. 4: 69-70].

46. Dr. Flynn's book, WHAT IS INTELLIGENCE?, includes a Figure AIII, with the following caption that provides further reliable support for the 0.3 point inflation per year: "Using the WISC to test whether the IQ gains of American children have been relatively uniform (about 0.30 points per year) between 1947 and 2002, and whether that has been true at all IQ levels. The three IQ levels I have chosen are 125-140 (high), 90-115 (average), and 55-80 (low). At each level, the broken line represents a gain of exactly 0.30 points per year. The solid lines show how little actual rates of gain have deviated from that value." [DX 6, James R. Flynn., WHAT IS INTELLIGENCE? (2009)].

47. Dr. Kaufman, Dr. Fletcher, and Dr. Proctor unequivocally agreed with Dr. Flynn, testifying that the Flynn Effect is roughly three points per decade or 0.3 points per year. [H.T. Vol. 6: 19; H.T. Vol. 5: 25; H.T. Vol. 6: 102-103]. Even Dr. Hagan was forced to concede that after analyzing all the available data on the Flynn Effect, including an analysis of only the Wechsler tests, the rate of gain fits tightly around 0.3 points per year. [H.T. Vol. 7: 144]. The precision of the Flynn Effect correction is supported by the preponderance of expert testimony in this case.

48. Manuals guiding the determination of mental retardation also recognize that the Flynn Effect

results in about 0.3 points inflation per year. The AAIDD Manual, which applies to all intelligence tests, finds that obsolete norms may create a problem with identifying people as having intellectual disability. [DX 4]. The AAIDD Manual specifically instructs testers to recognize the Flynn Effect in the amount of 0.33 points per year. [H.T. Vol. 4: 132].

49. As long ago as 1997, even test makers recognized correction for the Flynn Effect. The WAIS-III Technical Manual<sup>6</sup> recognizes that there is a real

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<sup>6</sup> The most updated Wechsler test is the Wechsler Adult Intelligence Scale-IV ("WAIS-IV"), published in 2008. However, it is significant that even older test manuals, including the WAISIII which was published pre-Atkins, recognized the Flynn Effect. Additionally, silence of the WAIS-IV technical manual on correction for the Flynn Effect is no evidence that scores should not be corrected for norm obsolescence when an old test is used. It is not a surprise that a manual published for a new test does not mention the Flynn Effect because such a correction is only needed when older intelligence tests are used. However, even the technical manual for the WAIS-IV provides a conversion table that shows the impact of norm obsolescence. As stated in a recent article, "Clearly publishers have acknowledged the [Flynn Effect] by renorming tests more frequently and providing validity studies and conversion tables. A publisher should not be expected to address every use of the test." Jack M. Fletcher, Karla K. Stuebing, and Lisa C. Hughes, "IQ Scores Should be Corrected for the Flynn Effect in High-Stakes Decisions," 28(5) *Journal of Psychoeducational Assessment* 469 (2010).

phenomenon of IQ inflation over time and explains that data suggests the inflation rate is 0.3 of a point per year. [H.T. Vol. 4: 48-49]. The manual states:

**Updating of Norms.** Because there is a real phenomenon of IQ:-score inflation over time, norms of a test of intellectual functioning should be updated regularly (Flynn, 1984, 1987; Matarazzo, 1972). Data suggest that an examinee's IQ score will generally be higher when outdated rather than current norms are used. **The inflation rate of IQ scores is about 0.3 point each year.**

[DX 13 at 8-9] (emphasis added).

50. Several publications on intelligence and intelligence scores recognize that the Flynn Effect results in inflation of 0.3 points per year:

- Alan Kaufman, IQ TESTING 101 203 (2009) ("After 10 years, the norms for an IQ test are 3 points out of date, and after two decades the outdatedness reaches a hefty 6 points.") [DX 7];
- Elizabeth Lichtenberger & Alan Kaufman, ESSENTIALS OF WAIS-IV ASSESSMENT 33-34 (2009) ("Overall, the Flynn Effect has shown that, on average, American children and adults have increased their scores on intelligence tests at the rate of 3 points per decade ...") [DX 8];
- Elizabeth Lichtenberger & Alan Kaufman, ASSESSING ADOLESCENT AND ADULT INTELLIGENCE 39 (3d ed. 2006)

(“As impressive as the three-point gain per decade for people in the United States has seemed to readers of Flynn’s (1984) article, the United States has outgained only two of the nations studied by Flynn (1987) ...”) [DX 10];

- James R. Flynn, “Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect,” 12 *Psychology, Public Policy, and Law* 184 (2006) (“It recommends deducting 0.3 IQ points per year from the scores of defendants for every year that passed between the date when the test was normed and the date when the test was taken.”) [DX 17];

- James R. Flynn, “The WAIS-III and WAIS-IV: *Daubert* Motions Favor the Certainly False Over the Approximately True,” 16 *Applied Neuropsychology*, 100 (2009) (“The bold highlights comparisons where either a later form of the WISC has been used to check an earlier form of the WISC or a later form of the WAIS has been used to check an earlier form of the WAIS. These show rates of gain averaging at about 0.3 points per year with admirable consistency.”) [DX 18];

- James R. Flynn & Lawrence G. Weiss, “American IQ Gains from 1932 to 2002: The WISC Subtests and Educational Progress,” 7(2) *Int’l Journal of Testing* 217 (2007) (“Taking the midpoint of the most recent estimates, the WISC gives a gain of 0.318 points for the period

between 1948 and 2002 with little variation.”) [DX 19];

- James R. Flynn, “The Mean IQ of Americans: Massive Gains 1932 to 1978,” 95(1) *Psychological Bulletin* 32 (1984) (“If we select out the eight combinations with the largest number of subjects, they evidence rates of gain whose consistency is quite remarkable, ranging from .250 points per year to .440 points, with a median of .332.”) [DX 24];

- Alan S. Kaufman, “Looking Through Flynn’s Rose-Colored Scientific Spectacles,” 28(5) *Journal of Psychoeducational Assessment* 494 (2010) (citing research conducted by Tomoe Kanaya & Stephen J. Ceci) (“The bulk of evidence suggests that the Flynn Effect is at least three points per decade for IQs in the range associated with mental retardation.”);

- Alan S. Kaufman & Lawrence G. Weiss, “Guest Editors’ Introduction to the Special Issue of JPA on the Flynn Effect,” 28(5) *Journal of Psychoeducational Assessment* 379 (2010) (“IQ gains from one generation to the next have occurred on a world-wide basis, with the American gain being three points per decade.”).

51. The Court finds that the Flynn Effect results in about 0.3 points inflation per year and that the rate of gain is sufficiently precise to be relied upon and



applied by this Court.

**C. Scores on intelligence tests should be corrected for the Flynn Effect.**

52. It is proper procedure to apply and correct intelligence scores based on the Flynn Effect because of norm obsolescence. This is supported by the AAIDD Manual, credible experts in this case, a survey of psychological practitioners, the scientific literature, and other courts.

53. In *Atkins* cases, the determination of IQ score is of ultimate importance and every method improving accuracy must be used. [H.T. Vol. 4: 93-94]. The AAIDD Manual and the User's Guide to the AAIDD affirm that "best practices require recognition of a potential Flynn Effect when older intelligence tests are used in the assessment or interpretation of an IQ score. [DX 4, AAIDD Manual and DX 12, USER'S GUIDE: MENTAL RETARDATION DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORT (10th ed. 2007) ("User's Guide:"). As stated by the User's Guide:

The main recommendation resulting from this work [regarding the Flynn Effect] is that all intellectual assessment must use a reliable and appropriate individually administered intelligence test. In cases of tests with multiple versions, the most recent version with the most current norms should be used at all times. **In cases where a test with aging norms is used, a correction for the age of the norms is warranted.**

[DX 12, User's Guide at 20-21] (emphasis added). The

AAIDD Manual is the leading guide for those giving intelligence tests. It is the product of years of preparation and review for leading practitioners in the field, rather than one company that publishes and sells a certain intelligence test. Earlier versions of this manual are cited in *Atkins* and *Briseno*. See, e.g. *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004) (applying the definition of mental retardation used by the American Association of Mental Retardation, predecessor to the AAIDD).

54. The WAIS-III Technical Manual also recognizes the need to correct scores for the Flynn Effect:

Regardless of the reasons for these changes in test performance, periodic updating of the norms is essential; otherwise, **average IQ scores will gradually drift upward and give a progressively deceptive picture of an individual's performance** relative to the expected scores in his or her own age group.

[DX 13, WAIS III/WMS-III TECHNICAL MANUAL at 9] (emphasis added).

55. Dr. Flynn, in his article “Tethering the Elephant” also describes that “Failure to adjust the scores [for the Flynn Effect] is to take flight from reality.” [DX 17, James R. Flynn, “Tethering the Elephant: Capital Cases, IQ~ and the Flynn Effect, 12 *Psychology, Public Policy, and Law* 170 (2006)]. Dr. Flynn advocates correcting scores by the following: “for every year between the year when a person took

a test and the year when the test was normed, deduct 0.3 IQ points from the IQ score.” [DX 18, James R. Flynn, “The WAIS-III and WAIS-IV: *Daubert Motions* Favor the Certainly False Over the Approximately True,” 16 *Applied Neuropsychology*, 100 (2009)].

56. Dr. Kaufman supports the AAIDD Manual’s scientific opinion that it is good practice to apply the Flynn Effect in instances where one is not able to use a recently normed test. [H.T. Vol. 6: 23].

57. Applying the Flynn Effect to an individual test score to correct for norm obsolescence is a method for ensuring that the individual is evaluated against an accurate normative basis. [H.T. Vol. 6: 31]. Dr. Fletcher testified that it is probably an error to conceptually think about the Flynn Effect as an adjustment of an individual IQ score. The Flynn Effect is actually a correction of the normative base, the denominator, the ruler against which the attained score is compared, and as such, a practitioner does not adjust the score itself but rather corrects the normative basis against which the score is compared because that normative base has shifted. [H.T. Vol. 5: 78-79].

58. Dr. Proctor testified that it is important for him to follow the procedures of the IQ test manuals, and he relies on them. [H.T. Vol. 6: 161, H.T. Vol. 7:37-38]. Dr. Proctor agreed with the WAIS-III Technical Manual that if test administrators give a test with outdated norms, then the resulting IQ score could be deceptively high. [H.T. Vol. 7:43]. If future test manuals advise practitioners to apply the Flynn Effect, Dr. Proctor would do so. [H.T. Vol. 7:41]. Dr. Proctor testified he understands that it is generally accepted practice to update norms and that one should

not just “accept” an IQ score with an eighteen-year-old normative basis. [H.T. Vol. 7:56]. Indeed, Dr. Proctor also testified that one of the principal reasons why IQ tests are renormed is because of the Flynn Effect. [H.T. Vol. 7: 21].

59. Dr. Proctor’s support for his opinion that it is inappropriate to take the Flynn Effect into account when calculating IQ scores is not persuasive. Dr. Proctor testified that the Flynn Effect is somehow encompassed by the standard error of measurement but also conceded that there is no support in the literature for this opinion. He has not authored any articles on the subject let alone on mental retardation. [H.T. Vol. 7: 63, 39, 40, 58, 59].

60. Dr. Greg Olley, chair of the division 33 American Psychological Association Committee on mental retardation and the death penalty, conducted a study in the spring of 2008 of a targeted population to obtain information about the current forensic practices of psychologists. [DX 47]. Dr. Olley sent a survey to approximately fifty educators and forensic psychologists who were nominated by his Committee based on their experience in mental retardation and forensic psychology. Dr. Olley received thirty-five responses. Dr. Hagan testified that he himself participated in the Olley survey. [H.T. Vol. 7: 167]. Eighty-five percent of the respondents were psychologists. When asked whether the Flynn Effect is a real occurrence, 91.2% responded yes. Dr. Hagan testified that he would have answered yes to this question. [H.T. Vol. 7: 169]. When asked whether correcting an obtained IQ score would be justified to account for the Flynn Effect, 87.5% responded yes. [DX 47]. The Court finds Dr. Olley’s survey reliable

evidence that correction for the Flynn Effect is recognized and accepted by practicing forensic psychologists in the area of mental retardation.

61. Dr. Hagan also conducted a survey in 2007 and found that applying the Flynn Effect was not the proper and trusted convention and custom in psychology. [H.T. Vol. 7: 120, SX 20]. Dr. Hagan surveyed twenty-eight directors of doctoral training programs approved by the American Psychological Association and board-certified school psychologists. [SX 20]. The survey relied on recognition of fourteen texts, four of which were authored by Dr. Kaufman, who testified that he advocates correction for the Flynn Effect. [H.T. Vol. 7: 158]. The survey did not include manuals such as the AAIDD, which have explicitly recommended correcting IQ scores for norm obsolescence. The survey also did not consider whether and how many of the respondents had evaluated convicted criminals, and Dr. Hagan conceded that the school psychologists included in his survey typically do evaluations in the education system only, having no experience with *Atkins* claims and applicants. [H.T. Vol. 7: 160]. Dr. Hagan also admitted that the directors of clinical training programs he surveyed received their training and education far before the Flynn Effect was discovered. [H.T. Vol. 7: 167]. The Court finds Dr. Hagan's findings unpersuasive because the sample of practitioners he surveyed lacked the expertise and proper knowledge to address recognition of the Flynn Effect in *Atkins* cases.

62. The Court finds that correction of IQ test scores for norm obsolescence is warranted. By way of example, the Court finds the hypothetical presented

on cross-examination to State's expert, Dr. Hagan, convincing. Dr. Hagan was asked to assume that two identical brothers, Joe and Jerry, have identical intellectual functioning. Joe took an intelligence test on January 1 of any given year, and Jerry took an intelligence test similar in content on February 1 of the same year, a month later. In the intervening time period, a new IQ test was published so Jerry took a new test with new norms. Both Joe and Jerry answered 50 questions correct. Joe scored a 73, and Jerry scored a 70, although both took the same test with the same items. Dr. Hagan argued that the difference in scores was due to Jerry taking a different measure and denied that the difference in scores resulted from obsolete norms. [H.T. Vol. 7: 147-148]. The Court disagrees and finds that obsolete norms may account for difference in IQ scores as presented by this example.

63. Several experts in the field of mental retardation have published articles that advocate application of the Flynn Effect to correct for norm obsolescence:

- Stephen Greenspan, "Issues in the Use of the 'Flynn Effect' to Adjust Scores When Diagnosing MR," 31(3) *Psychology in Mental Retardation and Developmental Disabilities* (2006) ("Given that mild [mental retardation] is still a somewhat-inadequately defined category, it is important to err in very close cases on the side of being overly inclusive, especially given the potentially fatal consequences of a false negative diagnostic conclusion. Use of

the Flynn Effect is a useful, and valid, method for increasing the likelihood that a psychologist will correctly diagnose [mental retardation] in someone deserving of that label.”) [DX 26];

- James R. Flynn, “The WAIS-III and WAIS-IV: *Daubert Motions* Favor the Certainly False Over the Approximately True,” 16 *Applied Neuropsychology*, 100 (2009) (“I advocate adjusting WISC and Wechsler Adult Intelligence Scale (WAIS) scores as follows: for every year between the year when a person took a test and the year when the test was normed, deduct 0.3 IQ points from the IQ score.”) [DX 18];

- James R. Flynn, “Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect,” 12 *Psychology, Public Policy, and Law* 174-75 (2006) (“Failure to adjust IQ scores in the light of IQ gains over time turns eligibility for execution into a lottery ...”) [DX 17];

- John H. Blume, Sheri Lynn Johnson & Christopher Seeds, “Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases,” 18 *Cornell J. L. & Pub. Pol’y* 689, 711-714 (2009) (“Due to the Flynn effect, IQ scores must be adjusted to take into account when the IQ test was taken in relation to when the test was re-normed. As with the practice effect, failure to take

the Flynn effect into account results in an artificially high IQ score.”) [DX 15];

- Jack M. Fletcher, Karla K. Stuebing, and Lisa C. Hughes, “IQ Scores Should be Corrected for the Flynn Effect in High-Stakes Decisions,” 28(5) *Journal of Psychoeducational Assessment* 469 (2010) (“IQ test scores should be corrected for high-stakes decisions in which a test with older norms is invoked as evidentiary support in the decision-making process. This could include not only Atkins cases involving capital offenses and the death penalty but also intellectual disability (ID) decisions involving social security eligibility or special education where eligibility hinges on a specific score or range of scores.”);

- Cecil R. Reynolds, John Niland, John E. Wright, and Michael Rosenn, “Failure to Apply the Flynn Correction in Death Penalty Litigation: Standard Practice of Today Maybe, but Certainly Malpractice of Tomorrow,” 28(5) *Journal of Psychoeducational Assessment* 4 77 (2010) (“As a generally accepted scientific theory that could potentially make the difference between a constitutional and unconstitutional execution, the [Flynn Effect] must be applied in the legal context.”).

64. Courts across several jurisdictions have also recognized and approved of correction for the Flynn



Effect in evaluating intelligence scores in death penalty cases:

- *Ex Parte Sosa*, No. W2-7729A (81st/218th Judicial District, Atascosa County, Texas, Feb. 10, 2011) (entering findings of fact and conclusions of law that recognize the Flynn Effect, stating that “[i]n the United States, the average IQ of the population increases .3 points per year, or 3 points every 10 years.”);
- *Thomas v. Allen*, No. 09-12869, 2010 U.S. App. LEXIS 10836, \*1, \*8 (11th Cir. May 27, 2010) (stating that the Flynn Effect is a well-supported, “empirically proven statistical fact,” tested through peer review and recognized and accepted by professional communities and holding that a court must account for the Flynn Effect when determining whether an IQ score falls within the mental retardation range and that a court should not view a raw, unadjusted IQ score as precisely measuring true);
- *Holladay v. Allen*, 555 F.3d 1346, 1358 (11th Cir. 2009) (“Moreover, all of the scores were on the WAIS tests, which may have reflected elevated scores because of the Flynn Effect.”);
- *Walker v. True*, 399 F.3d 315, 323 (4th Cir. 2005) (finding district court erred when it failed to consider the validity of defendant’s Flynn Effect evidence and

ordering that Flynn Effect evidence be considered on remand);

- *United States v. Davis*, 611 F. Supp. 2d 472, 485-88 (E.D. Md. 2009) (“[T]he Court finds the defendant’s Flynn Effect evidence both relevant and persuasive, and will, as it should, consider the Flynn-adjusted scores in its evaluation of the defendant’s intellectual functioning.”);

- *Wiley v. Epps*, 668 F. Supp. 2d 848, 894-95 (N.D. Miss. 2009) (taking into consideration the obsolescence of test norms in weighing the evidence on intellectual functioning);

- *People v. Superior Court of Tulare County*, 155 P.3d 259, 263 n. 4 (Cal. 2007) (recognizing that “[t]he Flynn effect is the observed tendency of mean scores on a given IQ test to increase slowly over time.”);

- *United States v. Parker*, 65 M.J. 626, 629 (N.M. Ct. Crim. App. 2007) (finding that the Flynn Effect is to be considered when evaluating a defendant’s IQ);

- *Williams v. Campbell*, No. 04-0681-WS-C, 2007 U.S. Dist. LEXIS 27050 (S.D. Ala. Apr. 11, 2007) (holding that the Flynn Effect could potentially render IQ scores unreliable);

- *Green v. Johnson*, 431 F. Supp. 2d 601, 610 (E.D. Va. 2006) (stating that evaluation of mental retardation purposes requires considerations other

than whether the score of above or below 70, including consideration of the Flynn Effect).

65. The Court finds that correcting intelligence scores for the Flynn Effect is proper procedure, supported by peer-reviewed scientific literature, other courts, and by a preponderance of the expert testimony and evidence presented to this Court.

**D. Correction for norm obsolescence is separate than the application of the standard error of measurement.**

66. IQ scores, separate and apart from the Flynn Effect, must account for measurement error. All psychometric tests, even when they are reliable, like the Wechsler test, have a small amount of measurement error that is typically expressed in terms of standard errors of measurement. [H. T. Vol. 5: 4 7]. Dr. Fletcher testified that the standard error of measurement is based on an index of variability around each person's average score. The error must be standardized to get the standard deviation, and the standard error of measurement is computed by the standard deviation and the square root of the sample size. [H.T. Vol. 5:48]. Generally, two standard measurement errors are used to create a 95 percent confidence interval, equating to about five points. The convention is to express this as a range that is five points on either side, plus or minus. *Id.*

67. The State's experts' conclusion that the standard error of measurement already accounts for the Flynn Effect is incorrect. Correction for the Flynn Effect applies to the norms of tests. The standard error of measurement applies to the observed test

score and is a statistical analysis. Even if the scores increase, there is no effect on the standard deviation of the test (usually fifteen points) and has no effect on the standard error of measurement because the entire distribution of test scores shifts and are higher than when originally normed. Thus, applying the convention that indicates an average IQ is 100 and two standard deviations below the mean indicates significantly subaverage IQ, would require scores of 103 and 73 on a ten year old test, 106 and 76 on a 20 year old test, and so on to show mental retardation. Dr. Fletcher testified that the Flynn Effect cannot possibly be part of the standard error of measurement, and Dr. Proctor could not cite to any authority to support his contrary conclusion. [H.T. Vol. 7: 202].

68. Dr. Flynn described the norming of tests to measuring height with a measuring tape. He stated that each test has a reference group that sets the norms and is a tape measure. The measuring tape tells a person whether an individual is of average height, meaning having an intelligence score of 100, or whether a person is a bit above average, having an intelligence score of 115, or whether a person is below average. The norm is "the tape measure for actually giving the IQ scores." [H.T. Vol. 4: 44-46]. Dr. Flynn also explained that if an older test is used, the score may be deceptive. For example, he explained that if a person left a tape measure out in the rain, it may shrink. If the same tape measure was used after it became obsolete, the height that was measured would be incorrect. [H.T. Vol. 4: 47].

69. Also supportive, the AAIDD Manual discusses the Flynn Effect and the standard error of measurement as two separate issues in two separate

sections. [H.T. Vol. 7: 204]. The AAIDD Manual, on page 37, recognizes the Flynn Effect as an “observation that every restandardization sample for a major intelligence test from 1932 through 1978 resulted in a mean IQ that tended to increase over time. [DX 4, AAIDD Manual at 37]. On the other hand, the AAIDD Manual, on page 36, states the standard error of measurement “is used to quantify [a] variability and provide a stated statistical confidence interval within which the person’s true score falls.” [DX 4, AAIDD Manual at 36].

70. The Court finds that application of the Flynn Effect is separate than an adjustment for the standard error of measurement.

**E. The Flynn Effect is applied by clinical practitioners to individual test results and is also accepted outside the criminal justice system.**

71. Practitioners outside the criminal justice system apply the Flynn Effect. [H.T. Vol. 6: 39]. Dr. Fletcher testified that practitioners who are experts in the area of mental retardation consider and apply the Flynn Effect in determining whether individuals are eligible for Social Security benefits or special education in the school system. [H.T. Vol. 5: 21].

72. The red book, the User’s Guide, [DX 12], applies to clinical practitioners and is an attempt to make it clear to clinical practitioners how they should apply the AAIDD Manual. [H.T. Vol. 5:25]. The User’s Guide advocates the practice of correcting for aging norms by applying the Flynn Effect. [DX 12, User’s Guide at 20-21]. In a list of guidelines for clinical practitioners, the guide specifically instructs clinical

practitioners to make a correction for the age of the norms:

The main recommendation resulting from this work is that all intellectual assessments must use a reliable and appropriate individually administered intelligence test. In cases of tests with multiple versions, the most recent version with the most current norms should be used at all times. **In cases where a test with aging norms is used, a correction for the age of the norms is warranted .... Thus the clinician needs to use the most current version of an individually administered test of intelligence and take into consideration the Flynn Effect as well as the standard error of measurement when estimating an individual's true IQ score.**

*Id.* (emphasis added)

73. Applying the Flynn Effect to correct for norm obsolescence, including to individual test results, is generally accepted scientific procedure in the pertinent professional community outside the criminal justice system, which includes psychologists, clinical school psychologists, neuropsychologists, researchers, and test consumers. [H.T. Vol. 6: 39].

74. Dr. Fletcher testified that “you will find people discussing the Flynn Effect in estimating it 0.3 . points per year in virtually any major textbook or treatise on intellectual assessment.” [H.t. Vol. 5: 27].

**1. Application of the Flynn Effect in  
determining disability in the school  
system**

75. One of the categories and eligibility criterion under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400, is mental retardation. The IDEA is a federal special education law that applies to all fifty states in terms of determination of disability. Under the IDEA, mental retardation is analyzed using a three-pronged definition, similar to that set out in the AAIDD Manual. Dr. Fletcher testified that there are several examples of where the states implement the IDEA and consider the problem of using obsolete norms and the misdiagnosis of mental retardation because of inflated scores. [H.T. Vol. 5: 33]. The federal statutes, however, do not specify any criteria to be used. The states take what Congress passes and then translate that into standards. Dr. Fletcher testified that the federal statutes would not discuss the Flynn Effect, but in practice, it is a consideration. [H.T. Vol. 7: 206].

76. Dr. Fletcher testified that special education benefits in schools depend on correction for the Flynn Effect. Practitioners recognize that obsolescence of old norms is an issue. The Weschler Intelligence Scale for Children-Revised (“WISC-R”), for example, for a time, gave inflated scores, and as a consequence, children who might have received special education benefits when assessed with the WISC-R, would not receive them. Obsolescence is particularly an issue in schools because school districts cannot always afford to purchase the newest and latest versions of an IQ test. [H.T. Vol. 5: 34]. It is proper for school districts that use outdated IQ tests to correct scores in accordance

with the Flynn Effect. [H.T. Vol. 6: 26].

77. Dr. Fletcher elaborated that when he served on the President's Commission for Special Education, the Commission would hold hearings on the costs of assessment. The cost of administering tests to determine whether or not a child was eligible for special education benefits ranged from \$800 to \$8,000 and the average was about \$4,500 per child. A kit for the Wechsler, for example, costs over \$1,000 with the hard case, and a school must then buy manuals and response booklets. [DX 36, Price Sheet for Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) and DX 37, Price Sheet for Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV); H.T. Vol. 5: 38].

78. Concerns about costs of purchasing new intelligence tests are also voiced in peer-reviewed journals. For instance, in the article, "Are All IQ Scores Created Equal? The Differential Costs of IQ Cutoff Scores for At-Risk Children," authors Tomoe Kanaya, Ph.D. and Stephen J. Ceci, Ph.D. write "Replacing old IQ norms with new (more accurate) norms, however, is an expensive and slow process. Faced with a cost of approximately \$1,000 per testing kit and the need to purchase many such kits, school districts can adopt a new IQ norm as quickly as their budgets allow." [DX 27, Tomoe Kanaya and Stephen J. Ceci, "Are All IQ Scores Created Equal? The Differential Costs of IQ Cutoff Scores for At-Risk Children," 1(1) *Child Development Perspectives* 52 (2007)]. The recommendation of these authors was that there be a correction for obsolete norms by school systems. *Id.*

79. In a commentary to the article authored by



Tomoe Kanaya and Stephen J. Ceci, Keith Widaman, in his article “Stalking the Roving IQ Score Cutoff: A Commentary on Kanaya and CeCi (2007)” agreed that the Flynn Effect is a proper correction in the education system:

If Flynn-effect adjustments can dampen improper score fluctuations due to aging norms and thereby smooth out the proportions of students receiving IQs of 70 or below, I think adjustments should be used; in fact, it would be inappropriate to do so. This “quick fix” is admittedly imperfect and should be monitored by continuing research to ensure that it has no unintended negative consequences. **Nonetheless, use of Flynn-effect adjustments, however imperfect, is likely to have fewer negative consequences than would the failure to use such adjustments.**

[DX 32, Keith Widaman, “Stalking the Roving IQ Score Cutoff: A Commentary on Kanaya and Ceci (2007)” *Child Development Perspectives* 57 (2007)] (emphasis added).

80. Drs. Kanaya and Ceci reasserted their position very recently in a 2010 article by stating that “IQ scores play a major role in determining the educational experiences and opportunities provided to a child (and the costs incurred by the schools to implement these special education services) throughout his or her school years.” Stephen J. Ceci and Tomoe Kanaya, “‘Apples and Oranges Are Both Round’: Furthering the Discussion on the Flynn

Effect,” 28(5) *Journal of Psychoeducational Assessment* 441, 444 (2010) (stating there is a higher likelihood for the Flynn Effect to have an impact on a child’s special education diagnosis).

81. Dr. Kaufman concurred in his testimony. He explained that during one of his lectures at Yale University, a school psychologist who attended the lecture commented that his school district has had a money freeze for years where updated versions of the different intelligence tests are not available. Dr. Kaufman responded that the psychologist should use the best test available, but if the only test available is an outdated one, then correction for the Flynn Effect should be made at three points per decade. [H.T. Vol. 6: 27].

82. The Court finds application of the Flynn Effect in determining special education benefits persuasive evidence that clinical practitioners use the Flynn Effect outside of the criminal justice system.

## **2. Application of the Flynn Effect in determining eligibility for Social Security disability benefits**

83. The Flynn Effect is recognized by the United States government. In the Social Security benefits guide, MENTAL RETARDATION, DETERMINING ELIGIBILITY FOR SOCIAL SECURITY BENEFITS, prepared by the Committee on Disability Determination for Mental Retardation [DX 11], authors advise and discuss the Flynn Effect:

Research suggests that **intelligence in the entire population increases at a rate of approximately 3 IQ points per decade**, which approximates the

standard error of measurement for most comprehensive intelligence tests. Thus, tests with norms older than 10 to 12 years will tend to produce **inflated scores** and could **result in the denial of benefits to significant numbers of individuals** who would be eligible for them if more recent norms had been used. Disability examiners who use tests with outdated norms may be **systematically if unintentionally denying benefits** to those who are legally entitled to them. **The examiners also risk losing their licenses for ethical violations of the their professional codes.**

[DX 11, National Research Council, MENTAL RETARDATION, DETERMINING ELIGIBILITY FOR SOCIAL SECURITY BENEFITS (2002) at 123 (emphasis added); H.T. Vol. 5: 30].

84. Dr. Fletcher testified he has applied the Flynn Effect in determining whether individuals have mental retardation and therefore qualify for benefits through the Social Security Administration. For example, he administered an IQ test to an individual, and after determining that his IQ was in the range associated with mental retardation, he also administered an adaptive behavior assessment. Dr. Fletcher further examined the individual's school records, and the records indicated there were difficulties, although the individual was not in special education for mental retardation but for behavior problems. The IQ test that was given, the Wechsler Intelligence Scale for Children-Revised ("WISC-R"), was about fourteen or fifteen years old, and Dr.

Fletcher testified that under these circumstances, he applied the Flynn Effect. [H.T. Vol. 5: 28-29].

85. Dr. Proctor agreed that when determining Social Security benefits, if intelligence tests with older norms are administered, a significant number of individuals will be denied benefits who would otherwise be eligible because of “inflated” scores. [H.T. Vol. 7: 70]. Once again, this is agreement by the State’s own experts that the Flynn Effect cannot be ignored.

86. The Court finds application of the Flynn Effect in determining Social Security benefits persuasive evidence that clinical practitioners use the Flynn Effect outside of the criminal justice system.

**F. The known error rate of the Flynn Effect.**

87. In their professional opinions, both Dr. Flynn and Dr. Kaufman viewed error rates associated with correcting individual scores as a misunderstanding of the application of the Flynn Effect. Correcting for the Flynn Effect is not a question of modifying individual scores; instead, it is a question of adjusting the normative basis of the test, which has been altered by the rise overall in intelligence scores of about three points per decade. Therefore, the need to reflect accurately the individual’s test score is a need to understand how the norms have changed. [H.T. Vol. 6: 41-42]. For instance, an average IQ score when the test is normed is 100, but the average will be 103 a decade later because of norm obsolescence. Correcting the individual score when a test with aging norms is used corrects for norm obsolescence. Otherwise, standards for the determination of mental retardation would have to increase by three points each decade. In

the example given above, the score associated with mental retardation on a ten year old test would be 73.

88. On the issue of error rate at the evidentiary hearing, Dr. Fletcher presented assessments completed by his research team, which were later published, Jack M. Fletcher, Karla K. Stuebing, and Lisa C. Hughes, "IQ Scores Should be Corrected for the-Flynn Effect in High Stakes Decisions," 28(5) *Journal of Psychoeducational Assessment*, 494 (2010), that showed that across Wechsler/Binet tests, the measurement error associated with the Flynn Effect of three points per decade is plus or minus one on either side of that confidence interval. [H.T. Vol. 5: 46].

89. Dr. Fletcher testified that this error rate is minimal given that the average norm obsolescence is consistently found to be about 0.3 points per year accounting for different ages, ability levels, and even different types of tests such as Wechsler, Binet, or Kaufman. [H.T. Vol. 6: 42]. The amount of variability around the average amount of change is small given the size of the mean difference. It is generally larger at lower levels of IQ so 0.3 points per year is a conservative estimate.

90. Dr. Fletcher's published study and related testimony demonstrated that the 95% confidence intervals for the Flynn Effect using the 14 studies identified by Dr. Flynn as contemporary comparisons of Wechsler and Binet scales is 2.50 to 3.09, with a weighted mean of 2.80, close to Flynn's unweighted average of 2.99. Dr. Fletcher testified and concluded in his article that the error rate is roughly plus or minus one point per decade, which is sufficiently precise for a correction for the Flynn Effect. Jack M.

Fletcher, Karla K. Stuebing, and Lisa C. Hughes, “IQ Scores Should be Corrected for the Flynn Effect in High-Stakes Decisions,” 28(5) *Journal of Psychoeducational Assessment*, 494 (2010).

91. Dr. Fletcher’s opinion was also based on the WAIS-IV TECHNICAL AND INTERPRETIVE MANUAL. [DX 14, David Wechsler, WAIS-IV TECHNICAL AND INTERPRETIVE MANUAL 77 (4d ed. 2008), Table 5.6]. The creators of the manual gave both the WAIS-III and WAIS-IV to about 240 people. The ranges included on Table 5.6 in the manual were 95 percent confidence intervals updated for examinees administered both tests in counterbalanced order. Dr. Fletcher testified that the scores were corrected by three points plus or minus one on either side of the confidence interval. [H.T. Vol. 5: 45-47].

92. The State’s expert Dr. Hagan agreed that there is a known or potential error rate for the Flynn Effect. [H.T. Vol. 7: 118]. Dr. Proctor made no mention of the error rate. Because the State did not provide further evidence or any explanation as to the error rate, the Court finds the State’s evidence lacking and unsubstantiated and finds Dr. Fletcher’s testimony credible.

93. The Court finds that there is a known error rate for the Flynn Effect of 0.1 per year and that the proposed correction of 0.3 points per year is sufficiently precise to be applied.

**V. PRONG ONE: “SIGNIFICANTLY  
SUBAVERAGE” GENERAL  
INTELLECTUAL FUNCTIONING**

94. Mr. Cathey’s IQ score establishes that he has “significant limitations” in intellectual functioning or

“significantly subaverage” general intellectual functioning.

**A. IQ Test Administered by Dr. Yohman in 1996**

95. Dr. J. Robert Yohman, a licensed Texas psychologist with specialty certification in clinical neuropsychology, administered the Wechsler Adult Intelligence Scale-Revised (“WAIS-R”) to Mr. Cathey on December 26, 1996. Mr. Cathey’s scaled score on that test was a 77. [DX 40]. Dr. Yohman made no correction to Mr. Cathey’s score for the Flynn Effect. If the Flynn Effect is taken into account, along with the standard error of measurement, Mr. Cathey’s true IQ score falls within the range necessary for diagnosing mental retardation.

**1. Applying the Flynn Effect and the standard error of measurement**

96. To apply the Flynn Effect to Mr. Cathey’s score of 77, Dr. Fletcher testified that an estimate of the age of the normative sample must first be calculated. The WAIS-R, administered by Dr. Yohman in 1996, was normed in 1978. At the time it was administered to Mr. Cathey, the norms for the WAIS-R were eighteen years old. Dr. Fletcher stated that to apply the Flynn Effect in this case, a practitioner must multiply 0.3 by eighteen, which is 5.4 points. Correcting the full-scale score of 77 for the Flynn Effect results in a score of 71.6. [H.T. Vol. 5: 43].

97. Dr. Proctor conceded that there is some inflation in Mr. Cathey’s score of 77 and that the Flynn Effect has had an impact on the score. [H.T. Vol. 7: 29]. Dr. Proctor also submitted that were he asked to correct the score of 77 for the Flynn Effect, he would

multiply 0.3 by eighteen years for a correction of 5.4 points, computing the score to a 71.6, the same procedure and result testified to by Dr. Fletcher. [H.T. Vol. 7:64].

98. Dr. Fletcher testified that the standard error of measurement must be applied to the score of 71.6, calculating a range of 66.6 to 76.6, after accounting for the five points of measurement error. [H.T. Vol. 5: 49].

99. The Court finds that this range and score, corrected for the Flynn Effect and the standard error of measurement, is within the range of mental retardation, as defined by authoritative treatises. [DX 4, AAIDD Manual and DX 5, DSM-IV].

## **2. Reliability of Dr. Yohman's Score**

100. Mr. Cathey's full scale score of 77 on the WAIS-R administered by Dr. Yohman is reliable and credible for the purpose of determining that Mr. Cathey has "significant limitations" in intellectual functioning or "significantly subaverage" general intellectual functioning. Dr. Yohman is a licensed psychologist in Texas with specialty certification in clinical neuropsychology and is a diplomate of the American Board of Professional Psychology and American Board of Clinical Neuropsychology. He has been licensed to practice in the state of Texas since 1998. [DX 40]. Dr. Yohman administered the WAIS-R in the Harris County jail under acceptable conditions. [DX 48, Trial Transcript, Vol. 23: 16]. The Court finds Dr. Yohman was qualified to administer the intelligence test and that the test was scored correctly.

101. Because Dr. Yohman's score is reliable and based on sound methodology, the Court finds there was no need to retest Mr. Cathey for purposes of the



evidentiary hearing. The State had opportunity and good reason to administer an IQ test to Mr. Cathey in 1996, and it failed to do so. Additionally, the State was given the right to fully cross-examine Dr. Yohman and his testing methodology at the punishment phase of Mr. Cathey's trial, and it has not ever questioned or objected to the validity of the test, Dr. Yohman's qualifications, or Mr. Cathey's score of 77. Because Mr. Cathey's experts relied on Dr. Yohman's score during the evidentiary hearing and did not present testimony based on a new intelligence test, retesting was not necessary.<sup>7</sup> See *Lagrone v. State*, 942 S.W.2d 602, 610-11 (Tex. Crim. App. 1997) (holding that when the defense intends to produce expert testimony, "trial courts may order defendants to submit to an *independent, state-sponsored* psychiatric exam ...") (emphasis added).

102. Dr. Fletcher testified that examining Mr. Cathey with another IQ test would not add to his ability to identify him with or without mental retardation. [H.T. Vol. 5: 112-113]. Dr. Fletcher stated that his opinion of mental retardation is valid and reliable regardless of the fact that he did not interview or retest Mr. Cathey. [H.T. Vol. 5: 88]. Although the Psychologist Licensing Act includes a provision on the

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<sup>7</sup> The State should be collaterally stopped from objecting now to Dr. Yohman's testing and score because it failed to object on these grounds at Mr. Cathey's trial. The issue of cognitive disability was placed before the jury during the punishment phase of trial, and the State had ample reason, at that time, to request testing of Mr. Cathey. Any retesting of Mr. Cathey now raises issues under the Fifth and Sixth Amendments, as well as the Fourteenth Amendment, that protect a defendant from the State's effort to interrogate him without his consent. *Fields v. State*, 627 S.W.2d 714, 718 (Tex. Crim. App. 1982).

need to examine an individual before rendering an opinion on mental retardation, Dr. Fletcher testified it was understood that he did not examine Mr. Cathey and that it was not necessary for his conclusion given the circumstances. [H.T. Vol. 5: 86-88].

103. Further, Dr. Kaufman, an expert in IQ testing and methodology, whose testimony was not rebutted by the State, testified that IQ test norms are not appropriately applicable to individuals whom have been incarcerated for as many years as ten, twelve, or fourteen years because the normative sample does not include a person who has been incarcerated for that long. Makers of IQ tests do not include incarcerated individuals in their sampling for determining norms. Therefore, Dr. Kaufman testified that it would not be proper procedure to test an inmate, like Mr. Cathey, unless no other test was available. Further, Dr. Kaufman stated that because intelligence tests are not accurate when administered to inmates who have been incarcerated for several years, it is best practice to rely on a valid IQ score obtained before the inmate was on death row for nearly fourteen years. [H.T. Vol. 6: 35-37]. Here, Dr. Yohman's administration of the WAIS-R to Cathey, after he was imprisoned only for a few months, was accurate, and the Court finds the full-scale score of 77 reliable, before a Flynn Effect correction.

#### **B. IQ Test Administered by the TDCJ**

104. Mr. Cathey's tests scores from the intake assessment at the Polunsky Unit lend further weight and reliability to the determination that Mr. Cathey meets the first prong of mental retardation. [DX 57, Texas Department of Criminal Justice ("TDCJ")]

Service Investigation Worksheet].

105. A 1998 Service Investigation Worksheet included in the TDCJ records indicated Mr. Cathey had an “EA score below 5 and an IQ below 73.” [DX 57, TDCJ Service Investigation Worksheet; H.T. Vol. 8:63]. Captain Bryant, captain at the Polunsky Unit where Mr. Cathey is housed, testified that inmates undergo a psychological assessment at intake. He verified that the official TDCJ record in Mr. Cathey’s file and in the State’s own records indicated that Mr. Cathey had an IQ below 73. [H.T. Vol. 8:63].

106. The State learned of this test score for the first time at the evidentiary hearing, and this pre-*Atkins* IQ score, although found in the records the State produced, was not provided to or relied on by its experts. [H.T. Vol. 8: 92-93].

107. Dr. Yohman’s score, corrected for the Flynn Effect, is lent further weight and reliability by the TDCJ finding independently that Mr. Cathey had an “EA score below 5 and an IQ below 73.”

#### **VI. PRONG TWO: SIGNIFICANT LIMITATIONS IN ADAPTIVE BEHAVIOR**

108. According to the AAIDD Manual, “[s]ignificant limitations in adaptive behavior are established through the use of standardized measures and, like intellectual functioning, significant *limitations in adaptive behavior* are operationally defined as performance that is appropriately two standard deviations below the population average on one of the three adaptive skills domains of conceptual, social, or practical.” [DX 4, AAIDD Manual at 47]. Adaptive behavior measures what a person actually does on a habitual everyday basis and not what they

are capable of doing. [H.T. Vol. 7: 185]. The DSM-IV recognizes that people with mild mental retardation, “[b]y their late teens ... can acquire academic skills up to approximately the sixth grade level. During their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance ... “ [DX 5 at 41]. The focus of an adaptive behavior assessment, therefore, is “on documenting the individual’s deficits, not his strengths,” [DX 29, J. Gregory Olley, “Knowledge and Experience Required for Experts in Atkins Cases,” 16 *Applied Neuropsychology* 135-140 (2009)], and the “focus in evaluations and ultimately adjudications under the adaptive prong must remain focused on the individual’s limitations, rather than any skills he or she may also possess.” [DX 16, James Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11 (2003)].

109. Dr. Fletcher described the three major domains: conceptual, social, and practical. A person meets the definition of mental retardation for the adaptive behavior prong if there is a deficiency in one of these areas or if the composite score across the three areas is deficient. [H.T. Vol. 5: 52].

110. There are standardized measures that are commonly used, including the Vineland Adaptive Behavior Scales (“Vineland”), the Adaptive Behavior Scales (ABS), the Scales of Independent Behavior, the Comprehensive Test of Adaptive Behavior-Revised, and the Adaptive Behavior Assessment System-II (ABAS). The AAIDD Manual advises that an administrator should obtain information regarding the individual’s adaptive behavior “from a person or

persons who know the individual well. Generally, individuals who act as respondents should be very familiar with the person and have known him/her for some time and have had the opportunity to observe the person function across community settings and times. Very often, these respondents are parents, older siblings, other family members, teachers, employers, and friends.” [DX 4, AAIDD Manual at 47].

111. Dr. Fletcher testified that practitioners generally do not, and should not, assess criminal behavior as part of the criterion for an adaptive behavior problem. He described incarceration as “a highly structured and very atypical social situation.” Criminal behavior and facts of the underlying crime are not used to identify adaptive behavior weaknesses because this is evidence of maladaptive behavior, and adaptive behavior and maladaptive behavior are entirely different phenomenon. [H.T. Vol. 5: 74-75]. Dr. Proctor agreed with Dr. Fletcher that adaptive behavior and maladaptive behavior are separate and distinct concepts. [H.T. Vol. 7:244].

112. Marc Tasse, Ph.D., an expert on the assessment of adaptive behavior, in an article titled “Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases,” published in the peer-reviewed journal *Applied Neuropsychology*, also recommends that correctional officers not be interviewed as respondents for adaptive behavior assessment:

**Correctional officers and other prison personnel should probably never be sought as respondents to provide information regarding the**

adaptive behavior of an individual that they've observed in a prison setting. The only extreme circumstance when one might consider interviewing a member of the prison personnel regarding an inmate's adaptive behavior would be if there is absolutely no one alive who can provide any information regarding the individual's functioning prior to incarceration.

[DX 31, Marc J. Tasse., "Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases," 16 *Applied Neuropsychology* 114 (Mar. 2009)] (emphasis added).

113. Greg Olley, Ph.D., an expert psychologist and chair of the Division 33 American Psychological Association Committee on Mental Retardation, confirms in his article:

Typical community functioning is difficult to assess in an individual who is incarcerated; the essential information is the individual's performance in the community before incarceration-not behavior in the structured environment of a jail or prison where a person with mental retardation may function quite well. Therefore, **observation of the defendant's prison functioning and reports by correctional officers do not provide the necessary information** for a valid diagnosis.

[DX 29, J. Gregory Olley, "Knowledge and Experience Required for Experts in *Atkins* Cases," 16 *Applied*

*Neuropsychology* 137 (2009)] (emphasis added).

114. Dr. Proctor agreed that an adaptive behavioral assessment should occur in the context of the individuals' typical community environment and that prison adaptive behavior is not valid for assessing adaptive ability in the free world. [H.T. Vol. 7: 102]. He also agreed with the statement that "[t]he evidence for adaptive behavior strengths or deficits must illustrate typical community functioning." [H.T. Vol. 6: 231, DX 30, Daniel J. Rechsly, *Documenting the Developmental Origins of Mild Mental Retardation*, *Applied Neuropsychology* 16, 124-134 (2009)]. Dr. Proctor has not published peer-reviewed literature on the subject. [H.T. Vol. 6: 234].

115. Dr. Proctor agreed that "the sole purpose of the adaptive prong of the definition for the criminal justice system is to ascertain that the measured intellectual impairment has had real life consequences, and that the presence of confirming deficits must be the diagnostician's focus." [H.T. Vol. 6: 212-214].

#### **A. Dr. Fletcher's Adaptive Behavior Assessment**

116. Dr. Fletcher used the Vineland test procedure to analyze adaptive behavior. He testified that the Vineland is a standardized procedure, and he used a form of the Vineland that represents a semi-structured interview. The Vineland is an appropriate assessment identified in the AAIDD Manual and also recognized and accepted by courts <sup>8</sup> in this

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<sup>8</sup> See, e.g., *Wiley v. Epps*, 625 F.3d 199, 217 (5th Cir. 2010) (recognizing that "the authors of the Vineland test expressly state that retrospective interviews to obtain information about a

jurisdiction. To minimize bias of the answers he received from his respondents, Dr. Fletcher used an interview form rather than a checklist. [H.T. Vol. 5: 60-61]. This form generates a set of scores from which Dr. Fletcher then compared the scores to normative tables. [H.T. Vol. 5: 54-55]. Dr. Fletcher has administered hundreds of Vineland tests, followed proper protocol, and has used retrospective assessments in the past. [H.T. Vol. 7: 190]. He did not record his conversations with the respondents but took notes on the forms because he has become very familiar with the protocol through his practice. [H.T. Vol. 5: 131].

117. Dr. Fletcher testified that when administering adaptive behavior assessments, practitioners look for limitations that make it difficult for a person to function independently in society. He explained that people with mental retardation have strengths in certain areas and can do things like learn to drive cars, work, and get married but that the purpose of an assessment is to focus on the weaknesses. [H.T. Vol. 5: 51].

118. In determining who to interview, Dr. Fletcher looked for people who knew Mr. Cathey best during his developmental period and prior to incarceration. Mr. Cathey's parents are deceased, but his older sister was in the home until she left at the age of eighteen

subject's behavior at an earlier stage is permissible in certain circumstances, including when the subject is in a restricted environment, such as a prison, and there is a question about the subject's adaptive functioning before coming to that environment"); *Chester v. Quarterman*, No. 5:05-cv-29, 2008 U.S. Dist. LEXIS 34936, at \*5 (E. D. Tex. Apr. 28, 2008) (stating the Vineland test is "an accepted instrument for measuring limitations in adaptive behavior").



and when Mr. Cathey was twelve or thirteen. Mr. Cathey married in his teens, and Ms. Bryant was also a suitable respondent. [H.T. Vol. 5: 55-56]. Although “a retrospective adaptive behavior assessment can be challenging,” literature confirms that it is “often considered as the only viable option when the assessed individual is incarcerated. Interviewing a respondent while asking them to recall a time prior to the individual’s incarceration is the proposed means of capturing the individual’s typical adaptive behavior in the community and establishing a retrospective diagnosis.” [DX 31, Marc J. Tasse, “Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases,” 16 *Applied Neuropsychology* 120 (Mar. 2009)]; see DX 29A, J. Gregory Olley and Ann W. Cox, “Assessment of Adaptive Behavior in Adult Forensic Cases: The Use of the Adaptive Behavior Assessment System-III,” in ADAPTIVE BEHAVIOR ASSESSMENT-II: CLINICAL USE AND INTERPRETATION 381, 387 (Thomas Oakland and Patti L. Harrison eds. 2009) (“Thus, the focus should be on the proper use of all available assessment methods and sources of information. With the best available information in hand, the expert can exercise clinical judgment to reach a conclusion.”)].

119. Dr. Fletcher also followed guidelines laid out by Dr. Mark Tasse for the conduct of retrospective assessment when he performed the Vineland exams. Dr. Tasse recommends that a practitioner very carefully define the time period in which the interview will occur and then conduct the interview and establish with the respondent what that time period is going to be. [DX 31, Marc J. Tasse., “Adaptive Behavior Assessment and the Diagnosis of Mental

Retardation in Capital Cases,” 16 *Applied Neuropsychology* 114 (Mar. 2009)].

120. Dr. Fletcher contacted the developer of the Vineland, Dr. Sara Sparrow, and asked her if she felt that retrospective interviews were appropriate and also whether telephone interviews were appropriate. Dr. Sparrow responded that both methods were sound. She indicated there was no difference in conducting a face-to-face as comparable to telephone interview as a result of one of her prior studies. [H.T. Vol. 5: 57-58].

121. The Court finds Dr. Fletcher’s use of the Vineland appropriate.

122. Using the Vineland, Dr. Fletcher interviewed Mr. Cathey’s older sister, Charlotte Ross, and former wife, Noaella Bryant, to learn about Mr. Cathey’s childhood, family history, and development. Dr. Fletcher reviewed all materials provided to him, including the trial transcript, affidavits from family members, which he found consistent with his independent assessment, the school records, and formal assessments, through the Vineland, of Mr. Cathey’s former wife, Noaella Bryant, and older sister, Charlotte Ross. [H.T. Vol. 5: 53]. He did not review the offense report, the guilt-innocence testimony, the punishment testimony, prison records, commissary records, or prison correspondence because he found these records irrelevant to adaptive behavior assessment and not indicative of Mr. Cathey’s adaptive behavior before the age of eighteen [H.T. Vol. 5: 97-98]. Dr. Fletcher did not examine or interview Mr. Cathey because outside sources provide a more reliable basis for assessment than the individual himself, who may as a result of

socialization, or a desire to please, over or underestimate his abilities.<sup>9</sup> [DX 4, AAIDD Manual at 51]. Dr. Fletcher's decision is confirmed by Dr. Tasse, who in one of his articles, states that "as many researchers have documented numerous times, individuals with low IQ may not always be reliable self-reporters." [DX 31, Marc J. Tasse., "Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases," 16 *Applied Neuropsychology* 114 (Mar. 2009)].

123. Dr. Proctor testified that Dr. Fletcher's adaptive behavior assessment used the best possible information. Authoritative sources in the field of forensic psychology instruct those assessing adaptive behavior to either use a standardized measurement device or to collect information from other sources. [H.T. Vol. 6: 178]. The best and most reliable informants are those who are around the person the most, including teachers, spouses, and family members. [H.T. Vol. 6: 184]. Dr. Fletcher interviewed people who had most opportunity to interact with Mr. Cathey. [H.T. Vol. 6: 238]. Dr. Proctor, on the other hand, reviewed only records and did not conduct any interviews.

124. Dr. Fletcher interviewed Mr. Cathey's older sister, Charlotte Ross, and his notes and observations in the form of the Vineland are admitted as an exhibit. [DX 39, Vineland-II Adaptive Behavior Scales Test of

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<sup>9</sup> During his testimony at the punishment phase of trial, Dr. Yohman testified that Mr. Cathey, in response to the personality tests Dr. Yohman administered, was "portraying himself in a better light probably than is likely to be found on objective evidence ... He wanted to look good." [DX 48, Trial Transcript, Vol. 23: 35].

Charlotte Ross (January 22, 2010)]. In discussing what Dr. Fletcher characterized as conceptual skills, Ms. Ross said she would have to repeat things to Mr. Cathey and could not leave him to do anything. Mr. Cathey was easily distracted and would believe anything he was told. He did not talk very much, talked in a monotone, rarely initiated conversation, and was probably at a sixth grade reading ability. [H.T. Vol. 5: 60-61]. In discussing what Dr. Fletcher described as practical skills, Ms. Ross said Mr. Cathey needed help with lots of things, and she would have to watch him or things would not get done. He never used tools. He knew coin denominations but did not have much experience with money. [H.T. Vol. 5: 61]. In discussing what Dr. Fletcher described as social skills, Ms. Ross explained that Mr. Cathey did not play sports, was not very expressive, could play simple games but not complex ones, and was teased frequently by other children. [H.T. Vol. 5: 63]. Based on his interview with Ms. Ross, Dr. Fletcher computed the adaptive behavior composite score as 66, which he testified is at the first percentile. Mr. Cathey received a score of 66 in socialization, a 68 in daily living skills, and a 69 in communication, scores the Court finds indicative of mental retardation [H.T. Vol. 5, p. 63].

125. Dr. Fletcher also interviewed Mr. Cathey's former wife, Ms. Noella Bryant, who married Mr. Cathey when he was a teenager but then divorced him a few years later. [DX 38, Vineland-II Adaptive Behavior Scales Test of Noella Bryant (January 22, 2010)]. Ms. Bryant told Dr. Fletcher that Mr. Cathey would not talk with her or communicate very much, he was not very cooperative, and she could not trust him to watch any of the children. [H.T. Vol. 5: 65]. Dr.

Fletcher computed the adaptive behavior composite as 59, which is at the less than the first percentile for his age. Mr. Cathey had a standard score of 61 in communication, 61 in daily living, and 60 in socialization, scores the Court finds consistent with the presence of mental retardation. [H.T. Vol. 5: 66].

126. The interviews of Ms. Ross and Ms. Bryant corroborated the affidavits Dr. Fletcher reviewed, and Dr. Fletcher found the affidavits from Mr. Cathey's family members reliable evidence. [H.T. Vol. 5: 98]. Dr. Proctor, by contrast, did not consider the affidavits nor attempt to interview the family members, although he had full opportunity to do so. [H.T. Vol. 6: 214, 223]. The Court finds the affidavits submitted by Mr. Cathey's family members reliable and indicative of adaptive behavior deficits.

127. From the Houston Independent School District records, Dr. Fletcher learned that Mr. Cathey had serious academic problems, that he had failed the ninth grade, and that he had dropped out of school. [DX 41, Houston Independent School Records]. He also read the trial transcript of Mr. Cathey's teacher's testimony who characterized him as seriously behind in middle school. [H.T. Vol. 5: 72]. Dr. Fletcher found the records consistent with his assessment that Mr. Cathey has adaptive behavior deficits.

128. The Court credits Dr. Fletcher's clinical judgments and the evidence he relied upon to make his clinical judgment, as well as his determination that Mr. Cathey has significant deficits in adaptive functioning in the conceptual, social, and practical domains that place him approximately two standard deviations below the mean in adaptive functioning.

**B. Conceptual Skill Area**

129. The Court finds that Mr. Cathey has the following deficits in the conceptual skill area:

130. Language. Mr. Cathey's family, who witnessed him growing up and who have intimate personal knowledge of his abilities, remember his difficulties expressing himself. His younger brother, Robert Charles Cathey, Jr., in an affidavit [DX 43, Affidavit of Robert Charles Cathey, Jr.], remembers Mr. Cathey's communication problems very clearly:

Eric had problems expressing himself and didn't speak often. He talked with me more than anybody else. I would understand what he was trying to say even when the words didn't make perfect sense. He felt most comfortable talking when he was doing something he understood, like playing basketball. He always used simple sentences and words.

Eric didn't have the confidence to verbally confront people because he didn't feel that he would get it right. He would get frustrated when he couldn't find the right words or when people didn't understand what he was saying. Sometimes when Eric got into trouble with other kids, I would step in because I was much better at talking to people than he was. He was physically strong but he was not good at verbal arguments.

Eric was not very good at talking about his emotions and reacted physically instead. On several occasions, he

punched holes in the wall because he was upset and frustrated. I remember this happening both in his childhood and during his marriage to Noaella.

131. Mr. Cathey's older sister, Charlotte Ross, confirms and similarly recounts Mr. Cathey's communicative deficits [DX 42, Affidavit of Charlotte Ross]:

When we were growing up, Eric was always very quiet. If you talked to him he would talk back but he would never initiate conversations. If Eric did ever speak, what he said would be short and straight to the point. I never heard him use long words. He would usually go without instead of asking for anything. If it wasn't provided for him, he wouldn't ask for it.

132. Even Mr. Cathey's younger sibling, Celecia Baker, states that Mr. Cathey had difficulties expressing himself [DX 45, Affidavit of Celecia Baker]:

As a child, Eric was slower than the rest of us and didn't catch onto things quickly. I don't think he understood lots of the things that people said to him. I remember always having to repeat myself. Sometimes he would drift off and wander off to play by himself.

133. Money, time, and number concepts. Mr. Cathey failed to manage his money. His older sister recounts that "Eric never had a bank account for his earnings to go in. He gave all his money and earnings

to Noaella and she paid all the bills.” [DX 42, Affidavit of Charlotte Ross].

134. The fact that Mr. Cathey was provided commissary money and used it to make purchases while on death row does not contradict this finding. Even at Polunsky, Mr. Cathey was unable to manage the \$85 he was given every two weeks. [H.T. Vol. 8: 70]. Mr. Cathey spent over his spending limit on several purchases. [DX 59, Commissary Purchase Receipts; H.T. Vol. 8: 70-71]. Additionally, there is evidence and a declaration from an inmate, Mr. Faryion Wardrip, that Mr. Cathey was assisted on several occasions in totaling and managing his purchases. [DX 50, Declaration of Faryion Wardrip].

135. Reading and writing. Mr. Cathey’s school records indicate limited functioning in reading and writing. It is clear that he performed poorly in school and on standardized tests during his academic career, failed ninth grade, and dropped out the following year. [DX 41, Houston Independent School District Records]. In the seventh grade, Mr. Cathey received D’s in math, history, and science. The next year he scored below 70 percent in history, science, and one semester of typing, and received D’s in English, language arts, reading, math, and one semester of typing. In his first year of high school, he failed one semester of English and Spanish. He did not score higher than a 72 in any subject. [DX 41, Houston Independent School Records]. Experts in adaptive behavior assessment recognize that “[g]rading standards vary from school to school. Information on the grades earned by other students in the same education settings can be enlightening. It is important to understand the grading standards in a specific



school context.” [DX 30, Daniel J. Rechsly, “Documenting the Developmental Origins of Mild Mental Retardation,” 16 *Applied Neuropsychology*, 129 (2009)]. Important then, although Dr. Fletcher has worked with the Houston Independent School District and is familiar with Ryan Middle School and Yates High School, Dr. Proctor, who practices and lives in Dallas, Texas, admitted that he has no similar knowledge of the schooling system. [H.T. Vol. 6: 257]. The Court finds Dr. Fletcher’s opinion on Mr. Cathey’s school records reliable.

136. Mr. Cathey’s standardized test scores also show objective evidence of functional academic impairment. In the spring semester of his ninth grade year, Mr. Cathey’s Metropolitan Achievement Test (“MAT”) scores were 5.6 grade level in math, 5.7 grade level in spelling, 5.4 grade level in language, 6.9 grade level in science, 5.9 or 6.9 (difficult to read) grade level in social studies, 5.7 grade level in research skills, 7.1 grade level in total reading, 6.0 grade level in total math, 5.6 grade level in total language, 6.3 grade level in total basic battery, and 6.5 grade level in total comprehensive battery. Mr. Cathey underperformed by multiple grade levels. [DX 41, Houston Independent School Records].

137. At the punishment phase of his trial, Mr. Cathey’s teacher at Ryan Middle School, Ms. Anne Smith, testified that on grade placement tests for high school, “[o]n the math test, [Mr. Cathey] functioned basically in the 30th/40th percentile. He passed all three sections of the math, the reading, and writing of the Teams Test, but he was still seriously below grade level.” [DX 48, Trial Transcript, Vol. 22: 235].

138. Although Mr. Cathey passed the TEAMS test

in the ninth grade, this is no indication that he is not mentally retarded. Dr. Fletcher testified the TEAMS test is an achievement test and that even people with mental retardation can pass the TEAMS test. TEAMS is a minimal standards test that was dropped by the State in 1989 and replaced by the TAKS and TAAS tests that test basic competency. [H.T. Vol. 7: 183]. The TEAMS test was widely criticized for its failure to accurately measure achievement relative to state standards. [H.T. Vol. 5: 158].

139. Although Mr. Cathey's older sister Charlotte Ross testified at trial that Mr. Cathey was a good student, in speaking to Dr. Fletcher, she explained that this meant he was well-behaved and did not get any detentions. [H.T. Vol. 5: 120]. Ms. Ross also testified at trial that Mr. Cathey was a "nerd" but this meant he would read comic books, including Spiderman. Dr. Fletcher testified that Spiderman was not a graphic and intricate novel when Mr. Cathey read it during his childhood and that reading of such comic books, even today, is consistent with mental retardation. [H.T. Vol. 5: 121, 161].

140. The fact that Mr. Cathey was not placed in special education classes because of a disability is still consistent with a finding of mental retardation. Literature in the area of mental retardation supports that "[s]chool diagnoses of [mental retardation] have become increasingly rare over the last 30 years ... Schools increasingly become reluctant to diagnose [mental retardation] even with persons who were clearly eligible on relevant criteria." [DX 30, Daniel J. Rechsly, "Documenting the Developmental Origins of Mild Mental Retardation," 16 *Applied Neuropsychology* 128 (2009)].

141. Dr. Yohman administered to Mr. Cathey a series of achievement tests, including the Wide Range Achievement Test-Revised (“WRAT-R”) and the Woodcock Johnson-Revised. [DX 49, Additional Score Sheets Provided by Dr. Yohman]. On the WRAT-R, Mr. Cathey’s score indicated he is in the fourth percentile for spelling and in the eighth percentile for letter-word identification and passage comprehension.<sup>10</sup> *Id.* Dr. Yohman also concluded from a series of memory tests that Mr. Cathey was “moderately deficient at about the second percentile level.” [DX 48, Trial Transcript, Vol. 23: 21]. The Court finds these results are consistent with and indicative of deficits in conceptual skills.

142. Additionally, Dr. Yohman administered to Mr. Cathey a Categories Test and the California Verbal Learning Test (“CVLT”), tests that are not intelligence tests, like the WAIS-R, but that are most related to IQ. [H.T. Vol. 7: 192; DX 49; Additional Score Sheets Provided by Dr. Yohman]. Dr. Fletcher testified that the Categories Test is a concept formation test that has different trials in which a person has to do problem solving: On this test, Mr. Cathey obtained a percentile score at the eighth percentile. [H.T. Vol. 7: 193]. Dr. Fletcher testified that the CVLT is a verbal memory test and is designed

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<sup>10</sup> At the punishment phase of Mr. Cathey’s trial, Dr. Yohman testified that Mr. Cathey “may possibly have a learning disorder which we’d call a learning disorder not otherwise specified, which means he has impairment in a variety of academic areas which certainly led to poor academic achievement, but not particularly in one area enough of a deficiency to warrant a selective learning disorder in that area. In other words, he was borderline to mildly deficient in most academic areas.” [DX 48, Trial Transcript, Vol. 23: 20].

to examine a person's ability to organize and encode information. On the CVLT, Mr. Cathey received a T score of 26. Dr. Fletcher testified that a T score has a mean of 50 and a standard deviation of 10. A score of 26 is about two and a half standard deviations below average, putting Mr. Cathey below the second percentile. [H.T. Vol. 7: 192-193]. The Court finds these results consistent with Mr. Cathey's deficits in conceptual and memory skills.

143. Dr. Yohman also administered to Mr. Cathey the Minnesota Multiphasic Personality Inventory ("MMPI"), which Dr. Fletcher testified is not a neuropsychological test but is a personality questionnaire. [H.T. Vol. 7: 195]. Dr. Fletcher stated the MMPI is not a reading test, and contrary to Dr. Proctor's opinion, the MMPI's test manual and publisher, Pearson, advises that the average reading level for the test is a fifth grade level. [H.T. Vol. 7: 195-196]. Dr. Fletcher further testified, to which Dr. Proctor conceded, that the MMPI does not require a full reading of all its items. *Id.* Dr. Yohman's reports also indicate that he administered to Mr. Cathey a Trail Test, which Dr. Fletcher testified requires no abstraction or judgment but is a vocabulary-based test. [H.T. Vol. 7:198]. Dr. Fletcher, unlike Dr. Proctor, is a board certified neuropsychologist, and in his opinion, the scores Mr. Cathey received on these tests are consistent with mental retardation.<sup>11</sup> This

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<sup>11</sup> Dr. Fletcher testified that although the tests, besides the WAIS-R, that Dr. Yohman administered to Mr. Cathey are neuropsychological tests not intelligence tests, the Flynn Effect also effects these scores. [H.T. Vol. 7: 198]. Dr. Fletcher stated that articles, such as the one admitted into evidence titled "The Flynn Effect and its Relevance to Neuropsychology," explains to neuropsychologists the relevance of the Flynn Effect and how the

Court finds Dr. Fletcher's opinions reliable.

144. The fact that Mr. Cathey's signature appears on letters and TDCJ forms does not prove that he did not have adaptive deficits before age 18 and does not show that he is without deficits today. Captain Bryant admitted that he had not personally seen Mr. Cathey fill out TDCJ forms. [H.T. Vol. 8: 65]. Further, the following grievance forms, admitted through Applicant's Exhibit 53<sup>12</sup>, included notations indicating that Mr. Cathey received help<sup>13</sup> in completing TDCJ Offender Grievance Forms:

- TDCJ Offender Grievance Form, received November 2, 2009, including notation "assisted by";
- TDCJ Offender Grievance Form, received April 8, 2009, including notation "This Complaint was assisted by and with the help of Offender";
- TDCJ Offender Grievance Form, received March 5, 2009, including

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phenomenon of norm obsolescence affects neuropsychological assessments. Id [DX 52, Merrill Hiscock, The Flynn Effect and its Relevance to Neuropsychology," 29(5) *Journal of Clinical and Experimental Neuropsychology* (2007)].

<sup>12</sup> Applicant's Exhibit 53 includes an affidavit from counsel for Applicant, clarifying that the grievance forms were received after she submitted an open records request to the TDCJ. The records were included in Mr. Cathey's offender's file, but the State had not received a copy of the same through their subpoena to the TDCJ.

<sup>13</sup> The names of the people, mostly offenders, who assisted Mr. Cathey were redacted.

notation "This was assisted by offender";  
and

- TDCJ Offender Grievance Form, received February 13, 2009, including notation "Assisted by Offender."

145. Several of the TDCJ forms, with Mr. Cathey's name and information, were also filled out in different handwritings, which confirms the finding that Mr. Cathey received help from other people. [DX 58, TDCJ Visitor Forms; H.T. Vol. 8: 67]. From State's Exhibit 15, but entered as Applicant's Exhibit 58, the following visitor change forms, verified by Captain Bryant, were written in different script:

- TDCJ Visitor Change Form, dated April 30, 1997;
- TDCJ Visitor Change Form, dated July 20, 1998;
- TDCJ Visitor Change Form, dated May 27, 1998; and
- TDCJ Visitor Change Form, dated June 22, 2005.

Leah Madison, a correctional officer at the Polunsky Unit, admitted she did not personally see Mr. Cathey writing the romantic letter he allegedly gave her that also caused Mr. Cathey disciplinary problems. [H.T. Vol. 8: 82]. Dr. Proctor testified that one of the poems in Mr. Cathey's letters was plagiarized, and he also acknowledged that some of the material in the letters was copied directly from the internet. [H.T. Vol. 6: 140, H.T. Vol. 7: 271]. Dr. Proctor did not see Mr. Cathey write the letters, and he did not interview anyone who had seen Mr. Cathey write the letters. [H.T. Vol. 6: 268]. Although Mr. Cathey spells at the

fourth percentile level, although his full-scale IQ score was 77 even without correcting for the Flynn Effect, although Dr. Proctor has never seen Mr. Cathey use a dictionary, although Dr. Proctor would not expect someone who spells at a fourth percentile level to be able to spell the word “renaissance” found in Mr. Cathey’s letters, which Dr. Proctor admitted not being able to spell, Dr. Proctor testified that he believes it is likely that Mr. Cathey wrote the letters. [H.T. Vol. 7:31]. If, however, Mr. Cathey did not write the letters or the grievance forms, Dr. Proctor stated that his opinions on mental retardation would change. [H.T. Vol. 6: 252].

146. There is evidence that inmates in neighboring cells assisted Mr. Cathey in writing letters. [DX 50, Declaration of Faryion Wardrip and DX 51, Declaration of Ronald Hamilton]. Mr. Wardrip, for example, verified that he lived next to Mr. Cathey at the Polunsky Unit, read to Mr. Cathey his letters, and helped Mr. Cathey write letters that related to political topics, which Mr. Cathey would then copy and mail. [DX 50, Declaration of Faryion Wardrip]. Mr. Hamilton provided confirming statements, affirming in his declaration that he read to Mr. Cathey his letters and helped Mr. Cathey write letters that related to romantic topics, which Mr. Cathey would then copy and mail. [DX 51, Declaration of Ronald Hamilton]. Dr. Fletcher confirmed that adult men with learning disabilities often ask other men for help writing romantic letters. [H.T. Vol. 7: 182]. Dr. Proctor was not aware that Mr. Cathey was assisted by neighboring inmates, but he conceded that this fact would impact his assessment of Mr. Cathey’s writing skills. [H. T. Vol. 6: 275].

147. Dr. Fletcher testified that he believed Mr. Cathey could not have authored the letters included in the prison records on his own. [H.T. Vol. 7: 175]. He stated that it was not possible for someone who was spelling and writing at a fifth grade level to write the letters that were described, unless there was some intensive intervention program. [H.T. Vol. 7: 182]. There is no program for death row inmates that could accelerate development of an individual whose spelling is in the fourth percentile. *Id.*

148. Dr. Proctor agreed with the DSM-IV and admitted that individuals with mild mental retardation can acquire academic skills up the sixth grade level by their late teens. [H.T. Vol. 7: 86-87]. To a certain extent, people with mild mental retardation are educable, teachable, trainable, and can improve their writing skills with rote practice. [H.T. Vol. 6: 225]. However, this does not account for the level of sophistication of Mr. Cathey's letters from death row where there are no special educational programs.

149. The Court finds the letters with Mr. Cathey's signatures are not reliable evidence regarding mental retardation.

### **C. Social Skill Area**

150. The Court finds that Mr. Cathey has the following deficits in the social skill area:

151. Gullibility and naiveté. On cross examination at the punishment phase of Mr. Cathey's trial, Dr. Yohman testified that Mr. Cathey is "a follower, who is very unsophisticated, who has limited intellectual resources, and who is going to gravitate to whoever will give him attention and affection, who is going to be easily manipulated." [DX 48, Trial Transcript, Vol.



23:35].

152. Dr. Yohman's testimony comports with history provided by Mr. Cathey's sisters and brother:

When Eric was young, other kids would tell him to do things and he would just agree. On one occasion, a group of kids convinced Eric to egg a car and he did. Another time, one of our cousins persuaded Eric to throw rocks at cars from a bridge. Eric wouldn't put up any kind of fight. I think he was trying to fit in and didn't want to be called chicken. When he got older, Eric started to be persuaded to stay out late and not tell people where he was going. [DX 42, Affidavit of Charlotte Ross].

Because Eric was slower, he was easily manipulated by others. He always wanted other people's approval and would do anything to please them. He always followed the lead of others and rarely made decisions for himself. [DX 43, Affidavit of Robert Charles Cathey, Jr.].

Eric didn't have a group of friends when he was young, so when he started to make friends as an adult he was very loyal and wanted to impress them. A lot of his friends used him and played on his weakness. They would get Eric to do favors for them, such as lending them money. [DX 43, Affidavit of Robert Charles Cathey, Jr.].

Eric wasn't very popular. He used to keep to himself. He had problems expressing himself. Eric was never a leader. He always followed. He told me that he just wanted to fit in. [DX 44, Affidavit of Celecia Baker].

153. Even the capital offense for which Mr. Cathey was found guilty did not demonstrate forethought, planning, or complex execution of purpose on his part. To the contrary, the facts indicate and provide evidence of Mr. Cathey's deficits and gullibility. Dr. Proctor admitted, for example, that Mr. Cathey did not plan the kidnapping, was not a passenger of the car that was surveying the victim, did not drive either car involved in committing the crime, and did not ask any questions of the victim. (H.T. Vol. 7: 17].

154. The facts of the alleged escape attempt made by five inmates at the Ellis Unit, including Mr. Cathey, are also consistent with mental retardation. Dr. Proctor submitted that it is possible that Mr. Cathey was asked to participate in the escape attempt because he is gullible, and Dr. Proctor also conceded that Mr. Cathey did not plan the escape. [H.T. Vol. 7: 13-14]. There is no evidence in the affidavits of Mr. Cathey's family members that indicated any leadership characteristics. [H.T. Vol. 7: 15]. It is also dispositive that Mr. Cathey was unsuccessful in his escape attempt and that he was caught by prison officials at the top of a second fence surrounding the Ellis Unit.

155. Self-esteem. Mr. Cathey's adaptive deficits caused him to suffer a further impairment of his self-esteem. Mr. Cathey's brother explains that "Eric always felt that he wasn't as good as everybody else.

He was often very hurt about the way other kids treated him and was upset that he didn't have many friends." [DX 43, Affidavit of Robert Charles Cathey, Jr.].

156. Charlotte Ross, Mr. Cathey's older sister, confirms and recounts first-hand experience with Mr. Cathey's low self-esteem [DX 42, Affidavit of Charlotte Ross]:

Eric got upset very easily. He never talked about his emotions, but I used to find him crying. He used to get really frustrated when we were doing something that Eric couldn't do as well as us. For example, I was a tomboy when I was young and used to be better than him at football. This really upset him. He always looked to us siblings for reassurance and to tell him that things would be okay, especially when he got picked on or told off by his father.

157. Avoiding being victimized. Mr. Cathey was not able to avoid being a victim during his childhood. He was often bullied by other children, as described by his older sister:

Some kids picked on him at school once, and instead of fighting back or getting a teacher, he jumped out of a second story window and ran away. On another occasion, Eric was at the public pool and some older guys picked on him and he got a beating. He didn't fight back. [DX42, Affidavit of Charlotte Ross].

158. Other children took advantage of his impaired

functioning, as described by his brother:

Eric was often teased by other kids because they thought he was “weird” and because he was tall and skinny. Eric found it difficult to avoid fights because he always reacted to teasing and could never shrug off insults. Kids in the neighborhood knew how to wind him up and enjoyed provoking him. [DX 43, Affidavit of Robert Charles Cathey, Jr.].

159. Interpersonal relations. Mr. Cathey was severely impaired in terms of interpersonal relationships. Although Mr. Cathey quit school early and married Ms. Bryant after she became pregnant with his child, Ms. Bryant divorced and left him for someone else. [DX 48, Vol. 23: 27]. Even Ms. Bryant recounted Mr. Cathey’s limited functioning in the context of married life [DX 44, Affidavit of Noaella Bryant]:

What Eric thought was really funny annoyed me. He used to jump out at me when it was dark and when I was in the house and thought I was alone. I would tell him that he was scaring me, but he laughed and kept doing it. Eric didn’t understand why it wasn’t funny. We fought a lot about this.

160. Mr. Cathey’s older sister also remembers her brother’s interpersonal difficulties [DX 42, Affidavit of Charlotte Ross]:

I never knew Eric to have any friends. The only friends that he had were mine and his other sister’s and brother’s

friends. Sometimes, when our friends came around, they would think he was weird at the beginning because he was tall, lanky, and never said anything. He would be quiet and stay in his own space.

161. Mr. Cathey's brother confirms and also provides further evidence of Mr. Cathey's impaired adaptive functioning [DX 43, Affidavit of Robert Charles Cathey, Jr.]:

Eric was not very social and did not speak to many people. When family friends and relatives visited the house, he did not want to be around them and wandered off on his own. He would often ignore visitors when they spoke to him.

Eric was often teased by other kids because they thought he was "weird" and because he was tall and skinny. Eric found it difficult to avoid fights because he always reacted to the teasing and could never shrug off insults. Kids in the neighborhood knew how to wind him up and enjoyed provoking him.

Eric always felt that he wasn't as good as everybody else. He was often very hurt about the way other kids treated him and was upset that he didn't have many friends.

162. Dr. Walter Quijano, a licensed clinical psychologist who testified at the punishment phase of Mr. Cathey's trial, administered to Mr. Cathey a Mallon Clinical Inventory on February 28, 1997 and testified at trial that Mr. Cathey has a dependent and

compulsive type of personality. [DX 48, Trial Transcript, Vol. 23 :42]. Dr. Quijano described these personality types as follows:

The dependent personality is one that uses the relationship to hang on to their relationship. Their relationship is not reciprocal like most normal relationships are, but the dependent person ingratiates, holds, does things for the other person not because the relationship is reciprocal but because you want to hold on to that relationship. So, you are bound to do things that you don't otherwise want to do or to do humiliating things to purchase that relationship.

The compulsive is similar except that the trick used by the compulsive is to keep the distance, to not express true feelings, not express true opinions, less he displeases the other person and so he would appear very compliant with rules, regulations, will do everything properly, cross the t's and dot the i's, not because it's rewarding for him, but again because he wants that relationship to continue.

[DX 48, Trial Transcript, Vol. 23:42-43]. The Court finds these personality traits consistent with mental retardation.

163. Dr. Proctor testified that he did not know if Mr. Cathey was good at making friends, and there is no evidence from the trial transcript that Mr. Cathey had this characteristic. The affidavits of Mr. Cathey's

family members indicated Mr. Cathey was shy and did not make friends. Dr. Proctor admitted that this fact, if true, would indicate a deficit in social adaptive behavior. [H.T. Vol. 6: 207].

164. The fact that Mr. Cathey married and had children is still consistent with mental retardation. Not only did Mr. Cathey's wife divorce him and state she did not trust him with the children, Dr. Fletcher testified that even people with mental retardation get married. [H.T. Vol. 5:51].

#### **D. Practical Skill Area**

165. The Court finds that Mr. Cathey has the following deficits in the practical skill area:

166. Activities of daily living. Mr. Cathey's ability to take care of his daily activities was significantly impaired by his mental retardation. Mr. Cathey's older sister, Charlotte Ross, verified that he was very dependent on others and unable to manage the simplest activities:

Eric could never do the washing or the cooking. I would always do that. He never helped me with chores around the house unless I asked him. I would always have to tell him what to do. He would never do anything like that on his own initiative. Sometimes, I would make the cleaning and washing up into a game, so that he would help me. I taught him how to use the microwave and how to clean around the house. [DX 42, Affidavit of Charlotte Ross].

167. As confirmed by Mr. Cathey's family, even

with direction, Mr. Cathey was unable to manage his home life and marriage:

When he first moved in with me, he could hardly do anything around the house. I had to tell him how to wash clothes and cook. I remember he didn't even know how to flip a hamburger patty. I had to show him how to do everything. I often left notes for him around the house, so that he would remember to do chores and things for the kids, but he often didn't finish the chores that I left for him. Eric also didn't know how to fix anything around the house. I always had to call someone out to fix things. [DX 44, Affidavit of Noaella Bryant].

One time I went over to see Eric at their apartment. Noaella had post-it notes all over the place telling him what to do and when to do it. The walls were completely yellow with post-it notes, but he did not finish what she told him to do. I noticed that the house was still very messy though. It was horrible in there. There were food and clothes everywhere. [DX 42, Affidavit of Charlotte Ross].

168. Dr. Proctor testified that people with mild mental retardation can master practical skills, can be aware of their pending execution, can be aware of the need to buy things, can ask for other people for money, can ask other people for help, and can be aware of future court hearings. [H.T. Vol. 6: 277]. Dr. Proctor agreed that it would be unsound and unreliable expert methodology to conclude that a person did not have



adaptive behavioral deficits by pointing to his strengths. [H.T. Vol. 6: 213]. To rely on the fact that a person does not have adaptive behavioral deficits by focusing on their strengths is a position that is unsupported in peer-reviewed literature. [H.T. Vol. 6:214].

169. Use of safety. Mr. Cathey was significantly impaired in assessing risks and taking precautions. His sister and brother both recount several occasions when Mr. Cathey injured himself because of his failure to assess risk:

On one occasion, we were chasing each other around a wall. Eric hit his head so hard it knocked him down, but he got up and started running and laughing again. He ran into the wall and hit his head again, busting it open this time, but again just got up and carried on running. This continued until we had to stop him and tell him that he was hurt. [DX 42, Affidavit of Charlotte Ross].

Eric was just not aware of risk. If what he was doing involved risks, he never made sure that he was safe. He wouldn't think to do anything if he got hurt, we would have to tell him to or do it for him. Eric got injured a lot. When he was 8 or 9, he cracked his head swinging on a clothes line. Once, he got spooked by a bug on the wall and fell off and bumped his head. Another time, at the age of 8, Eric fell off a merry-go-round and bumped his head so hard he passed out. Around the same age, he broke his arm

swinging on some monkey bars. [DX 42, Affidavit of Charlotte Ross].

If anything was out of place in the house, we would immediately think it was Eric. For example, if there was blood on the walls, we would check Eric's head and see if there was a bruise. A saying developed in our house that it was just "typical Eric." [DX 42, Affidavit of Charlotte Ross].

Eric was especially accident-prone as a child and often tripped over things. When he was 9 or 10 years old, he fell off the porch and injured his head. I remember my mother and the rest of the family saying that Eric had "lost his mind" because of his dazed behavior after the accident. I also remember him breaking his arm in Emancipation Park. [DX 43, Affidavit of Robert Charles Cathey, Jr.].

170. The incident in which Mr. Cathey fell from the monkey bars required surgery and a three-day hospital stay. [DX 46, Harris County Hospital District Medical Records].

171. Occupational skills. Mr. Cathey had difficulty obtaining and keeping a steady job. His former wife explains Mr. Cathey's impaired occupational skills [DX 44, Affidavit of Noaella Bryant]:

Our son Eric was born in 1989. Eric had to get a job to bring in the income. I had to look for jobs for Eric because he didn't look himself. He used to tell me that he

didn't think that he could get a good job because he didn't have any skills. He had never learned any trades. He sat at home for a long time with no work. I told him that he had to get a job so that we could pay for rent. Eric eventually got a job as a security guard. He worked by himself at night, five nights a week. The only thing that he told me about the job was that he had a flashlight, and he might be getting a permit to carry a gun. Eric was fired from the job because he didn't wait to be relieved by the person who came to take over his shift.

172. Mr. Cathey's older sister also confirmed Mr. Cathey's impairment in occupational skills [DX 42, Affidavit of Charlotte Ross]:

When Eric was still living at home, my husband and I got Eric to come to work with us. We felt like we needed to help him out. We never gave him any responsibility though, because Eric would mess it up. Eric would never have gotten stressed if we gave him any responsibility. He was so used to being told what to do. I always felt like he needed this guidance, because he couldn't cope with things by himself.

173. At the punishment phase of Mr. Cathey's trial, Mr. Luke Ezech, Ms. Charlotte Ross's former husband, testified that Mr. Cathey worked with him at his battery shop for two years. [DX 48, Trial Transcript, Vol. 22: 242-244]. Mr. Ezech stated that his business related to the reconditioning of car batteries

and that he taught Mr. Cathey to check dead batteries and also asked him to watch the shop for him while he was away. *Id.* Dr. Proctor conceded that the work Mr. Cathey performed at the battery shop was work a person with mental retardation can perform. [H.T. Vol. 6: 227-228]. Although Dr. Proctor used evidence of Mr. Cathey's occupational skills to evaluate whether Mr. Cathey had adaptive behavior deficits, Dr. Proctor also admitted that he did not know how long Mr. Cathey held jobs, information that is important to his own evaluation. [H.T. Vol. 6: 226].

174. The fact that Mr. Cathey worked, although he was terminated, is consistent with mental retardation. Dr. Fletcher testified that even people with mental retardation are able to work and learn to replicate specific tasks, like the tasks Mr. Cathey performed at the battery shop. [H.T. Vol. 5: 51]. In his interview of Ms. Bryant, Dr. Fletcher also learned that when Mr. Cathey did find a job, often he could not keep it. [H.T. Vol. 5: 159].

#### **E. Testimony and Records from the TDCJ**

175. During the evidentiary hearing to determine whether Mr. Cathey meets the diagnostic criteria for mental retardation, the State called several Texas Department of Criminal Justice ("TDCJ") correctional officers and officials. The State also admitted records from the TDCJ as evidence. The Court finds that the environment in which the correctional officers and officials observed Mr. Cathey is not indicative of typical community functioning. All inmates are housed in their cells twenty-three hours a day. The prison officials tell inmates when to shower, recreate, and eat. The prison system also supplies all

necessaries to inmates. [H.T. Vol. 8:69].

176. Dr. Proctor agreed that prison guards are typically not used for evaluating adaptive behavior because their interaction with the assessed individual is too limited. [H.T. Vol. 6: 185]. Dr. Proctor--the State's only witness to offer an opinion on whether Mr. Cathey is a person with mental retardation--admitted that he did not use, interview, or rely on any communication with any prison guard or official for his opinions that Mr. Cathey is not mentally retarded. [H.T. Vol. 6: 241]. He also admitted that "the fact that an individual possesses one or more skills that might be thought by some laypersons as inconsistent with the diagnosis of mental retardation cannot be taken as disqualifying." [H.T. Vol. 6: 212].

177. Although testimony from the State indicated Mr. Cathey had several books in his cell, Captain Bryant testified that he had not seen Mr. Cathey read a book. [H.T. Vol. 8: 63]. There is also evidence that inmates could easily pass, borrow, and share books through a "4-inch-by-4 inch hole at the bottom of the door ... " [H.T. Vol. 8: 65]. Captain Bryant stated he had seen some rather large items such as small paperback books fit through the gaps, *id.*, and Leah Madison testified that inmates would pass papers, reading materials, and almost anything they are asked to pass. [H.T. Vol. 8: 81]. Dr. Fletcher also indicated that people with mental retardation try to impress others and make them think they know a lot more than they really do. Having books like *The Echelon Vendetta* [SX 21, State Inventory of Mr. Cathey's Cell], *Tactics and Strategy of Chess* [SX 21, State Inventory of Mr. Cathey's Cell], and The Looking Glass [SX 21, State Inventory of Mr. Cathey's

Cell], in one's cell when one has a history of reading deficits, as Mr. Cathey has, is consistent with Dr. Fletcher's testimony. [H.T. Vol. 7: 191]. Further, Mr. Faryion Wardrip, who lived next to Mr. Cathey at the Polunsky Unit, provided a declaration that Mr. Cathey would hold books for him and for another inmate in his cell and that very often, inmates would trade books and even letters through the gaps in the cell doors. [DX 50, Declaration of Faryion Wardrip].

178. Similarly, although testimony from the State indicated Mr. Cathey had a chess board, Captain Bryant testified he had not seen Mr. Cathey play chess. [H.T. Vol. 8: 65]. Investigator Don Cohn admitted that he did not see any chess pieces in Mr. Cathey's cell. (H.T. Vol. 8: 21]. Dr. Proctor admitted that he and others had made assumptions that Mr. Cathey had been playing chess, when without evidence of Mr. Cathey even having chess pieces, he could have been playing checkers. [H.T. Vol. 7:97]. Further, Mr. Faryion Wardrip, who lived next to Mr. Cathey at the Polunsky Unit, provided in a declaration that Mr. Cathey did not play chess and only had a chess board because he wanted to trade it with another inmate. [DX 50, Declaration of Faryion Wardrip]. Although Leah Madison stated she had seen Mr. Cathey play chess, [H.T. Vol. 8: 77], her testimony is inconsistent with the overwhelming testimony and evidence that Mr. Cathey did not play chess. Ms. Madison did not testify as to how long Mr. Cathey played chess, how often he played chess, or whether the pieces being used were actually chess pieces.

179. The fact that Mr. Cathey has an internet profile is no evidence that Mr. Cathey is not a person

with mental retardation. [SX 13, Internet Profile of Eric De Wayne Cathey]. Dr. Proctor admitted that inmates do not have access to the internet and that someone else must have posted the profile in Mr. Cathey's name. [H.T. Vol. 6: 278].

180. The State presented evidence of visitor records, including documentation of visits made to Mr. Cathey by his attorneys and clergy. [SX 15, TDCJ records]. The State stated on record that use of the visitor records was solely to show what changes had been made to Mr. Cathey's visitor list, also stating the visitor records were received as part of the entire TDCJ file. [H.T. Vol. 6: 167]. The Court finds that these records are irrelevant to the issue of whether Mr. Cathey is mentally retarded.

#### **VII. PRONG THREE: ONSET BEFORE THE AGE OF EIGHTEEN**

181. There is credible and reliable evidence that Mr. Cathey suffered from significant deficits in intellectual and adaptive functioning before the age of 18. Although the limitation in his functioning was not formally documented before the age of 18, all risk factors commonly associated with mental retardation were present prior to Mr. Cathey turning 18. No evidence was presented at the evidentiary hearing that established an intervening cause after the age of 18 that could account for Mr. Cathey's limitations in intellectual and adaptive functioning.

182. The Court finds that Mr. Cathey exhibited significantly subaverage general intellectual functioning concurrent with deficits in adaptive behavior that originated before the age of 18.

**VIII. OTHER EVIDENCE INDICATIVE OF  
MENTAL RETARDATION (*EX PARTE*  
*BRISENO* FACTORS)**

183. In *Ex Parte Briseno*, the court provided a short list of other evidentiary factors that a factfinder “*might* also focus” on when weighing evidence of mental retardation: (a) did those who knew the person best during the developmental stage think he was mentally retarded, and if so, act accordingly; (b) has the person formulated plans and carried them through or is his conduct impulsive; (c) does his conduct show leadership or does it show that he is led around by others; (d) is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable; (e) does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject; (f) can the person hide facts or lie effectively in his own or others’ interests; and (g) putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of the offense require forethought, planning, and complex execution of purpose. 135 S.W.3d at 8.

184. The Court finds that these factors serve only as mere guides and are suggestions of the court. Indeed, the so-called “*Briseno* factors” are not advocated by the AAIDD Manual and weaken and obscure the constitutional determination of mental retardation that is required. [DX 15, John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J. L. & PUB. POL’Y 689, 711-714 (2009)]. A recent article, defining a section on *Briseno* as “The



Glass Half-Full Perspective,” provides further insight:

The *Briseno* factors present an array of divergences from the clinical definitions in applying *Atkins*. For one, as the court’s statement indicates, *Briseno* erroneously pits mental retardation against disorders in an either-or dichotomy. Further, the factors by turns adhere to stereotype or label...and focus solely on adaptive strengths...Even the factors that do point to traits that “occur with sufficient frequency to warrant certain limited generalizations...fail to address significant qualifications to these generalizations...**Overall, the *Briseno* factors narrow the scope of relevant behaviors to a limited group of questions from a universe of possibilities, and as such fail to fully address all skill areas set out in the clinical definitions...**Thus, a factfinder applying all the factors will not necessarily have assessed the full possibility of adaptive deficits, and cannot therefore rule out the possibility of significant limitations in adaptive functioning.

*Id.* (emphasis added). Dr. Fletcher testified that even though the *Briseno* opinion was issued by the Texas Court of Criminal Appeals in 2004, the standard did not take into account the 2002 edition of what was then the AAMR standards. *Ex Parte Briseno* also makes recommendations that are not accepted

practice in the field of psychology for diagnosing mental retardation. [H.T. Vol. 7: 209]. This Court finds that the factors advocated in *Ex Parte Briseno* are not binding and that these factors have guided but not formed its opinion on whether Mr. Cathey is a person with mental retardation.

185. Even if the Court found the *Briseno* factors were binding and dispositive, an analysis of these factors supports the finding that Mr. Cathey is a person with mental retardation.

186. It is irrelevant that no fact witness for Mr. Cathey at the punishment phase of his trial testified that Mr. Cathey had mental retardation. The fact witnesses were not asked this question directly, which is not a surprise given that in 1997 when Mr. Cathey was tried, mental retardation was not a bar to the death penalty. *Atkins v. Virginia*, 536 U.S. 304 (2002).

187. There is no evidence that Mr. Cathey formulated plans and carried them through. In fact, Dr. Yohman, at the punishment phase of Mr. Cathey's trial, testified that he administered tests related to Mr. Cathey's ability to organize or plan and that Mr. Cathey was very "poor" at these tests and took "kind of a random approach" to performing tasks. [DX 48, Trial Transcript, Vol. 23: 23].

188. There is no evidence that Mr. Cathey ever led anyone in anything. There is no evidence in the affidavits of Mr. Cathey's family members, for instance, that indicated any leadership characteristics. [H.T. Vol. 7: 15]. On cross examination at the punishment phase of Mr. Cathey's trial, Dr. Yohman testified that Mr. Cathey is "a follower, who is very unsophisticated, who has

limited intellectual resources, and who is going to gravitate to whoever will give him attention and affection, who is going to be easily manipulated.” [DX 48, Trial Transcript, Vol. 23:35]. Mr. Cathey’s family members provided affidavits confirming the same:

- “When Eric was young, other kids would tell him to do things and he would just agree.” [DX 42, Affidavit of Charlotte Ross];
- “He always followed the lead of others and rarely made decisions for himself.” [DX 43, Affidavit of Robert Charles Cathey, Jr.];
- “Eric was never a leader. He always followed. He told me that he just wanted to fit in.” [DX 44, Affidavit of Celecia Baker].

189. *Briseno* also asks whether conduct in response to external stimuli is rational and appropriate, regardless of whether it is socially acceptable, and whether a person can lie effectively in his own or other interests. There is no evidence that Mr. Cathey could do either. [add]

190. Even the capital offense for which Mr. Cathey was found guilty did not demonstrate forethought, planning, or complex execution of purpose on his part. Dr. Proctor admitted, for example, that Mr. Cathey did not plan the kidnapping, was not a passenger of the car that was surveying the victim, did not drive either car involved in committing the crime, and did not ask any questions of the victim. [H. T. Vol. 7: 17]. Courts have affirmed that impulsive crimes are not the sort of crimes that require forethought and

planning. *Carr v. State*, No. 71,634 (Tex. Crim. App. May 17, 1995) (unpublished), *Ex parte Carr*, No. AP-75,627 (Tex. Crim. App. Feb. 28, 2007) (unpublished) (finding Carr to have mental retardation even though he shot a pregnant 16-year-old in the forehead while robbing a convenience store); *Modden v. State*, 721 S.W.2d 859, 860 (Tex. Crim. App. 1986), *Ex parte Modden*, 147 S.W.3d 293, 307 (Tex. Crim. App. 2004) (finding Modden to have mental retardation even though he stabbed a convenience store clerk 16 times in the face and neck in the course of a robbery).

#### **IX. RISK FACTORS FOR MENTAL RETARDATION**

191. The AAIDD Manual sets forth risk factors commonly associated with mental retardation. The four categories of risk factors are: (1) biomedical: factors that relate to biologic processes; (2) social: factors that relate to social and family interaction; (3) behavioral: factors that relate to potentially causal behaviors; and (4) educational: factors that relate to the availability of educational supports that promote mental development and the development of adaptive skills. [DX 4, AAIDD Manual at 60]. Mental retardation often reflects the cumulative or interactive effects of multiple risk factors.

192. The AAIDD Manual highlights that the etiology of mental retardation may facilitate diagnosis. The AAIDD Manual states that “All relevant risk factors are identified, including those that are thought to be most important (such as trisomy 21 or Down syndrome) as well as those that are thought to be less important (such as social deprivation or lack of timely educational intervention). The presence of interactions between

risk factors are then evaluated and described. Etiological diagnosis and classification thus consists of a comprehensive list of all of the risk factors and interactions among risk factors for which the available data provide sufficient evidence.” [DX 4, AAIDD Manual at 68].

193. Because of correlation between risk factors and mental retardation, it is relevant to this Court to determine whether Mr. Cathey’s history contains any of the risk factors for mental retardation identified by the AAIDD Manual. There is ample evidence from the family history witnesses that establish Mr. Cathey was exposed to all risk factors commonly associated with mental retardation. The presence of these risk factors lends further weight to the diagnosis of mental retardation in this case.

#### **A. Biomedical Risk Factors**

194. Traumatic brain injury is a risk factor included within the biomedical category. [DX 4, AAIDD Manual, Table 6.1 at 60]. Mr. Cathey presents numerous occasions of serious head trauma during his childhood. At age two, Mr. Cathey “allegedly fell & struck edge of table,” according to hospital records. [DX 46, Harris County Hospital District Medical Records]. His older sister Charlotte Ross recounts other head injuries for which Mr. Cathey did not receive medical attention [DX 42, Affidavit of Charlotte Ross]:

On one occasion ... Eric hit his head so hard [on a wall] it knocked him down ... He ran into the wall and hit his head again, busting it open this time.

Once, he got spooked by a bug on the wall and fell off and bumped his head.

Another time, at the age of 8, Eric fell off a merry-go-round and bumped his head so hard he passed out.

195. Mr. Cathey's younger brother confirms and recalls two more serious blows to the head [DX 43, Affidavit of Robert Charles Cathey, Jr.]:

When he was 9 or 10 years old, he fell off the porch and injured his head. I remember my mother and the rest of the family saying that Eric had "lost his mind" because of his dazed behavior after the accident.

[W]hen Eric was 15 or 16, ... [he was hit] in the face with a vase ... The vase smashed, leaving him with a scar down his face.

196. Mr. Cathey's younger sister remembers "He must have busted his head open at least twice but I can't remember his exact age." [DX 45, Affidavit of Celecia Baker].

#### **B. Social Risk Factors**

197. An impaired child-giver and adult non-responsiveness are risk factors included within the social category of risk factors for mental retardation. [DX 4, AAIDD Manual, Table 6.1 at 60]. Mr. Cathey's mother showed signs of impairment: "When I first started going with Eric, I thought his family was very weird. Their house was completely out of the order. It was disgusting. Everything was completely chaotic. Eric's mother seemed very slow." [DX 44, Affidavit of Noaella Bryant].

198. Mr. Cathey's mother was also non-responsive:

“Eric sometimes told me that he felt left out and different from Robert, my older sister Charlotte, and me. He often said that our mother didn’t like him as much and that she treated him differently.” [DX 45, Affidavit of Celecia Baker]. Mr. Cathey’s older sister also had to call the ambulance when he broke his arm, rather than his own parents. [DX 42, Affidavit of Charlotte Ross].

199. During the punishment phase of Mr. Cathey’s trial, Mr. Cathey’s mother, Ms. Willie Lee Cathey, testified that her husband, Mr. Cathey’s father, sold drugs, used drugs, and drank wine and beer in the home. When he would drink, Mr. Cathey’s father would become mean and violent and would “get his gun” after the children and Ms. Cathey. [DX 48, Trial Transcript, Vol. 23: 87].

### **C. Behavioral Risk Factors**

200. Child abuse and neglect, domestic violence, and social deprivation are included within the behavioral category of risk factors for mental retardation. [DX 4, AAIDD Manual, Table 6.1 at 60]. As attested to by his family members, Mr. Cathey was exposed to extraordinary levels of violence and neglect once his father began dealing drugs from home:

While we were growing up, our father was a drug dealer ...There was drug dealing, drug use, and prostitution in our house. The house could be chaotic with people firing guns and shouting and cursing. Eric and I and our sister Lisa would run and hide in the bedroom. One time, we climbed out of the bedroom

window to hide in the yard. [DX 43, Affidavit of Robert Charles Cathey, Jr.].

201. At the punishment phase of Mr. Cathey's trial, Mr. Cathey's older sister, Ms. Charlotte Ross, testified about the violent, chaotic, and abusive environment in the home. [DX 48, Trial Transcript, Vol. 22: 202-206] (testifying that Mr. Cathey's father was a drug dealer, their home was robbed twice, and the children would constantly be yelled at by their parents). Ms. Ross also testified that neither she nor her siblings would discuss the robberies because it was a "taboo" in the house. [DX 48, Trial Transcript, Vol. 22: 207].

202. During the punishment phase of his trial, Mr. Cathey's mother, Ms. Willie Lee Cathey, confirmed and testified that Mr. Cathey's father sold drugs for many years from the house. [DX 48, Trial Transcript, Vol. 23: 83]. Ms. Cathey also testified that her husband, Mr. Cathey's father, was robbed twice in the house at gunpoint, and during one occasion, the entire family hid underneath a table. [DX 48, Trial Transcript, Vol. 23: 83-86].

#### **D. Educational Risk Factors**

203. Impaired parenting and inadequate family support leads to educational risk factors. [DX 4, AAIDD Manual, Table 6.1 at 60].

204. The affidavits of Mr. Cathey's family members indicate there was inadequate family support in the household. "There was drug-dealing, drug use, and prostitution in our house. The house could be chaotic with people firing guns and shouting and cursing." [DX 43, Affidavit of Robert Charles Cathey, Jr.].



## **X. DETERMINATION CONCERNING MENTAL RETARDATION**

205. Mr. Cathey is a person with mental retardation. His full scale obtained score of 77 on the W AIS-R, administered by Dr. Yohman, without correction for the Flynn Effect, demonstrates that his intellect is firmly in the range of mild mental retardation, as recognized by the AAIDD Manual. With correction for the Flynn Effect, Mr. Cathey's score on the WAIS-R is a 71.6, and after applying the standard error of measurement, his corrected score falls within the range of mental retardation. The finding of mental retardation is further supported by Dr. Fletcher's determination that Mr. Cathey has significant deficits in adaptive functioning in the conceptual, social, and practical realms that place him more than two standard deviations below the mean in adaptive functioning. Taking into account all of this evidence, Mr. Cathey meets the diagnostic criteria for mental retardation. [H.T. Vol. 3:57].

### **CONCLUSIONS OF LAW**

206. The preponderance of the evidence establishes that Mr. Cathey has significantly subaverage general intellectual functioning.

207. The preponderance of the evidence shows that Mr. Cathey suffers from significant deficits in adaptive behavior.

208. The preponderance of the evidence shows that Mr. Cathey exhibited significantly subaverage general intellectual functioning concurrent with deficits in adaptive behavior that originated before the age of 18.

209. The preponderance of the evidence shows

several risk factors for mental retardation present in Mr. Cathey's history.

210. The preponderance of the evidence shows that Mr. Cathey is a person with mental retardation. Accordingly, under the holdings of *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), he cannot be put to death. His death sentence must be modified to a sentence of life imprisonment.

211. The Flynn Effect is a scientifically valid and reliable phenomenon applied to correct for norm obsolescence.

212. The Flynn Effect is used by clinical practitioners in the diagnosis of mental retardation and is used by practitioners outside the criminal justice system to correct for norm obsolescence.

213. The Flynn Effect should be applied to individual test results to correct for norm obsolescence when a test with aging norms is used, and it is a generally accepted scientific procedure.

214. The Flynn Effect has a known or potential error rate sufficiently precise to be applied.

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

SIGNED this 31 day of December, 2012.

/s/Shawna L. Reagin

Hon. Shawna L. Reagin

Presiding Judge of the 176th  
Criminal District Court, Harris  
County, Texas

281a

Respectfully Submitted,

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*Counsel for Eric Dewayne Cathey*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of February, 2011, copies of these Proposed Findings of Fact and Conclusions of Law was served by certified mail on the Respondent at the following addresses:

Roe Wilson, Esq.

Office of the Harris County District Attorney

1201 Fannin, Suite 600

Houston, Texas 77002

/s/ Layne Kruse

Layne Kruse

**CAUSE NO. 713189-B**

EX PARTE	§	IN THE
ERIC DEWAYNE	§	DISTRICT
CATHEY,	§	COURT
Applicant.	§	HARRIS
	§	COUNTY, TEXAS
	§	176TH DISTRICT
		COURT

**ORDER**

The Clerk is hereby ORDERED to prepare a transcript of all papers in Cause No. 713189-B and transmit same to the Court of Criminal Appeals, as provided by Article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. All of the Applicant's pleadings filed in Cause No. 713189-B, including his Application for Writ of Habeas Corpus;
2. All of the Respondent's pleadings filed in Cause No. 713189-B, including the Respondent's Original Answer and Supplemental Answer;
3. All affidavits and exhibits filed in Cause No. 713189-8;
4. This Court's findings of fact, conclusions of law and order recommending relief in Cause No. 713189-8;
5. Any Proposed Findings of Fact and Conclusions of Law submitted by either the Applicant or the Respondent in Cause No. 713189-B;

6. The reporter's record of the writ hearing held January 22-26, 2010, in Cause No. 713189-B; and

7. The indictment, judgment, sentence, docket sheet and appellate record in Cause No. 713189, unless they previously have been forwarded to the Court of Criminal Appeals.

The Clerk is further **ORDERED** to send a copy of the Court's findings of fact and conclusions of law, including its order, to Applicant's counsel: Layne Kruse, Fulbright & Jaworski, 1301 McKinney, Suite 1500, Houston, Texas 77010 and to Respondent: Roe Wilson, Harris County District Attorney's Office, 1201 Franklin, Suite 600, Houston, Texas 77002.

**BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE APPLICANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 713189-8.**

SIGNED this 31ST day of December, 2012.

/s/Shawna L. Reagin

SHAWNA L. REAGIN, JUDGE  
176TH DISTRICT COURT,  
HARRIS COUNTY, TEXAS