

**Capital Case – Execution October 5, 2021 at 6:00 central**

**No. 21-\_\_\_\_\_**

**In The Supreme Court Of The United States**

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ERNEST JOHNSON,

*Petitioner,*

v.

PAUL BLAIR,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF MISSOURI

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**PETITIONER'S PETITION FOR WRIT OF CERTIORARI APPENDIX**

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# **Appendix A**



# SUPREME COURT OF MISSOURI

## en banc

STATE EX REL. ERNEST JOHNSON, ) *Opinion issued August 31, 2021*  
)  
Petitioner, )  
)  
v. ) No. SC99176  
)  
PAUL BLAIR, WARDEN OF POTOSI )  
CORRECTIONAL CENTER, )  
)  
Respondent. )

### ORIGINAL PROCEEDING IN HABEAS CORPUS

#### PER CURIAM

#### Facts and Procedural History

In February 1994, Ernest Lee Johnson bought a bottle of beer and a package of cigarettes at a Columbia convenience store he frequented.<sup>1</sup> Johnson made a second trip to the convenience store but did not purchase anything. On one of these trips, Johnson questioned the cashier about who would be working the next shift. The cashier responded Mabel Scruggs would relieve her at 5:00 p.m. and the store closed at

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<sup>1</sup> Many of the facts for this section are taken from *State v. Johnson*, 968 S.W.2d 686 (Mo. banc 1994) (*Johnson I*); *State v. Johnson*, 22 S.W.3d 183 (Mo. banc 2000) (*Johnson II*); *Johnson v. State*, 102 S.W.3d 535 (Mo. banc 2003) (*Johnson III*); *State v. Johnson*, 244 S.W.3d 144 (Mo. banc 2008) (*Johnson IV*); and *Johnson v. State*, 333 S.W.3d 459 (Mo. banc 2011) (*Johnson V*).

11:00 p.m. Johnson left but returned a short time later, staying only a few minutes before leaving again. The cashier noticed Johnson staring at her while she deposited the money from her shift into the store safe. Johnson again did not purchase anything on this trip.

Johnson went to his then-girlfriend's house and purchased a \$20 rock of crack cocaine from his girlfriend's son, Rodriguez Grant. Johnson left but returned to buy two more rocks and ask Rodriguez to lend him the .25 caliber pistol Johnson gave him a few weeks prior in exchange for crack cocaine. Rodriguez agreed, and the two test-fired the pistol in the back yard. Johnson returned the gun a while later, claiming it did not work but then retrieved the pistol and left again, wearing layers of clothing, a mask over his face, and black tennis shoes. For around a month, Johnson confided to Rodriguez his plans to hold up the convenience store, locking all but one employee in the back room and having the remaining employee open the safe.

The next time Johnson returned to the house, his face and clothes were spattered with blood. Johnson came in through the back door and went downstairs to Rodriguez's room and gave him back the pistol. Johnson then cleaned his tennis shoes, took off his clothes, put the clothes into a trash bag, and told his girlfriend's other son, Antwane Grant, to get rid of the bag. Johnson had a large amount of money sorted by denomination, and he and Rodriguez counted it. Johnson then hid the money in an air vent. Rodriguez went back upstairs and soon smelled something burning. When Rodriguez returned downstairs, he found Johnson burning paper.

At 1:12 a.m., a deputy sheriff responded to a call to check on the convenience store for the possibility of a disturbance involving weapons. The store lights were still

on. Through the windows, the officer saw the cash register was opened and the money vault was out and in the middle of the floor. He observed blood smears on the front door lock. City police officers arrived with keys. Upon entering, they discovered two dead bodies and a .25 caliber shell casing in the bathroom. Another body and another .25 caliber shell casing were found inside the walk-in cooler. The safe was empty.

All three victims were store employees: Mary Bratcher, age 46; Fred Jones, age 58; and Mabel Scruggs, age 57. Each victim died from head injuries consistent with a bloody hammer found at the scene. In addition, Mary Bratcher suffered at least ten stab wounds to her left hand consistent with a bloody flat-head screwdriver found in a field near the store, and Fred Jones suffered a nonfatal, facial gunshot wound. Officers also found a bloody Phillips screwdriver, a pair of gloves, a pair of jeans, and a brown jacket in the field next to the store.

Hair on the gloves was consistent with Mabel Scruggs. Blood on the gloves was consistent with Mabel Scruggs or Fred Jones. Hair on the jacket was consistent with Fred Jones. Blood on the jacket was consistent with a mixture of the blood of all three victims.

On the morning the bodies were discovered, Johnson went to a shopping mall and made over \$200 in cash purchases. After he returned to his girlfriend's house, police officers arrived asking for any information about the murders. Johnson initially refused to speak with the officers but eventually agreed to accompany them to the police station. The interviewing officer did not believe Johnson's alibi and read him his *Miranda* rights. Johnson then gave conflicting versions of his alibi and became depressed whenever the

convenience store was mentioned. He stated he did not care if the officers shot him. At one point Johnson said, “It took more than one man to do that job.”

The police obtained a search warrant for Johnson’s girlfriend’s house and found a bag containing \$443; coin wrappers; partially burned checks, coupons, and a cash register receipt—all bearing the convenience store’s name; a live .25 caliber round; and a black pair of tennis shoes with the same company logo as the bloody shoeprints found inside the store.

Officers arrested Johnson. Upon seeing Rodriguez Grant in a holding cell, Johnson stated, “That boy didn’t have anything to do with this. None of those boys did.” When asked how he knew this information, Johnson responded, “I knew they weren’t there.”

Antwane Grant led police to the park where he hid, at Johnson’s direction, a .25 caliber semi-automatic pistol, 17 live rounds of .25 caliber ammunition, a sweat shirt, a pair of sweat pants, a hooded jacket, two stocking caps, and two pairs of socks. Antwane identified the clothes—and the black tennis shoes found at the house—as those Johnson wore the evening of the murders.

Blood on the sweat shirt was consistent with Fred Jones. Blood on the hooded jacket was consistent with Fred Jones or Mabel Scruggs. Hair on one of the stocking caps was consistent with Fred Jones’ and Johnson’s hair.

A Boone County jury found Johnson guilty of three counts of first-degree murder and sentenced him to three death sentences. Johnson sought post-conviction relief. This Court affirmed the guilt-phase but set aside his three death sentences. *Johnson I*,

968 S.W.2d at 702. Following a second penalty-phase proceeding, the new jury returned three death sentences. This Court affirmed the death sentences on direct appeal in *Johnson II*, 22 S.W.3d at 194. This Court later set aside those death sentences during Johnson's second post-conviction appeal, remanding the case for a third penalty-phase proceeding because of incomplete evidence of his mental capacity—specifically, his alleged intellectual disability. *See Johnson III*, 102 S.W.3d at 541. Following the third penalty-phase proceeding, the jury found Johnson is not intellectually disabled and again imposed three death sentences. This Court affirmed the death sentences on direct appeal. *See Johnson IV*, 244 S.W.3d at 165.

Johnson filed a Rule 29.15 *pro se* motion for post-conviction relief, and appointed counsel filed an amended motion. *Johnson V*, 333 S.W.3d at 462. The motion court held an evidentiary hearing and received testimony from three mental-health professionals, from Johnson's third penalty-phase attorneys, and from several other witnesses relating to guilt-phase testimony. *Id.* The motion court entered findings and a judgment overruling Johnson's motion. *Id.* This Court affirmed the denial of Johnson's final post-conviction relief motion. *Id.* Johnson then filed for habeas relief in the United States District Court for the Western District of Missouri. The district court denied Johnson's eight claims and denied a certificate of appealability. A panel of the United States Court of Appeals for the Eighth Circuit also unanimously denied a certificate of appealability and rehearing.

The Supreme Court denied a petition for writ of certiorari on October 6, 2014. This Court then issued a warrant of execution and set Johnson's execution date for

November 3, 2015. Johnson filed his first petition for writ of habeas corpus in this Court, which this Court denied. Johnson then filed an as-applied challenge to Missouri's method of execution in federal court. The district court dismissed Johnson's complaint, and Johnson moved for a stay of execution. Johnson appealed, but the Eighth Circuit overruled the motion for stay. *Johnson v. Lombardi*, 809 F.3d 388 (8th Cir. 2015). The Supreme Court then granted Johnson's request for a stay of execution. Ultimately, Johnson amended his petition twice in the federal district court, but both times the district court found Johnson's petition failed to state a claim under FRCP 12(b)(6). *See Johnson v. Lombardi*, 2:15-CV-4237-DGK (W.D. Mo. May 1, 2017). After the district court dismissed Johnson's second amended petition, Johnson appealed, and the Eighth Circuit concluded Johnson sufficiently stated a claim. The State petitioned the Supreme Court for a writ of certiorari, which was granted. The Supreme Court subsequently vacated the Eighth Circuit's judgment and remanded the case to the Eighth Circuit for further consideration in light of *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). On remand, the Eighth Circuit determined Johnson had not stated a claim upon which relief could be granted and rejected his request for leave to file a third amended complaint in order to propose a firing squad as a new alternate method of execution. Johnson then petitioned the Supreme Court for writ of certiorari. On May 24, 2021, the Supreme Court denied certiorari. *Johnson v. Precythe*, 141 S. Ct. 1622 (2021) (Sotomayor, J., dissenting). The State then filed a notice of ruling and supplement to the State's second motion to set execution date, renewing its request for this Court to set an execution date.

This Court issued its order setting Ernest Johnson’s execution date for October 5, 2021. Johnson filed this petition for writ of habeas corpus, alleging (1) he is actually innocent of the death penalty because he is intellectually disabled;<sup>2</sup> (2) the jury instructions on intellectual disability violated Johnson’s constitutional rights; and (3) his execution by lethal injection would be cruel and unusual. This Court finds and concludes Johnson is not intellectually disabled. Further, this Court concludes Johnson is not entitled to relief on his remaining claims.<sup>3</sup>

### **Standard of Review**

A petition for a writ of habeas corpus is the appropriate avenue to raise claims of intellectual disability. *See State ex rel. Strong v. Griffith*, 462 S.W.3d 732, 739 (Mo. banc 2015). A habeas petitioner bears the burden of proof to show he is entitled to habeas corpus relief. *State ex rel. Lyons v. Lombardi*, 303 S.W.3d 523, 526 (Mo. banc 2010). “[H]abeas review does not provide duplicative and unending challenges to the finality of a judgment, so it is not appropriate to review claims already raised on direct appeal or during post-conviction proceedings.” *Strong*, 462 S.W.3d at 733-34 (internal quotations omitted).

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<sup>2</sup> As further explained below, although Johnson frames his claim as one of actual innocence, it rests on the notion he is “actually innocent” of the death penalty because he is intellectually disabled and so his execution would violate the Eighth Amendment—this is, in essence, an *Atkins* claim. In *Atkins*, the Supreme Court held those who are determined to be mentally retarded, now more appropriately referred to as intellectually disabled, are categorically ineligible for a death sentence. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>3</sup> This Court may deny issuance of a writ of habeas corpus without issuing an accompanying opinion. *See* Rule 84.24. An opinion is issued in this case, however, because an execution date is pending and to demonstrate the careful review and consideration of the merits of Johnson’s intellectual disability claim.



However, “[t]here is no absolute procedural bar to . . . seeking habeas relief. Successive *habeas corpus* petitions are, as such, not barred. But the opportunities for such relief are extremely limited. A strong presumption exists . . . against claims that already have once been litigated.” *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 217 (Mo. banc 2001).

## **Analysis**

### **I. *Johnson Is Not Intellectually Disabled***

Executing intellectually disabled offenders violates the Eighth Amendment’s prohibition of cruel and unusual punishment. *See Atkins*, 536 U.S. at 321. The Supreme Court leaves to the states “the task of developing appropriate ways to enforce the constitutional restriction upon [the state’s] execution of sentences.” *Id.* at 317. “The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community’s diagnostic framework.” *Hall v. Florida*, 572 U.S. 701, 721 (2014).

The Supreme Court has indicated the Diagnostic and Statistical Manual of Mental Disorders 5<sup>th</sup> edition (DSM-5) embodies “current medical diagnostic standards” for determining intellectual disability. *Moore v. Texas*, 137 S. Ct. 1039, 1045 (2017) (*Moore I*). The DSM- 5 refines the long-used three-pronged approach to intellectual disability. DSM-5 at 37. The three criteria are: (A) deficits in intellectual functions; (B) deficits in adaptive functioning in comparison to an individual’s age, gender, and socioculturally matched peers; and (C) onset during the developmental period. *Id.* This Court likewise

recognizes the DSM-5 as the proper framework with which to analyze intellectual disability.

Congruent with the DSM-5 and prevailing medical standards, § 565.030.6<sup>4</sup> defines “intellectual disability” as:

[A] condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

This Court already considered Johnson’s intellectual disability claim in his 2015 petition for habeas corpus and denied relief. Johnson now requests this Court consider his claim again in light of *Moore I* and *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*). These cases do not provide cause for a different outcome as demonstrated by the analysis set out below.

Because Johnson’s “petition for writ of habeas corpus is an original proceeding in this Court, pursuant to Rules 84.22 and 91.01, this Court is the factfinder.”<sup>5</sup> *State ex rel. Cole v. Griffith*, 460 S.W.3d 349, 358 (Mo. banc 2015). As such, this Court considers Johnson’s argument and evidence.

#### ***A. Intellectual Functioning***

Intellectual functioning is typically measured with individually administered and psychometrically valid tests of intelligence. DSM-5 at 37.

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<sup>4</sup> All statutory references are to RSMo 2016, unless noted otherwise.

<sup>5</sup> While this Court may appoint a special master pursuant to Rule 8.03, the circumstances of this case do not require the appointment of a special master.

Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +/- 5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75 (70 +/- 5). Clinical training and judgment are required to interpret test results and assess intellectual performance.

*Id.* While an IQ score of 65 to 75 may indicate intellectual disability, there is no strict IQ score cutoff. *See Hall*, 572 U.S. at 712. Instead, “an individual with an IQ test score ‘between 70 and 75 or lower,’ may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning.” *Id.* at 722. (internal citation omitted) (quoting *Atkins*, 536 U.S. at 309 n.5). Additionally, practice effects and the “Flynn effect” may affect test scores.<sup>6</sup>

“IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks.” DSM-5 at 37. For this reason, the DSM-5 emphasizes evaluation of a person’s broader intellectual functions in determining intelligence, i.e., reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience. *Id.* In adults, this presents as impairments in abstract thinking, executive function (i.e., planning, strategizing, priority setting, and cognitive flexibility), and short-term memory, as well as functional use of academic skills (e.g., reading, money management). *Id.*

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<sup>6</sup> DSM-5 at 37. The “Flynn effect” results in overly high scores due to out-of-date test norms.

Johnson has taken several IQ tests in his life, obtaining the following scores prior to the murders: 77 in 1968;<sup>7</sup> 63 in 1972; 95 in 1979;<sup>8</sup> 78 in 1994; and 84 in 1995. Since the murders, Johnson obtained scores of: 67 in 2003; 67 in 2004; 70 in 2008; 71 in 2009; and 70 in 2019. Multiple of Johnson's scores place him above the range of intellectual disability. This fact alone, however, does not invalidate or dismiss his lower scores. Before the murders, Johnson obtained only one score (out of four valid scores) that would indicate significant subaverage intelligence. Dr. Heisler, an expert for the State, believed Johnson was malingering during his 2004 IQ test, and the fact that Johnson's scores decline markedly after the murders supports that conclusion.

Regardless of whether Johnson has been malingering during his recent IQ tests, his test scores are not dispositive because they, as adjusted for margin of error and the Flynn effect, are within the range that could be indicative of intellectual disability. The additional, broader intelligence factors set forth in the DSM-5, however, illustrate Johnson does not possess such substantial deficits in intellectual functioning to prove intellectual disability. Most glaring is Johnson's ability to plan, exemplified by the details of his murders. During an interview with Dr. Heisler 10 years after the murders, Johnson was able to recall specific, strategic decisions he made and the reasons for them. For example, Johnson planned for at least a month to rob the convenience store; decided

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<sup>7</sup> In his petition for habeas corpus, Johnson states he scored 72 in 1968. This Court has already considered this discrepancy and stated Johnson obtained a score of 77. *See Johnson IV*, 244 S.W.3d at 152.

<sup>8</sup> The department of corrections administered this test while Johnson was incarcerated. Its results are likely not valid because it was given in a group setting. *See DSM-5* at 37. Accordingly, this Court does not consider this test result and only lists it for completeness.

to rob the Casey's because he needed more money to purchase cocaine; visited the store several times the day of the murders to gain information regarding who would be on duty; wore two layers of clothing so he could remove the top layer after the robbery because he knew witnesses may give a description of his clothing; wore a mask to conceal his identity; and, subsequent to the murders, instructed his then-girlfriend's son to hide evidence, including a pistol, ammunition, and the clothes Johnson wore the evening of the murders, which contained physical evidence. *Johnson I*, 968 S.W.2d at 689.

These facts illustrate Johnson's ability to plan, strategize, and problem solve—contrary to a finding of substantial subaverage intelligence. Dr. Keyes, one of Johnson's experts, even admitted Johnson took logical, precise, intelligent steps to prepare, execute, and avoid apprehension for the murders, and these behaviors indicated Johnson was very goal-oriented in carrying out his plan. *Johnson IV*, 244 S.W.3d at 154. As the Supreme Court recognized in *Atkins*, "There is no evidence that [persons with intellectual disability] are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." 536 U.S. at 318.

In sum, Johnson's IQ scores are not dispositive of intellectual disability, but his ability to plan, reason, strategize, and set goals prove Johnson does not possess significantly subaverage intelligence as would indicate intellectual disability. Even so, this Court will also assess Johnson's adaptive functioning.

### ***B. Adaptive Functioning***

“Deficits in adaptive functioning” refers to “how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background.” DSM-5 at 37. Various adaptive behaviors, such as communication, functional academics, and self-direction, fall into three domains of adaptive functioning: conceptual, social, or practical. *Id.* This criterion 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.” *Id.* Importantly, and critical to Johnson’s claim, “[t]o meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the [person’s] intellectual impairments[.]” *Id.* In essence, adaptive deficits must be caused by impaired intellectual functioning.<sup>9</sup>

Johnson asserts he possesses continual, extensive deficits in four adaptive behaviors: functional academics, home living, communication, and self-direction. Dr. Martell’s report asserts these alleged deficits render Johnson severely impaired in all

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<sup>9</sup> Actual deficits in adaptive functions are not *per se* evidence of intellectual disability. *See* DSM-5 at 37. There are many aspects of Johnson’s life that could, absent intellectual disability, account for any alleged deficit in adaptive behaviors; namely his addiction to cocaine, inconsistent upbringing, poor education, and abusive childhood to name a few. This Court is sensitive to the fact that these possible alternative explanations are sometimes in and of themselves effects of intellectual disability, and it is not Johnson’s burden to prove any deficit is not caused by some other factor. *See Moore I*, 137 S. Ct. at 1051; *see also* DSM-5 at 37. Johnson must, however, provide enough evidence to prove the alleged deficits are related to his alleged deficits in intellectual functioning. *See* DSM-5 at 38. On the whole, Johnson fails to do this.

the three diagnostic domains. In analyzing Johnson's evidence, this Court is cognizant of the Supreme Court's instruction in both *Moore I* and *Moore II* to not over-emphasize or over-rely upon adaptive strengths as opposed to adaptive deficits. Johnson's arguments regarding his alleged deficits in adaptive behaviors are largely not credible, and suffer from a lack of causal connection to his alleged impaired intellectual functioning.

This Court finds Johnson's evidence does not prove he possesses deficits in adaptive function and, for that reason, Johnson is not sufficiently impaired in any of the three domains of adaptive functioning outlined in the DSM-5.

**i. Johnson's Evidence**

In support of his intellectual disability claim, Johnson presents several experts' reports and seven affidavits. Six of the seven affidavits are written by attorneys involved with Johnson's defense and regard Johnson's mental ability at trial and ability to participate in his defense. The attorneys' relationship with Johnson raises strong concerns of bias and are otherwise not persuasive. In the remaining affidavit, a juror from Johnson's 2006 penalty-phase trial details his reasoning for finding Johnson not to be intellectually disabled. Johnson attacks this juror's reasoning, but nothing in the affidavit is germane to the determination of whether Johnson is intellectually disabled.

The only expert reports not previously considered by this Court in Johnson's 2015 petition for a writ of habeas corpus are those of Dr. Martell and Dr. Adler.<sup>10</sup> Dr. Martell based his report on previous reports of Johnson's experts and recently performed

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<sup>10</sup> This Court did consider Dr. Adler's 2008 report in Johnson's 2015 petition for habeas corpus. Dr. Adler's new report is substantially the same.

cognitive tests. This Court has already considered the reports Dr. Martell relied upon and found them not persuasive. This Court is likewise not persuaded by Dr. Adler’s recent testing because of Johnson’s incentive to produce results indicating intellectual disability. Moreover, as § 565.030.6 states, “intellectual disability” is “a condition . . . manifested and documented before eighteen years of age.” Because Johnson is now over 60 years old, reports of Johnson’s alleged current mental ability are not given much weight.

Dr. Adler’s report is also not persuasive. Dr. Adler administered Quantitative Electroencephalograms (“QEEG”) to Johnson in 2008 and in 2020. QEEG measures the brain’s electrical activity. Dr. Adler determined Johnson’s QEEG is indicative of Fetal Alcohol Spectrum Disorder (“FASD”). Importantly, though FASD may sometimes cause intellectual disability, Dr. Adler does not make a finding as to whether Johnson is intellectually disabled. Dr. Adler’s report is, thus, not persuasive on the question of whether Johnson is intellectually disabled.

## **ii. Adaptive Behaviors**

### ***a. Functional Academics***

Johnson largely relies on his poor academic performance to prove his alleged deficit in functional academics. Namely, Johnson states he was in a developmental reading class in the ninth grade, took special education classes, was placed on the “basic track” in ninth grade for “slower-ability” children, received poor grades, missed school often, has between a second and third grade reading level, and had to repeat the ninth grade before ultimately dropping out of school.



As this Court noted in *Johnson IV*, there is no evidence the “special education” classes for “slower-ability” children were classes meant for students with intellectual disability—and Johnson does not assert as much. 244 S.W.3d at 155. Johnson also does not provide any evidence of a formal evaluation or diagnosis of intellectual disability during the developmental period. While Johnson’s records do indicate poor grades, they do not meet the legal definition of intellectual disability.

Even if Johnson were to have proved a deficit in functional academics, he does not attempt to connect the alleged deficit with diminished intellectual functioning. Instead, Johnson merely asserts, “there is no evidence that would support any other conclusion regarding this adaptive function.” But, there are multiple factors present in Johnson’s life that could, absent intellectual disability, prevent academic achievement. Again, Johnson is not required to prove his poor academic performance is not caused by some independent factor, but this Court finds Johnson failed to prove a causal connection between his poor academic performance and his alleged intellectual impairment.

#### **b. Home Living**

Johnson asserts he has lived with women who cared for him like his grandmother and former girlfriends. *Id.* at 154. These women state Johnson did not have any duties around the house and could not cook, drive, or do laundry “the right way.” Johnson has also had significant trouble maintaining even menial employment. As previously considered, this testimony was from Johnson’s friends and family members who knew Johnson would not be sentenced to death if it was determined he was intellectually

disabled. *Id.* Moreover, even taken as accurate, this testimony does not demonstrate Johnson requires ongoing support to function in daily life.

Contrary to this testimony, Johnson’s probation officer testified he was capable of working and that he had worked before but did not hold a job very long because he was not motivated to work. *Id.* Even Dr. Keyes believed Johnson was not motivated to work. *Id.* Thus, this Court is not persuaded the facts demonstrate such extensive deficits—if any deficiency at all—to indicate intellectual disability. Johnson again does not demonstrate a causal connection between these facts and his alleged intellectual impairment.

### **c. Communication**

Johnson asserts his ability to communicate has been “severely compromised since he was [a] child.” A conclusion, however, that Johnson possesses such significant deficits in communication to prove intellectual disability is contrary to the evidence. In support, Johnson notes he “stayed close and ‘up underneath’ his grandmother” as a child; his grandmother called him “special”; Johnson interacted with younger children; was placed in special education classes and was “slow” in school; and others teased him and called him “slow,” “dummy,” “crazy,” and “stupid.”

Johnson also presents the following evidence from his experts: Johnson’s ability to communicate orally is “fair”; his ability to read and write is “significantly impaired”; Johnson reads at a third-grade level; Johnson’s spelling is poor and his punctuation and grammar are very poor”; and Johnson tested at the four-and-a-half-year-old age level on the Vineland Adaptive Behavior Scale. Notably, Johnson’s own expert, Dr. Smith

testified Johnson has a very concrete understanding of verbal communication, but has difficulty with written communication. Johnson has failed to demonstrate he requires ongoing support in order to communicate with others in daily life.

In addition, there is reliable, contradictory evidence from several witnesses that Johnson is able to communicate effectively with others: Johnson wrote back and forth with his ex-girlfriend frequently while in prison; was able to communicate with the officers who interviewed him during the initial murder investigation and understood the officer's questions; was able to communicate with his probation officer; and had no problem communicating or making purchases when he came into the Casey's prior to the murders.

The most revealing piece of evidence contradicting deficits in communication is Dr. Heisler's video-recorded interview with Johnson. In the video, which the State played at trial, Johnson communicated effectively with Dr. Heisler for over an hour and was able to relay information regarding his reasoning and strategies for the murders 10 years after the fact.<sup>11</sup>

#### **d. Self-Direction**

The bulk of Johnson's evidence regarding self-direction revolves around his "inability to conform his actions to the law." There is no doubt Johnson has, even before the murders, not conformed his actions to the law. Criminal behavior, absent a causal

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<sup>11</sup> This Court acknowledges strengths in adaptive behaviors such as communication may increase in controlled environments like prison and notes it is not solely relying on Johnson's behavior in prison.

connection to intellectual impairment, however, does not support intellectual disability. In his petition, Johnson himself acknowledges he “has been charged and convicted of various offenses—most of them property-related and **indicative of a drug addiction**.” It is extremely telling that the only cause Johnson mentions for not conforming his actions to the law is his drug addiction—not intellectual impairment.

Moreover, the fact that Johnson has a lengthy criminal history does not establish a deficit in self-direction. Johnson’s expert, Dr. Keyes, noted Johnson is goal-oriented—contrary to a finding that Johnson lacks self-direction. Additionally, the premeditated and strategic nature of the murders, along with Johnson’s forethought in evading apprehension indicate Johnson does not have a deficit in self-direction. Johnson’s parole officer also testified he was able to seek out help for his ongoing substance abuse and even asked to be placed in protective custody to avoid retaliation for a drug debt he owed another prisoner. *Id.* at 155.

## **II. No Instructional Error**

Johnson further argues (1) the sentencing court erred in instructing the jury Johnson had the burden to prove he is intellectually disabled, and (2) the jury instructions misled the jury into believing they must have unanimously found Johnson to be intellectually disabled before they could individually consider intellectual disability as a mitigating factor. This Court already considered and rejected Johnson’s first claim in *Johnson IV* and need not consider it again.<sup>12</sup> *See Strong*, 462 S.W.3d at 733-34.

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<sup>12</sup> In *Johnson IV*, this Court held:

Johnson's second claim of instructional error is procedurally barred because he did not raise it at trial, on direct appeal, or during post-conviction relief proceedings.

*Strong*, 462 S.W.3d at 738-39. Johnson seeks to overcome this procedural bar through both a freestanding and gateway claim that he is actually innocent of the death penalty because he is intellectually disabled.

While Johnson could properly raise a claim of actual innocence because he is sentenced to death, *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 547 (Mo. banc 2003), his specific claim that he is actually innocent because he is intellectually disabled is not cognizable. In *Sawyer v. Whitley*, the Supreme Court held a court may reach a procedurally barred claim when an offender shows, by clear and convincing evidence, no reasonable juror would have found the petitioner eligible for the death penalty under applicable state law. 505 U.S. 333, 347-48 (1992). The Supreme Court clarified, and this Court has reiterated, however, actual innocence of the death penalty only means the defendant can prove they are either innocent of the actual underlying crime or aggravating factors. *Id.* at 340-41; *see also Clay v. Dormire*, 37 S.W.3d 214, 218 (Mo.

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Johnson's claim is without merit. Under section 565.030.4(1), a finding of [intellectual disability] is made by the jury and, if such a finding is made, the potential punishment for a capital defendant is limited to life imprisonment. Determining a defendant is [intellectually disabled] is not a finding of fact that increases the potential range of punishment; it is a finding that removes the defendant from consideration of the death penalty. The Supreme Court's holding in *Ring* requiring a jury to find statutory aggravating circumstances beyond a reasonable doubt does not apply to the issue of [intellectual disability]. The instruction the trial court submitted to the jury, MAI-CR 3d 313.38, is not in conflict with substantive law or *Ring*. The court did not err in instructing the jury that Johnson had the burden of proving [intellectual disability] by a preponderance of the evidence.

*Johnson IV*, 244 S.W.3d at 151.

banc 2000); *see also State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 258 (Mo. App. 2011).

Intellectual disability is neither an element of the underlying crime nor an aggravating factor. Rather, intellectual disability concerns whether an offender is *eligible* for the death penalty. *See Atkins*, 536 U.S. at 320. Johnson's second claim has been previously litigated and decided against him and, even if that was not the case, it would be procedurally barred because it could have been previously litigated.

### **III. Method of Execution**

Johnson also argues Missouri's lethal injection protocol, as applied to him, would constitute cruel and unusual punishment in violation of article I, § 21 of the Missouri Constitution.<sup>13</sup> The basic facts underlying Johnson's claim are as follows. Doctors diagnosed Johnson with an atypical parasagittal meningioma brain tumor in 2008. Doctors performed a craniotomy on Johnson to remove the tumor but were unable to remove it entirely. As a result of the surgery, Johnson has scarring on his brain and is missing a portion of his brain matter responsible for the movement of and sensation in the legs. Johnson alleges these brain defects interrupt his electrical brain activity that

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<sup>13</sup> The State argues Johnson's method of execution claim is properly brought in a declaratory judgment action, not habeas. This Court has recognized that habeas corpus is the proper remedy when a prisoner seeks to vacate his or her sentence. *Hicklin v. Schmitt*, 613 S.W.3d 780, 787 (Mo. banc 2020). Of course, Johnson's method of execution claim, if successful, would not vacate his death sentence, but would merely change how the state would carry out his sentence. Therefore, as *Hicklin* suggests, Johnson's method of execution claim is more appropriately brought in a declaratory judgment action. *See also Hill v. McDonough*, 547 U.S. 573, 579-80 (2006) (holding a method of execution claim must be brought under § 1983, not in habeas). However, as a practical matter, death-sentenced defendants have raised method of execution claims along with other habeas corpus claims and been permitted review of such claims.

manifests as violent and uncontrollable seizures. Johnson also alleges doctors have diagnosed him with epilepsy since the craniotomy. In sum, Johnson argues Pentobarbital, the drug used in Missouri's lethal injection protocol, when coupled with his preexisting brain defects, will trigger painful seizures during his execution.

Both the Missouri and United States constitutions prohibit cruel and unusual punishment. Mo. Const. art. I, § 21; U.S. Const. amend. VIII. In order to succeed on his method-of-execution claim, Johnson must plead and prove two elements. First, Johnson must establish the State's chosen method of execution **"presents a risk that is 'sure or very likely to cause serious illness and needless suffering,' and [would] give rise to sufficiently imminent dangers."** *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (emphasis added). "[T]here must be a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment." *Id.* (internal quotation marks omitted).

Second, "a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew*, 139 S. Ct. at 1125. In showing an alternative method of execution is feasible and readily implemented, "the inmate's proposal must be sufficiently detailed to permit a finding that the State could carry it out relatively easily and reasonably quickly." *Id.* at 1129 (internal quotation marks omitted). It is not enough for the prisoner to show the alternative method of execution is "slightly or marginally safer." *Glossip*, 576 U.S. at

877. What is more, the Eighth Amendment does not require states to adopt “untried and untested” methods of execution. *Bucklew*, 139 S. Ct. at 1130.

***a. No Substantial and Unjustifiable Risk***

To prove the first element, Johnson argues the administration of Pentobarbital “creates a substantial and unjustifiable risk that violent and uncontrollable seizures could be triggered during the execution due to [Pentobarbital’s] interaction with [his] remaining [tumor], scarring tissue, and brain defect.” In support of his conclusion, Johnson exclusively relies on Dr. Joel Zivot’s affidavit. The salient portion of Dr. Zivot’s affidavit is as follows:

As a result of Mr. Johnson’s brain tumor, brain defect, and brain scar, a substantial risk of serious harm will occur during his execution as a result of a violent seizure that is induced by Pentobarbital injection. Generalized seizures, such as the one that would occur in Mr. Johnson, are severely painful. . . . As seizures are known to be painful and are observed as such by others, Pentobarbital induced seizures will be more painful than seizures from other causes including those that would otherwise occur in Mr. Johnson as a result of his underlying epilepsy. . . . It is erroneous to dismiss the risk of Pentobarbital induced seizures in the case of Ernest Johnson by claiming that Mr. Johnson may have a seizure at the time of his execution as a function of a baseline seizure disorder. The Missouri execution protocol will increase the likelihood of a seizure with a very high degree of probability. . . . I am of the opinion that Mr. Johnson faces a significant medical risk for a serious seizure as the direct result of the combination of the Missouri lethal injection protocol and Mr. Johnson’s permanent and disabling neurologic disease.

This affidavit concludes Johnson faces an increased risk of seizure during his execution due to Pentobarbital. However, the analysis underlying Dr. Zivot’s conclusion does not prove a seizure is “sure or very likely” to occur during Johnson’s execution because the affidavit does not prove a causal connection between Pentobarbital and an increased possibility of seizure. *Glossip*, 576 U.S. at 877. Instead, Dr. Zivot rests his



conclusions on an analysis of a different barbiturate—Methohexital. Methohexital, which is structurally related to Pentobarbital, is used to intensify and prolong seizures during electroconvulsive therapy (ECT).<sup>14</sup> Dr. Zivot reasons that, because Pentobarbital is also a barbiturate and is structurally related to Methohexital, it too is a “seizure-promoting compound” that creates a risk Johnson will suffer a painful seizure during his execution.<sup>15</sup>

Notably, the affidavit fails to show how the effects of Pentobarbital and Methohexital are similar or how Pentobarbital will cause a similar reaction when administered during Johnson’s execution. This is crucial because, as the affidavit notes, “Barbiturates are a large group of drugs with a wide spectrum of action . . . [that produce] differing effects on the central nervous system.” Without an adequate comparison of the effects of Methohexital with the effects of Pentobarbital, Dr. Zivot’s conclusion regarding Methohexital cannot be imputed to Pentobarbital. Furthermore, Dr. Zivot does not note how much Methohexital is used to exacerbate an ECT seizure and how that unknown amount compares to the 5-10 grams of Pentobarbital used in Missouri’s lethal execution protocol. This Court finds Dr. Zivot’s affidavit, standing alone, is not

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<sup>14</sup> ECT is “a form of treatment of mental disorders in which convulsions are produced by the passage of an electric current through the brain.” *Stedman’s Medical Dictionary* 913440.

<sup>15</sup> It should be noted that Dr. Zivot has been retained by several death-sentenced inmates to provide expert testimony supporting a method-of-execution claim. Courts have routinely rejected Dr. Zivot’s opinions. *See Bucklew*, 139 S. Ct. at 1131-33; *Williams v. Kelley*, 854 F.3d 998, 1001 (8th Cir. 2017); *Johnson v. Lombardi*, 809 F.3d 388, 391 (8th Cir. 2015).

sufficient proof that Johnson is sure or very likely to suffer a painful seizure during his execution.<sup>16</sup>

***b. Feasible and Readily Implementable Alternative***

Further, Johnson has not pleaded and proved “a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason.” *Bucklew*, 139 S.Ct. at 1125. Johnson’s only mention of a feasible and readily implementable alternative method of execution is the following paragraph near the end of his writ petition:

Because Missouri does not require Mr. Johnson to plead an alternative method of execution, the Eighth Circuit’s finding that he had plead [sic] a plausible claim should also hold true in this court. To the extent this Court would require Mr. Johnson to plead an alternative method of execution, Mr. Johnson alleges that execution by firing squad is an acceptable alternative method. To the extent that requiring an alternative method would be a new pleading requirement, Mr. Johnson would request an opportunity to address that issue further.

It is unclear what Johnson suggests by “Missouri does not require [him] to plead an alternative method of execution[.]” *Bucklew* and *Glossip*, among other cases, make clear that Johnson must show “a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain” to prevail on his method-of-execution claim. *See Bucklew*, 139 S. Ct. at 1125 (stating the two-element

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<sup>16</sup> In addition to the flaws in Dr. Zivot’s reasoning, this Court is also cognizant of Dr. Zivot’s similar conclusion that Russell Bucklew was “likely to experience prolonged feelings of suffocation and excruciating pain” during his execution. *Bucklew*, 139 S.Ct. at 1131. Further impugning Dr. Zivot’s credibility, the witnesses present at Bucklew’s eventual execution stated Bucklew showed no signs of pain or discomfort.

test set forth in *Glossip* “governs all Eighth Amendment method-of-execution claims” (internal quotation marks omitted)). Although not addressed in his writ petition, it is possible that Johnson rationalizes, because he is only raising a claim under article I, § 21 of the Missouri Constitution and not the Eighth Amendment, that he is exempt from pleading and proving what *Bucklew* and *Glossip* require. That rationalization has no basis in precedent. “The Eighth Amendment and article I, § 21 of the Missouri Constitution provide the same protection against cruel and unusual punishment.” *State v. Wood*, 580 S.W.3d 566, 588 (Mo. banc 2019). As such, this Court applies the same standard no matter if the prisoner alleges his eventual execution will violate the Eighth Amendment and/or article I, § 21 of the Missouri Constitution. *State v. Nathan*, 522 S.W.3d 881, 882 n.2 (Mo. banc 2017). Additionally, a petition for a writ of habeas corpus is a civil action subject to the rules of civil procedure. *Nixon*, 63 S.W.3d at 216. Because Missouri is a fact pleading state, Johnson’s petition must set forth facts showing he is entitled to habeas relief. *Id.*

Johnson’s mention of a firing squad as an alternative method of execution fails to provide sufficient detail<sup>17</sup> to permit a finding that the State could carry out an execution

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<sup>17</sup> In *Bucklew*, the Supreme Court gave some guidance as to what “sufficient detail” means in regards to an allegation of nitrogen-induced hypoxia as an alternative method of execution:

Mr. Bucklew’s bare-bones proposal falls well short of that standard. He has presented no evidence on essential questions like how nitrogen gas should be administered (using a gas chamber, a tent, a hood, a mask, or some other delivery device); in what concentration (pure nitrogen or some mixture of gases); how quickly and for how long it should be introduced; or how the State might ensure the safety of the execution team, including protecting them against the risk of gas leaks.

139 S. Ct. at 1129.

via firing squad relatively easily and reasonably quickly. *Bucklew*, 139 S. Ct. at 1125. Rather than provide the requisite proposal, Johnson, in his Reply to Answer, belatedly attaches the Utah Department of Corrections' firing squad protocol as an exhibit. This Court normally would not consider the exhibit because a Reply to Answer exists only to "clarify the facts and issues in a habeas corpus proceeding," not to include matters omitted from the writ petition. *State ex rel. Singh v. Purkett*, 824 S.W.2d 911, 912 n.1 (Mo. banc 1992); Rule 91.12. Nevertheless, Johnson neither asks this Court to adopt Utah's protocol in full nor identifies the portions of Utah's protocol he proposes as an alternative method of execution. This Court determines Johnson's inclusion of Utah's protocol, without more, does not provide the "sufficient detail" required by *Bucklew* or this Court's fact pleading requirements.

In addition, Johnson's "proposal" does not sufficiently allege death by firing squad "would significantly reduce a substantial risk of severe pain"<sup>18</sup> or that Missouri "has refused to adopt [a firing squad] without a legitimate penological reason."<sup>19</sup> *Bucklew*, 139 S. Ct. at 1125. The failure to plead and prove either one of these requirements is

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<sup>18</sup> In his Reply to Answer, Johnson concludes, without any analysis or support, that "a firing squad will significantly reduce his risk of pain since his seizure condition is obviously not implicated if he is shot to death[.]" This Court need not consider conclusory allegations made in a petition for a writ of habeas corpus. *Tucker v. Kaiser*, 176 S.W.2d 622, 623 (Mo. banc 1944).

<sup>19</sup> In its suggestions in opposition to Johnson's writ petition, the State argues it would have legitimate penological reasons to refuse to adopt firing squad as an execution method, namely: (1) Missouri's lethal injection protocol has a track record of rapid and painless death; (2) execution by firing squad would jeopardize the safety and the security of the department of corrections and its personnel; and (3) death by firing squad would tarnish the dignity of Missouri's execution procedures.

fatal to Johnson’s method of execution claim. Nevertheless, Johnson has failed to plead and prove both; therefore, his method of execution claim fails.<sup>20</sup>

This Court finds and concludes Johnson has failed to prove he is intellectually disabled; therefore, he is eligible for the death penalty. Additionally, this Court finds and concludes Johnson is not entitled to relief on any of his remaining claims. This petition for a writ of habeas corpus is denied.<sup>21</sup>

All concur.

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<sup>20</sup> Even if Johnson could plead and prove his method of execution claim, Missouri would not be required to adopt firing squad as an alternative method of execution because it is “untried and untested.” *Bucklew*, 139 S. Ct. at 1130. Only four states allow firing squad as an alternative method of execution; Mississippi, Oklahoma, Utah, and South Carolina. *See Methods of Execution*, Death Penalty Information Center, <https://deathpenaltyinfo.org/executions/methods-of-execution>. Furthermore, only three executions have been carried out by firing squad since 1976, and only Utah has used a firing squad since the 1920s. *See Facts about the Death Penalty*, Death Penalty Information Center, <https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf>; *see also McGehee v. Hutchinson*, 854 F.3d 488, 494 (8th Cir. 2017) (explaining a firing squad may not be a tried and tested alternative because “The firing squad has been used by only one State since the 1920s. It requires trained marksmen who are willing to participate and is allegedly painless only if volleys are targeted precisely”). Neither the Eighth Amendment nor article I, § 21 of the Missouri Constitution would require the State to implement such a seldom-used and risky method of execution, especially when Missouri’s lethal injection protocol has proved successful in achieving rapid and painless death for condemned inmates.

<sup>21</sup> On July 12, 2021, Johnson filed a motion for stay of execution with this Court. That motion is contemporaneously overruled.

# **Appendix B**



Supreme Court of Missouri  
en banc

SC99176


State ex rel. Ernest Johnson, Petitioner

vs.

Paul Blair, Warden of Potosi Correctional Center, Respondent.

- ☐ Sustained
- ☐ Overruled
- ☐ Denied
- ☐ Taken with Case
- ☐ Sustained Until
- ☒ Other

Order issued: Petitioner's motion for rehearing overruled. Petitioner's request for stay of execution overruled.

By:   
Chief Justice

October 1, 2021  
Date





No. SC99176  
Boone County Circuit Court Case No. 13R019441538-01  
**In the Supreme Court of Missouri**

May Session, 2021

State ex rel. Ernest Johnson,  
Petitioner,

v. HABEAS CORPUS

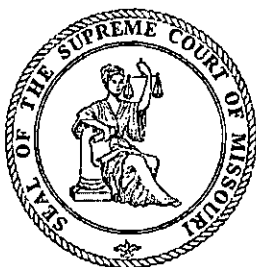
Paul Blair, Warden of Potosi Correctional Center,  
Respondent.

*Now at this day come again the parties aforesaid by their attorneys and the Court here now being sufficiently advised of and concerning the premises doth consider and adjudge that the petition for a writ of habeas corpus filed herein is hereby denied in conformity with the opinion of this Court herein delivered.  
(Opinion filed.)*

STATE OF MISSOURI-Sct.

*I, BETSY AUBUCHON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 2021, and on the 31<sup>st</sup> day of August 2021, in the entitled cause.*

*Given under my hand and seal of said Court, at the City of  
Jefferson, this 1<sup>st</sup> day of October, 2021.*



*Betsy Aubuchon*  
Clerk

*John R. [Signature]*  
Deputy Clerk

# **Appendix C**



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September 14, 2021

Paula Harms, JD  
Office of the Federal Public Defender  
Kansas City, Missouri

Dear Attorney Harms,

I am a psychiatrist and chair of the Steering Committee of the DSM. In December 2019, the DSM Steering Committee approved the removal of the following sentence from the DSM-5, which addresses the diagnosis of intellectual disability: “To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A.” *DSM-5*, at p. 38.

Around the same time, DSM-5 was undergoing review and updating of its entire text. Because of the extensive effort required to publish the DSM-5-TR, now scheduled to appear in March 2022, the change described above has not yet been made public in APA’s publications, but this sentence will not appear in the text of DSM-5-TR.

The change was agreed to by the Steering Committee after much deliberation and input from diagnostic professionals practicing in the field of Intellectual Disability. The change was warranted because these professionals informed us of the confusion this sentence caused in the diagnostic process, appearing to add a diagnostic criterion beyond the official criteria set. That was not the intent of the sentence and thus, to avoid such confusion, the sentence was removed. I hope this information is helpful.

Sincerely yours,

Paul S. Appelbaum, MD  
Elizabeth K. Dollard Professor of Psychiatry, Medicine and Law  
Director, Center for Law, Ethics & Psychiatry  
Department of Psychiatry  
Columbia University Vagelos College of Physicians and Surgeons  
  
Chair, DSM Steering Committee  
American Psychiatric Association

# **Appendix D**

## Text Updates

### Intellectual Developmental Disorder (Intellectual Disability) \*

#### Diagnostic Features

**Location** DSM-5, P. 37

**As printed** The essential features of intellectual development disorder (intellectual disability) are deficits in general mental abilities (Criterion A) and impairment in everyday adaptive functioning, in comparison to an individual's age-, gender-, and socioculturally matched peers (Criterion B). Onset is during the developmental period (Criterion C). The diagnosis of intellectual developmental disorder is based on both clinical assessment and standardized testing of intellectual **and** adaptive **functions.**

**As updated** The essential features of intellectual development disorder (intellectual disability) are deficits in general mental abilities (Criterion A) and impairment in everyday adaptive functioning, in comparison to an individual's age-, gender-, and socioculturally matched peers (Criterion B). Onset is during the developmental period (Criterion C). The diagnosis of intellectual developmental disorder is based on both clinical assessment and standardized testing of intellectual **and-functions,** **standardized neuropsychological tests, and standardized tests of** adaptive **functions-functioning.**

**Location** DSM-5, P.38

**As printed** Criterion B 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. **To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A.** Criterion C, onset during the developmental period, refers to recognition that intellectual and adaptive deficits are present during childhood or adolescence.

**As updated**

Criterion B 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 **across in multiple environments, such as one or more life settings at home,** school, **at** work, **at home, or in the** and community. **To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A.** Criterion C, onset during the developmental period, refers to recognition that intellectual and adaptive deficits are present during childhood or adolescence. Criterion C, onset during the developmental period, refers to recognition that intellectual and adaptive deficits are present during childhood or adolescence.

**Reason for update** The changes focus on a phrase contained in DSM-5 that appears to inadvertently change the diagnostic criteria for Intellectual Disability to add a fourth criterion.

\* The name was changed from Intellectual Disability (Intellectual Developmental Disorder)

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# **Appendix E**

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- **Forensic Psychiatry**
- **Forensic Psychology**
- **Forensic Pathology**
- **Forensic Neurology**
- **Forensic Social Work**
- **Forensic Science**
- **Child Sexual Abuse**
- **Criminology**
- **Security**

June 18, 2021

Jeremy Weis, Esq.  
Federal Public Defender's Office  
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Suite 300  
Kansas City, MO 64106

## **RE: Ernest Johnson v. Lombardi (Warden)**

Dear Mr. Weis,

I am writing to share the findings and opinions from my review of the case materials you have provided, and my collateral interviews of witnesses in the above captioned matter.

### **Referral Questions**

You have asked that I examine and test Mr. Johnson, and review the background materials in this case, in order to address the following referral questions:

- (1) In light of evolving diagnostic standards, does Mr. Johnson meet criteria for Intellectual Disability pursuant to *Atkins v. Virginia* under current diagnostic guidelines?

### **Answers to Referral Questions**

Based on my examination, testing, and review of the background materials, I have reached the following opinions to a reasonable degree of psychological certainty:

(1) Mr. Johnson has significantly subaverage intellectual functioning based on valid, objective test scores that fall within the range of Intellectual Disability.

(2) Mr. Johnson exhibits significant deficits or impairments in all three domains of adaptive functioning (Conceptual, Social and Practical) at the level of "Mild" to "Moderate" severity.



(3) Mr. Johnson's intellectual and adaptive deficits originated in the developmental period.

(4) Mr. Johnson thus meets all of the current criteria for Intellectual Disability pursuant to Atkins v. Virginia.

### **Qualifications of Examiner**

I was an expert witness for the Government in Atkins v. Virginia, and I have since consulted on numerous Atkins-related cases for both prosecutors and defense attorneys throughout the country.

I received a Bachelor's Degree in psychology with honors from Washington and Jefferson College (1980), a Master's Degree in psychology from the University of Virginia (1985), and a Ph.D. in clinical psychology from the University of Virginia (1989). I completed my clinical psychology internship specializing in forensic psychology at New York University Medical Center, Bellevue Hospital, and Kirby Forensic Psychiatric Center in New York City (1986-1987), and was awarded a Post-Doctoral Fellowship in Forensic Psychology, also at New York University Medical Center, Bellevue Hospital, and Kirby Forensic Psychiatric Center during which I specialized in forensic neuropsychology (1987-1988).

I am Board Certified in Forensic Psychology by the American Board of Forensic Psychology of the American Board of Professional Psychology, Diplomate Number 5620. I am a Fellow of the American Academy of Forensic Psychology; a Fellow and Past-President of the American Academy of Forensic Sciences; and a Fellow of the National Academy of Neuropsychology. I am licensed as a clinical psychologist by the State of California, License Number PSY15694. I am also licensed as a clinical psychologist by the State of New York, License Number 011106.

I am a 2020-2022 Distinguished Fellow at the Center for Psychology and the Law of the University of California – Irvine. From 1994 until the Forensic Psychiatry Fellowship program I taught in was ended in 2017, I was an Assistant Clinical Professor of Psychiatry and Biobehavioral Sciences at the Semel Institute for Neuroscience and Human Behavior and the Resnick Neuropsychiatric Hospital of the David Geffen School of Medicine at UCLA. Currently, as the UCLA Forensic Psychiatry Fellowship has been reinstated, I have a promotion

pending to Associate Clinical Professor. From 1992 to 1996 I was a Clinical Assistant Professor in the Department of Psychiatry at New York University School of Medicine. I was also a forensic research scientist at the Nathan Kline Institute for Psychiatric Research, and the founding director of the Forensic Neuropsychology Laboratory at Kirby Forensic Psychiatric Center in New York City from 1988 to 1994.

I have authored over 100 publications and presentations at professional meetings, with a research emphasis on forensic issues involving forensic neuropsychological assessment, mental disorders, brain damage, intellectual disability, elder capacities, and violent criminal behavior.

I have been admitted to testify as an expert witness in more than two hundred cases, including testimony in both criminal and civil matters in federal and state courts throughout the United States. I have consulted and testified for both prosecutors and defense attorneys in criminal cases, as well as plaintiffs and defense attorneys in civil matters.

### **Diagnostic Criteria for Intellectual Disability**

In their decision in Atkins v. Virginia, the United States Supreme Court stated:

Clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions. Their deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability.<sup>1</sup>

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<sup>1</sup> Atkins v. Virginia, 536 U.S. 304, 317-21 (2002).

Both the American Association on Intellectual and Developmental Disabilities (AAIDD) and The Diagnostic and Statistical Manual of Mental Disorders – 5<sup>th</sup> edition (DSM-5) define Intellectual Disability (ID) as a neurodevelopmental disorder that begins in childhood and is characterized by intellectual difficulties, as well as difficulties in conceptual, social, and practical areas of living. The DSM-5 diagnosis of ID requires the satisfaction of three criteria:

- A. Deficits and intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment academic learning and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing;
- B. Deficits in adaptive functioning that result in failure to meet developmental benchmarks in socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community. Adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical; and
- C. Onset of intellectual and adaptive deficits during the developmental period.

Normally-functioning individuals have an average IQ score of 100. Those with Intellectual Disability have significantly subaverage IQ scores of approximately 75 or below.

The DSM-5 definition of ID encourages a more comprehensive view of the individual than was true under the fourth edition, DSM-IV. More importance is placed on clinical judgment with regard to the presence of adaptive deficits, and less emphasis is placed on bright-line IQ cutoff scores. Intellectual Disability Notably, the diagnosis is made on the basis of evidence of adaptive deficits, and is not ruled-out by the presence of adaptive strengths. Adaptive deficits are classified on a scale from "Mild" to "Moderate" to "Severe" to "Profound," based on criteria set out in the DMS-5. Notably, even "Mild" deficits represent a significant impairment in one's adaptive skills and ability to function.

### **Basis for Opinions**

#### **Scope of Examination and Informed Consent**

I personally examined and tested Ernest Johnson in a quiet, private visiting room at the Missouri Department of Corrections Potosi Correctional Center on May 31, 2019 and June 1, 2019. Mr. Johnson was hands-free, and unrestrained during the examination. Comfort breaks were taken as needed.

He was advised that I had been retained by your office, of the limits on confidentiality in this forensic context, and of the lack of any treating relationship between us. Mr. Johnson was able to provide his informed consent to participate with this understanding.

#### **Tests Administered**

- Structured Neuropsychological Interview
- Mental Status Examination
- Wechsler Adult Intelligence Scale-IV
- Wide Range Achievement Test-IV
- California Verbal Learning Test -II
- Trail Making Test, Parts A & B
- Wisconsin Card Sort
- Tests of Verbal Fluency (F-A-S)
- Animal Naming Test
- Clinical Adaptive Functioning Interview

#### **Materials Reviewed**

I have reviewed several volumes of material regarding Mr. Johnson, which included the following:

1. 2009-06-09 Neuropsychological Evaluation by Dr. Paul D. Connor
2. 2005-08-15 Psychological Evaluation by Dr. Natalie Novick Brown
3. 2006-05-10 and 2006-05-11 Denis Keyes – Third Sentencing Hearing Testimony
4. 1995-12-13 Evaluation by Dr. Dennis Cowan
5. 2008-08-14 Forensic Psychiatric Examination by Dr. Richard S. Adler

6. 2004-07-21 WAIS-III Raw Data from Wayne "Sonny" Bradshaw
7. 2005-02-17 Deposition of Wayne "Sonny" Bradshaw
8. 2004 07-21 Evaluation by Dr. Gerald Heisler
9. 2005-02-17 Deposition by Dr. Gerald Heisler
10. 2001-09-07 Deposition of Dr. Carole Bernard
11. Ernest Johnson's School Records
12. Original File of Dr. Dennis Keyes
13. 2004-08-10 Report of Dr. Dennis Keyes
14. 2006-05-09 Dennis Booth – Third Sentencing Hearing Testimony
15. 2006-05-10 Robin Seabaugh – Third Sentencing Hearing Testimony
16. 1999-03-12 Jerome Peters – Second Sentencing Hearing Testimony
17. 2006-05-10 Thomas Powell – Third Sentencing Hearing Testimony
18. 1995-05-17 Jean Ann Patton – Original Trial Testimony
19. 2006-05-09 Gloria "Lisa" Johnson – Third Sentencing Hearing Testimony
20. 2005-02-10 Memo of Interview of Gloria "Lisa" Johnson and additional handwritten notes
21. 1995-05-17; 1999-03-11; 2006-05-09 Bobby Johnson – All Three Sentencing Hearings
22. 1995-11-21; 1995-12-07; 1995-02-11; 1995-12-13; 1996-02-13 Memos of Interviews of Bobby Johnson, Jr.
23. 2001-04-16 Affidavit of Bobby Johnson
24. 1995-05-17; 1999-03-11 Beverly Johnson – All Three Sentencing Hearings
25. 2001-06-01 Affidavit of Beverly Johnson
26. 2006-05-10 Ricky Frazier – Third Sentencing Hearing Testimony
27. 2006-05-10 Steven Mason -Third Sentencing Hearing Testimony
28. 2006-05-11 CW Dawson – Sentencing Hearing Testimony
29. 1996-05-21 Dr. Carole Bernard – First PCR Testimony
30. 1996-05-21 Dr. Dennis Cowan – First PCR Testimony
31. 1999-03-12 Dr. Dennis Cowan – Second Sentencing Hearing
32. 1994-06-24 Memo of Interviews with Delores Grant and Margaret Patrick
33. 1996-03-31 Psychological Evaluation by Robert Smith
34. 2000-04-06 Psychological Evaluation at Potosi Correctional Center
35. 2001-05-23 Affidavit of Fred Johnson
36. 2001-06-06 Affidavit of Patricia Zellars
37. 2001-10-26 Affidavit of Phillip McDuffy

38. 2004-12-09 Memo of Interview with Albert Patton
39. 2001-04-24 Affidavit of Anna "Annie" Lee Taylor
40. 2001-04-20 Affidavit of Bobby Johnson, Sr.
41. 2001-11-09 Affidavit of Catherine Luebbering
42. Genogram of Ernest Johnson's Family
43. James Dempsey's Social History
44. Jean Anne Patton's Mental Health Records
45. Michael Dennis's Social History
46. 2001-05-22 Affidavit of Preston Heard [Elementary School Teacher]
47. Videotaped Evaluations performed by Wayne "Sonny" Bradshaw and Dr. Gerald Heisler
48. Ernest Johnson's University Medical Records
49. August and September of 2008 Medical Records
50. September and October of 2008 Medical Records
51. 2008-09-12 Certified Copies of Potosi Correctional Center Medical Records
52. 2008-08-14 Certified Copies of Potosi Correctional Medical Records

### **Background Information**

Mr. Johnson's case, background, and family history have been extensively discussed elsewhere in the case materials, and will not be reiterated in detail here. However, a few important facts will be discussed to provide context and support for my opinions.

In addition, Mr. Johnson's history includes several risk factors for intellectual disability that merit a brief discussion to add context for understanding his inherent vulnerability to Intellectual Disability.

### **Family History**

Mr. Johnson reported that he was born in Steele, Missouri on [REDACTED] 1960. His father, Bobby, died at 78 years of age. Mr. Johnson was not sure of his precise cause of death, but related that he had kidney problems and was on dialysis. His father worked as a farmer and was uneducated and illiterate.

His mother, Jean Ann Patton, has also passed away although he was unable to tell me how old she was when she died and was unsure of her cause of death other than to say, "drinking probably." He said

that she did not work outside of the home, and when I asked how far she went to school he replied simply, "not far."

He stated that he is the youngest of three children. His older brother Bobby Johnson, Jr. is now, "68 or 70" years old, and his sister Beverly passed away from leukemia when she was, "62 or 63."

Mr. Johnson reported that he has never been married but has a son named Tony who is 37 years old.

### **Education**

Mr. Johnson told me that he completed the 10th grade before stopping school. He described his grades in school as, "not good."

He said he was taught in a Special Education, "trailer behind the school." He explained that he was placed in this program from preschool through the 10th grade. This report is supported by his school records, which reflect his placement in Special Education classes and Developmental Reading.<sup>2</sup>

### **Employment**

Mr. Johnson reported doing farm work, including harvesting watermelons, beans, and cotton.

He denied military service.

### **Medical History**

Mr. Johnson was unable to provide any information about his mother's pregnancy with him or his delivery, although he did report that she drank alcohol while she was pregnant with him. This report is also repeatedly supported in Mr. Johnson's case records.<sup>3</sup>

He told me he was slow to achieve developmental milestones including walking and talking. "Grandma always told me that I was special."

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<sup>2</sup> School Records, p. 4, 7, 11.

<sup>3</sup> Detailed below at p. 9-11 of this report.

**Brain tumor.** Mr. Johnson reported that he had a cancerous brain tumor removed, "in 2003 or eight." His medical records indicate that he had a 10-year history of headaches and began having seizures, which led to an MRI of his brain that revealed a mass. He was subsequently diagnosed with brain cancer by Dr. N. Scott Litofsky, who recommended neurosurgery to remove the tumor:

Dictated by: N. Scott Litofsky, M.D.

CLINIC NOTE

CHIEF COMPLAINT/HISTORY OF PRESENT ILLNESS:

I saw this patient in University of Missouri Neuro-Oncology Clinic for a consultation today, August 25, 2008 at the request of the medical staff of Potosi Correctional Center to evaluate the patient for a brain tumor. The patient is a 48-year-old man who states he has had headache for 10 years. He had a seizure several months ago and was placed on an anticonvulsant medication. He was evaluated with an MRI, which showed a brain mass.

\* \* \* \*

LABORATORY AND X-RAY DATA:

Neurodiagnostic studies: MRI of the brain shows an enhancing mass parasagittally, and more to the left than the right, involving the sagittal sinus with local mass effect. The sagittal sinus is not patent through the mass on the magnetic resonance venogram, and the mass enhances homogenously.

IMPRESSION:

Cerebral mass lesion. Likely represents a parasagittal meningioma. It is of sufficient size to warrant surgical resection. It is likely contributing to the patient's symptoms of headache, and may have been associated with the patient's seizure activity, which he described. A bifrontal parietal craniotomy with resection of the tumor and the sagittal sinus with no reconstruction would be the appropriate operative

He underwent a bi-frontoparietal craniotomy for resection of a parasagittal meningioma involving the sagittal sinus on 08/28/2008.

Dr. Litofsky followed-up with Mr. Johnson following the surgery, and noted the following findings on 09/08/2008:



Dictated by: N. Scott Litofsky, M.D.

CLINIC NOTE

I saw the patient in University of Missouri Neuro-Oncology Clinic for follow-up today, September 8, 2008. The patient returns 10 days following bifrontoparietal craniotomy for resection of parasagittal meningioma, involving the sagittal sinus. Final pathology is consistent with atypical meningioma. The patient has small amounts of residual tumor at the anterior and posterior aspects of the sagittal sinus, that were not resected because of proximity to draining veins. The patient relates that he has some headache today, although he did not complain to his correction officers of headache prior to transport. He states that his arm function is improving. He has not had any improvement in his leg function.

Mr. Johnson reported a history of seizures that were attributed to his brain tumor but which have been managed with medication since his brain surgery.

**Prior history of head injuries.** Mr. Johnson also reported experiencing several head injuries while growing up, including a concussion with loss of consciousness after falling off a cotton wagon.

According to **James Dempsey's** social history:

Earnest's [sic] mother, Jean Ann Patton (taking Albert Patton's name after marriage) ... reports that when Earnest [sic] was about 8 years old, he fell off a cotton trailer, bumped his head on concrete and was knocked unconscious. She reports that she cried and begged him to wake up, promising him Cheerios if he would wake up. She stated that her husband would not take Ernest to the hospital after he came to.<sup>4</sup>

**Jean Ann Patton** also testified during the original trial:

Q. Okay. Let me ask you about, do you remember a time when Ernest fell off a cotton trailer?

A. Yes.

Q. Tell the jury about that. How old was he when he fell off that cotton trailer?

A. I can't just remember now, but he was a really small boy. He was about -- he was about seven or eight years

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<sup>4</sup> James Dempsey social history, p.12.

old. He was, it was on that thing where you pulled the trailer up off, to weigh the cotton in the trailer, and he fell off.

Q. Did he get hurt?

A. His head, it hurt his head, he did.<sup>5</sup>

Mr. Johnson also reported being hit in the head with a chair in the 1980's when he was 18 or 19 years old. He stated that he lost consciousness during this assault and was treated at the University of Missouri Hospital in Columbia.

He denied any history of stroke, hypertension, or diabetes.

### **Psychiatric History**

Mr. Johnson denied any history of psychiatric treatment in the community, although the records indicate that he has been evaluated while in prison. He also denied any history of suicidal ideation or suicide attempts.

### **Current Medications**

Mr. Johnson reported that his only medication is for control of seizures, although he could not tell me the name of the medicine or his dosage. He did state that he has been taking the medicine since 2009 for seizure control.

### **Underlying Risk Factors For Intellectual Disability**

Although not required for a diagnosis, Mr. Johnson has a number of biological and environmental risk factors in his history that predispose him to Intellectual Disability. The evidence for each of these and some of the relevant supporting research will be described in the sections below, including a genetic predisposition, exacerbated by; (1) fetal alcohol exposure; (2) a history of head injuries; (3) child abuse and neglect; and (4) poverty and malnutrition during his developmental period.

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<sup>5</sup> Original trial testimony transcript, p. 2513.

### **Genetic Predisposition**

It has been recognized for many years that Intellectual Disability runs in families.<sup>6</sup> Having a parent or sibling with Intellectual Disability significantly increases the likelihood of having an intellectual disability.<sup>7</sup> Genetic causes are estimated to be responsible for approximately a quarter to one-half of identified cases.<sup>8</sup>

Mr. Johnson was born into a family with a documented history of intellectual impairment. His mother, Jean Ann Patton, was diagnosed with Moderate Mental Retardation by Maria Lykowski, M.D. at MMMHC on or about 11/19/1974. Her Full-Scale IQ was formally measured to be 61 at that time, with concomitant impairments in her adaptive functioning capabilities.<sup>9</sup>

In addition to Mr. Johnson, her son, Ernest's half-brother Danny Patton was also born with Profound Intellectual Disability and other neurological and neurobehavioral birth defects including microcephaly, cerebellar atrophy, legal blindness, seizure disorder, and PICA requiring constant care throughout his life.<sup>10</sup>

Having a mother and a brother diagnosed with Intellectual Disability significantly increases the risk that Mr. Johnson would be diagnosed with ID.

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<sup>6</sup> Nichols, P.L. (1984). Familial mental retardation. Behavior Genetics, 14: 161.

Heber, R. & Garber, H. (1970). An Experiment in the Prevention of Cultural-Familial Mental Retardation. Wisconsin Univ., Madison. Regional Rehabilitation Research and Training Center in Mental Retardation. Paper presented at Second Congress of International Association for Scientific Study of Mental Deficiency, Warsaw, Poland.

<sup>7</sup> Elena Bonora, Claudio Graziano, Fiorella Minopoli, et al. (2014). Maternally inherited genetic variants of CADPS2 are present in Autism Spectrum Disorders and Intellectual Disability patients. EMBO Molecular Medicine. Vol 6, No 6, p. 795-809.

Pietro Chiurazzia & Filomena Pirozzi (2016). Advances in understanding – genetic basis of intellectual disability. F1000Res; 5: 599.

<sup>8</sup> Srour M, Shevell M. (2014). Genetics and the investigation of developmental delay/intellectual disability. Arch Dis Child. 2014;99(4):386-389.

<sup>9</sup> Missouri Department of Mental Health records, MMMHC, bates 12 and 15.

<sup>10</sup> See Danny Patton's Marshall Rehabilitation Center medical records.

### **Fetal Alcohol Exposure and Fetal Alcohol Spectrum Disorder Diagnosis**

Dr. Adler, Dr. Smith. and Dr. Novick-Brown have all previously determined that Mr. Johnson suffers from Fetal Alcohol Exposure.<sup>11</sup>

There is a long-established scientific literature linking maternal alcohol use during pregnancy with birth defects, cognitive impairments, and intellectual disability.<sup>12</sup> This is a critical fact, because maternal alcohol use during pregnancy is the leading known risk factor for intellectual disability.<sup>13</sup>

In addition, Fetal Alcohol exposure has been specifically linked to broad impairments in adaptive functioning that are directly relevant to diagnosing intellectual disability. For example, in a longitudinal study of 473 patients sponsored by the Centers for Disease Control and Prevention, patients with Fetal Alcohol Syndrome received an average adaptive behavior composite score of 67 on a formal measure of adaptive behavior and average reading, spelling, and arithmetic scores of 78, 75, and 70, respectively, on achievement testing.<sup>14</sup> All of these scores are consistent with diagnostic criteria for Intellectual Disability as well.

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<sup>11</sup> Dr. Adler's 08/14/2008 Report.

<sup>12</sup> National Institute on Alcohol Abuse and Alcoholism (2000, December). Fetal alcohol exposure and the brain (Alcohol Alert No. 50). Retrieved from <http://www.niaaa.nih.gov/publications/aa50.htm>

Cornelius, M. D., Day, N. L., Richardson, G. A., & Taylor, P. M. (1999). Epidemiology of substance abuse during pregnancy. In P. J. Ott & R. E. Tarter (Eds.), *Sourcebook on substance abuse: Etiology, epidemiology, assessment, and treatment* (pp. 1–13). Needham Heights, MA: Allyn & Bacon, Inc.

<sup>13</sup> O'LEARY, C., LEONARD, H., BOURKE, J., D'ANTOINE, H., BARTU, A. and BOWER, C. (2013), Intellectual disability: population-based estimates of the proportion attributable to maternal alcohol use disorder during pregnancy. *Developmental Medicine & Child Neurology*, 55: 271–277.

<sup>14</sup> Ann P. Streissguth, A.P., Barr, H.M., et al. (1996). *Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE): Final Report*. Atlanta, GA: Centers for Disease Control and Prevention, Grant No. R04/CCR008515.

Numerous available interviews and social histories indicate that Mr. Johnson's mother, Jean Ann Patton, in addition to being diagnosed with Intellectual Disability had a long-standing history of alcohol abuse.

**Dr. Smith** noted the following in his 1996 report regarding Mr. Johnson's fetal alcohol exposure:

Ms. Patton indicated that she began using alcohol at approximately age 10. ... She had also been introduced to marijuana and smoked on a near daily basis. Interviews with Bobby Johnson, Sr., have indicated that Ms. Patton drank throughout each of her pregnancies, including her pregnancy with Ernest Johnson. Ms. Patton also supported this, indicating that her difficulty with her "nerves" prevented her from being able to cut back even during her pregnancies. Ms. Patton's abuse of alcohol continues to the present time. She acknowledged, with embarrassment, that she is unable to go for a full day without drinking.

The research has demonstrated that the abuse of substances by a mother during her pregnancy can have negative effects upon the unborn child. Ms. Patton reflected upon her pregnancy with Mr. Johnson and indicated that he was born at home, was premature, and extremely small in stature and weight. She noted that early along he was thin and often ill. The school records indicate that Mr. Johnson had significant difficulties in school and was placed in special education classes. This history strongly supports the diagnosis of Fetal Alcohol Effect for Mr. Johnson.

\* \* \* \*

Mr. Johnson's limited intellectual functioning is likely to be the direct result of his mother's abuse of alcohol and other drugs during her pregnancy. As an adolescent and young adult, Mr. Johnson has been greatly limited in his ability to perform in school and employment situations.<sup>15</sup>

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<sup>15</sup> 03/21/1996 Report of Dr. Robert Smith, p. 3-5. See also Declaration of Bobby Johnson, Sr.

This is also reflected in an interview with **Mr. Johnson's sister Beverly:**

Beverly also shared that she has a step-brother, Danny Patton, and that he has been institutionalized because her mother did not take care of him. Danny was born with severe deficiencies because of Jean Ann's alcohol and drug abuse when she was pregnant, according to Beverly.<sup>16</sup>

Mr. Johnson's mother drinking during her pregnancy with him has also been reported by **several family members:**

Bobby Sr. reported that Jean Ann was drinking heavily throughout the pregnancy of both Beverly and Ernest, and she received no pre-natal care as they could not afford it.

Both Bobby Sr. and Jean Ann were drinking a lot at this point and the relationship often involved physical abuse of one another. Bobby Jr. recalls numerous occasions when his parents would have physical fights. Bobby Jr. recalls living in a shack that did not have electricity, plumbing, heating or refrigeration.<sup>17</sup>

Ernest was born [REDACTED] 1960 at home. According to family members, including Bobby Sr., Ernest was pre-mature, small, and underweight. It was reported by Ernest's father that Jean Ann, Ernest's mother, drank heavily throughout her pregnancy with Ernest.<sup>18</sup>

Bobby Johnson Jr. also reported that Jean Ann drank while she was pregnant with Ernest, and described alcoholism as rampant throughout the extended family.<sup>19</sup>

Beverly Johnson testified that she says her mother was always an alcoholic.<sup>20</sup>

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<sup>16</sup> 11/09/2001 Affidavit of Karen Luebbering, interview with Mr. Johnson's sister Beverly Johnson, p. 5.

<sup>17</sup> Michael Dennis social history, p. 3.

<sup>18</sup> Ibid, p. 5.

<sup>19</sup> 02/07/1996 interview with Loyce Hamilton, bates 1814.

**Dr. Natalie Novick Brown** supports her diagnosis of Mr. Johnson with Fetal Alcohol Spectrum Disorder in elaborate detail in her report<sup>21</sup> that is too extensive to be reproduced here, but which the reader is strongly encouraged to review.

## **Head Injury**

It has long been known that concussions have a cumulative and adverse effect on brain functioning,<sup>22</sup> and especially on children's developing brains in which research has demonstrated particular vulnerabilities for expressive language deficits.<sup>23</sup> Head injury can be a direct cause of cognitive impairment, intellectual decline, and IQ loss due to traumatic brain injury.

Mr. Johnson has a developmental history of at least two significant head injuries with loss of consciousness, beginning at eight years of age.

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<sup>20</sup> Original Trial Testimony, p. 2485.

<sup>21</sup> Dr. Novick-Brown's report, 08/15/2005, p. 14-40.

<sup>22</sup> Gronwall, D., & Wrightson, P. (1975). Cumulative Effect of Concussion. The Lancet, Volume 306, Issue 7943, pp. 995-997.

<sup>23</sup> Ewing-Cobbs, L., Miner, M.E., Fletcher, J.M., & Levin, H.S. (1989). Intellectual, Motor, and Language Sequelae Following Closed Head Injury in Infants and Preschoolers. J. PediaPCRA Transcript, Psychol., 14 (4): pp. 531-547.

Anderson, V., & Moore, C. (1995). Age at injury as a predictor of outcome following pediatric head injury: A longitudinal perspective. Child Neuropsychology: A Journal on Normal and Abnormal Development in Childhood and Adolescence, Volume 1, Issue 3, pp. 187-202.

Collins, M.W., Lovell, M.R., Iverson, G.L., et al. (2002). Cumulative Effects of Concussion in High School Athletes. Neurosurgery: Volume 51, Issue 5, pp. 1175-1181.

Moser, R.S., Schatz, P., & Barry D. (2005). Prolonged Effects of Concussion in High School Athletes. Neurosurgery: Volume 57, Issue 2, pp. 300-306.

## **Child Abuse**

Both witnessing the abuse of others, and being the victim of abuse, increase the risk of intellectual disabilities in children.<sup>24</sup> Mr. Johnson has experienced both. Several experts and lay witnesses have described abusive incidents during Mr. Johnson's childhood that are summarized below.

**Physical abuse and neglect.** It is important to note that the abandonment, neglect, abuse, and depravation that Ernest Johnson experienced during his early years had a significant impact on his development:<sup>25</sup>

The primary caretaker for Mr. Johnson during his childhood and adolescence was his paternal grandmother, Clementine Johnson. Interviews of the family members indicate that she was a caring but ineffectual surrogate mother. She was unemployed and provided minimal structure for the children. When she felt the children had become too unruly, she would whip them with a switch, leaving welts and cuts upon their bodies. She relied heavily upon Bobby Johnson, Jr. to assist her with the children and to serve as a parent. She was unable to protect the children from their intoxicated father who would feel the need to assert his authority over the children by beating them. On several occasions, he is noted to have punched Mr. Johnson in the face and to continue beating him in spite of the pleadings of the grandmother. On another occasion, the father chased Mr. Johnson across a field, firing a shotgun into the air over his head. Mr. Johnson was terrified and refused to return home until his father left. A similar event occurred when the father chased

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<sup>24</sup> Perez, CM, & Widom, CS. (1994). Childhood victimization and long-term intellectual and academic outcomes. Child Abuse & Neglect, Volume 18, Issue 8, p, 617-633.

Carrey, N, Butter, HJ, Persinger, MA, et al. (1995). Physiological and Cognitive Correlates of Child Abuse, Journal of the American Academy of Child & Adolescent Psychiatry, Volume 34, Issue 8, p. 1067-1075.

<sup>25</sup> 03/21/1996 Report of Dr. Robert Smith, p. 3.



Mr. Johnson across the field to whip him. However, on this occasion Mr. Johnson had hidden a BB gun and turned and shot his father. He then ran and hid until the father left.<sup>26</sup>

Within Mr. Johnson's family, substance abuse and violence were directly related to one another. His father, Bobby Johnson, Sr., would abuse alcohol and become extremely agitated and violent. There are multiple reports of his physically abusing the children and his wife, chasing the family with a gun and shooting at them. With regard to Ms. Patton, she is also reported to have a violent temper when intoxicated. She has reported, as well as others, that she has become physically abusive toward her children when intoxicated and engaged in physical fights with her husbands and male partners when under the influence.<sup>27</sup>

**Bobby Johnson, Jr.** reported the following:

Bobby stated that his father's "whuppings" were always severe. He believes that if the current child abuse laws were in effect at the time he and his brother and sister were growing up, both his father and grandmother would have been jailed. Bobby recalls having personally experienced such severe beatings that his skin was full of welts. He compares those injuries to the welts on Kunta Kinte in the "Roots" movie. He also believes that Ernest got more beatings from his father than the rest of the children.<sup>28</sup>

**Beverly Johnson**, Ernest Johnson sister, reported to social worker James Dempsey that:

Beverly Johnson states that she, Ernest, and Bobby, or physically abused by a friend of their paternal grandfather. She reports that they called the man Mister Izac, and that he had an amputated leg. She reports that Mister Izac would force them to lie across the floor in a row, while he sat in a chair and whipped them with belts and extension cords. She reports that he threatened to kill them if they ever told their grandfather.<sup>29</sup>

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<sup>26</sup> 03/21/1996 Report of Dr. Robert Smith, p. 8.

<sup>27</sup> 03/21/1996 Report of Dr. Robert Smith, p. 5-6.

<sup>28</sup> Memo to file from interview of Bobby Johnson, junior.

<sup>29</sup> James Dempsey's social history, p. 16.

**Sexual abuse and child prostitution.** At approximately age 17, [Mr. Johnson's sister] Beverly related that she was sexually abused by her stepfather, Albert Patton. She indicated that he also sexually molested Mr. Johnson and her brother Bobby Johnson, Jr.:

As Bobby Johnson, Jr. reached late adolescence, his mother, Jean Ann Patton, began introducing him to older women (e.g., ages 30 to 40) for sexual relations. On these occasions, the women would give Bobby Johnson, Jr. money and/or alcohol and drugs. He would then share these "gifts" with his mother. Again, Mr. Johnson was exposed to these behaviors and had no way to judge them as being inappropriate.

When Mr. Johnson was approximately 16 years of age, his mother began introducing him to older women for sex. Initially, he was reluctant and embarrassed. On the first occasion, Ms. Patton encouraged Mr. Johnson to use alcohol and marijuana to "put him in the mood" before introducing him to an older woman. From that time on, it was a weekly event for Mr. Johnson to be introduced by his mother to an older woman with whom he was expected to have sex. At the conclusion of each sexual encounter, he would receive gifts in the form of money and/or drugs. It was expected that Mr. Johnson would then share these gifts with his mother. It is important to note that Jean Ann Patton acknowledged during her interview that she prostituted each of her children in order to support herself and her abuse of alcohol and drugs. This prostitution was also reported by Mr. Johnson's stepbrother, Albert Patton. He related that his mother also encouraged him to have sex with older women for "gifts."<sup>30</sup>

### **Poverty and Malnutrition**

Mr. Johnson grew up in a highly unstable and impoverished home that exposed him to significant risks for abnormal brain development. Declaration and affidavits from numerous witnesses, describe objectively deplorable, filthy and unsanitary conditions in the family home, and lack of food and proper nutrition during Mr. Johnson's developmental years:

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<sup>30</sup> 03/21/1996 Report of Dr. Robert Smith, p. 7-8..

**Bobby Johnson, Sr.** describes being a sharecropper all his life and how little they had in terms of personal wealth. He also references Jean Ann's drinking and about her drinking during pregnancy.<sup>31</sup>

**Anna Lee Johnson Taylor** has described how poor the families were growing up.<sup>32</sup>

Ernest's uncle **Fred Johnson** has described how poor their families were all throughout life.<sup>33</sup>

Ernest's brother **Bobby Johnson, Jr** describes in great detail how poor their family was growing up.<sup>34</sup>

**Neurodevelopmental consequences of poverty.** Entire books have been written about the negative impact of poverty on brain development.<sup>35</sup> The combination of poverty and abuse is particularly toxic in this regard.<sup>36</sup> Children who grow up in low-income families are exposed to more environmental stressors, such as unsafe neighborhoods, stressed parents, and less access to healthy food. Growing up below the poverty line hinders brain development and leads to poorer performance in school.

Research has demonstrated that gray matter brain volume in the temporal lobes, frontal lobes and hippocampus—brain areas that are

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<sup>31</sup> Bobby Johnson, Sr.'s Declaration.

<sup>32</sup> Anna Lee Johnson Taylor's Affidavit.

<sup>33</sup> Fred Johnson's Affidavit.

<sup>34</sup> See 02/07/1996 interview with Loyce Hamilton; 12/11/1995 Memo to file.

<sup>35</sup> Lipina, S.J., & Colombo, J.A. (2009). Poverty and brain development during childhood: An approach from cognitive psychology and neuroscience. Washington, DC, US: American Psychological Association.

Faraha, M.J., Sherab, D.M., Savagea, J.H., et al. (2006). Childhood poverty: Specific associations with neurocognitive development. Brain Research, Volume 1110, Issue 1, p. 166–174.

<sup>36</sup> Luby, J., Belden, A., Botteron, K., et al. (2013). The Effects of Poverty on Childhood Brain Development: The Mediating Effect of Caregiving and Stressful Life Events. JAMA Pediatr.; 167(12),p. 1135-1142.

critical to cognitive processes required for academic and social success—is particularly vulnerable to a person’s early environment. Children who grew up in families below the federal poverty line have gray matter volumes 8 to 10 percent below normal development. Another consequence of living in poverty is inadequate nutrition, which in turn increases the risk of cognitive disabilities.<sup>37</sup>

**Socioeconomic status.** Poverty is a key variable in understanding why some children’s brains develop abnormally. In a seminal study of this issue,<sup>38</sup> the IQs of children raised in urban versus suburban Detroit changed significantly from age 6 years to age 11 years:

In this study, the change from age 6 years to age 11 years increased the percentage of urban children scoring less than 85 on the WISC-R from 22.2 to 33.2. ... A negligible change was observed in suburban children. Maternal IQ, education, and marital status, and low birth weight predicted IQ at age 6 years but were unrelated to IQ change. Growing up in a racially segregated and disadvantaged community, more than individual and familial factors, may contribute to a decline in IQ score in the early school years.

**Dr. Smith** noted in his report:

When Mr. Johnson was approximately 12 years of age, all of the children became involved in shoplifting food and clothing for themselves and the family. Mr. Johnson's sister, Beverly, often skipped school because of the harassment she received from the other children regarding her shoddy clothing and unkempt appearance. The impoverished condition of the family continued and their father provided no relief. Stealing was justified for survival and was accepted by the adults in the family,<sup>39</sup>

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<sup>37</sup> Haris, JC. (2006). Intellectual Disability: Understanding Its Development, Causes, Classification, Evaluation, and Treatment. New York: Oxford University Press.

<sup>38</sup> Breslau, N., Chilcoat, HD, Susser, ES, et al. (2001). Stability and Change in Children’s Intelligence Quotient Scores: A Comparison of Two Socioeconomically Disparate Communities. American Journal of Epidemiology, Vol. 154, No. 8, 711-17.

<sup>39</sup> 03/21/1996 Report of Dr. Robert Smith, p. 6-7.

**Fred Johnson** stated in his 2001 affidavit:

Our family was one of numerous black families living approximately five miles outside of Iuka, Mississippi, where the white families lived. We were extremely poor, often unable to pay our monthly rent of \$.50 to \$1.00. We ended up moving into smaller houses that were more affordable. Once our family lived in a building that had been used to store grain for farm animals. Cattle were once kept in the front part of this building. It had a tin roof and tin walls inside, and we could see through the walls. We were desperate to keep the winter cold and rain out, and ended up using scrap pieces of wood and cardboard to cover openings. Winter was the worst, because we had no adequate heating system. I made a stove out of an old oil drum by cutting a hole into it and covering the hole with a piece of tin. This provided the only heat we had, and we burned anything we could find - sticks, limbs, anything. It was very cramped living in this building; some of our family slept on pallets of quilts or small mattresses on the kitchen floor because there was no bedroom space.<sup>40</sup>

**Intellectual Disability, Genetic Vulnerabilities,  
and Risk for Comorbid Disorders**

Mr. Johnson's record reflects a diagnostic history of depression, and early-onset alcohol abuse. Each of these disorders has a fundamental connection to intellectual disability and impaired adaptive functioning.

This is a critical concept, as many individuals with intellectual disability will also meet diagnostic criteria for a range of comorbid disorders, but the presence of a co-occurring disorder does not rule-out intellectual disability. The DSM-5 specifically notes, "The diagnosis of intellectual disability should be made whenever criteria A, B, and C are met."<sup>41</sup> Other diagnoses do not have to be excluded as a cause for impairments in order for the criteria of intellectual disability to be met.

**Psychiatric comorbidity.** The DSM-5 notes that co-occurring mental disorders are very frequent in persons with intellectual disability, with

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<sup>40</sup> 05/23/2001 Affidavit of Fred Johnson, p. 2.

<sup>41</sup> DSM-5, p. 39

rates three to four times higher than in the general population. Among the most common of the comorbid psychiatric disorders are attention-deficit/hyperactivity disorder; and depressive and bipolar disorders.<sup>42</sup>

**Early-onset alcohol abuse.** Substance abuse disorders are also common among persons with intellectual disability, often reflecting a lack of proper treatment and/or not receiving appropriate services.<sup>43</sup> In addition, there is a strong genetic loading for alcohol abuse in Mr. Johnson's family, increasing the risk that he would develop problems with alcohol. There is a longstanding and well-documented scientific literature demonstrating the genetic inheritance risk for alcohol and substance use disorders.<sup>44</sup>

### **Present Examination Findings**

#### **Behavioral Observations and Mental Status Examination**

Ernest Johnson was at the time a 58-year-old African American gentleman who arrived for testing using a cane for stability, and wearing prison-issued scrubs with a white shirt and grey pants. He wore bifocals. His appearance was remarkable for freckles, missing teeth, and a skull defect from past brain surgery to remove a malignant tumor.

He was pleasant, cooperative, and effortful throughout two days of examination and testing.

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<sup>42</sup> Ibid., p. 40.

<sup>43</sup> McGillicuddy, N. B. (2006), A review of substance use research among those with mental retardation. *Ment. Retard. Dev. Disabil. Res. Rev.*, 12: 41–47.

<sup>44</sup> Cloninger, C.R. (1999). The genetics of substance abuse. Chapter 7 in *The American Psychiatric Press Textbook of Substance Abuse Treatment*, Second Edition. Washington, DC: APA Press.

C. Robert Cloninger, Michael Bohman, & Sören Sigvardsson, (1981). Inheritance of Alcohol Abuse: Cross-Fostering Analysis of Adopted Men. *Arch Gen Psychiatry*. 1981;38(8):861-868.

Danielle M. Dick & Laura J. Bieru (2006). The genetics of alcohol dependence. *Curr Psychiatry Rep* (2006) 8: 151.

He was appropriately oriented to the world around him, knowing who he was, where he was, and the approximate date and time. (He was off on the date by one day, stating that it was May 30th when it was in fact May 31st.)

His speech was produced at a slow rate with mumbled articulation at times, but a normal quantity of output. He was also observed to stammer occasionally, for example at one point saying, "in the late... in the... in the... middle."

His thoughts were expressed in a simple but coherent, goal-directed, and logical fashion with no evidence of formal thought disorder. His thought content was free from fixed, false beliefs (i.e., delusions) or abnormal sensory experiences (e.g., auditory, visual, somatosensory, gustatory, or olfactory hallucinations). This presentation remained stable over both days of examination and testing.

His observable affect was blunted in range and intensity and this also remained unchanged over both days, although his affect was appropriately related to his mood and to the content of his thoughts. His underlying mood was inferred to be mildly anxious. His insight was fair.

He described his appetite as, "alright." He stated that his weight has gone up since he stopped smoking approximately 1 year ago. He also described his sleep as, "alright." He reported that his social relationships and activities are, "fine."

When asked how he has been feeling emotionally he replied tersely, "sad."

He denied any recent changes in his thinking or memory. However, he stated that he has experienced a stutter since his brain tumor surgery which effects his speech and language.

He also complained of gross motor impairment stating, "they took my equal liberty" out. By this he meant his equilibrium, but used a paraphasia which is symptom of expressive language impairment. This problem with balance again appears to be a consequence of his brain surgery.

He explained that he had developed a seizure disorder due to a cancerous tumor in his brain that was removed, "in 2003 or 8." However, he reported that his seizures are moderated by medication and that he has had no seizures in the past 3 years.

### **Neurocognitive and IQ Test Findings**

In addition to testing his intelligence during this examination, I also administered a focused battery of neuropsychological tests to assess his abilities in a number of specific areas of neurocognitive functioning that have historically been identified as deficit areas for him.

#### **Data Validity**

In any forensic context, the reliability and validity of the data obtained is of paramount importance in order for test interpretation and forensic opinions to be accurate. For this reason, forensic neuropsychologists employ measures to detect poor effort or malingering during their testing.

Mr. Johnson passed all these test validity checks, including: (1) Reliable Digit Span (RDS); (2) the Wisconsin Card Sort Failure to Maintain Set score and (3) the Forced-Choice trial of the CVLT-II. Therefore, his test results can be confidently relied upon as providing accurate measures of his current level of neurocognitive functioning.

#### **IQ Testing**

On formal IQ testing with the Wechsler Adult Intelligence Scale-IV, Mr. Johnson achieved a Full-Scale IQ score of 70 which falling at the bottom 2<sup>nd</sup> percentile, in the range of Intellectual Disability. Adjusting this score for norm obsolescence (the "Flynn effect") results in a Full-Scale IQ score of 66, also in the range of Intellectual Disability.<sup>45</sup>

Comparing the underlying Index scores, his broad cognitive ability areas were evenly developed (i.e., Verbal Comprehension, Perceptual Reasoning, Working Memory, and Processing Speed) with no areas of significant strength or weakness.

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<sup>45</sup> WAIS-IV mid-year norming date = 2007: 2019-2007=12 x .3 = 3.6; 70 - 3.6 = Flynn-corrected FSIQ = 66.4.



As will be discussed below, the level of intellectual functioning observed during this testing is commensurate with his past history of significantly subaverage IQ test scores.

### **Academic Achievement**

I tested Mr. Johnson's academic achievement using the Wide Range Achievement Test-IV. His abilities in all areas were significantly impaired, generally falling in the bottom 1<sup>st</sup> percentile (i.e., 99 out of 100 people score higher than he does). Functionally, his abilities fall at the early elementary school level.

His scaled scores (analogous to IQ scores) are summarized in the table below:

<b><u>WRAT-IV Scale</u></b>	<b><u>SS</u></b>	<b><u>Percentile</u></b>
Word Reading	65	1
Sentence Comprehension	65	1
Reading Composite	64	1
Spelling	61	0.5
Math Computation	70	2

### **Language and Communication**

Mr. Johnson's phonemic verbal fluency (i.e., his ability to generate words that begin with different letters, in this case F, A, and S) was severely impaired, placing him in the bottom 0.4th percentile when compared to others of his age, sex, and education (i.e., 99.6% of others have better verbal fluency than he does).

Similarly, his phonemic verbal fluency (the ability to generate words in different subject categories, in this case animal names) was also impaired, placing his ability in the bottom 8<sup>th</sup> percentile when compared to others of his sex, age, and education.

His Verbal Comprehension Index on the WAIS-IV placed his capacity for understanding what he hears in the bottom 2 percent of the population.

### **Problem Solving, Concept Formation, and Perceptual Reasoning**

On the Wisconsin Card Sorting Test (WCST), which tests his abstract problem-solving ability under conditions that require him to adapt to changing problems over time and his ability to learn from feedback, Mr. Johnson's performance was significantly impaired. He was only able to complete three out of six categories, placing him in the bottom 6<sup>th</sup> percentile compared to others of his age and education. He also exhibited a large number of perseverative responses (pathological repetition of incorrect answers despite feedback), and his Learning-to-Learn score (which measures his conceptual efficiency and ability to learn how the test works and how to solve the changing problems) was in the bottom 2<sup>nd</sup> percentile.

His Perceptual Reasoning Index on the WAIS-IV, which measures his ability to solve various abstract visual puzzles, placed him in the bottom 5 percent of the population.

### **Speed of Information Processing**

Mr. Johnson's information processing speed is moderately impaired. This was observed both on the Processing Speed Index of the WAIS-IV that placed his ability in the bottom 8<sup>th</sup> percentile (i.e. 92% of others score more highly than he did); and on Part A of the Trail Making Test which placed him in the bottom 6<sup>th</sup> percentile.

### **Divided Attention / Multitasking**

Mr. Johnson's capacity for dividing his attention for two competing stimuli at the same time (i.e. multitasking) was also significantly impaired based on his performance on Part B of the Trail Making Test. His score on this measure placed him in the bottom 7<sup>th</sup> percentile (i.e., 93 percent of others of his age, sex, and education score higher than he does.)

### **Working Memory and Verbal Learning**

His Working Memory Index on the WAIS-IV, which captures several aspects of his ability to remember what he hears, placed his abilities in the bottom 6<sup>th</sup> percentile.

On the California Verbal Learning Test-II, his ability to learn lists of items and recall them accurately over multiple exposures was mildly impaired overall, and marked by significant confabulation (i.e., the pathological intrusion of material into his memory that was not part of the original stimuli). He confabulated at a rate higher than 99.9 percent of other of his background in the general population.

### **Evidence Supporting Opinions Regarding Intellectual Disability**

In this section of the report, I will address the evidence in the record and from my examination that supports my opinions for each prong of the Intellectual Disability diagnosis. It is important to note that this is a comprehensive diagnostic process that requires careful investigation. Counter to popular belief, many individuals with Intellectual Disability are not immediately identifiable by the way they look or after limited interactions, and the diagnosis can be missed if it is not the primary focus of a clinical examination.

### **Diagnostic Criterion I: Deficits in Intellectual Functions**

IQ test scores of 75 or below are considered to be within the margin of error in qualifying for a diagnosis of Intellectual Disability.

Mr. Johnson's IQ has been tested extensively over the years, beginning in the third grade. His Full-Scale IQ test scores, using individually-administered, culturally-appropriate intelligence tests before and after appropriate corrections for norm obsolescence<sup>46</sup> are summarized in the table below:

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<sup>46</sup> All IQ tests are to some extent "rubber rulers," meaning that their level of precision is limited by a number of factors. Psychometrically, the two most common are: (1) measurement error (a margin of error of approximately +/- 5 IQ-points); and (2) the phenomenon of gradual norm obsolescence known as the Flynn Effect (reflecting the fact that as humans are slowly becoming more intelligent, small annual normative adjustments are required in order to keep IQ test scores aligned with the normal "Bell Curve").

The Flynn Effect is an issue is quite relevant and important in a high-stakes determination such as in capital punishment, where test scores can mean the difference between life and death; and an extra degree of precision is both necessary and expected. Both the current AAIDD and DSM5 criteria note the necessity of adjusting scores for the Flynn Effect in this context. The adjustment involves

Test Date	Examiner	FSIQ Obtained	Mid-Year <sup>47</sup> Norm Date	Flynn Adjustment	Corrected FSIQ
WISC 1968	Hufstutter	72	1948 20 years	-6.0	66.0
WISC 1972	Hufstutter	63	1948 24 years	-7.2	55.8
WAIS-R 1995	Bernard	78	1978 17 years	-5.1	72.9
WAIS-R 1995	Cowan	84	1978 17 years	-5.1	78.9
WAIS-III 2003	Keyes	67	1995 8 years	-2.4	64.6
WAIS-III 2004	Bradshaw /Heisler	67	1995 9 years	-2.7	64.3
WAIS-III 2008	Connor	70	1995 13 years	-3.9	66.1
WAIS-III 2009	Connor	71	1995 14 years	-4.2	66.8
WAIS-IV 2019	Martell	70	2007 12 years	-3.6	66.4
<b>LIFETIME AVERAGE</b>		<b>71.3</b>			<b>66.9</b>

**Lifetime Average IQ Score.** In the context of Mr. Johnson’s capital case, this examiner must determine to a reasonable degree of psychological certainty, the presence or absence of “deficits in general mental abilities” pursuant to an Atkins determination. How does one decide if his “true IQ” is in the range or not?

Perhaps the best method for obtaining an optimal indication of Mr. Johnson’s “true IQ” is to consider the totality of his lifetime of test scores. Averaging all of his Flynn-adjusted Wechsler IQ scores results in a mean lifetime Full-Scale IQ of 66.9, which falls clearly within the range of Intellectual Disability.<sup>48</sup>

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calculating the number of years since the test was originally normed, and then subtracting 0.3 points per year from the obtained FSIQ score.

<sup>47</sup> See Edward A. Polloway (2015). The Death Penalty and Intellectual Disability American Association on Intellectual and Developmental Disabilities, American Association on Intellectual and Developmental Disabilities, Washington, D.C., p. 126.

**Test score validity.** During my examination specifically, Mr. Johnson “passed” on each of several test probes used to detect any deception or malingering. Over the course of each of his IQ examinations, the only time poor effort has been raised was by Dr. Heisler, who actually did not test Mr. Johnson (Mr. Bradshaw did). However, I note that there are several objective indications that actually show that Mr. Johnson’s test effort for Mr. Bradshaw was good.

First, Dr. Keyes had tested Mr. Johnson over a year before and obtained the exact same IQ score as Mr. Bradshaw. Dr. Keyes also employed specialized tests to detect malingering (the Test of Memory Malinger), and Mr. Johnson’s scores were valid, indicating that he was not malingering. Further, it is extremely unlikely that a person with Mr. Johnson’s history of adaptive deficits could “fake” on two IQ tests a year apart and be able to obtain the exact same score. In fact, looking at all of his adjusted IQ scores over time shows that his scores are remarkably consistent over a 51-year time span. This is a strong indication of “convergent validity” supporting the accuracy of his Lifetime Average IQ score as the best estimate of his “true” IQ.

Second, looking specifically at Mr. Bradshaw’s test results, there are two “embedded” measures of test validity in the WAIS-III he administered. Reliable Digit Span (RDS) looks at the longest strings of numbers recalled, both forward and backward. Mr. Johnson’s RDS score of 9 was valid for Dr. Bradshaw, indicating that he was putting forth good effort. Further, Mr. Johnson obtained an age-corrected scaled score (ACSS) of 7 on the Digit Span subtest for Mr. Bradshaw, which is also a valid score.<sup>49</sup>

**It is normal for measured IQ scores to change or vary over time and test version.** Intelligence is not fixed at birth, and contrary to popular belief it is not stable throughout the lifespan. It is a malleable trait that is subject to change as a result of the interaction between inherent genetic predispositions and environmental experiences and events.

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<sup>48</sup> Notably, his uncorrected Lifetime Average IQ score of 71.3 would also be in the range for a diagnosis of Intellectual Disability.

<sup>49</sup> Troy A. Webber & Jason R. Soble (2018) Utility of various WAIS-IV Digit Span indices for identifying noncredible performance validity among cognitively impaired and unimpaired examinees, The Clinical Neuropsychologist, 32:4, 657-670.

This is particularly true for IQ scores obtained during childhood. In childhood and adolescence, intelligence is particularly vulnerable to plasticity and change. The relation between brain size and IQ is lower in children than in adults, and IQ is related to brain development in complex ways.

For example, there is persuasive neuroscientific research showing a direct association between declining IQ scores and abnormal brain development:

- In landmark study published in the prestigious journal *Nature*,<sup>50</sup> scientists at University College London studied 33 healthy, normal adolescents (aged 12-16), with a wide mix of abilities. They tested their IQ in 2004, and then again 3-4 years later. During each test session, each child had their brains scanned using fMRI. Thirty-three percent of the participants showed a clear change in their total IQ score, ranging from an increase of 21 points, to a decrease of 18 points; and the IQ changes were directly related to differences in brain structure:
  - “these changes in performance were validated by their close correlation with changes in local brain structure. ... our results emphasize the possibility that an individual’s intellectual capacity relative to their peers can decrease or increase in the teenage years.”
- Another study involved 188 children and adolescents over a period of two years. MRIs of the study participants were taken at six sites across the US. This study was the first to show the association between cortical thickness and development on full scale IQ. Children with a significant decrease in IQ had

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<sup>50</sup> Ramsden, VS, Richardson, FM, Josse, G., et al. (2011). Verbal and non-verbal intelligence changes in the teenage brain. Nature, 479, p. 113–116.

exaggerated cortical thinning, implicating the potential impact of environmental events on IQ and brain development:<sup>51</sup>

- Importantly, individuals who showed large decreases in FSIQ displayed the steepest and most significant reductions in cortical thickness. Results support the view that there can be meaningful cognitive ability changes that impact IQ within relatively short developmental periods and show that such changes are associated with the dynamics of cortical thickness development.

We learn from these studies that it is normal for IQ scores to change during development, even without any underlying hereditary, biological, environmental, or social situational risk factors.

Children with intellectual limitations can test at IQ levels higher than the range typically associated with intellectual disability and then regress to IQ scores within the range for intellectual disability as they grow older.<sup>52</sup>

Additionally, there are risk factors that are associated with changes in IQ scores over time. A number of the risk factors for intellectual disability discussed above – genetic predisposition, low socioeconomic status, history of head trauma in the developmental period, and exposure to physical abuse - are also risk factors for a decline in measured IQ.

**Uncertainty about Dr. Cowan's 1995 IQ score.** Dr. Novick Brown reports a 1995 WAIS-R IQ test score of 84 (along with some but not all associated subscale scores) as coming from Dr. Cowan's December 1995 report (although her data actually appear to derive from his testimony at Mr. Johnson's first Post-Conviction hearing). Dr. Cowan

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<sup>51</sup> Miguel Burgaleta, M., Johnson, W., Waberd, DP, et al. (2014). Cognitive ability changes and dynamics of cortical thickness development in healthy children and adolescents NeuroImage, Volume 84, 1 January 2014, Pages 810–819.

Schnack, HG, van Haren, NEM, Brouwer, RM, et al. (2015). Changes in Thickness and Surface Area of the Human Cortex and Their Relationship with Intelligence. Cereb. Cortex, 25 (6): 1608-1617.

<sup>52</sup> The Death Penalty and Intellectual Disability, AAIDD (2015), p. 143-144.

does not report any IQ scores or subscale scores in his report. Rather, he simply states, as he did in his PCR testimony, that:

There does not appear to be a marked or significant difference between his present versus his prior intellectual capacities. The presently obtained IQ score would be generally consistent with that obtained on prior examinations when taking into account and utilizing age-corrected normative data.<sup>53</sup>

In the interest of transparency and thoroughness, I have included Dr. Cowan's scores my analysis. However, I remain concerned about the validity those scores because the Full-Scale IQ score reported by Dr. Cowan in his testimony is substantially higher than those obtained by any other psychologist who has evaluated Mr. Johnson over the years.

**It is not possible to review Dr. Cowan's IQ test data for errors.**

It is my understanding that Dr. Cowan has passed away, and that his data from this examination no longer available, making a definitive resolution of this concern difficult.

Dr. Cowan reported no IQ score in his report, and the actual test forms and administration details have been lost to follow-up. This is problematic to the extent that it is now impossible to check for possible threats to the validity and accuracy of those scores, given that the score of 85 reported in his testimony is a significant outlier in the context of Mr. Johnson's other scores and his adaptive behavior history.

- We can't rule out administrator error (including administration errors and scoring mistakes), the degree of which varies as a function of education, training, and experience, and even the best examiners make mistakes. A recent meta-analysis of the literature on administrator error concluded:<sup>54</sup>

Results indicate that a mean of 99.7% of protocols contained at least 1 examiner error when studies that

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<sup>53</sup> Dr. Cowan's Neuropsychological report, 12/13/1995, p. 6.

<sup>54</sup> Styck, KM & Walsh SM. (2016). Evaluating the prevalence and impact of examiner errors on the Wechsler scales of intelligence: A meta-analysis. Psychological Assessment, 28 (1): 3-17.



included a failure to record examinee responses as an error were combined and a mean of 41.2% of protocols contained at least 1 examiner error when studies that ignored errors of omission were combined. Furthermore, graduate student examiners were significantly more likely to make at least 1 error on Wechsler intelligence test protocols than psychologists. However, psychologists made significantly more errors per protocol than graduate student examiners regardless of the inclusion or exclusion of failure to record examinee responses as errors. On average, 73.1% of Full-Scale IQ (FSIQ) scores changed as a result of examiner errors.

**Group-administered tests cannot be used for determining IQ.**

The diagnosis of Intellectual Disability must be made using *individually administered* tests of cognitive abilities, such as IQ tests and neuropsychological tests. This is because group-administered tests are notoriously inaccurate and unreliable. Mr. Johnson was given a group test for prison classification purposes called the Beta IQ test that cannot be used for diagnosing ID. According to a Missouri DOC psychological evaluation report from 1996:

A Beta I.Q. Test, administered in 1979. reflected an I.Q. score of 95 which is within the low average range.<sup>55</sup>

**Additional neuropsychological evidence of cognitive impairment.** As specified in the DSM-5,<sup>56</sup> other tests of cognitive abilities besides IQ testing can be dispositive with regard to establishing significantly substandard intellectual functioning.

During my examination, I did additional neurocognitive testing to look at Mr. Johnson's capacity for reasoning, problem-solving, planning, abstract thinking, academic achievement, memory, and learning from experience. The results of that testing revealed clinically significant and significantly subaverage functioning in the following areas:

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<sup>55</sup> 06/25/1996 Missouri Department of Corrections Psychological Evaluation Report, p. 2.

<sup>56</sup> "Individual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single IQ score." DSM5, p. 37.

- (1) Academic Skills
- (2) Verbal Communication
- (3) Concept Formation
- (4) Problem Solving
- (5) Abstract Reasoning
- (6) Learning and Memory
- (7) Attention
- (8) Processing Speed

Prior neuropsychological testing by Dr. Cowan in 1995 and Dr. Connor in 2008-2009 revealed a similar pattern of neurocognitive deficits. Dr. Cowan found Mr. Johnson to have severe neurocognitive impairments in multiple functional areas and to be "brain-damaged," concluding:

As based upon this examination, this patient did demonstrate evidence of neuropsychological impairment and disturbance of functioning in the areas of memory functioning, abstract reasoning, attention and concentrational [sic] capacities, sequential reasoning, speed of mentation, novel learning and motor dysfunction. ...These impairments will have a significant effect upon this patient's level of functional capabilities. This patient tends to think fairly slow. When information is presented to him too rapidly, he will miss relevant and potentially crucial information. He is unable to hold his attention and concentration for an extended period of time which also affects his abilities of comprehension and understanding. ... his thinking approach is very simplistic and concrete.<sup>57</sup>

Over a decade later, Dr. Connor found the same pattern of neurocognitive impairments<sup>58</sup>:

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<sup>57</sup> Dr. Cowan's 1995 report, p. 7.

<sup>58</sup> Dr. Connor's 2009 report, p. 10.

## **INTEGRATIVE SUMMARY**

Mr. Johnson's pattern of neuropsychological performance on this assessment indicates deficits in the majority of cognitive domains. Figure 1 graphically represents his pattern of performance where all scores are converted to standard deviations from the mean (a score of 0). With the exception of intellectual functioning, standard deviations at or below -1 represent areas of impaired functioning. Mr. Johnson's performance on both assessments (8/2008 and 9/2009) are represented on this figure. **Mr. Johnson's performance is remarkably consistent between the testing prior to and post surgery.** As can be seen in Figure 1, Mr. Johnson displayed deficits in intellectual functioning, some measures of academic functioning, verbal and visual spatial learning and memory, attention, executive functioning, and to a lesser extent in motor coordination. His pattern of performance is certainly consistent with a diagnosis of mild mental retardation. The Vineland Adaptive Behavior Scales administered in 2003 by Dr. Keyes certainly indicates very significant deficits in adaptive functioning that supports a diagnosis of mild mental retardation. **Mr. Johnson's pattern of neuropsychological performance is consistent with the diagnoses of Mild Mental Retardation (DSM-IV code 317), Cognitive Disorder, NOS (DSM-IV Code 294.9), and Learning Disorder, NOS (DSM-IV Code 315.9).**

## **Conclusion Regarding Mr. Johnson's Intellectual Functioning**

It is my opinion that Mr. Johnson meets Criterion A based on the valid, objective test scores that place him within the range for a diagnosis of Intellectual Disability. Mr. Johnson's impaired performance on the neuropsychological testing administered during this examination in conjunction with his prior IQ testing and neuropsychological testing provides additional strong evidence of substantial impairments in intellectual functions that involve reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding; as well as critical components that include verbal comprehension, working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficiency.

## **Diagnostic Criterion II:** **Significant Deficits or Impairments in Adaptive Functioning**

In addition to impaired IQ and age of onset in the developmental period, significant impairment **in at least one of three broad areas** of Adaptive Functioning (Practical, Social, and/or Conceptual) is also required for the diagnosis of Intellectual Disability. The available data support a finding that Mr. Johnson has adaptive deficits in all three diagnostic areas.

The central issue here is identifying deficits, not strengths. Making the

diagnosis is based on identifying things that the individual *cannot* do (or cannot do without external supports) rather than things they *can* do. It is not a balancing of strengths vs weaknesses, but rather the identification of functional impairments alone that satisfies the diagnostic criteria.

It is also important to consider the context in which the individual is living. Highly structured custodial settings such as sheltered care facilities, hospitals, jails, and prisons generally do not allow the degree of autonomy and freedom necessary to display a full range of adaptive behaviors, and the structure these settings provide generally helps to encourage better adaptive functioning through external structure. Thus, as in Mr. Johnson's case, while prison records may be helpful in documenting certain deficit areas, evidence of strengths in this environment would not be reliable indicators of adaptive functioning for the identification of impairments. Similarly, evidence of functional strengths in the course of committing a crime are not evidence that can be to contradict a diagnosis on Intellectual Disability, as the diagnosis is based on evidence of adaptive behavior impairments, not strengths.

### **THE CONCEPTUAL DOMAIN**

The **conceptual domain** involves skills in language, reading, writing, math, reasoning, knowledge, memory, judgment, and self-direction.

In this domain, there is both empirical and anecdotal evidence that Mr. Johnson has significant impairments that cluster in three broad areas, including:

- (1) functional academic skills:
- (2) language skills; and
- (3) concept formation and self-direction.

Mr. Johnson's records reflect that he was developmentally delayed since birth. **Dr. Robert Smith** testified that Mr. Johnson was:

"... delayed in terms of some of the normal things that we look for in child development. Things that I was most interested in were things like walking, talking, responding to external stimuli, interacting with the environment... For all of those areas, the family reported that Ernest was delayed."

**James Dempsey's** social history notes that:

Ernest's mother, Jean Ann Patton (taking Albert Patton's name after marriage), reports that Ernest was a nice kid, but always played by himself, and with his dogs and chickens. She reports that Ernest was born slow, and learned to talk late. She states that he was a mama's boy, and constantly used to cling onto her. Jean Ann reports that she tried to get help for Ernest, but down South, unless you had lots of money, you could not get help.<sup>59</sup>

**James Dempsey** also noted that:

Bobby Jr. recalls that everyone in the family knew there was something wrong with Ernest. It seemed like he was slow in learning to walk and talk, and after he entered school he had an extremely hard time understanding what was being taught. Bobby remembers trying to help Ernest read, but it was impossible.<sup>60</sup>

In notes from an interview with **Gloria Johnson**,<sup>61</sup> she reported that:

She would talk with Ernest, Ernest was not real talkative but she felt he liked her. He had a hard time carrying on a conversation of any substance.

**Beverly Johnson**, Ernest's sister, told social worker James Dempsey that:

Ernest was very slow, intellectually, while growing up. She reports that when he was about 5 or 6 years old, he pulled a skillet full of hot grease off the stove and onto his head, severely burning the right side of his head and face.<sup>62</sup>

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<sup>59</sup> James Dempsey social history, p.12.

<sup>60</sup> Ibid at p. 5

<sup>61</sup> Memorandum of interview by Michael Dennis to Mr. Johnson's file, 02/10/2005, p. 1.

<sup>62</sup> James Dempsey social history, p. 17.

Some of the clearest indications that he is impaired in conceptual skills are reflected in his being held back twice, being placed in Special Education classes, and having documented deficits on standardized academic achievement testing from the time he started in school. During his early elementary school years, he repeated the second grade, and after being promoted to fourth grade he was identified for placement in Special Education where he then had to repeated the third grade. Subsequently he repeated the ninth grade as well.

His early schoolwork was repeatedly reported as "ungraded."

His academic history is accurately summarized in the following chart prepared by **Dr. Novick Brown**<sup>63</sup>:

Ernest Johnson's Academic History

Academic Year	Age	Grade Level	Category/Result
1966/67	6	1	ungraded
1967/68	7	2	ungraded
1968/69	8	2 (year #2)	ungraded
1969/70	9	3	ungraded
1970/71	10	4	ungraded
1971/72	11	3 (year #2)	Special Education
1972/73	12	5	Special Education
1973/74	13	7	Special Education
1974/75	14	8	Special Education
1975/76	15	9	failed 9 <sup>th</sup> grade
12/10/76	16	9 (year #2)	dropped out

**Bobby Johnson, Sr.**, Mr. Johnson's father, noted in his affidavit:

Ernest had some rough times in school; it seemed he was always behind the other children, not understanding the things they could understand.<sup>64</sup>

Mr. Johnson's brother, **Bobby Johnson, Jr.** stated in his affidavit that:

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<sup>63</sup> 08/15/2005 report of Dr. Natalie Novick Brown, p. 29.

<sup>64</sup> Affidavit of Bobby Johnson, Sr., 07/20/2002, p. 6.

Ernest went to a country school outside Charleston; it was for black children only. He caught a bus to go to Washington Elementary School and then to Lincoln School in Charleston before attending Hearn Elementary in 1969. I believe it was 1969 before he went to school with white children. Ernest had some rough times in school; it seemed he was always behind the other children, not understanding the things they could understand.<sup>65</sup>

Mr. Johnson's brother, **Bobby Jr.**, told social worker James Dempsey that:

However, Bobby Jr. reports that Ernest Johnson was very slow in school while growing up in Charleston MO. He reports that Ernest could not pick up his lessons taught in school. He reports that Ernest was picked on a lot in school, because he was quiet and kept to himself. He reports that Ernest was easily influenced by others.<sup>66</sup>

**Dr. Robert Smith** notes in his report that:

The interviews and social history indicate that Mr. Johnson struggled to adapt both at school and at home. As a teenager, he experienced significant difficulties in school placed in special education classes. His grades declined significantly at approximately age 15. He was no longer involved in extracurricular activities or sports and his behavior in school became disruptive.<sup>67</sup>

**Steven Mason**, who was Mr. Johnson's teacher the year he repeated the ninth grade, testified:

Q. All right. How was Ernest as an art student?

A. He really wasn't good at all. He struggled in class. He didn't really understand the instructions and he pretty much had a hard time doing everything he tried to do in class.

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<sup>65</sup> 04/20/2001 Affidavit of Bobby Johnson, Jr., p. 5-6.

<sup>66</sup> James Dempsey social history, p. 18.

<sup>67</sup> 03/21/1996 Report of Dr. Robert Smith, p. 9.

Q. Well, you said he had difficulty with instructions. How so?

A. Well, for example, I remember distinctly there's a Beginning Art I project we call the quanting method of clay, where you're supposed to take your clay, a ball of clay, and pat in your hand, and roll it on the table gently, and spread your hand make some coil. And you stack these coils and you join them together. Most, 90 percent of my students, do that the first time. And he struggled with that every time. He never did, couldn't get It. He'd rub it and mash it too hard and it would flop and, you know, you couldn't complete the project doing that.

Q. So that was an example of him having a hard time with instructions. Could he follow instructions?

A. The way the class was set up, I gave the instructions, I let them know what we're going to do, and I showed them an example, and I passed out a sheet. Then I demonstrated it a little bit. And then if you had any questions, you would hold up your hand and ask. Of course, he never did hold up his hand and ask any questions. So I had to come around and ask him why he couldn't do this. And I'd just talk to him, and he'd just have this, just like, "I don't know what you're talking about" look; you know what I'm saying?

Q. Okay.

A. You know, a blank look.

Q. This was a mainstream class? It wasn't a learning disabled class?

A. No, it wasn't. The arts were designed so that you got academic kids, you got basic kids, you got all of them. It was called mainstreaming.

Q. Okay. Could he read his assignments?

A. No. Not in my opinion, no, he couldn't. He



couldn't, because whenever he read them, he didn't do the project.

Q. Did he have, in your opinion, the basic educational or the basics to be able to do the things in your class?

A. No.<sup>68</sup>

\* \* \* \*

Q. Was he, for example, able to use a ruler in class?

A. No. You know, you're supposed to have a -- be able to use a compass and a ruler and, you know, a protractor. And you're basically, when you have your ruler, if you're left-handed or right-handed, you have the ruler in the opposite hand that you're writing with. So if I'm right-handed, I will hold down the ruler and use it. Well, whenever he tried to use a ruler, he would just, whenever he drew on the paper, the whole ruler would move. He didn't just put enough pressure to do something simple like that.

Q. And he couldn't use, you said, a protractor or a compass?

A. Yes. For example, on a compass, you would -- It's made like a V and it has one end where you stick the pencil in. And there's a point, and you place the point on your paper after you got the pencil in and twirl it, depending on how many -- how big you want your circle, a five-inch circle, a three-inch circle. And his would slide all around or it would flop and the circle would be uneven. And you know, I just tried to help him and he just couldn't do it.<sup>69</sup>

According to a **Missouri DOC psychological evaluation** report from 1996:

Previous file information shows that Inmate Johnson was evaluated while he was in school and I.Q. testing resulted in an

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<sup>68</sup> Third sentencing testimony transcript, p. 1240-1241

<sup>69</sup> Third Sentencing testimony transcript, p. 1243.

I.Q. of 70. ... It was stated that "he was barely able to read the S.O.S.P. at the 6<sup>th</sup> grade level during the interview."<sup>70</sup>

**Donna Kay Brown**, a corrections case worker who prepared a presentence investigation report about Mr. Johnson told social worker James Dempsey that:

The PSI indicates that Mr. Johnson did poorly in school and had no vocational skills or substantial work experience. Donna Kay Brown notes that Mr. Johnson's interview behavior represented him to be "very childlike and unintelligent."<sup>71</sup>

His **academic achievement testing** record, summarized below, also shows that he has functioned in the very bottom percentiles across all academic areas compared to other children on standardized tests:<sup>72</sup>

Achievement Test Scores: Percentiles (Grade Equivalent)

<u>Grade</u>	<u>Date</u>	<u>Reading</u>	<u>Math</u>	<u>Language Arts</u>
Grade 2	4/69	1% (1.0)	*	*
Grade 3	4/70	2% (1-5)	4% (2-4)	9% (2-4)
Grade 4	4/71	1% (1-6)	*	2% (2-4)
Grade 3*	4/72	29% (3-1)	*	13% (2-5)
* First year where his transcript is designated "Special Education"				
Grade 5	4/73	2% (2-8)	2% (3-4)	2% (2-9)
Grade 7	4/74	7%	8 %	2%
Grade 9	10/75	2%	21%	6%

\* untested

<sup>70</sup> 06/25/1996 Missouri Department of Corrections Psychological Evaluation Report, p. 2.

<sup>71</sup> James Dempsey social history, p. 40-41.

<sup>72</sup> Ibid, p. 29-30.

With regard to Mr. Johnson's functional concept formation skills, **Ricky Frazier**, who grew up next door to Mr. Johnson, testified that:

A. He tried, he did. He wanted to play.

Q. How was he on understanding the rules of the game back in school?

A. Well, that was the reason that they wouldn't let him play because he didn't understand basically what, how we was playing and what we was doing at the time. So kids then thought that if you wasn't strong enough to participate, they didn't want, you know, you to be on their team. So he was basically eliminated from a lot of the, you know, kids stuff.<sup>73</sup>

During my examination, Mr. Johnson told me that he was late learning to walk and talk. With regard to his school experience he said, "All I wanted to do was play basketball, so they let me go through. They called me dummy. I was always a loner and didn't have many friends. Nobody wanted to be bothered with me, because I was a dummy. So I just wanted to be by myself."

With regard to expressive speech and language skills, Mr. Johnson reported that he had trouble walking and talking sometimes as a child. He also said, "I can't understand words that people use, especially big words. My brother and sister helped me out."

I asked him what kind of things he liked to read as a kid and he replied, "The Cat in the Hat. Mostly I like to play tic-tac-toe."

### **Conclusion Regarding Adaptive Impairment in the Conceptual Domain**

The Diagnostic and Statistical Manual of Mental Disorders-5<sup>th</sup> Edition characterizes the various severity levels for adaptive impairments as defined by the second criterion of intellectual disability. Based on the evidence summarized above, Mr. Johnson's level of functioning is best captured by the DSM-5 description of "moderate" severity in the **conceptual domain**:

All through development, the individual's conceptual skills lag markedly behind those of peers. For preschoolers, language and pre-academic skills developed slowly. For school-age children,

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<sup>73</sup> Third sentencing testimony transcript, p. 1263.

progress in reading, writing, mathematics, and understanding of time and money occurs slowly across the school years and is markedly limited compared with that of peers. For adults, academic skill development is typically at an elementary level, and support is required for all use of academic skills in work and personal life. Ongoing assistance on a daily basis is needed to complete conceptual tasks of day-to-day life, and others may take over these responsibilities fully for the individual.<sup>74</sup>

### **THE SOCIAL DOMAIN**

The **social domain** refers to empathy, social judgment, interpersonal communication skills, the ability to make and retain friendships, and similar capacities.

Mr. Johnson's impairments in this area primarily revolve around:

- (1) deficits in expressive and receptive language skills needed for basic communication,
- (2) deficits in social relationship formation, and
- (3) vulnerability to manipulation and being taken advantage of by others.

Mr. Johnson's social deficits began early in childhood, with delayed talking and ongoing social delays in communication.

His IQ testing over the years has consistently shown impairment in verbal skills, with his Verbal IQ functioning at a lower level than his Performance IQ. Similarly, neuropsychological testing has identified deficits in his expressive and receptive language skills, placing him in the bottom 2<sup>nd</sup> percent of the population for verbal comprehension, and below the bottom 1<sup>st</sup> percentile for verbal fluency.

**Dr. Dennis Keyes** testified during the third penalty phase proceedings about his findings from interviewing Mr. Johnson siblings:

"In conversation, he would keep talking on and on and on, or he would just be quiet. There was no give and take of normal conversation."

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<sup>74</sup> DSM-5, p. 34.

"... both his brother and sister said his (socialization) behaviors were severely deficient... He had tantrums when he was younger. He'd forget to keep a secret. If he was denied his own way, he'd go into tantrums. He didn't know how to use a fork and a spoon. He used his fingers... when he was young, he didn't have a best friend or a friend of the opposite sex."

In addition to communication deficits, Mr. Johnson's fundamental interpersonal social skills were also impaired. According to **Dr. Robert Smith:**

Mr. Johnson has had very limited relationships. He had no close male friends, growing up. ... This information was substantiated by Mr. Johnson's brother, sister, stepbrother and stepsister. Mr. Johnson's experience with women was also limited.<sup>75</sup>

**Dr. Cowan** reported from his interview of Mr. Johnson's brother, sister, stepbrother, and stepsister he had no close friends during childhood, and that those he associated with in his teens and young adult years, "were individuals who used alcohol and other drugs." His experience with women, "was also limited."<sup>76</sup>

**Bobby Johnson, Jr.** reported that his younger brother was frequently taunted in school because he was quiet, kept to himself, and tended to be "easily influenced by others."<sup>77</sup>

**Gloria Lisa Johnson**, who lived with Mr. Johnson for approximately six months in the mid-1980's, testified:

Q. Okay. So you got to know Ernest fairly well?

A. Yes.

Q. What was Ernest like?

A. Quiet.

Q. Talk much?

A. No.

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<sup>75</sup> 03/21/1996 Report of Dr. Robert Smith, p. 9.

<sup>76</sup> Dr. Cowan's report, 03/21/1996.

<sup>77</sup> James Dempsey social history, p. 18; Report of Dr. Novick Brown.

Q. Were you able to carry on a conversation with him?

A. No. He asked how I was doing and I asked him how he was doing, but as far as sitting and conversating, no, we never did have a conversation together.<sup>78</sup>

**Ricky Frazier**, who grew up next door to Mr. Johnson testified that:

Q. How were the other kids towards Ernest?

A. They was very bad towards him. A lot of kids like to run and play and they didn't like to accept him being a part of a lot of the things that we did because he was uncoordinated, puny, you know, and couldn't understand. He was always in the wrong place when they tried to organize something.

Q. He couldn't understand?

A. No, he couldn't.<sup>79</sup>

In his social history, **James Dempsey** noted is vulnerability to manipulation and sexual abuse during Mr. Johnson's time at Algoa:

While at Algoa, Mr. Johnson received a protective custody hearing during his stay in housing unit #1, and was confined in protective custody, due to being emotionally and sexually assaulted. Mr. Johnson was forced into oral and anal sodomy by 4 fellow inmates. Mr. Johnson reports that one of these 4 inmates, who worked in the dining room threatened him as he went to one of his meals.

\* \* \* \*

Lawrence Wilson also reported that Mr. Johnson was a weak inmate who had been very cooperative and honest during the period of time incarcerated at Algoa.<sup>80</sup>

During my examination, Mr. Johnson told me that he was late learning to walk and talk. With regard to his school experience he said, "They

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<sup>78</sup> Third sentencing testimony transcript, p. 1116.

<sup>79</sup> Third sentencing testimony transcript, p. 1264.

<sup>80</sup> James Dempsey social history, p. 41.

called me dummy. I was always a loner and didn't have many friends. Nobody wanted to be bothered with me, because I was a dummy. So I just wanted to be by myself."

During my examination, I asked Mr. Johnson if he was ever taken advantage of as a child or adolescent and he replied that he was, "always with grandmother, my brother, or sister." I then asked about when he was older and he replied, "everybody knew I had a weakness. I didn't know what I was doing. They would steal money from me, say things cost more than they really did, got me to pay for things for everybody." He went on to explain that he was only included because of his older brother. He described himself as a "hanger on" who was "there because of my brother." He said he was easily tricked or fooled by others. And gave the example above.

### **Conclusion Regarding Adaptive Impairment in the Social Domain**

The Diagnostic and Statistical Manual of Mental Disorders - 5th Edition (DSM-5) characterizes the various severity levels for adaptive impairments seen in Intellectual Disability. Based on the evidence summarized above, Mr. Johnson's level of functioning is captured by the DSM-5 descriptions for "Mild to Moderate" severity in the **social domain**.

Mild impairment in the social domain is described as follows:

Compared with typically developing age-mates, the individual is immature in social interactions. For example, there may be difficulty in accurately perceiving peers' social cues. Communication, conversation, and language or more concrete or immature than expected for age. There may be difficulties regulating emotion and behavior in an age-appropriate fashion; these difficulties are noticed by peers in social situations. There is limited understanding of risk in social situations; social judgment is immature for their age, and the person is at risk of being manipulated by others (gullibility).

Moderate impairment in the social domain is described as follows:

The individual shows marked differences from peers in social and communicative behavior across development. Spoken language is typically a primary tool for social communication but is much less complex than that of peers. Capacity for relationships is evident in ties to family and friends, and the individual may have

successful friendships across life and sometimes romantic relations in adulthood. However, individuals may not perceive or interpret social cues accurately. Social judgment and decision-making abilities are limited, and caretakers must assist the person with life decisions. Friendships with typically developing peers are often affected by communication or social limitations. Significant social and communicative support is needed in work settings for success.<sup>81</sup>

### **THE PRACTICAL DOMAIN**

The **practical domain** centers on self-management in areas such as personal care, job responsibilities, money management, recreation, and organizing school and work tasks. Mr. Johnson's record reveals significant impairments requiring external supports in all areas, but particularly in: (1) self-care, (2) work skills, and (3) personal safety.

#### **Self-Care**

**Beverly Johnson**, Ernest's sister, told social worker James Dempsey that:

Ernest was very slow, intellectually, while growing up. She reports that when he was about 5 or 6 years old, he pulled a skillet full of hot grease off the stove and onto his head, severely burning the right side of his head and face. She reports that some of the hot grease got into his ear canal, and that Ernest has lost partial loss of hearing in his right ear. Beverly Johnson reports that Ernest was not able to get medical attention until that evening when their father came home. She reports that Ernest was hospitalized for some time, and had to receive several skin grafts.<sup>82</sup>

**James Dempsey** notes in his social history that:

He reports that he does not remember many things about his childhood, before age 10, because things were really poor when he was living with his mom, because of her abuse. Ernest remembers that at age 10, a kid pushed him off the sliding board and he fell and broke his arm. He also remembers that

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<sup>81</sup> DSM-5, p. 35.

<sup>82</sup> James Dempsey social history, p. 17.



his grandma was frying fish and he pulled the skillet full of hot grease onto him, receiving severe burns to his head and ears. He reports that he has hearing damage in his right ear as a consequence of the hot grease.

\* \* \* \*

Ernest reports that he did not have many friends and that the school kids used to tease him in grade school. <sup>83</sup>

Mr. Johnson's step-father, **Albert Patton**, also reported during an interview in 2004 that Mr. Johnson was unable to care for himself without external supports for his daily needs:

Albert believes Ernest had a difficult time taking care of his everyday needs. Ernest never fixed a meal for himself, he would always ask someone to do it for him. Whenever Ernest would break something he would throw it away, never attempting to fix it. Ernest could not wash his clothes by himself. Albert believes if Georgia was not around Ernest could not really have taken care of himself. <sup>84</sup>

**Albert Patton** also related during an interview in 2004 that:

Albert believes Ernest had a difficult time taking care of his everyday needs. Ernest never fixed a meal for himself, he would always ask someone to do it for him. Whenever Ernest would break something he would throw it away, never attempting to fix it. Ernest could not wash his clothes by himself. Albert believes if Georgia was not around Ernest could not really have taken care of himself. During his time in Chicago Ernest generally stayed to himself. He would spend a lot of time in his room or sitting out on the porch. <sup>85</sup>

During an interview with **Gloria Johnson**, a former girlfriend of Ernest, investigator Michael Dennis documented that:

During the five years she knew him she does not recall Ernest having a job. He may occasionally have an odd job, but nothing that would last more than a week or so. Most of the time Beverly would help him out financially.

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<sup>83</sup> James Dempsey social history, p. 5-6.

<sup>84</sup> 12/09/04 Memo to the file of Interview with Albert Patton.

<sup>85</sup> 12/09/2004 Memo of interview with Mr. Johnson's step-father Albert Patton, p. 1.

Lisa recalls that Ernest could not do much on his own. On one occasion that she is sure of Ernest brought her a job application for a fast food restaurant, she thinks it was Hardee's. Ernest asked her to fill it out for him. She did not think much about it at the time. Ernest seemed to never do anything for himself. He would often comment that Beverly would take care of him. She does not recall Ernest ever fixing anything for dinner, and on one occasion when he attempted to do the laundry at her house he had no clue. Ernest just started pouring way too much detergent into the machine and was trying to turn the machine on but did not know how. Lisa was thankful he did not know how to operate the washer, since when she checked the clothes she discovered that they had not been sorted, the whites and darks were together. Ernest told her Beverly always washed his clothes.<sup>86</sup>

Notes from that interview also include:

Ernest was not real talkative but she felt he liked her. He had a hard time carrying on a conversation of any substance. ... She would write to Ernest. He would write back. Ernest's letters were very difficult to understand. Words would be missing, and many were misspelled. She would have to try and figure out what Ernest was trying to write. ...

He lived with her 6-8 months. She knew him for about 5 years. During that time Ernest never had a job. There were a few occasions when Ernest might get a day job but nothing ever lasted.

She recalls at least one occasion when Ernest brought a job application home and she filled it out for him.

\* \* \* \*

When she first new Ernest he was living with Beverly. Bev took care of him financially. She had not known Ernest to have a regular job during the 5 years she knew him. While Ernest could dress and wash himself, he could not do much else. She did not observe him ever cook. One occasion he attempted to do laundry he had no clue what to do. He poured a whole bunch of detergent into the machine. She was thankful she was there and

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<sup>86</sup> 12/10/2005 interview memo..

saw Ernest doing this. When she checked the clothes they had not been sorted, colors and whites were together. When she asked why he had done this he said Bev always did his laundry.<sup>87</sup>

In notes from an interview with Mr. Johnson's brother, **Bobby, Jr.**, the following observations were provided:

He described Ernest as never being a violent person. He also described Ernest as being very slow. He remembers that when they were kids, Ernest would always hang out with younger kids because he felt more comfortable with them. Bobby stated that none of the children in his family were geniuses. He explained that although he had graduated from junior college, his education was always a struggle. He advised that when he began school, he was placed in special education classes and had to work hard to get placed in regular classes. He advised that Ernest and Beverly were even slower. He explained that Ernest and Beverly found it difficult to do even basic things like spelling simple words. Despite their difficulties, he believes that Beverly would have graduated from high school if she had not gotten pregnant. ... Ernest quit high school before his junior year.

Bobby relates that he believes that he and his other siblings were passed through school although they had not quite acquired the skills they needed. He stated that although he has graduated from junior college, when he was tested upon entrance to the Department of Corrections, his skills or below the 8th grade level.

Bobby remembers trying to help Ernest with his schoolwork. He related that he spent hours trying to teach Ernest the really small stuff like spelling four letter words. Bobby also recalls that Ernest's schoolmates called him "dummy." Consequently, Ernest became the class clown because it got him positive attention when the other children laughed at him. Bobby believes that Ernest started school at the Washington Elementary School in Wyatt, Missouri, about (5) miles east of Charleston. ... He stated that he knows that the schools just passed Ernest and Beverly along because to this day neither one of them has even the basic spelling skills.

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<sup>87</sup> Ibid.

Bobby explained that Ernest began stealing because he could not get or hold a job. Because he had no basic skills, he was forced to steal to survive. He never obtained a driver's license and spent much of his adult life when he was not incarcerated homeless, staying wherever he could.<sup>88</sup>

**Dr. Natalie Novick Brown** noted in her report<sup>89</sup> that:

There also is no evidence that Mr. Johnson was ever able to live independently. Throughout much of his 20s, he lived with relatives, and at the time of his instant offense, he was living with Deloris Grant, who was employed full time. In addition, Dr. Keyes testified during the Third Penalty Phase that Mr. Johnson was unable to use public transportation.

**Gloria Lisa Johnson**, who lived with Mr. Johnson for approximately six months in the mid-1980's, testified that:

Q. Okay. When you all lived together, what duties or responsibilities around the house did he have?

A. He didn't have any.

Q. Why not?

A. He didn't know how to do them. I didn't trust him to do them.

Q. Could he cook?

A. No.

Q. Was he able to drive anybody anywhere?

A. No.

Q. Did he have a driver's license?

A. No.

Q. Was he able to do the laundry?

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<sup>88</sup> Memorandum to file, November 21, 1995 interview with Bobby Johnson junior.

<sup>89</sup> Dr. Novick Brown's report, p. 40.

A. No.

Q. Why not?

A. He overloaded the laundry one time and put too much detergent in it.

Q. Okay. Anybody ever teach him how to do it?

A. No.

Q. When you were living with him, who took care of him?

A. I did.

Q. Okay. Was his sister Beverly ever involved, helping, with you?

A. Oh, yeah.

Q. Okay. Where did Ernest work?

A. No. He might have went and did little odd jobs here and there maybe, but no.

Q. Was he able to write very well?

A. No.

Q. Did you ever receive a letter from him?

A. Oh, yeah.

Q. What were they like?

A. You had to blend in. You had to, like, make in your own words to understand what he was saying.

Q. They weren't complete sentences?

A. No, they weren't.

Q. Did you ever have an opportunity to work with

Ernest on a job application?

A. Yes.

Q. What did you do?

A. I had to fill it out.

Q. Okay. Did that happen more than one time?

A. Maybe. Now that I know of, maybe once. And then if it was any more, I didn't do it. His sister might have did it.<sup>90</sup>

### **Work Skills**

**Thomas Powell**, who was Mr. Johnson's probation officer, testified that:

Q. Okay. How was Ernest then?

A. This time Ernest had some difficulty with the employment situation. He had two or three placements with temporary services. As I recall, from refreshing my mind with the transcripts, there was one placement where there were difficulties with labels, and so that position -- he lost that job.

Q. He couldn't put labels on boxes?

A. That was my understanding. And also he was extended in our program for approximately 20 days because of the employment issue.<sup>91</sup>

Mr. Johnson's counsellor at Positive Motivation, **Dennis Booth**, testified at the third sentencing hearing that he had trouble reading and writing and only held menial jobs:

Q: Okay. Did he work?

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<sup>90</sup> Third Sentencing testimony transcript, p. 1116-1118.

<sup>91</sup> Third Sentencing testimony transcript, p. 1200.

A: He held menial jobs, usually didn't last too long.

Q: Did he have, to your knowledge, any trouble reading and writing?

A: Yes.<sup>92</sup>

**Dr. Dennis Keyes** testified at the third penalty phase hearing that because Mr. Johnson's language skills were impaired, this also affected his ability to hold jobs:

"He was unable to read and write at any level that could have suggested he could have gotten a job."

Mr. Johnson's DOC records indicate that he has no history of successful employment. **Tom Powell**, the treatment coordinator at a DOC halfway house (PMI), testified in the penalty phase of the 1994 trial that Mr. Johnson had trouble holding on to menial jobs. "...There was a problem with some boxes, the labels were all wrong."<sup>93</sup>

In notes from an interview with **Gloria Johnson**, she reported that:

During the five years she knew him she does not recall Ernest having a job. He may occasionally have an odd job, but nothing that would last more than a week or so. Most of the time Beverly would help him out financially.

Lisa recalls that Ernest could not do much on his own. On one occasion that she is sure of Ernest brought her a job application for a fast food restaurant, she thinks it was Hardee's, Ernest ask her to fill it out for him. She did not think much about it at the time.

Ernest seemed to never do anything for himself. He would often comment that Beverly would take care of him. She does not recall Ernest ever fixing anything for dinner, and on one occasion when he attempt to do the laundry at her house he had no clue. Ernest just started pouring way too much detergent into the machine and was trying to turn the machine on but did not know how. Lisa was thankful he did not know how to operate the

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<sup>92</sup> Third Sentencing testimony transcript, p. 1177.

<sup>93</sup> DOC records, p. 2567.

washer, since when she checked the clothes she discovered that they had not been sorted, the whites and darks were together. Ernest told her Beverly always washed his clothes.<sup>94</sup>

Notes from a witness interview with **Mary Delores Grant** indicate that:

When Ernest first got out, he seriously looked for work with Delores driving him around town picking up job applications and helping him fill them out. She could not say what type of follow-up Ernest did but she could say what she helped him do.<sup>95</sup>

### **Personal Safety**

With regard to Mr. Johnson's ability to manage his personal safety, **Ricky Frazier**, who grew up next door to Mr. Johnson, testified that:

Q. How about how was Ernest -- This is an odd question. How was Ernest at crossing the street? Do you have any memories of that?

A. Oh, yeah, a lot.

Q. Tell me about these, please?

A. He'd get whoopings for trying to get across the street.

Q. He would get whoopings for trying to cross the street?

A. Trying to cross the street.

Q. Tell us why.

A. He would be with us, a group of guys, maybe kids, and they'll get to the edge of the four-lane road and they'll try to cross. We would take off across, after we was standing there, we would take off across, and we'd get across and we'd look back and Ernest hadn't come across. He would look both ways, he'd try to

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<sup>94</sup> Memorandum of interview by Michael Dennis to Mr. Johnson's file, 02/10/2005, p. 1.

<sup>95</sup> Mary Delores Grant witness interview memo, 06/24/1994.



get across. He'd run out there and maybe a car would blow at him. And he'd run to the middle of the road and go back instead of continue on across. Which that would have been, you know, better for him to go on across than to turn around and go back after you made it halfway.<sup>96</sup>

During my clinical examination of Mr. Johnson, we talked about his personal care growing up and specifically dressing. He told me, "I couldn't do it. My grandmother did it for me. I thought she was my mom. She called me her baby."

I asked if he was able to manage getting his shoes on the right feet and tying his laces. He replied that, "my sister and brother taught me how to do it."

With regard to personal hygiene he reported that his grandmother bathed him until he was 12 years old because he needed help. He was unable to keep his fingernails and toenails clipped but, "somebody would do it," for him.

We also discussed use of utensils at the dinner table and he explained to me, "I would use my hands. Felt more comfortable at the time. Everyone else would use a knife and fork. Grandma would cut up food for me." He reported that he did not know how to cook and could not use the oven microwave, dishwasher, or other kitchen appliances.

He stated that he did have chores but described them as, "The easiest ones. Clear the table. Straighten the chairs. I always got the easiest that there was." I asked him why and he replied, "people told me I was slow to do things."

I asked him if he knew how to use the washer and dryer and he replied, "Grandma did. I watched. I almost got my hand caught in the roller, so she wouldn't let me do that no more." He reported that he did not know how to fold clean clothes.

He also told me that he did not take out the garbage stating that, "somebody else did that." He did describe having a chore in the pigpen and said, "Daddy would bring me watermelons and I would throw it over the fence into the pigpen."

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<sup>96</sup> Third Sentencing testimony transcript, p. 1265-1266.

I asked him about how he would get around town or if he ever got lost. He denied getting lost saying, "my brothers and sisters were always with me."

With regard to use of public services I asked if he ever went to the bank and he replied, "No. Never in my life." I asked if he ever went to the post office and he replied, "only when I was older, about 19." I asked me if he ever went to the DMV and he replied, "Never in my life."

I asked if he is ever had a budget and if he was able to stick to it. He replied, "I always lived with the girl and the woman would do that." I asked him about money management and he explained, "somebody was always with me. I couldn't do it alone." He said he never carried a credit card and did not know how to be sure his change was correct.

I asked him if he ever engaged in any dangerous or reckless behavior when he was growing up and he told the story where he, "picked up a copperhead snake not knowing it was dangerous." I asked if he would go to the doctor or ask for help if he was hurt or sick and he replied that they had no money for doctors.

I asked if he was able to keep score during games and he replied, "No. That wasn't my thing."

I asked if he would measure using a ruler or in the kitchen and he replied no to both. "I just throw the stuff together. It would turn out how it turned out." He said that he only made pancakes on a radiator, and otherwise did not know how to cook.

He stated that he has never used a dictionary. He stated that he never wrote letters or used email when he was young and as an adult, "not that much. I have to use the littlest words to make a sentence. I have a dictionary for 7 to 12-year-olds. Mom got it for me from Amazon."

With regard to work he described working as a janitor but said, "I was always late because I had to ride my bike from the halfway house." Despite having this job, he reported that he was unable to save any money for future needs. He described his responsibilities as, "sweep the floor." He said he was able to use a broom, mop, and a dustpan.

With regard to self-direction I asked him who made the key decisions in his life and he replied, "whoever the girl I was with. When I made them I ended up in the penitentiary."

He reported that he has worked on farms, as a janitor, and at Hardee's where he made biscuits. He said he also worked for "Sam Walton's daughter" setting up tents for parties, and had a few temporary temp jobs.

### **Conclusion Regarding Adaptive Impairment in the Practical Domain**

The Diagnostic and Statistical Manual of Mental Disorders - 5th Edition (DSM-5) characterizes the various severity levels for adaptive impairments seen in Intellectual Disability. Based on the evidence summarized above, Mr. Johnson's level of functioning is best captured by the DSM-5 descriptions of "Moderate" severity in the **practical domain**.

Moderate impairment in the practical domain is described as follows:

The individual can care for personal needs involving eating, dressing, elimination, and hygiene as an adult, although an extended period of teaching and time is needed for the individual to become independent in these areas, and reminders may be needed. Similarly, participation in all household tasks can be achieved by adulthood, although an extended period of teaching is needed, and ongoing support will typically occur for adult level performance. Independent employment in jobs that require limited conceptual and communication skills can be achieved, but considerable support from coworkers, supervisors, and others as needed to manage social expectations, job complexities, and ancillary responsibilities such as scheduling, transportation, health benefits, and money management. A variety of recreational skills can be developed. This typically requires additional supports and learning opportunities over an extended period of time. Maladaptive behavior is present in a significant minority and causes social problems.<sup>97</sup>

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<sup>97</sup> Ibid.

**Standardized testing of adaptive functioning by Dr. Keyes.** Dr. Keyes administered standardized tests of adaptive functioning to Mr. Johnson, his relatives, and a former teacher during his evaluation in 2003. Personally, I am not a proponent of such testing in capital litigation because the tests were not developed or normed for retrospective use, making such applications unreliable.

However, in the interest of transparency and completeness, I note that Dr. Keyes identified impairments in all areas of adaptive abilities, which is consistent with the records outlined above. Dr. Keyes reported the following test findings:

**ADAPTIVE BEHAVIOR - Vineland Adaptive Behavior Scales**

(Information on Mr. Johnson's adaptive functioning was collected from interviews with five people.)

	<u>Standard Scores</u>		<u>Ave.</u>	<u>% Rank</u>	<u>Age Equivalent</u>
Communication	<20	29	25	<0.1	approx 4 yrs - 6 mos.
Daily Living Skills	20	<20	20	<0.1	approx 4 yrs - 8 mos.
Socialization	29	<20	20	<0.1	approx 3 yrs - 9 mos.
Composite	20	20	20	<0.1	approx 4 yrs - 8 mos.

**ADAPTIVE BEHAVIOR (Self-Report) – Scales of Independent Behavior – Revised (SIB-R)**

	<u>Standard Score</u>	<u>Percentile</u>	<u>Est. Age Equivalent</u>
Social Interaction & Communication Skills	61	0.4	
Personal Living Skills	72	3.0	
Community Living Skills	50	0.1	
Broad Independence (Full Scale)	59	0.3	<u>roughly 12 yrs. 6 mo.</u>

**Summary of Forensic Opinions**

In the time since Mr. Johnson's last hearings, standards for the determination of intellectual disability in *Atkins* cases have evolved, both clinically and legally. The United States Supreme Court rulings in *Hall v. Florida* (finding the use of a bright-line IQ-score cutoff unconstitutional) and sequential decisions in *Moore v. Texas* (finding the use of outdated and non-medical definitions of intellectual disability unconstitutional) have acknowledged that: (1) IQ test scores are subject to systematic errors (e.g., psychometric issues such as the margin of error and the Flynn effect) that must be taken into account, and (2) recognizing the critical role of clinical judgement in applying current standards for the diagnosis of Intellectual Disability.

Clinical standards have also evolved with the latest iterations of both

the Diagnostic and Statistical Manual of Mental Disorder and the Manual of the American Association on Intellectual and Developmental Disabilities that have significantly changed with way doctors make this diagnosis. There has been a major step away from using IQ scores to determine the degree of Intellectual Disability in favor of classifying the degree of ID based on impairment in adaptive functioning. There has also been an acknowledgement that IQ scores are not the only indicators of impairment in intellectual functions, and that neuropsychological test scores also provide critical evidence of cognitive impairment.

In this matter, following the latest advances legally and clinically, I have reached the following opinions in this matter to a reasonable degree of neuropsychological certainty:

#### **Opinion With Regard to Deficits in Intellectual Functions**

As discussed in detail above, it is my opinion that the evidence supports a finding that Mr. Johnson has significantly subaverage intellectual functioning based on valid, objective IQ and neurocognitive test scores that fall within the range of Intellectual Disability.

#### **Opinion with Regard to Impairments in Adaptive Functioning**

Mr. Johnson exhibits evidence of significant deficits and impairments in all three domains of adaptive functioning (Conceptual, Social and Practical), at the level of "Mild" to "Moderate" severity. Impairment in only one area is all that would be required to meet this diagnostic prong, but Mr. Johnson shows impairment in all three.

There is substantial "convergent validity" from anecdotal, contemporaneous, and empirical data sources supporting the conclusion that Mr. Johnson functions adaptively in the range of Intellectual Disability, which meets the second diagnostic prong.

#### **Opinion with Regard to Age of Onset**

It is my opinion that Mr. Johnson's intellectual and adaptive deficits find their origin in the developmental period. The data discussed above clearly show that he was exhibiting intellectual deficits and impairments in conceptual, social, and practical adaptive abilities during his development prior to age 18. The presence of FASD and

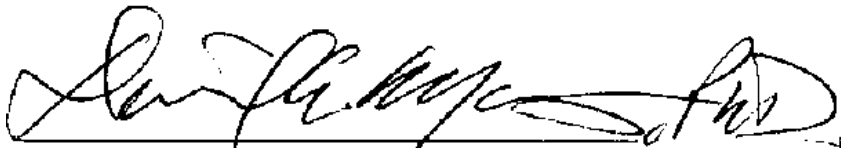
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other risk factors for intellectual disability in the developmental period further support the onset of these deficits in the developmental period.

Thank you for the opportunity to evaluate this interesting case. If you have any questions, please feel free to contact me directly any time at (949) 230-7321.

Sincerely,

A handwritten signature in black ink, appearing to read 'Daniel A. Martell', with a stylized flourish at the end.

Daniel A. Martell, Ph.D., A.B.P.P.  
Fellow, American Academy of Forensic Psychology  
Fellow, National Academy of Neuropsychology  
Fellow and Past President, American Academy of Forensic Sciences

# **Appendix F**

GERALD H. HEISLER, Ph.D.  
3108 SOUTH OLD RIDGE ROAD  
COLUMBIA, MISSOURI 65203

Mr. Johnson was seen for evaluation on July 21, 2004. The WAIS-III and a clinical interview were given. He was referred for testing by the Boone County Prosecutor's Office so that an estimate of his intellectual functioning could be obtained. The interview and testing took place at the Boone County Jail.

Mr. Johnson is currently incarcerated at the Potosi State Correctional Facility having been convicted of capital murder and sentenced to death. Because of recent judicial decisions, it is necessary to get an estimation of whether he could be considered mentally retarded or had a mental disability.

**Background Information:**

Mr. Johnson's records were reviewed before the interview took place. This included yearly reports from the Department of Corrections, his school records, interviews that happened with correctional officers who had firsthand knowledge of his activities, an interview with his work supervisor, reviews of audiotapes which were recorded of Mr. Johnson making phone calls to family, friends and his attorneys, and the previous testimony and evidence that was presented in his legal trials.

**Tests Administered:**

**Wechsler Adult Intelligence Scale III:**

This intelligence scale provides the most current professionally accurate estimation. It consists of test items that had been re-normed and standardized in 1997.

**Behavioral Observations by Psychometrist Mr. Sonny Bradshaw:**

The test was given by Mr. Wayne Bradshaw, a professional psychometrist. He noted Mr. Johnson had no expressive or receptive problems, and gave short responses on his verbal subtests. He was cooperative with testing and seemed to understand the test and instructions. He had performed the same test seven months previously. Mr. Bradshaw noted "Mr. Johnson appeared to know the answers on a few subtests but answered incorrectly anyhow". He was regarded by Mr. Bradshaw as being attentive to the tasks.

The testing conditions were quiet, private and with no distractions. The assessment was done in one session without interruption. Mr. Bradshaw believed that Mr. Johnson appeared tired at times but not enough to affect his performance. He did have an injured right hand and appeared to have difficulty writing. This may have affected his performance on some tasks which involved using his right hand.

3-92



Clinical Interview by Dr. Heisler:

Mr. Johnson entered the interview appearing his stated age of 44. He was advised his responses would not be confidential. He appeared thin and said that he had lost weight because he had had a collapsed lung six weeks before. He spoke deliberately and was friendly and cooperative. He shook hands carefully because his right thumb had been hurt within the last several days while playing softball. He claimed that he had been playing first and during the last out of the game, he had made sure that he had caught the ball, but it had jammed his finger. The finger looked swollen.

Mr. Johnson claimed that he thought that the Potosi Institution was "all right". "It's somewhere to go to spend time". He doesn't feel that he's treated well, however, because he's ordered around. What he likes about the institution is his cable television. He was able to list his range of favorite cable channels. He remarked that his favorite program is *The Young and the Restless* and his favorite character is Victor because "he's a good guy who doesn't mess around". He enjoys getting cakes and cookies. He currently is in Administrative Segregation he claims because he owes other inmates \$1500.00 for marijuana he's used but hasn't paid for.

During the interview, Mr. Johnson was asked to count \$2.00 of change from coins that were on the interview table. He was able to do so easily.

At Potosi, Mr. Johnson works in the kitchen and says he washes dishes. He talked about his supervisor positively. She also reports he is able to work well with no problems.

He was able to describe living previously in Columbia and how he would catch a bus to get into town every three or four hours. The bus pick-up location was in front of the Casey's store in which the crimes for which he was convicted, was located. He had no difficulties obtaining transportation where he lived.

He talked about knowing where to go for a job but having some difficulty with employment.

He's had substance abuse problems since childhood.

His favorite foods are noodles and sausages and he likes dessert. He says that he is able to wear his own clothes and likes sweat pants and sweat shirts. He reported no difficulty in taking showers or eating.

When asked about his writing, Mr. Johnson claimed that John Burlingame writes letters for him and has been doing so for only a couple of months. He was unable to explain why several letters in his file, which dated back several years, were written by Mr. Johnson were in his file. They were in good written form. He is able to tell time.

Mr. Johnson talked about going to sleep at twelve and he will rise at four so he can do his job in the kitchen. He often naps between one and four in the afternoon.

Mr. Johnson said that he has some contact with the family, his sisters but not his brother. He said that he has several friends and acquaintances within the institution.

He denied having any goals. He remarked that he never had the desire to go to school and claimed that his brother and sisters did homework for him.

He openly admitted being guilty of his offense. He talked about how his girlfriend had broken up with him and he was upset. He had called St. Louis where his girlfriend supposedly was and a man had answered. That had made him even angrier. He got upset and asked for a gun from a man with whom he was staying. He needed money. The closest store was the Casey's. He remarked about waiting for the last person to leave. He said he was aware that they had two safes, because he had been in the store frequently. He knew the manager had a key and first she said she didn't have one and then when she tried to flush the key down the toilet, he became enraged. "She lied to me". He claims he shot the people before brutalizing their bodies with a hammer. He had worn several layers of clothes because he thought it would confuse his description.

Clinical interview indicates that there was no indication of a psychotic thought disturbance or organic brain dysfunction. His speech was clear and his affect was appropriate. He was friendly, pleasant and somewhat passive. There were no complaints of sleep or appetite disturbance.

#### **Test Results:**

Mr. Johnson received a verbal intelligence score of 67, a performance intelligence score of 73 and a full-scale score of 67. As is presented in the *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*, (the professional guideline for diagnosis) "there should be noted that there is a measurement error of approximately 5 points in assessing IQ". .....mental retardation would not be diagnosed in an individual with an IQ of lower than 70 if there are no significant deficits or impairments in adaptive functioning. The choice of testing instruments and interpretation of results should take into account factors that may limit test performance"....

Mr. Johnson's results place him in the mild mentally retarded category, if these results were to be considered valid; however, there are concerns about mitigating factors during this testing. From recorded conversations with his attorneys, he knew well what was occurring and that his ability to continue to avoid execution could be linked to this test performance.

Importantly, in order to be considered retarded, a person not only has to have the onset of this before 18, but also have concurrent deficits or impairments in present adaptive functioning in at least 2 of the following areas; communication, self-care, home living, social-interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. It is this examiner's belief that Mr. Johnson does not meet this criteria. He wasn't regarded as mentally retarded before 18.

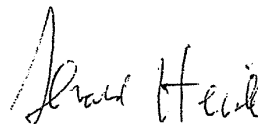
Mr. Johnson is able to communicate well. He can care for himself, he is able to dress, feed and bathe himself. He has good social interactions with peers and was able to relate appropriately with this examiner and others. He's aware of community resources. He's able to engage in work, leisure and follow appropriate health and safety functions. Though he has a poor academic record, he comes from an impoverished background and began substance abuse before age 10. He began alcohol usage at 6 and started smoking pot at 11. Because of his use of drugs within the institution, there is concern whether this use may have influenced his performance.

Mr. Johnson has had a range of evaluations during the course of his life. Most of the estimates of his functioning have placed him in the borderline level of intellectual functioning. He has had some diagnostic psychometric testing which has indicated his revised Beta to be 95 which is average intellectual functioning.

Interviews were done with Brian Phillips, Julie Mapes, Mike Leyden and Janet Williams who work with Mr. Johnson at the Potosi Institute. These interviews were conducted by William Haas, special investigator for the Boone County Prosecutor. They all report positively that Mr. Johnson is able to understand the essentials around him, speak well, can write, reads, performs his job well and is able to process and interact with others in his environment appropriately. There is no indication of difficulties in his daily function due to communication or the other areas listed above. In fact, in testing done by the Defense, Dr. Dennis Keyes reports that Mr. Johnson had good language skills. Previous expert mental health witnesses during trial have remarked that he is not retarded. These references can be found in the court record.

**Summary:**

In summary, Mr. Johnson was seen for evaluation and given a clinical interview in the WAIS-III. It is this examiner's opinion that considering previous testing, the plus or minus 5 error factor on the WAIS-III, but more importantly, considering his ability to function, to process and understand his environment, to communicate, engage in work, leisure, and health and all areas as listed before, that Mr. Johnson cannot be accurately diagnosed as having mental retardation.



Gerald H. Heisler, Ph.D.  
Licensed Psychologist

# **Appendix G**

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

STATE OF MISSOURI, )  
 )  
Plaintiff, )  
 )  
vs. ) Case No. 13R019441538-01  
 )  
ERNEST LEE JOHNSON, )  
 )  
Defendant. )

COPY

DEPOSITION OF DEBORAH TURNER

The deposition of Deborah Turner taken on Saturday,  
May 6, 2006, at the Susanna Wesley Family Learning Center,  
209 W. Commercial, Charleston, Missouri, on behalf of the  
Defendant.

APPEARANCES:

For the State:  
By Telephone:  
Hon. Kevin Crane  
Prosecuting Attorney  
Boone County Courthouse  
705 E. Walnut  
Columbia MO 65201  
573/886-4100

For the Defendant:  
By Telephone:  
Hon. Timothy R. Cisar  
Bridges, Cisar & Mizell, L.L.C.  
750 Bagnell Dam Boulevard, Suite A  
Lake Ozark MO 65049  
573/365-2383

Sharon G. Anielak, RPR-CCR  
ROSE COURT REPORTING SERVICE  
141 Lake Road  
Benton, Missouri 63736  
573/545-3036

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1 The deposition of DEBORAH TURNER, a witness produced,  
2 sworn, and examined between the hours of 9:40 a.m. and 10:15  
3 a.m. on Saturday, May 6, 2006, at the Susanna Wesley Family  
4 Learning Center, 205 W. Commercial, Charleston, Missouri,  
5 before me, SHARON G. ANIELAK, RPR-CCR, a Notary Public in the  
6 state of Missouri, in a matter now pending in the Circuit  
7 Court of Boone County, Missouri, Case No. 13R019441538-01,  
8 wherein State of Missouri is the plaintiff and Ernest Lee  
9 Johnson is the defendant, on behalf of the defendant.

10 STIPULATIONS

11 It is stipulated and agreed that this deposition may be  
12 taken down in shorthand by Sharon G. Anielak, RPR-CCR, a  
13 Notary Public in the state of Missouri, and thereafter  
14 transcribed in typewriting.

15 It is further stipulated and agreed that all formalities  
16 regarding the taking of this deposition are waived and that  
17 all objections except objections as to the form of question  
18 asked are reserved and may be raised upon the trial of this  
19 matter.

20 The signature of this witness is not waived.  
21  
22  
23  
24  
25

1                                DEBORAH TURNER,  
2    having been sworn upon her oath of veracity, testified as  
3    follows:  
4                                DIRECT EXAMINATION,  
5    BY MR. CISAR:  
6    Q.    Madam, please state your name for the Court?  
7    A.    My name is Deborah Turner.  
8    Q.    Mrs. Turner, how old are you?  
9    A.    Sixty-nine.  
10   Q.    Okay.   And you live in Charleston?  
11   A.    Yes.  
12   Q.    How long have you lived in Charleston?  
13   A.    All my life.  
14   Q.    All right.   And you are under a subpoena to appear in  
15   Ernest Johnson's trial next week.   Is that correct?  
16   A.    Correct.  
17   Q.    Are you able to make it there?  
18   A.    No.  
19   Q.    And why not?  
20   A.    Because of health reasons.  
21   Q.    Yours or your husband's?  
22   A.    My husband as well as mine.  
23   Q.    All right.   You are of what race?  
24   A.    African-American.  
25   Q.    Okay.   Do you know Ernest Johnson?



1 A. Yes.

2 Q. How do you know Ernest Johnson?

3 A. I know Ernest Johnson as being a student at one of the  
4 schools that I worked at.

5 Q. That you worked at, one of the schools?

6 A. Yes.

7 Q. What school was that?

8 A. It's called Washington school there in Wilson City.

9 Q. Okay. Is that near Wyatt?

10 A. It is Wyatt. It's across the street from -- it's a  
11 little area across the street from Wilson City, but the  
12 school was in Wyatt.

13 Q. Okay. And what grade would he have been in back then?

14 A. If I can remember right, it was either first or second.

15 Q. All right. Was that an integrated or segregated school?

16 A. All black.

17 Q. What type of conditions were at that school because of  
18 that?

19 A. Well, it was a very poor condition because the black  
20 children was handed down all of the books that an all white  
21 school by the name of Eugene Field, they used the books and  
22 then the beginning of the next school year, the black would  
23 receive those books.

24 Q. Was it a rich community or a poor community that this  
25 was in?

1 A. Our community was a very poor community. As far as the  
2 black was concerned, but as far as the other race, it was  
3 very rich.

4 Q. You remember Ernest as in either the first or second  
5 grade. Is that correct?

6 A. Correct.

7 Q. What memories do you have of him?

8 A. The memories that I have of Ernest, he was a very shy,  
9 very slow, withdrawn child.

10 Q. Okay. Do you recall his personality?

11 A. His very -- his personality, he had a sweet personality.  
12 But it was something there that he was very shy and a very  
13 slow. I don't know if it was because he was slow and  
14 couldn't mix very well or not.

15 Q. Okay. Do you recall his abilities at all in any of the  
16 school work there, or was that something that you would have  
17 had access to?

18 A. He was a special -- special ed student, in what I call  
19 special ed. Very slow. Slow learning.

20 Q. And you recall that because you worked there at the  
21 school and have active memory of that.

22 A. Yes, I worked at the school there.

23 Q. As far as the community of Charleston -- and is that  
24 where Ernest lived at this time?

25 A. Yes, in the rural area.

1 Q. Is this Wilson City and Wyatt near Charleston?  
2 A. Yes. Ernest lived about one mile from Charleston and  
3 about six from Wyatt.  
4 Q. Could you describe the area he lived in?  
5 A. He lived in a farmhouse, a frame house. And it wasn't a  
6 very nice house, and he had ----  
7 Q. I'm sorry, I didn't hear what you said. It was or was  
8 not?  
9 A. It was not. They had no running water. They had what  
10 we called then outhouses. You had to heat your water for  
11 taking a bath and washing dishes on a coal stove. Had to  
12 pump your water from outside.  
13 Q. These were the conditions Ernest's family lived in back  
14 then?  
15 A. Yes.  
16 Q. As far as Charleston as a community to grow up in in the  
17 '60s as an African-American, can you please describe for the  
18 jury?  
19 A. As far as the living conditions in Charleston back in  
20 the '60s, it was very bad. It was a racist area, which it's  
21 pretty much -- a little bit better now. If we went to the  
22 movie here in Charleston, which was called the McCutcheon  
23 Theater, the blacks had to sit in a very small area upstairs  
24 there, and the whites sat downstairs, and it was a level area  
25 where the white could throw soda and popcorn over on the

1 black. The black seating area at the theater was no more  
2 than where maybe like 25 to 40 people could sit in that area  
3 all crammed up.

4 The eating, the restaurants, we could order our food,  
5 and we would have -- either -- if we stayed there to eat, we  
6 would have to stand up or leave. It was -- I can remember we  
7 had a bus -- small bus station on Marshall Street. When the  
8 people would come in off of the bus, it was a sign says,  
9 "Black to the rear to be served." We could not go on the  
10 inside. They served us through a window on the outside.

11 And the school area in Charleston, at Lincoln school, we  
12 also got the old books from Eugene Field. It was two  
13 schools, Eugene Field and Mark Twain school.

14 Q. They were white schools. Is that ----

15 A. All white school. All white school. Eugene Field and  
16 Mark Twain was all white schools. Lincoln school was all  
17 black.

18 Q. Were these elementary schools?

19 A. Elementary school, yes. They went from seven -- I think  
20 it was seven or eight down to first graders. And Lincoln  
21 school went from first through twelfth grade.

22 Q. And Ernest was at -- was it Washington school over in  
23 ----

24 A. In Wyatt, yes.

25 Q. Wyatt, okay.

1 A. Yes.

2 Q. And that also was a black school. Is that ----

3 A. All black, correct.

4 Q. Were there signs in the community back in the '60s for

5 whites only or colored only, at that point?

6 A. I was trying to remember. At the bus station, I know it

7 was. It said, "Black to the back." To be served.

8 Q. Okay. Do you know when those signs came down in town?

9 A. I think when the signs came down is when they closed

10 that small bus station and tore it down.

11 Q. Do you know when that was?

12 A. No, I don't.

13 Q. Do you recall the working conditions for African-

14 Americans in Charleston and the area in the '60s?

15 A. Yes, there was farm work, picking cotton, chopping

16 cotton. Working in the fields, like plowing, and the women

17 did domestic work like in the kitchen. That was just about

18 it as far as I can remember.

19 Q. It was not a rich or well-to-do community for the

20 African-American person.

21 A. No, it was not.

22 MR. CISAR: I think that's all I have, Mr. Crane.

23 CROSS-EXAMINATION,

24 BY MR. CRANE:

25 Q. Hi, Mrs. Turner.

1 A. Hi.

2 Q. If you testified -- did you testify in the previous  
3 trials?

4 A. For Ernest?

5 Q. Yes.

6 A. No.

7 Q. You've been interviewed before on this case?

8 A. I have been -- I have been spoken to before on this  
9 case.

10 Q. By some people with the public defender's office?

11 A. I guess it was at the public defender's office. I'm  
12 pretty sure they was.

13 Q. I don't think I've ever visited with you, have I?

14 A. No.

15 Q. You indicated you had some health problems.

16 A. Yes.

17 Q. Could you tell us what those are, please?

18 A. Me myself, I am -- arthritis problem, and there is other  
19 areas, conditions in my body, I would not -- I prefer not  
20 describing my health problem.

21 Q. Okay. And did you travel to this location where you're  
22 doing this deposition today?

23 A. Which is about four blocks from where I live.

24 Q. You got a ride there?

25 A. Yes.



1 Q. And your husband is ill?

2 A. My husband have a heart condition. He have had five  
3 bypasses and maybe like four or five stents at different  
4 times, yes.

5 Q. Okay, and I guess you care for him?

6 A. He's able to care for himself sometime, and sometime I  
7 have to see about him. We -- in fact, we see about each  
8 other.

9 Q. Okay. If you were under subpoena for court for this  
10 trial, is there anything that would prevent you from coming  
11 up here to Columbia?

12 A. Yes. If I ride very far, I stiffens up.

13 Q. Okay. You mean you got to stop and get out and kind of  
14 move around?

15 A. Not -- not even that. I have a heel problem, which is a  
16 bone spur, and it's very painful, which can -- you know, I'm  
17 just not able to travel that far.

18 Q. You have a heel spur that keeps you from traveling?

19 A. No, no, no, no, it doesn't keep me from traveling. It  
20 is very painful. And right now, I cannot have the surgery  
21 that is required to have.

22 Q. Okay, but you could ride in a car up here to Columbia  
23 though; right?

24 A. I'm not going to say I can't ride in a car to Columbus.  
25 What I am saying now, due to health problems, I can't come.

1 Q. Okay. Now, you were a teacher of -- one of Ernest's  
2 teachers. Is that correct?

3 A. I worked in the school system where Ernest at -- at --  
4 at Wyatt where Ernest went. I was a secretary there, and I  
5 visited the classrooms.

6 Q. You were a secretary and not a teacher.

7 A. I was like a secretary-teacher's aide.

8 Q. So you never taught students?

9 A. Yes, I helped with the students. That's the reason why  
10 I said secretary-teacher's aide. The main teacher was in the  
11 room, and I was assisting with her, helping her.

12 Q. Okay. And when would this have been?

13 A. When Ernest was in the first <sup>or</sup> ~~and~~ second grade.

14 Q. And how old would you have been at that time?

15 A. Whoo. Probably maybe in my twenties, twenties,  
16 thirties.

17 Q. Okay. Well, you were born in what, '37?

18 A. I was born in '36.

19 Q. Thirty-six. And when did you start working as a  
20 secretary at the school?

21 A. Ooh, I really can't remember. Let me see. Thirty,  
22 five. Probably when I was about thirty, twenty-five, twenty-  
23 five, probably twenty-five. Somewhere along up in there. I  
24 just can't remember right now.

25 Q. Okay. So you don't remember when you started working.



1 A. No, I really don't. That's a lot of years back.  
2 Q. Okay. Well, how old would Ernest have been when you met  
3 him?  
4 A. When I first met Ernest to really know Ernest at the  
5 first grade, maybe like seven, six, seven, or eight. Because  
6 I think he had repeated the first or the second grade.  
7 Q. Do you know that?  
8 A. No, I don't know that, but I believe he had because he  
9 was very slow and he was -- he was one of the oldest children  
10 in his class.  
11 Q. Well, ma'am, I've looked through previous interviews,  
12 and maybe I don't have everything and maybe I missed  
13 something. I don't find where you've ever said that Ernest  
14 was slow before today.  
15 A. Well, I have said Ernest was slow, because Ernest was a  
16 special ed student. I don't know -- I don't know what ----  
17 Q. Before today, have you told anyone that Ernest was slow?  
18 A. I've always mentioned Ernest was a slow, shy, special  
19 ed.  
20 Q. Now, I've seen where you said he was shy and quiet.  
21 A. Um-hum.  
22 Q. But I don't -- and you know, again, if it's somewhere in  
23 the record, I'm -- you know, I'll certainly stand corrected,  
24 but you -- you're saying you've said that before.  
25 A. I could have.

*I know I said E was slow + shy*

1 Q. You could have?  
2 A. Yes.  
3 Q. To whom?  
4 A. I have spoke with -- I don't know the names of the  
5 people, can't remember the names of the ones that I spoke to.  
6 Just like the lawyer I just finished speaking with. During  
7 that particular time, maybe everything was not documented  
8 that I had said.  
9 Q. Is there any documentation that you're relying on that  
10 he was slow?  
11 A. Because I was around him.  
12 Q. No, any documentation.  
13 A. Not that I can recall. Because I would not have  
14 documented it.  
15 Q. Because you were a secretary.  
16 A. Secretary-teacher's aide.  
17 Q. And you mentioned that Wyatt was a segregated school.  
18 A. Yes.  
19 Q. How long did he go there?  
20 A. How long did Ernest go there?  
21 Q. Yes.  
22 A. Ernest went there until they moved away. I think they  
23 -- his mom moved to Columbus or somewhere up in that area,  
24 Jefferson City. I really don't know.  
25 Q. So you don't know how long Ernest was at Wyatt.

1 A. No, I don't, because I can't remember the year that they  
2 moved from this area.

3 Q. How many other children were in his class?

4 A. I have no record of how many children was in his class.  
5 That's been a number of years ago.

6 Q. That's been a long, long time ago. But yet you remember  
7 this particular child.

8 A. Yes. I remember that -- and not only that particular  
9 child, I remember some of the other students that was there.  
10 Because I was old enough to remember them.

11 Q. And you've testified that he was in special education.

12 A. Correct.

13 Q. So the school provided special education classes.

14 A. They sure did. His teacher was Nadine Warfield.

15 Q. Okay.

16 A. She was a special ed teacher.

17 Q. And how many other students were in special education?

18 A. I have no idea.

19 Q. Do you remember any of their names?

20 A. Oh, I can -- I was trying to remember some of the  
21 students' names that was in there, but right now, I can't  
22 remember any of them.

23 Q. So the only student that you remember is Ernest.

24 A. I'm not going to say that's the only student that I can  
25 remember. I can remember Ernest's name because it had been

1 mentioned, and Ernest went to school with some of my  
2 children, because I worked there and I carried my children to  
3 school there.

4 Q. And what's your education, ma'am?

5 A. My education?

6 Q. Yes.

7 A. I'm a high school graduate and with some -- a few  
8 college hours.

9 Q. Okay. And when did you get the college hours?

10 A. I went -- I took them -- I took them through another  
11 special program. I didn't go to college per se myself.

12 Q. Right. When did you ---

13 A. I took some classes.

14 Q. When did you get those college hours?

15 A. I really don't know. I can't remember the year. It's  
16 been a long time ago.

17 Q. Was it before or after you were a secretary at Wyatt?

18 A. It was after.

19 Q. So at the time you were at Wyatt, you were in your  
20 twenties?

21 A. Should have been, yes.

22 Q. And you had a high school education at that time.

23 A. Correct.

24 Q. And what were your duties as a secretary?

25 A. My duties as secretary was to keep the absentees, the

1 records, and meal counts, and the students that did have  
2 special needs, like first aid or something like that, if they  
3 scraped their knee, I would clean them up, and I would go to  
4 the classroom and help assist the teacher if there was a  
5 problem, and I would set in on the classroom.

6 Q. What, to keep order or something?

7 A. Just to keep them quiet if a teacher was working with  
8 one. You know, when there's -- there's some children need  
9 more attention than others.

10 Q. Right. And did you ever have occasion to see Ernest  
11 Johnson outside of school?

12 A. I -- I probably did. I'm pretty sure I did. With his  
13 parents, you know, with his mom. I would go by the house,  
14 you know. Sometimes I would go by their house and I would  
15 stop at the house or something like that, but as far as  
16 seeing him at a movie or something like that, no.

17 Q. So you don't recall Ernest doing anything, seeing him in  
18 any activities. You don't know what he did outside of  
19 school.

20 A. Not that I can recall.

21 Q. I'm still trying to figure out -- I wanted to figure out  
22 how, if Ernest was in grade school in, what, let's say 1960  
23 -- he was born in '60, so he'd be in grade school, what?  
24 What, did it start with kindergarten?

25 A. I don't know if that particular time -- I know -- I'm

1 pretty sure -- I don't know if they had a kindergarten here  
2 at Charleston at that particular time or not. I can't  
3 recall, and it would have started -- if they had a  
4 kindergarten, it would have been. It would have -- could  
5 have gone. I just don't know. See, all children don't go to  
6 kindergarten.

7 Q. Right, so the earliest he would have been in grade  
8 school would have been 1966?

9 A. I guess.

10 Q. But you don't remember that either.

11 A. No, I don't.

12 Q. And what was, in your view, special education?

13 A. In my view, special education?

14 Q. Yeah, what -- what did -- when you said Ernest, you now  
15 remember that Ernest was a special education student, what  
16 does that mean or did that mean in grade school?

17 A. That means in grade school he was below grade average,  
18 couldn't keep up with the average student.

19 Q. At what -- when you say special education, what was done  
20 for special education students?

21 A. The special education students work below grade level.

22 Q. Right, I got that.

23 A. And they had to have special attention to help them to  
24 try.

25 Q. Pardon me?



1 A. To help them to try to grasp reading, spelling, math,  
2 and so on. They just couldn't keep up.

3 Q. Right, well ----

4 A. He was slow.

5 Q. Just let me give -- here's what I'm getting at. I  
6 wasn't good at math when I was in school, and I couldn't keep  
7 up and I had to have more attention from the teacher. Is  
8 that what you mean?

9 A. Okay, let me ask you a question. When the teacher  
10 came ----

11 Q. No, now, ma'am, I don't mean to be disrespectful.

12 A. Okay, let me tell you what ----

13 Q. Is that what you mean?

14 A. No, what I mean is Ernest was a child that could not  
15 grasp very quickly.

16 Q. Okay.

17 A. Even with someone there helping him. We would have to  
18 go over it and over. He could not pick up.

19 Q. All right. And back to my question, I was slow in math  
20 and had to have a teacher go over and over things with me.  
21 Is that what you mean by special education?

22 A. What I mean is special education, that was the name of  
23 the class. Ernest not -- wasn't only slow in math. Ernest  
24 was very slow in all subjects.

25 Q. Okay. And you're saying that there was a -- he's --

1 he's -- the school had separate sections.  
2 A. They had separate classrooms.  
3 Q. At Wyatt school.  
4 A. Yes, just like first grade had their class, second  
5 grade, so on and so forth.  
6 Q. And who was the teacher?  
7 A. Mrs. Nadine Warfield was his teacher.  
8 Q. Is she still living?  
9 A. No, she's deceased.  
10 Q. And you don't remember any of the other students.  
11 A. Not offhand, I don't. Probably if I had time to think  
12 about it, I probably could remember some of them, but not  
13 offhand I don't.  
14 Q. When you were interviewed before about this case, were  
15 you aware of Mr. Johnson's current legal problems?  
16 A. Well, I was aware of it, because I had read and I had  
17 heard that he was in trouble, and I could not believe it.  
18 Q. Well, I mean, when the public defender came to interview  
19 you -- because you've been talked to over the years. You  
20 know, this happened back in '94.  
21 A. No, I have not been talked to over the years.  
22 Q. Well, do you remember when you were first talked to  
23 about this case?  
24 A. No, I don't. Maybe like a year or so ago, but that was  
25 my first time.



1 Q. You think it was a year ago?

2 A. Year or so ago. Could have been.

3 Q. Okay. And you don't remember who you talked to.

4 A. I don't know if I talked to his lawyer, the public  
5 defender -- it could have been his lawyer, public defender.

6 Q. Okay, and were you told that he'd killed three people?

7 A. The lawyer at that particular time didn't say anything  
8 about that, but I knew that he had killed a person, but I  
9 wasn't aware he had killed three.

10 Q. Made aware that this was a death penalty case?

11 A. I knew that.

12 Q. They told you that?

13 A. I knew that.

14 Q. And when you talked to Mr. Cisar, who's on the other end  
15 of the phone here, what did he tell you?

16 A. Mr. Cisar wanted -- he told me that Ernest had to go  
17 back to trial and asked if I could come, and I also told him  
18 due to the fact of the condition -- he told me that he was  
19 trying to keep Ernest from getting -- I know it was the death  
20 penalty, but he was trying to keep him, I guess, from being  
21 electrocuted.

22 Q. Okay. He told you he was trying to keep him from being  
23 electrocuted?

24 A. He didn't want to see the child be killed.

25 Q. Okay. And what else did he tell you?

1 A. Like what?

2 Q. I don't know. What else did he tell you?

3 A. He just explained the case with Ernest and that he was  
4 trying to help him. That's it. And ----

5 Q. Was there anything about his intelligence that came up  
6 during that conversation?

7 A. I really don't know. It could have. I really don't  
8 know, sir.

9 Q. Well, when did you talk to Mr. Cisar?

10 A. I talked to Mr. Cisar yesterday, last night, and he was  
11 down -- if it's the same one, he was down maybe like a month  
12 or two ago.

13 Q. So you talked to him yesterday and you don't remember if  
14 the issue of intelligence was an area that he questioned you  
15 about.

16 A. He didn't question me yesterday on any of that. He let  
17 me know that I would be doing a deposition.

18 Q. Okay. And before that, was that last week when he  
19 talked to you?

20 A. I didn't speak to him last week.

21 Q. Okay, when was the time that you spoke to him before  
22 last night?

23 A. Oh, probably about a month or so ago.

24 Q. A month ago.

25 A. I'm thinking maybe -- I was trying to think the day he

1 was down when I was subpoenaed.

2 Q. Okay.

3 A. And I don't have that paper with me to give you the  
4 correct date.

5 Q. And did Mr. Cisar ever show you or tell you that you had  
6 previous -- previously said that Ernest was slow?

7 A. Did he tell me that, that I said that?

8 Q. Yeah, prior to the time he talked to you. Did he go,  
9 "You've earlier said Ernest was slow"?

10 A. Not that I can recall, because I knew he was slow.

11 Q. Okay. Now, you said he was shy.

12 A. Yes.

13 Q. And you said he was quiet.

14 A. Yes.

15 Q. And you're saying that, now, he was slow and in special  
16 ed.

17 A. I had said that previous.

18 Q. Okay. To the public defender.

19 A. Correct.

20 Q. Do you know when that was?

21 A. No, I don't.

22 MR. CRANE: Okay, I think that's all I have other  
23 than making a record.

24 MR. CISAR: I have a few questions.

25 REDIRECT EXAMINATION,

1 BY MR. CISAR:  
2 Q. Mrs. Turner, have I ever told you what to say at all?  
3 A. No, you did not.  
4 Q. I have questioned you about Ernest Johnson, and I've  
5 asked you what you know. Is that correct?  
6 A. Correct.  
7 Q. Have I ever attempted to put words into your mouth and  
8 tell you, "This is what you must say"?  
9 A. No.  
10 Q. You -- if you were twenty-five or so when you started  
11 working, that would have been about '61. Does that start --  
12 is that correct with your memory as to when you might have  
13 started working in Charleston in the school district?  
14 A. Correct. Somewhere along up in there, yes.  
15 Q. Early '60s.  
16 A. Yes.  
17 MR. CISAR: Okay. I have no more questions. I  
18 think we're done with you, Mrs. Turner. Is that correct, Mr.  
19 Crane?  
20 MR. CRANE: Well, I mean, I still want to stay on  
21 the record.  
22 MR. CISAR: Sure, I understand that.  
23 MR. CRANE: Thank you, Mrs. Turner.  
24 THE WITNESS: You're welcome.  
25 MR. CISAR: Mrs. Anielak, he wants to make a

1 statement for the record, I believe.

2 MR. CRANE: I am objecting to this being taken as a  
3 deposition to preserve testimony. The witness is apparently  
4 under subpoena. There's been no established basis for her  
5 unavailability at the trial next week. The witness can  
6 travel at the expense of the public defender system.  
7 Further, given that at least at this point, unless the State  
8 has missed something, there's no indication of any previous  
9 statements about the defendant's intelligence that -- that  
10 the State's aware of, I would at a minimum object to her  
11 assessment of his intelligence at this juncture unless it is  
12 in a courtroom.

13 MR. CISAR: Are you done?

14 MR. CRANE: Yeah. And I guess my response is --  
15 and not to limit my response to this. I'm sure we'll have  
16 more talking about this at a later point -- is that she's  
17 explained to us and to me before the deposition that she's  
18 physically unable to get there and her husband is physically  
19 unable to have her away, and her observations are not  
20 assessments necessarily, but they're observations of what she  
21 knows about Ernest Johnson, and if she's unavailable for  
22 court in that regard, I understand this is the proper way to  
23 preserve that testimony. And so I'd ask -- anyway, I'll stop  
24 there.

25 I think we're done. I don't need to have presentment or

1 signature. Mr. Crane? Do you -- do you waive -- do you care  
2 about presentment or signature on your end? Kevin?

3 MR. CRANE: Hmm. So you're going to try to make  
4 this be a deposition to preserve with no signature.

5 MR. CISAR: Kevin, I'll do whatever you want.

6 MR. CRANE: Well, I mean, it's your depo.

7 MR. CISAR: Mrs. Anielak, can you get this to her  
8 for her review between now and end of Monday, say?

9 \* \* \* \* \*

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1 I, DEBORAH TURNER, do hereby certify that I have read  
2 the above and foregoing transcript and that the above and  
3 foregoing is a true, accurate, and complete record of my oral  
4 deposition.

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16 COUNTY OF SCOTT

17 STATE OF MISSOURI

18 I, SHARON G. ANIELAK, RPR-CCR, a Notary Public in the  
19 state of Missouri, do hereby certify that the witness DEBORAH  
20 TURNER read the above and foregoing transcript and affixed  
21 her signature above, all in my presence, on this \_\_\_\_\_ day  
22 of May, 2006.

23

My commission expires June 20, 2009.

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- your are original

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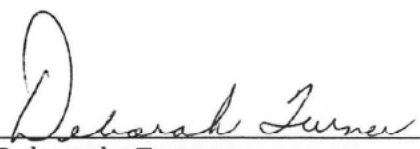
AMENDMENT TO DEPOSITION

The witness DEBORAH TURNER states she wishes to make the following changes to testimony originally given:

Page/Line	Should Read	Reason
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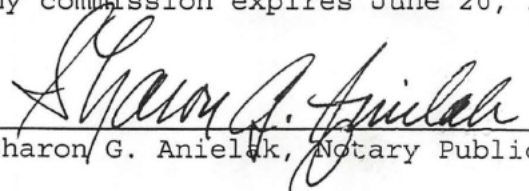
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See attached page

  
Deborah Turner

Subscribed and sworn to before me this 8<sup>TH</sup> day of May, 2006.

My commission expires June 20, 2009.

  
Sharon G. Anielak, Notary Public



1 STATE OF MISSOURI

2 COUNTY OF SCOTT

3 I, SHARON G. ANIELAK, RPR-CCR, a Notary Public in the  
4 state of Missouri, do hereby certify that the above and  
5 foregoing is a true, accurate, and complete record of the  
6 oral deposition of DEBORAH TURNER as taken down by me in  
7 shorthand at the time and place and in the matter aforesaid  
8 and thereafter transcribed in typewriting by me, all to the  
9 best of my ability.

10 I further certify that prior to testifying, the witness  
11 was sworn upon her oath of veracity by me, a person  
12 authorized to administer such oaths.

13 I further certify that I am neither related to nor  
14 employed by any party or attorney in this matter and have no  
15 interest whatsoever in its outcome.

16 Given under my hand and seal of office this 6th day of  
17 May, 2006.

18 My commission expires June 20, 2009.

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IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 13R019441538-01
	)	
ERNEST LEE JOHNSON,	)	
	)	
Defendant.	)	

CERTIFICATE OF REPORTER  
AND STATEMENT OF DEPOSITION CHARGES

(Rule 57.03(g)(2)(a) & Sec. 492.590 RSMO 1985)

DEPOSITION OF DEBORAH TURNER,

taken down in shorthand by me, Sharon G. Anielak, RPR-CCR, a Notary Public in the state of Missouri, and thereafter transcribed in typewriting by me and original rendered to Hon. Timothy R. Cisar, Bridges, Cisar & Mizell, L.L.C., 750 Bagnell Dam Boulevard, Suite A, Lake Ozark, Missouri, 65049, 29 pages on behalf of the Defendant, costs taxed:

TO: Mr. Timothy R. Cisar, \$225.00.

TO: Mr. Kevin Crane, \$34.80.

Upon delivery of this transcript, the above charges had not yet been paid. It is anticipated that all charges will be paid in the normal course of business.

WHEREUPON I have hereto affixed my hand and seal this 6th day of May, 2006.

My commission expires June 20, 2009.

\_\_\_\_\_  
Sharon G. Anielak, Notary Public

Sharon G. Anielak, RPR-CCR  
ROSE COURT REPORTING SERVICE  
141 Lake Road  
Benton, Missouri 63736  
573/545-3036

## LAWYER'S NOTES

COPY

# Appendix H

INSTRUCTION NO. 1

Those who participate in a jury trial must do so in accordance with established rules. This is true of the parties, the witnesses, the lawyers, and the judge. It is equally true of jurors. It is the Court's duty to enforce these rules and to instruct you upon the law applicable to the case. It is your duty to follow the law as the Court gives it to you.

However, no statement, ruling or remark that I may make during the trial is intended to indicate my opinion of what the facts are. It is your duty to determine the facts and to determine them only from the evidence and the reasonable inferences to be drawn from the evidence. Your decision must be based only on the evidence presented to you in the proceedings in this courtroom; and you may not conduct your own research or investigation into any of the issues in this case. In this determination of the facts, you alone must decide upon the believability of the witnesses and the weight and value of the evidence.

In determining the believability of a witness and the weight to be given to testimony of the witness, you may take into consideration the witness' manner while testifying; the ability and opportunity of the witness to observe and remember any matter about which testimony is given; any interest, bias, or prejudice the witness may have; the reasonableness of the witness' testimony considered in the light of all of the evidence in the case; and any other matter that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness.

Faithful performance by you of your duties as jurors is vital to the administration of justice. You should perform your duties without prejudice or fear, and solely from a fair and impartial consideration of the whole case.

MAI-CR 3d 302.01

Tendered by Court

*gm gm 5/11/06*

INSTRUCTION NO. 2

You must not assume as true any fact solely because it is included in or suggested by a question asked a witness. A question is not evidence, and may be considered only as it supplies meaning to the answer.

From time to time the attorneys may make objections. They have a right to do so and are only doing their duty as they see it. You should draw no inference from the fact that an objection has been made.

If the Court sustains an objection to a question, you will disregard the entire question and you should not speculate as to what the answer of the witness might have been. The same applies to exhibits offered but excluded from the evidence after an objection has been sustained. You will also disregard any answer or other matter which the Court directs you not to consider and anything which the Court orders stricken from the record.

The opening statements of attorneys are not evidence. Also, you must not consider as evidence any statement or remark or argument by any of the attorneys addressed to another attorney or to the Court. However, the attorneys may enter into agreements or stipulations of fact. These agreements and stipulations become part of the evidence and are to be considered by you as such.

MAI-CR 3d 302.02

Tendered by Court

*Given 5/11/06*

INSTRUCTION NO. 3

The law applicable to this trial is stated in these instructions and Instructions No. 1 and 2, which the court read to you immediately after you were sworn as jurors. All of these instructions will be given to you to take to your jury room for use during your deliberations on punishment.

You must not single out certain instructions and disregard others or question the wisdom of any rule of law.

The Court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

In later instructions, you will be told that, in order to consider the death penalty, you must first find one or more statutory aggravating circumstances beyond a reasonable doubt. The burden of causing you to find the statutory aggravating circumstances beyond a reasonable doubt is upon the state.

A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the truth of a proposition. The law does not require proof that overcomes every possible doubt. If, after your consideration of all the evidence, you are firmly convinced that a proposition is true, then you may so find. If you are not so convinced, you must give the defendant the benefit of the doubt and must not find such proposition to be true.

MAI-CR 3d 313.30A, as modified

Tendered by State

*Don Jan 5/11/06*

INSTRUCTION NO. 4

On Counts I, II and III, the defendant has been found guilty of murder in the first degree. It will be your duty to determine within the limits prescribed by law the punishment that must be imposed for that offense.

The punishment prescribed by law for murder in the first degree is either death or imprisonment for life by the Department of Corrections without eligibility for probation or parole.

MAI-CR 3d 313.31, as modified

Tendered by State

*gmm gm 5/11/06*

254



INSTRUCTION NO. 5

The law requires that certain circumstances be considered in making your decision as to the punishment to be imposed. We will proceed as follows:

First, the attorneys will have an opportunity to make a statement outlining any evidence to be presented. Such evidence may then be introduced.

After that, the Court will instruct you as to the circumstances you should consider in determining the punishment.

Then the attorneys may make their arguments.

You will then go to the jury room, deliberate, and arrive at your verdict.

MAI-CR 3d 313.32, as modified

Tendered by State

*Jan 5/4/06*

INSTRUCTION NO. 6

In determining the punishment to be assessed under Counts I, II and III against the defendant for the murders of Fred Jones, Mary Bratcher and Mable Scruggs, you must first consider whether or not the defendant is mentally retarded.

As used in this instruction, a person is mentally retarded if he suffers from a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

If you unanimously find by a preponderance of the evidence that the defendant is mentally retarded, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole. As used in this instruction, "preponderance of the evidence" means that it is more likely true than not true that the defendant is mentally retarded.

MAI-CR 3d 313.38

Tendered by State

*Prof State*  
*SM*  
*5/11/06*

INSTRUCTION NO. 7

If you did not unanimously find by a preponderance of the evidence that the defendant is mentally retarded, as submitted in Instruction No. 6, under Count I against the defendant for the murder of Fred Jones, you must first consider whether one or more of the following statutory aggravating circumstances exists:

1. Whether the murder of Fred Jones was committed while the defendant was engaged in the commission of another unlawful homicide of Mary Bratcher. A person commits the unlawful homicide of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Whether the murder of Fred Jones was committed while the defendant was engaged in the commission of another unlawful homicide of Mable Scruggs. A person commits the unlawful homicide of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

3. Whether the defendant murdered Fred Jones, for the purpose of the defendant receiving money or any other thing of monetary value from Fred Jones or another.

4. Whether the murder of Fred Jones involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find:

That the defendant committed repeated and excessive acts of physical abuse upon Fred Jones and the killing was therefore unreasonably brutal.

5. Whether the murder of Fred Jones was committed for the purpose of preventing a lawful arrest of defendant.

6. Whether the murder of Fred Jones was committed while the defendant was engaged in the perpetration of robbery. A person commits the crime of robbery when he forcibly steals property.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exists, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

MAI-CR 3d 313.40, as modified

Tendered by State

*Jan 5/11/06*

258

INSTRUCTION NO. 8

As to Count I, if you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. 7 exists, then you must decide whether there are facts and circumstances in aggravation of punishment which, taken as a whole, warrant the imposition of a sentence of death upon the defendant.

In deciding this question, you may consider all of the evidence presented, including evidence presented in support of the statutory aggravating circumstances submitted in Instruction No. 7. If each juror finds facts and circumstances in aggravation of punishment that are sufficient to warrant a sentence of death, then you may consider imposing a sentence of death upon the defendant.

If you do not unanimously find from the evidence that the facts and circumstances in aggravation of punishment warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

MAI-CR 3d 313.41A, as modified

Tendered by State

*Jan Jan 5/11/06*

259

INSTRUCTION NO. 9

As to Count I, if you unanimously find that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of a sentence of death upon the defendant, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented.

As circumstances that may be in mitigation of punishment, you shall consider:

1. Whether the murder of Fred Jones was committed while the defendant was under the influence of extreme mental or emotional disturbance.
2. Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

You shall also consider any other facts or circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

MAI-CR 3d 313.44A *modified*

Submitted by Defendant

*gm 5/11/08*

INSTRUCTION NO. 10

As to Count I, you are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. You must consider all the evidence in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

MAI-CR 3d 313.46A

Tendered by State

*Jan Jan 5/11/06*

261

INSTRUCTION NO. 11

When you retire to your jury room, you will first select one of your number to act as your foreperson and to preside over your deliberation.

You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it, but any such verdict should be signed by your foreperson alone.

As to Count I, if you unanimously decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Fred Jones, your foreperson must complete the verdict form and write into your verdict all of the statutory aggravating circumstances submitted in Instruction No. 1 that you found beyond a reasonable doubt. The foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of Fred Jones by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of Fred Jones by imprisonment for life by the Department of Corrections without eligibility for probation or parole, your foreperson will sign the verdict form so fixing the punishment.

If you unanimously find by a preponderance of the evidence that the defendant is mentally retarded, as submitted in Instruction No. 6, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.



If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. 7, or if you are unable to unanimously find that there are facts and circumstances in aggravation of punishment that warrant the imposition of a sentence of death, as submitted in Instruction No. 8, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you do unanimously find the matters described in Instructions No. 7 and 8, and you are unable to unanimously find that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, but are unable to agree upon the punishment, your foreperson will complete the verdict form and sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, you must answer the questions on the verdict form and write into your verdict all of the statutory aggravating circumstances submitted in Instruction No. 7 that you found beyond a reasonable doubt and your foreperson must sign the verdict form stating that you are unable to decide or agree upon the punishment.

If you return a verdict indicating that you are unable to decide or agree upon the punishment, the Court will fix the defendant's punishment at death or at imprisonment for life by the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that, under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable forms to which all twelve jurors agree and return them with all unused forms and the written instructions of the Court.

MAI-CR 3d 313.48A, as modified

Submitted by State

*gm gm* 5-11-06  
263

INSTRUCTION NO. 12

If you did not unanimously find by a preponderance of the evidence that the defendant is mentally retarded, as submitted in Instruction No. 6, under Count II against the defendant for the murder of Mary Bratcher, you must first consider whether one or more of the following statutory aggravating circumstances exists:

1. Whether the murder of Mary Bratcher was committed while the defendant was engaged in the commission of another unlawful homicide of Fred Jones. A person commits the unlawful homicide of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Whether the murder of Mary Bratcher was committed while the defendant was engaged in the commission of another unlawful homicide of Mable Scruggs. A person commits the unlawful homicide of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

3. Whether the defendant murdered Mary Bratcher, for the purpose of the defendant receiving money or any other thing of monetary value from Mary Bratcher or another.

4. Whether the murder of Mary Bratcher involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find:

That the defendant committed repeated and excessive acts of physical abuse upon Mary Bratcher and the killing was therefore unreasonably brutal.

5. Whether the murder of Mary Bratcher was committed for the purpose of preventing a lawful arrest of defendant.

6. Whether the murder of Mary Bratcher was committed while the defendant was engaged in the perpetration of robbery. A person commits the crime of robbery when he forcibly steals property.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exists, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

MAI-CR 3d 313.40, as modified

Tendered by State

*gm gms 1/11/06*

265

INSTRUCTION NO. 13

As to Count II, if you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. 12 exists, then you must decide whether there are facts and circumstances in aggravation of punishment which, taken as a whole, warrant the imposition of a sentence of death upon the defendant.

In deciding this question, you may consider all of the evidence presented, including evidence presented in support of the statutory aggravating circumstances submitted in Instruction No. 12. If each juror finds facts and circumstances in aggravation of punishment that are sufficient to warrant a sentence of death, then you may consider imposing a sentence of death upon the defendant.

If you do not unanimously find from the evidence that the facts and circumstances in aggravation of punishment warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

MAI-CR 3d 313.41A, as modified

Tendered by State

*Jm Jm 5/11/06*

266

INSTRUCTION NO. 14

As to Count II, if you unanimously find that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of a sentence of death upon the defendant, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented.

As circumstances that may be in mitigation of punishment, you shall consider:

1. Whether the murder of Mary Bratcher was committed while the defendant was under the influence of extreme mental or emotional disturbance.
2. Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

You shall also consider any other facts or circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

MAI-CR 3d 313.44A *modified*

Submitted by Defendant

*gm gm 5/11/08*

INSTRUCTION NO. 15

As to Count II, you are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. You must consider all the evidence in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

MAI-CR 3d 313.46A

Tendered by State

*Jan 5/11/06*

INSTRUCTION NO. 16

When you retire to your jury room, you will first select one of your number to act as your foreperson and to preside over your deliberation.

You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it, but any such verdict should be signed by your foreperson alone.

As to Count II, if you unanimously decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Mary Bratcher, your foreperson must complete the verdict form and write into your verdict all of the statutory aggravating circumstances submitted in Instruction No. 12 that you found beyond a reasonable doubt. The foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of Mary Bratcher by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of Mary Bratcher by imprisonment for life by the Department of Corrections without eligibility for probation or parole, your foreperson will sign the verdict form so fixing the punishment.

If you unanimously find by a preponderance of the evidence that the defendant is mentally retarded, as submitted in Instruction No. 6, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. 12, or if you are unable to unanimously find that there are facts and circumstances in aggravation of punishment that warrant the imposition of a sentence of death, as submitted in Instruction No 13, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you do unanimously find the matters described in Instructions No. 12 and 13, and you are unable to unanimously find that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, but are unable to agree upon the punishment, your foreperson will complete the verdict form and sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, you must answer the questions on the verdict form and write into your verdict all of the statutory aggravating circumstances submitted in Instruction No. 12 that you found beyond a reasonable doubt and your foreperson must sign the verdict form stating that you are unable to decide or agree upon the punishment.

If you return a verdict indicating that you are unable to decide or agree upon the punishment, the Court will fix the defendant's punishment at death or at imprisonment for life by the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that, under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable forms to which all twelve jurors agree and return them with all unused forms and the written instructions of the Court.

MAI-CR 3d 313.48A, as modified

Submitted by State

*John J. M. 5/11/06*

270



INSTRUCTION NO. 17

If you did not unanimously find by a preponderance of the evidence that the defendant is mentally retarded, as submitted in Instruction No. 6, under Count III against the defendant for the murder of Mable Scruggs, you must first consider whether one or more of the following statutory aggravating circumstances exists:

1. Whether the murder of Mable Scruggs was committed while the defendant was engaged in the commission of another unlawful homicide of Fred Jones. A person commits the unlawful homicide of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Whether the murder of Mable Scruggs was committed while the defendant was engaged in the commission of another unlawful homicide of Mary Bratcher. A person commits the unlawful homicide of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

3. Whether the defendant murdered Mable Scruggs, for the purpose of the defendant receiving money or any other thing of monetary value from Mable Scruggs or another.

4. Whether the murder of Mable Scruggs involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find:

That the defendant committed repeated and excessive acts of physical abuse upon Mable Scruggs and the killing was therefore unreasonably brutal.

5. Whether the murder of Mable Scruggs was committed for the purpose of preventing a lawful arrest of defendant.

6. Whether the murder of Mable Scruggs was committed while the defendant was engaged in the perpetration of robbery. A person commits the crime of robbery when he forcibly steals property.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exists, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

MAI-CR 3d 313.40, as modified

Tendered by State

*gm gm 5/11/06*

272

INSTRUCTION NO. 19

As to Count III, if you unanimously find that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of a sentence of death upon the defendant, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented.

As circumstances that may be in mitigation of punishment, you shall consider:

1. Whether the murder of Mable Scruggs was committed while the defendant was under the influence of extreme mental or emotional disturbance.
2. Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

You shall also consider any other facts or circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

MAI-CR 3d 313.44A

*modified*

Submitted by Defendant

*Don In 5/11/06*

INSTRUCTION NO. 20

As to Count III, you are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. You must consider all the evidence in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

MAI-CR 3d 313.46A

Tendered by State

*gm gm 5/11/06*

275

INSTRUCTION NO. 21

When you retire to your jury room, you will first select one of your number to act as your foreperson and to preside over your deliberation.

You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it, but any such verdict should be signed by your foreperson alone.

As to Count III, if you unanimously decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Mable Scruggs, your foreperson must complete the verdict form and write into your verdict all of the statutory aggravating circumstances submitted in Instruction No. 17 that you found beyond a reasonable doubt. The foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of Mable Scruggs by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of Mable Scruggs by imprisonment for life by the Department of Corrections without eligibility for probation or parole, your foreperson will sign the verdict form so fixing the punishment.

If you unanimously find by a preponderance of the evidence that the defendant is mentally retarded, as submitted in Instruction No. 6, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. 17, or if you are unable to unanimously find that there are facts and circumstances in aggravation of punishment that warrant the imposition of a sentence of death, as submitted in Instruction No 18, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you do unanimously find the matters described in Instructions No. 17 and 18, and you are unable to unanimously find that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, but are unable to agree upon the punishment, your foreperson will complete the verdict form and sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, you must answer the questions on the verdict form and write into your verdict all of the statutory aggravating circumstances submitted in Instruction No. 17 that you found beyond a reasonable doubt and your foreperson must sign the verdict form stating that you are unable to decide or agree upon the punishment.

If you return a verdict indicating that you are unable to decide or agree upon the punishment, the Court will fix the defendant's punishment at death or at imprisonment for life by the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that, under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable forms to which all twelve jurors agree and return them with all unused forms and the written instructions of the Court.

INSTRUCTION NO. 22

Under the law, a defendant has the right not to testify. No presumption or inference of any kind may be drawn from the fact that the defendant did not testify.

MAI-CR 3d 308.14 as modified  
Submitted by the defendant

gm gm 5/11/06

INSTRUCTION NO. 22

The attorneys will now have the opportunity of arguing the case to you regarding the punishment to be imposed. Their arguments are intended to help you in understanding the evidence and applying the law, but they are not evidence.

You will bear in mind that it is your duty to be governed in your deliberations by the evidence as you remember it, the reasonable inferences which you believe should be drawn therefrom, and the law as given in these instructions.

It is your duty to render such verdict under the law and the evidence concerning the punishment to be imposed as in your reason and conscience is true and just.

The state's attorney must open the argument. The defendant's attorney may then make his argument. The state's attorney may then reply. No further argument is permitted by either side.

MAI-CR 3d 313.49

Tendered by State

*gm gm 5/11/06*

*279*



VERDICT

(Jurors: Use this form only if the punishment you now assess and declare is death. See Instruction No. 11 for directions as to what must be written on this verdict form. The foreperson's signature must appear after the statutory aggravating circumstance or circumstances.)

As to Count I, the defendant Ernest Lee Johnson having been found guilty of murder in the first degree of Fred Jones, we, the jury, now assess and declare the punishment at death. We have found the following statutory aggravating circumstance or circumstances beyond a reasonable doubt:

MAI-CR 3d 313.58A, as modified

Submitted by State

*g m Jones 5/11/06*

280

## VERDICT

(Jurors: Use this form only if the punishment you now assess and declare is imprisonment for life without eligibility for probation or parole.)

As to Count I, the defendant Ernest Lee Johnson having been found guilty of murder in the first degree of Fred Jones, we, the jury, now assess and declare the punishment at imprisonment for life without eligibility for probation or parole.

MAI-CR 3d 313.58A, as modified

Submitted by State

*Jan 5/11/06*

281

## VERDICT

(Jurors: Use this form only if you are unable to decide or agree upon the punishment. See Instruction No. 11 for directions as to what must be written on this verdict form. You will bear in mind, however, that under the law it is your primary duty and responsibility to fix the punishment.)

As to Count I, the defendant Ernest Lee Johnson having been found guilty of murder in the first degree of Fred Jones, we, the jury, are unable to decide or agree upon the punishment. We answer the following questions:

1. Does the jury unanimously find by a preponderance of the evidence that the defendant is mentally retarded?

Yes [ ] No [ ]

(Jurors: If the answer to Question 1 is yes, the jury must return the verdict form fixing the defendant's punishment at life imprisonment without eligibility for probation and parole.)

2. Does the jury unanimously find beyond a reasonable doubt statutory aggravating circumstance or circumstances?

Yes [ ] No [ ]

(Jurors: If the answer to Question 2 is no, the jury must return the verdict form fixing the defendant's punishment at life imprisonment without eligibility for probation and parole.)

3. Does the jury unanimously find beyond a reasonable doubt that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of death upon the defendant?

Yes [ ] No [ ]

4. Does the jury unanimously find that there are facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment?

Yes [ ] No [ ]

(Jurors: If the answer to Question 4 is yes, the jury must return the verdict form fixing the defendant's punishment at life imprisonment without eligibility for probation or parole.)

If the answer to question 2 is yes, list below the statutory aggravating circumstance or circumstances that you have unanimously found beyond a reasonable doubt:

## VERDICT

(Jurors: Use this form only if the punishment you now assess and declare is death. See Instruction No. 16 for directions as to what must be written on this verdict form. The foreperson's signature must appear after the statutory aggravating circumstance or circumstances.)

As to Count II, the defendant Ernest Lee Johnson having been found guilty of murder in the first degree of Mary Bratcher, we, the jury, now assess and declare the punishment at death. We have found the following statutory aggravating circumstance or circumstances beyond a reasonable doubt:

MAI-CR 3d 313.58A, as modified

Submitted by State

*gpn gpn 5/11/06*

284

## VERDICT

(Jurors: Use this form only if the punishment you now assess and declare is imprisonment for life without eligibility for probation or parole.)

As to Count II, the defendant Ernest Lee Johnson having been found guilty of murder in the first degree of Mary Bratcher, we, the jury, now assess and declare the punishment at imprisonment for life without eligibility for probation or parole.

MAI-CR 3d 313.58A, as modified

Submitted by State

*Don Jr 5/11/06*

285

## VERDICT

(Jurors: Use this form only if you are unable to decide or agree upon the punishment. See Instruction No. 16 for directions as to what must be written on this verdict form. You will bear in mind, however, that under the law it is your primary duty and responsibility to fix the punishment.)

As to Count II, the defendant Ernest Lee Johnson having been found guilty of murder in the first degree of Mary Bratcher, we, the jury, are unable to decide or agree upon the punishment. We answer the following questions:

1. Does the jury unanimously find by a preponderance of the evidence that the defendant is mentally retarded?

Yes [ ]

No [ ]

(Jurors: If the answer to Question 1 is yes, the jury must return the verdict form fixing the defendant's punishment at life imprisonment without eligibility for probation and parole.)

2. Does the jury unanimously find beyond a reasonable doubt statutory aggravating circumstance or circumstances?

Yes [ ]

No [ ]

(Jurors: If the answer to Question 2 is no, the jury must return the verdict form fixing the defendant's punishment at life imprisonment without eligibility for probation and parole.)

3. Does the jury unanimously find beyond a reasonable doubt that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of death upon the defendant?

Yes [ ]

No [ ]

4. Does the jury unanimously find that there are facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment?

Yes [ ]

No [ ]

(Jurors: If the answer to Question 4 is yes, the jury must return the verdict form fixing the defendant's punishment at life imprisonment without eligibility for probation or parole.)

If the answer to question 2 is yes, list below the statutory aggravating circumstance or circumstances that you have unanimously found beyond a reasonable doubt:

MAI-CR 3d 313.58A, as modified

Submitted by State

*gan gan 5/11/02*



## VERDICT

(Jurors: Use this form only if the punishment you now assess and declare is death. See Instruction No. 21 for directions as to what must be written on this verdict form. The foreperson's signature must appear after the statutory aggravating circumstance or circumstances.)

As to Count III, the defendant Ernest Lee Johnson having been found guilty of murder in the first degree of Mable Scruggs, we, the jury, now assess and declare the punishment at death. We have found the following statutory aggravating circumstance or circumstances beyond a reasonable doubt:

MAI-CR 3d 313.58A, as modified

Submitted by State *gm gm 5/11/06*

*288*

## VERDICT

(Jurors: Use this form only if the punishment you now assess and declare is imprisonment for life without eligibility for probation or parole.)

As to Count III, the defendant Ernest Lee Johnson having been found guilty of murder in the first degree of Mable Scruggs, we, the jury, now assess and declare the punishment at imprisonment for life without eligibility for probation or parole.

MAI-CR 3d 313.58A, as modified

Submitted by State

*gm 5/11/06*

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## VERDICT

(Jurors: Use this form only if you are unable to decide or agree upon the punishment.

See Instruction No. 21 for directions as to what must be written on this verdict form. You will bear in mind, however, that under the law it is your primary duty and responsibility to fix the punishment.)

As to Count III, the defendant Ernest Lee Johnson having been found guilty of murder in the first degree of Mable Scruggs, we, the jury, are unable to decide or agree upon the punishment. We answer the following questions:

1. Does the jury unanimously find by a preponderance of the evidence that the defendant is mentally retarded?

Yes [ ] No [ ]

(Jurors: If the answer to Question 1 is yes, the jury must return the verdict form fixing the defendant's punishment at life imprisonment without eligibility for probation and parole.)

2. Does the jury unanimously find beyond a reasonable doubt statutory aggravating circumstance or circumstances?

Yes [ ] No [ ]

(Jurors: If the answer to Question 2 is no, the jury must return the verdict form fixing the defendant's punishment at life imprisonment without eligibility for probation and parole.

3. Does the jury unanimously find beyond a reasonable doubt that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of death upon the defendant?

Yes [ ] No [ ]

4. Does the jury unanimously find that there are facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment?

Yes [ ] No [ ]

If the answer to question 2 is yes, list below the statutory aggravating circumstance or circumstances that you have unanimously found beyond a reasonable doubt:

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# **Appendix I**

## INSTRUCTION A

In determining the punishment to be assessed under Counts I, II and III against the defendant for the murders of Fred Jones, Mary Bratcher and Mable Scruggs, you must first consider whether or not the defendant is mentally retarded.

As used in this instruction, a person is mentally retarded if he suffers from a condition involving substantial limitations in general functioning characterized by significantly sub-average intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

The state has the burden of proving beyond a reasonable doubt that the defendant is not mentally retarded. Unless you find beyond a reasonable doubt that the defendant is not mentally retarded, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

MAI-CR3d 313.38, modified

Submitted by defendant

*Refused* 5/11/06

INSTRUCTION NO. B

When you retire to your jury room, you will first select one of your number to act as you foreperson and to preside over your deliberation.

You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it, but any such verdict should be signed by your foreperson alone.

As to Count 1, if you unanimously decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Fred Jones, your foreperson must complete the verdict form and write into your verdict all of the statutory aggravating circumstance(s) submitted in Instruction No. \_\_\_\_\_ that you found beyond a reasonable doubt. The foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of Fred Jones by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of Fred Jones by imprisonment for life by the Department of Corrections without eligibility for probation or parole, your foreperson will sign the verdict form so fixing the punishment.

If you do not unanimously find beyond a reasonable doubt that the defendant is not mentally retarded, as submitted in Instruction No. \_\_\_\_\_, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. \_\_\_\_\_ or if you are unable to unanimously find that there are facts and circumstances in aggravation of punishment that warrant the imposition of a sentence of death, as submitted in Instruction No. \_\_\_\_\_, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or

MAI-CR 3d 313.48A, as modified  
Submitted by Defendant

*refused gm*  
*5/11/06*

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parole.

If you do unanimously find the matters described in Instructions No. \_\_\_\_ and \_\_\_\_, and you are unable to unanimously find that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, but are unable to agree upon the punishment, your foreperson will complete the verdict form and sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, you must answer the questions on the verdict form and write into your verdict all of the statutory aggravating circumstance(s) submitted in Instruction No. \_\_\_\_ that you found beyond a reasonable doubt and your foreperson must sign the verdict form stating that you are unable to decide or agree upon the punishment.

If you return a verdict indicating that you are unable to decide or agree upon the punishment, the Court will fix the defendant's punishment at imprisonment for life in the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that, under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable forms to which all twelve jurors agree and return them with all unused forms and the written instructions of the Court.



### INSTRUCTION NO. C

When you retire to your jury room, you will first select one of your number to act as you foreperson and to preside over your deliberation.

You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it, but any such verdict should be signed by your foreperson alone.

As to Count II, if you unanimously decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Mary Bratcher, your foreperson must complete the verdict form and write into your verdict all of the statutory aggravating circumstance(s) submitted in Instruction No. \_\_\_\_\_ that you found beyond a reasonable doubt. The foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of Mary Bratcher by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of Mary Bratcher by imprisonment for life by the Department of Corrections without eligibility for probation or parole, your foreperson will sign the verdict form so fixing the punishment.

If you do not unanimously find beyond a reasonable doubt that the defendant is not mentally retarded, as submitted in Instruction No. \_\_\_\_\_, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. \_\_\_\_ or if you are unable to unanimously find that there are facts and circumstances in aggravation of punishment that warrant the imposition of a sentence of death, as submitted in Instruction No. \_\_\_\_, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

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Submitted by Defendant

*refused sm 5/11/06*

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If you do unanimously find the matters described in Instructions No. \_\_\_\_ and \_\_\_\_, and you are unable to unanimously find that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, but are unable to agree upon the punishment, your foreperson will complete the verdict form and sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, you must answer the questions on the verdict form and write into your verdict all of the statutory aggravating circumstance(s) submitted in Instruction No. \_\_\_\_ that you found beyond a reasonable doubt and your foreperson must sign the verdict form stating that you are unable to decide or agree upon the punishment.

If you return a verdict indicating that you are unable to decide or agree upon the punishment, the Court will fix the defendant's punishment at imprisonment for life in the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that, under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable forms to which all twelve jurors agree and return them with all unused forms and the written instructions of the Court.

**INSTRUCTION NO. D**

When you retire to your jury room, you will first select one of your number to act as you foreperson and to preside over your deliberation.

You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it, but any such verdict should be signed by your foreperson alone.

As to Count **III** if you unanimously decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Mable Scruggs, your foreperson must complete the verdict form and write into your verdict all of the statutory aggravating circumstance(s) submitted in Instruction No. \_\_\_\_\_ that you found beyond a reasonable doubt. The foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of Mable Scruggs by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of Mable Scruggs by imprisonment for life by the Department of Corrections without eligibility for probation or parole, your foreperson will sign the verdict form so fixing the punishment.

If you do not unanimously find beyond a reasonable doubt that the defendant is not mentally retarded, as submitted in Instruction No. \_\_\_\_\_, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. \_\_\_\_ or if you are unable to unanimously find that there are facts and circumstances in aggravation of punishment that warrant the imposition of a sentence of death, as submitted in Instruction No. \_\_\_\_, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

MAI-CR 3d 313.48A, as modified  
Submitted by Defendant

*Refused 9/25/11/06*

If you do unanimously find the matters described in Instructions No. \_\_\_ and \_\_\_, and you are unable to unanimously find that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, but are unable to agree upon the punishment, your foreperson will complete the verdict form and sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, you must answer the questions on the verdict form and write into your verdict all of the statutory aggravating circumstance(s) submitted in Instruction No. \_\_\_ that you found beyond a reasonable doubt and your foreperson must sign the verdict form stating that you are unable to decide or agree upon the punishment.

If you return a verdict indicating that you are unable to decide or agree upon the punishment, the Court will fix the defendant's punishment at imprisonment for life in the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that, under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable forms to which all twelve jurors agree and return them with all unused forms and the written instructions of the Court.

## VERDICT

(Jurors: Use this form only if you are unable to decide or agree upon the punishment. See Instruction No. \_\_\_\_ for directions as to what must be written on this verdict form. You will bear in mind, however, that under the law it is your primary duty and responsibility to fix the punishment.)

(As to Count I, we) (We), the jury, are unable to decide or agree upon the punishment for the murder of Fred Jones. We answer the following questions:

( (1.) Does the jury unanimously find beyond a reasonable doubt that the defendant is not mentally retarded?

Yes [ ]      No [ ]

(Jurors: If the answer to Question (1) is no, the jury must return the verdict form fixing the defendant's punishment at life imprisonment without eligibility for probation or parole.))

(1.) (2.) Does the jury unanimously find beyond a reasonable doubt statutory aggravating circumstance (or circumstances)?

Yes [ ]      No [ ]

(Jurors: If the answer to Question (1) (2) is no, the jury must return the verdict form fixing the defendant's punishment at life imprisonment without eligibility for probation or parole.)

(2.) (3.) Does the jury unanimously find that there are facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment?

Yes [ ]      No [ ]

(Jurors: If the answer to Question (2) (3) is yes, the jury must return the verdict form fixing the defendant's punishment at life imprisonment without eligibility for probation or parole.)

If the answer to Question (1) (2) is yes, list below the statutory aggravating circumstance (or circumstances) that you have unanimously found beyond a reasonable doubt:

MAI-CR-3d 31~~3~~58, modified  
Submitted by defendant

*refused 5/11/06*

## VERDICT

(Jurors: Use this form only if you are unable to decide or agree upon the punishment. See Instruction No. \_\_\_\_ for directions as to what must be written on this verdict form. You will bear in mind, however, that under the law it is your primary duty and responsibility to fix the punishment.)

(As to Count ~~1~~ <sup>II</sup>, we) (We), the jury, are unable to decide or agree upon the punishment for the murder of Mary Bratcher. We answer the following questions:

((1.) Does the jury unanimously find beyond a reasonable doubt that the defendant is not mentally retarded?

Yes [ ]      No [ ]

(Jurors: If the answer to Question (1) is no, the jury must return the verdict form fixing the defendant's punishment at life imprisonment without eligibility for probation or parole.))

(1.) (2.) Does the jury unanimously find beyond a reasonable doubt statutory aggravating circumstance (or circumstances)?

Yes [ ]      No [ ]

(Jurors: If the answer to Question (1) (2) is no, the jury must return the verdict form fixing the defendant's punishment at life imprisonment without eligibility for probation or parole.)

(2.) (3.) Does the jury unanimously find that there are facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment?

Yes [ ]      No [ ]

(Jurors: If the answer to Question (2) (3) is yes, the jury must return the verdict form fixing the defendant's punishment at life imprisonment without eligibility for probation or parole.)

If the answer to Question (1) (2) is yes, list below the statutory aggravating circumstance (or circumstances) that you have unanimously found beyond a reasonable doubt:

MAI-CR-3d 313-58, modified  
Submitted by defendant

*refused 5/11/06*



## VERDICT

(Jurors: Use this form only if you are unable to decide or agree upon the punishment. See Instruction No. \_\_\_\_ for directions as to what must be written on this verdict form. You will bear in mind, however, that under the law it is your primary duty and responsibility to fix the punishment.)

(As to Count III, we) (We), the jury, are unable to decide or agree upon the punishment for the murder of Mable Scruggs. We answer the following questions:

((1.) Does the jury unanimously find beyond a reasonable doubt that the defendant is not mentally retarded?

Yes [ ]      No [ ]

(Jurors: If the answer to Question (1) is no, the jury must return the verdict form fixing the defendant's punishment at life imprisonment without eligibility for probation or parole.))

(1.) (2.) Does the jury unanimously find beyond a reasonable doubt statutory aggravating circumstance (or circumstances)?

Yes [ ]      No [ ]

(Jurors: If the answer to Question (1) (2) is no, the jury must return the verdict form fixing the defendant's punishment at life imprisonment without eligibility for probation or parole.)

(2.) (3.) Does the jury unanimously find that there are facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment?

Yes [ ]      No [ ]

(Jurors: If the answer to Question (2) (3) is yes, the jury must return the verdict form fixing the defendant's punishment at life imprisonment without eligibility for probation or parole.)

If the answer to Question (1) (2) is yes, list below the statutory aggravating circumstance (or circumstances) that you have unanimously found beyond a reasonable doubt:

MAI-CR-3d 313-58, modified  
Submitted by defendant

*referred 5/11/06*

# **Appendix J**

Natalie Novick Brown, PhD  
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Seattle, WA 98125  
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August 13, 2008

Valerie Leftwich, Esq.  
Missouri State Public Defender System  
Appellate/PCR Division  
Woodrall Centre – 1000 W. Nifong, Bldg. 7. Ste. 100  
Columbia, Missouri 65203

Re: Ernest L. Johnson v. State of Missouri  
Case No. 08BA-CV02685

Dear Ms. Leftwich:

Per your request, I have completed a functional assessment of Ernest L. Johnson, a 48-year-old man convicted of three counts of murder and sentenced to death on June 19, 1995. The penalty phase portion of his original trial was reversed on May 26, 1998, and on April 19, 1999, he was re-sentenced to death following a Second Penalty Phase hearing. On April 22, 2003, the Supreme Court of Missouri reversed and remanded the case for a Third Penalty Phase hearing. He was re-sentenced to death as a result of that hearing on June 21, 2006.

The following report summarizes my opinion regarding whether Mr. Johnson's behavioral history and development are consistent with a diagnosis of a Fetal Alcohol Spectrum Disorder (FASD) and, if so, whether FASD could fully account for all of the data regarding his behavioral history, including his instant offense.

Procedures in this assessment included clinical interview and testing with Mr. Johnson on July 12, 2008 (8.0 hours) and extensive document review (see Appendix A). As FASD involves physical as well as cognitive-behavioral abnormalities, two other members of my multidisciplinary assessment team are also testing and examining Mr. Johnson: Dr. Paul Connor is conducting neuropsychological testing on Mr. Johnson to determine current functional capacity, and Dr. Richard Adler is examining your client and making a diagnosis if appropriate, taking into account the current lifelong functional assessment as well as Dr. Connor's neuropsychological testing. An FASD diagnosis will not be

Assessment: Ernest Johnson  
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made unless diagnostic criteria established by the federal government are fully met (see Appendix B and C).

## **SUMMARY OF INSTANT OFFENSE**

Shortly after midnight on February 13, 1994, three employees of Casey's General Store were found dead. All three had been beaten with a blunt object, and one of them had been shot. The safe to the store was found open. Witnesses indicated that Ernest Johnson took a .25 caliber pistol from a house located at 200 Mohawk and told the occupants of the house he was going to rob the store. He was seen running from the store, and bloody clothing was found in a field near Casey's and in the Indian Hills neighborhood where 200 Mohawk is located. During a search of that residence, police found burned checks made out to Casey's dated February 13, 1994, as well as money, food stamps, and store receipts. Two crack pipes also were found, but no connection was established between the pipes and Mr. Johnson. Witnesses reported he was smoking crack cocaine the night of the murders.

## **PREVIOUS EVALUATIONS / TESTIMONY**

### Carole Bernard, PhD (defense expert)

(Dr. Bernard is a psychologist retained by defense counsel prior to trial in 1995. Her objective was to determine whether Mr. Johnson had cocaine psychosis at the time of the instant offense. After her first visit with Mr. Johnson, she reported to trial counsel that it was her opinion Mr. Johnson was not under the influence of cocaine psychosis at the time of the crime. She testified in the First PCR on May 21, 1996, and by deposition on September 7, 2001.)

### S.D. Parwatikar, MD (defense expert)

(Dr. Parwatikar is a psychiatrist retained by defense counsel in 1995 to assess Mr. Johnson's competency and assess the influence of environmental and medical factors on his functioning.)

Dr. Parwatikar opined in his report (3-8-95) that Mr. Johnson was competent to stand trial.

### Dr. Dennis Cowan, EdD (defense expert)

(Dr. Cowan spent six hours interviewing and administering neuropsychological testing to Mr. Johnson in December 1995. He subsequently testified for the

Record on Appeal. In the latter, he noted that he had conducted "thousands" of neuropsychological evaluations. The purpose of his involvement in Mr. Johnson's case was to "assess and rule out the presence of him suffering from any brain damage.")

Dr. Cowan determined from James Dempsey's social history that Mr. Johnson suffered at least two head injuries during childhood:

"(At) eight years old, (he fell) off a cotton trailer, bumping his head on concrete. He was knocked unconscious....(In) 1977 (he) was brought to the emergency room via his sister after he had sustained a head injury where he was struck on the head with a chair and suffered a loss of consciousness..."

According to Dr. Cowen, Mr. Johnson confirmed the data in Mr. Dempsey's report except that Mr. Johnson said he began drinking alcohol at age 11 or 12 rather than 14-15.

Dr. Cowan used pre-1994 test results to establish a baseline for his testing:

"(There was) some standardized objective testing regarding his intellectual level of functioning, preexisting head injury, which I can then use as base line data....According to this record, he had an IQ in the '70s...mild mental retardation...he was later tested by the Department of Corrections in which his IQ score improved to 83...It's better, not substantially better."

Dr. Cowan described some of the results of his testing:

On the Wisconsin Card Sort, a test of frontal lobe brain functioning that includes abstract reasoning, problem solving, learning new information, and judgment, Mr. Johnson obtained the following result:

"Ernest was only able to get through four sorts...That is significantly below functioning (indicating) his reasoning is impaired (and) his problem solving is impaired. He's not able to take information which I'm giving him and plug that information in so as to direct his answers to produce the correct response. He also had 45 perseverative errors. A perseverative error is when you're told that (a response) is not right, and you keep going back and doing the same thing...Normal limits (are) 16 to 18...he's demonstrating frontal lobe dysfunction...."

On the Memory Assessment Scale, Mr. Johnson's performance fell at the 23<sup>rd</sup> percentile:

"...overall his memory functioning is significantly below where it should be, showing evidence of cerebral impairment...The short-term memory scale score is looking at factors which are...involved with attention and concentration....I found his short-term memory scale score...to be at the 21<sup>st</sup> percentile... Verbal memory is looking at the ability to recall what you've been told...He is told a story. He is then asked for an immediate free recall of that story...That story is again asked later on for a delayed recall. His verbal memory scale score was found to be at the 4<sup>th</sup> percentile...(The last test...is a visual memory scale score. He is shown drawings...after a delayed period, he is asked to reproduce those drawings after some interference tasks...His visual memory scale score was found to be at the 77<sup>th</sup> percentile, which is actually pretty functional. He can remember things much better when he sees it. He does not remember things when he is just told it....There is such a significant discrepancy from the 77 to the 4<sup>th</sup> percentile that suggested to me that he's most likely suffering from a verbal learning disability."

In his report, Dr. Cowan reported several of Mr. Johnson's subtest scaled scores on the WAIS-R:

<u>Verbal Subtests</u>	<u>SS</u>	<u>Performance Subtests</u>	<u>SS</u>
Information	6	Picture Completion	9
Vocabulary	6	Picture Arrangement	7
Arithmetic	7	Block Design	mild
Comprehension	5	Object Assembly	severe
Similarities	mild	Digit Symbol	7
Digit Span	?		

Dr. Cowan found that Mr. Johnson's Full Scale IQ was 84.

He testified about his conclusions:

"One conclusion (is) he has problems in the functional areas of attention, concentration, abstract reasoning, speed, speed of mentation..., spatial perceptual skills, sequential reasoning. Most likely there's supporting data of him suffering from a verbal learning disability."

According to Dr. Cowan, Mr. Johnson's reading skills were at the 5<sup>th</sup> grade level. After noting some of his other test results, Dr. Cowan testified about Mr. Johnson's performance on the Halstead-Reitan:



"(His) Halstead Impairment Index Score....exceeds the allowable cutoff. Therefore, from an overall perspective...his brain function was found to be within the brain damaged range."

Dr. Cowan testified about the conclusions he reached as a result of his testing:

"The first conclusion which I reached was that his brain functioning was indeed within the brain damaged range, at the mild degree of impairment....The second conclusion that I reached was that his brain damage does appear to be very diffusely represented, meaning it's not localized, it's spread throughout the entire brain....My third conclusion was that there appeared to be multiple causes...(One cause was) congenital abnormalities...effects of the alcohol that his mother consumed during her pregnancy on his brain. Number two, a learning disability...Number three, the multiple head injuries...And number four...his history of polysubstance abuse. A fifth conclusion that I reached was how this brain damage affects his day-to-day life functioning...his thinking is going to be very slow. When information is presented to him too fast, he misses it. That will also have an effect with his comprehension, his verbal comprehension, what he understands people to say. He only will pick up bits and pieces of what they have to say. His memory functioning is going to be impaired. He's not going to remember things which people tell him. His functioning is only at the 4<sup>th</sup> percentile. His thinking processes, how he approaches things, are very simplistic and concrete. He's able to respond to simple questions, but as the stimuli becomes increasingly more complex, his level of functioning proportionately deteriorates. He tends to respond in a gut-level reactionary mode versus a more analytical-type thinking processes. He just responds. He doesn't think through, cause and effect, before responding. Once he gets an idea in his head, it's stuck there. He doesn't shift that thinking very well, even when told repeatedly that's not correct."

Dr. Robert Smith, PhD (defense expert)

(Dr. Smith conducted a mental state evaluation of Mr. Johnson in March 1996 and later testified in the Second Penalty Phase. The evaluation spanned 5-6 hours, and a number of collateral individuals were interviewed: birth mother Jean Patton, brother Bobby Johnson, Jr., sister Beverly Johnson, step-brother Albert Patton, step-sister Ruthie Patton, maternal great aunt Lucy Liddell, maternal great uncle Burrell Liddell, and social historian James Dempsey. He also consulted with Dr. Carole Bernard. Dr. Smith testified that he could not administer any written tests because Mr. Johnson "was not understanding what he was reading" and could "not get the full concept" of a sentence.)



Dr. Smith diagnosed Mr. Johnson with Fetal Alcohol Effect (now called Alcohol Related Neurodevelopmental Disorder) and testified about how the four criteria for an FASD diagnosis were met (see diagnostic section of this report). He also diagnosed Mr. Johnson with dysthymia and substance abuse involving alcohol, marijuana, and cocaine.

With regard to substance abuse, Dr. Smith testified about a genetic history of substance abuse in many relatives on both sides of Ernest Johnson's family. He described several symptoms of substance dependence in Mr. Johnson: increasing tolerance over time, increasing amounts of time spent in trying to get money to acquire substances, attempts to cut back his substance use. Dr. Smith also noted:

"(There were) occasions when he expressed to others that he was out of control and was trying to cut back and was unable to do that....by the end of his addiction, he was doing very little other than using substances or spending time with peers who he used substances with."

Dr. Smith also testified about several environmental traumas that occurred during Ernest Johnson's youth and affected his behavior. He noted poor role modeling when Mr. Johnson was eleven:

"Jean Ann, Ernest's mother, was a chronic alcoholic, abused both alcohol and other drugs, had great difficulty sort of taking on the responsibilities of being a mother....In order to support her use of alcohol and drugs, she began prostituting herself. She would steal money and other items from the persons that she would have sexual relations with, and the children were present when these gentlemen would be with her during the sexual intercourse. They would observe her stealing things from these gentlemen, and that became a significant factor for Ernest....The second summer, Beverly became involved in prostitution, at her mother's insistence, and soon became pregnant. She then remained with her mother throughout the pregnancy and continued to live with her mother. Bobby, Jr. was later that summer introduced to several female clients that Jean Ann arranged for him to have intercourse with, and he would receive gifts of money, alcohol, and drugs that he would then give to his mother. The following summer, the mother encouraged Ernest to also engage in those activities, and she would readily give the children alcohol and drugs as a reward for their compliance."

Dr. Smith testified that when Mr. Johnson was twelve years old, other children taunted him and his siblings because they wore donated clothing and clothing made from flour sacks. In his opinion, this caused Mr. Johnson to begin stealing:

"...both Ernest and his siblings began stealing items from stores, clothing to wear and food for the family to eat...."

Around this same time, Mr. Johnson was introduced to drugs and alcohol by his mother and older siblings:

"They would use alcohol and drugs together as a family, and Jean Ann would use with the children."

By age 15, Mr. Johnson was "basically unsupervised" according to Dr. Smith:

"...the only people that Ernest had a relationship with (were) his brother and sister. At the age of 15, however, his sister was now living with Jean Ann because she was pregnant and had her first child, and Bobby, Jr. had moved away out of the home... So that left Ernest basically by himself with his grandmother, who was around 70 years of age at that point... he is basically unsupervised... his use of alcohol and drugs has progressed... he is really losing interest in school and having a lot of difficulties."

By age 16, Mr. Johnson's mother was married to Albert Patton and had two children with him. According to Dr. Smith's testimony, Patton physically and sexually abused Mr. Johnson:

"Albert Patton was reported by all the family members as physically abusive and sexually abusive to the children. Each of the children gave their own account of his being sexually abusive to them as well as to the other children, including Ernest."

By age 18, Mr. Johnson was incarcerated for his first felony offense. According to Dr. Smith, after being sexualized and prostituted by his mother in his early teens, then sexually abused by his step-father Albert Patton in his mid-teens, he was then sexually assaulted by several inmates in prison. By age 18, he also was using alcohol, marijuana, and cocaine on a daily basis.

Dr. Smith testified that throughout childhood, Ernest Johnson was exposed to role modeling from adults who abused substances (family members on both sides of his family, including both parents), noting that some of these adults became violent when under the influence.

Dr. Smith testified that when he consulted with Dr. Bernard, she told him she could not administer the MMPI to Mr. Johnson because "he couldn't read." She reportedly informed Dr. Smith that her testing of Mr. Johnson's IQ determined he was in the borderline IQ range.

Dr. Smith testified that he reviewed Mr. Johnson's school records and found the following:

"The records reflected that Ernest had significant difficulties in school with attention, with concentration, that he had evidence of some learning disabilities, that he was receiving failing grades, that he was placed in special classes, and that he eventually dropped out because of his inability to function in school...He has been tested repeatedly. Although the scores have varied, he has consistently been in the borderline (or) mental retardation range of intellectual functioning."

Summarizing the factors that affected Mr. Johnson at the time of the instant offense, Dr. Smith testified that he did not find Antisocial Personality Disorder. Rather, Mr. Johnson's behavior was explained by the following:

"The first is the genetic influence that influenced his susceptibility to alcohol and drug addiction. That influenced his susceptibility to depression. So we first have a genetic influence. Then, we have a series of trauma, physical abuse, and sexual abuse that influenced his behavior. Then, we have his addiction to alcohol, marijuana and cocaine. They influenced his behavior. And then we have his limited intellectual function as a result of Fetal Alcohol Effect, which also affects his behavior...."

Dr. Smith testified that another factor that influenced Mr. Johnson's mental state at the time of the offense was a crisis in his relationship with Deloris Grant:

"(H)e indicated he was living with Mary or Delores Grant...his girlfriend. She was employed at the Veterans Administration Hospital. She was not an alcohol or drug user, and she was upset with his use of alcohol and drugs...he felt very strongly about her, cared for her, had made some attempts to look at his use, and he even asked some people for assistance with his addiction, was not able to do anything significant...Mary Grant basically said, 'I can't deal with this anymore. I'm going to leave you.' Ernest was very concerned about that, did not want to lose the relationship, sort of tried to persuade her to stay with him. She said, 'Tonight I'm packing my things. I'm leaving. Our relationship is over.' Ernest then met with some peers, used cocaine, used some alcohol, continued to do that throughout the day, followed up and contacted Mary Grant again during the day...she said that the relationship was over. He was very distraught, upset, continued to use alcohol and cocaine, returned to their home, purchased cocaine from Mary's son Rod, and continued to purchase cocaine from him throughout the evening. Later in the evening, Rod had no more cocaine. Ernest felt a craving for cocaine, felt a need to have more cocaine, at that point, talked with Rod. Rod provided him with a handgun. He then went to a

store with the intent of robbing it to get money so that he could get more cocaine....Ernest had Fetal Alcohol Effect and a low IQ. Those are ongoing problems that don't go away. The depression that we're describing is an ongoing depression....he meets the diagnostic criteria for alcohol dependence, cocaine dependence, and cannabis dependence...he meets the criteria for Fetal Alcohol Effect....he meets the criteria for long-standing depression called dysthymia....he is functioning at borderline mental retardation range....Each of those disorders has symptoms. When taken in combination, they interact...Alcohol and other drugs interfere with an individual's ability to concentrate, to think clearly, to problem solve, and causes mood swings, angry outbursts. Many of those are symptoms of FAE, (which), again, in combination, increases or enhances them."

It was Dr. Smith's opinion that at the time of the offense, Mr. Johnson was experiencing a "mental disturbance," and his ability to appreciate the criminality of his conduct was "impaired."

Dr. Jerome Peters, DO (prosecution expert)

(Dr. Peters conducted a document review in 1999, including testimony by Drs. Bernard, Smith, and Cowan, and rendered opinions regarding diagnoses in a report dated March 2, 1999. He did not conduct a face-to-face examination or testing of Mr. Johnson. He also did not conduct any collateral interviews. At the time of his testimony in the Second Penalty Phase, Dr. Peters was senior psychiatrist with the Missouri Department of Mental Health.)

It was Dr. Peters' opinion that Mr. Johnson suffered from Antisocial Personality Disorder:

"I believe, on my review of records presented to me, that Mr. Johnson showed a pervasive developmental personality of antisocial personality."

He based this diagnostic opinion on "juvenile delinquency, truancy from school, several arrests, incarcerations, drug abuse, lack of remorse, not taking responsibility, (and) not conforming to social norms."

He ruled out Dysthymia:

"Because clinically you cannot make the diagnosis, on the data provided, of dysthymia; specifically because of Mr. Johnson's overwhelming cocaine dependence and alcohol abuse."

He also ruled out FAS and FAE:

"It is my opinion that there's not reliable data associated with Mr. Johnson's background. The diagnosis of Fetal Alcohol Syndrome is such an overwhelming pediatric neurological disorder that this is something that any clinician, whether it be a family practitioner, pediatrician, or even a high school or grade school teacher would note that Mr. Johnson suffered from some neurological disorder and which would then be able to be diagnosed by a specialist that it was Fetal Alcohol Syndrome because of the facial dysgenesis, the low birth weight, microcephalic. Individuals with Fetal Alcohol Syndrome have a small head, they have profound mental retardation. Typically, the child or an adolescent or early adult with Fetal Alcohol Syndrome has a functional IQ typically of 68, which places them in the serious mental retardation level. The physical anomalies associated with the Fetal Alcohol Syndrome are so significant that there is kidney, heart, and structural anomalies associated with Fetal Alcohol Syndrome. So it is significant such that educators, clinicians, are very aware of that diagnosis so that it, to me, it's inconceivable that Mr. Johnson could come this far in life, based on the records I reviewed, and now be given a diagnosis of Fetal Alcohol Syndrome. It...defies clinical judgment. They have small birth weight, they have small growth, they have microcephaly, or small cranium, and this is pervasive throughout their development into adulthood. I don't believe it fits the criteria of diminished capacity...there was a logical display of rational behavior by Mr. Johnson in how he methodically planned the crimes, how he covered his clothing, specifically, the use of socks. The practicing with the firearm, learning how to operate the firearm...it shows goal-directed, logical, rational behavior in planning and delivering the use of the firearm in the commission of a crime. He then returned the firearm, after he had gone to the store (which) showed rational behavior in that he was methodical in how he was disposing of evidence and the issue of survivability."

Dr. Peters summarized the factors that he felt undermined a diagnosis of FAS/FAE:

"I believe he was capable of conforming his conduct to the requirements of the law based on his methodical planning, his deliberation, the methodical removal and attempting to conceal evidence, and the use of the weapons involved, and his motive for the crime shows that it was preplanned."

In terms of his training and experience, Dr. Peters testified that his FAS training consisted only of "pediatric rotations with child psychiatrists":

"I have worked with child and adolescent patients who have suffered from Fetal Alcohol Syndrome....I believe with the residency I saw...in the



adolescent unit four or five, might have been six (children) on the unit, and then at the hospital."

He testified that he'd never authored any articles in the FAS field or conducted any research in the area.

Although Dr. Peters indicated in his report that Mr. Johnson's IQ was likely in the borderline range, he testified in the Second Penalty Phase that Mr. Johnson's "functional" IQ was in the low average range:

"His actual intellectual functioning I saw in the records ranged from 66, 77, 84, with a bottom line, his functional IQ is 84...(The) Wechsler Adult Intelligence Test utilized on Mr. Johnson is culturally prejudiced against him because he is an African-American. Thus, his score of 84 really is approximately between three to six points higher....He is low average...."

He noted that in contrast, an individual with Fetal Alcohol Syndrome "will have a typical IQ of around 68. They will function (at the) fourth grade level and behave similar to someone that is seven years old."

Dr. Peters found no evidence of brain damage or mental retardation; and he based these conclusions on one test of "organic impairment" conducted by Dr. Cowan (Trail-Making) "and also his IQ of 84." He noted that if there had been brain damage, Mr. Johnson would have had a history of "seizures, encephalopathies, problems with infections to the brain, (or) any type of dysfunction of the brain." When asked if he'd considered Dr. Cowan's Halstead Impairment Index, which indicated brain damage, Dr. Peters had no opinion regarding the validity or invalidity of the test and reiterated that based on the Trail-Making Test and IQ tests, "there's no indication in any of the testing of significant brain impairment."

Denis Keyes, PhD (defense expert)

(Dr. Keyes conducted a psychoeducational evaluation of Mr. Johnson in December 2003 at the request of defense counsel, and he issued his report on August 10, 2004. His assessment involved document review, face-to-face interview with standardized testing, and interviews with Mr. Johnson's brother, sister, and teacher Robin Seabaugh. He also testified during the Third Penalty Phase.)

Dr. Keyes summarized his IQ test results as follows:

*Wechsler Adult Intelligence Test – Third Edition*

<u>Verbal Subtests</u>	<u>SS</u>	<u>Performance Subtests</u>	<u>SS</u>
Information	6	Picture Completion	6
Vocabulary	4	Picture Arrangement	7
Arithmetic	5	Block Design	5
Comprehension	3	Matrix Reasoning	5
Similarities	5	Digit Symbol	3
Digit Span	6		
Verbal IQ =	69 (1.0 %ile)		
Performance IQ =	70 (2.0 %ile)		
Full Scale IQ =	67 (1.0 %ile)		

On the *Woodcock-Johnson Psycho-Educational Battery-III (Pt. 2)*, Mr. Johnson did not score above the 30<sup>th</sup> percentile in any category. Broad Reading skills fell at the 13<sup>th</sup> percentile (SS=83); Broad Written Language Skills fell at the 18<sup>th</sup> percentile (SS=86), and Broad Math Skills fell at the 13<sup>th</sup> percentile (SS=83). Oral Language skills were a relative strength: 28<sup>th</sup> percentile (SS=91).

On the *Vineland Adaptive Behavior Scales* (information collected from 4 family members and 1 teacher), Mr. Johnson's scores were as follows: Communication = <0.1 percentile (SS=25), Daily Living Skills = <0.1 percentile (SS=20), Socialization = <0.1 percentile (SS=20), and Composite = <0.1 percentile (SS=20). Mr. Johnson also scored himself in terms of adaptive skills on the *Scales of Independent Behavior-Revised*. He viewed himself as somewhat more skilled than his family and teacher saw him but still within the significantly deficient range (at the 3<sup>rd</sup> percentile or lower in Social Interaction and Communication Skills, Personal Living Skills, and Community Living Skills). He viewed his Broad Independence (full scale) functioning as roughly equivalent to that of a twelve-and-a-half year old.

On the *Bender-Gestalt Test*, there were "minor indications (of) organicity," and overall performance was in the low average range.

Dr. Keyes testified during the Third Penalty Phase that the following tests were considered reliable by the DSM-IV-TR and American Association on Mental Retardation for the purpose of assessing IQ level: WPPSI, WISC, WAIS, Kaufman (for children and adults), and the Stanford-Binet. He specifically excluded the Revised Beta as a reliable test of IQ:

"The Revised Beta...is not considered very highly by most people who are in the know. The Revised Beta...was given in 1979 (and is) very quick, it's very easy, and you can give it to a group of people at the same time."

Dr. Keyes testified about the historical evidence of deficits in Mr. Johnson's academic functioning dating back to second grade and indicated that the IQ scores in school (at age eight and twelve) documented deficient intellectual functioning before Mr. Johnson was 18. Dr. Keyes testified that both of Mr. Johnson's IQ tests in school were administered by the school psychologist in the Charleston Public School system. He noted that the IQ test administered when Mr. Johnson was twelve (IQ=63) was likely somewhat more reliable than the test administered at age eight (IQ=72) because of the increased age. He also noted that the IQ at age twelve was "more in line with the later administrations of Dr. Heisler, Mr. Bradshaw, and myself." He acknowledged that Dr. Cowan's IQ testing in 1995 was inconsistent with more recent testing.

With regard to possible malingering, Dr. Keyes testified that he had done research on this issue for his dissertation:

"I looked at the scores that they got when they were faking and the scores that they got when they were not faking, and they were statistically different. In other words, you cannot fake on two tests of intelligence and come up with the same score."

He also described the "aces and spaces" technique for determining if someone is malingering on the IQ test, which involves a pattern of correct responses interspersed with one or more incorrect responses, noting that this pattern was present in his testing (i.e., Picture Completion, Vocabulary) and in Wayne Bradshaw's (Dr. Heisler's psychometrician). He also administered a malingering test:

"I gave what was called the Test of Memory Malingering...he had 48 correct, which suggested he was not malingering."

Dr. Keyes testified that IQ scores tend to increase somewhat as one ages, but this didn't happen with Mr. Johnson "because he did not learn." Comparing his test results (Full Scale IQ = 67) and those of Psychometrist Wayne Bradshaw (Full Scale IQ = 67) to the IQ score Mr. Johnson received at age twelve (IQ = 63), he concluded that the two more recent tests "were valid administrations and that the IQ is somewhere around 67, roughly, plus or minus five points."

Dr. Keyes identified several risk factors for mental retardation that were present in Mr. Johnson's history: head injuries in childhood that might have caused traumatic brain injury; two known risk factors in the social area: impaired child caregiving and family poverty; and several factors in the behavioral area: child abuse and neglect, domestic violence, inadequate safety measures, social deprivation, and difficult child behaviors. With respect to the latter, Dr. Keyes testified that Mr. Johnson "was a thief as a child." He also noted that there was



no early intervention system in place in the 1970s to address these risks until the 1990s when Public Law 94-142 funded special education services.

According to Dr. Keyes, Ernest Johnson presented as more capable than he actually was, which he characterized as the "cloak of competence":

"Mr. Johnson is able to manifest his behavior in a way that makes people think he is not impaired as seriously as he is. People think that he is capable of understanding and capable of doing things that he is probably not capable of...and he agrees with things that people say. He appears to listen....in a highly structured environment he does very well."

Dr. Keyes concluded his testimony with an opinion that Mr. Johnson met criteria for mental retardation and that the age of onset for that condition was "probably prior to birth."

Gerald Heisler, PhD (prosecution expert)

(Dr. Heisler interviewed Mr. Johnson in 2004, spoke to corrections staff, and reviewed records at the request of the prosecutor's office. He had his psychometrist Wayne Bradshaw administer a standardized IQ test. The purpose of his assessment was to determine Mr. Johnson's intellectual functioning.)

Dr. Heisler reported collateral interviews with corrections staff, who noted that Mr. Johnson spoke well, performed his job well, and was able to interact appropriately in the prison environment. When Dr. Heisler asked Mr. Johnson about his writing skills, Mr. Johnson responded that he had another inmate write his letters for him. Test results were as follows:

*Wechsler Adult Intelligence Scale – Third Edition*

<u>Verbal Subtests</u>	<u>SS</u>	<u>Performance Subtests</u>	<u>SS</u>
Information	4	Picture Completion	8
Vocabulary	4	Picture Arrangement	7
Arithmetic	5	Block Design	4
Comprehension	3	Matrix Reasoning	5
Similarities	4	Digit Symbol	4
Digit Span	7	Symbol Search	5
Letter-Number Seq	8		
Verbal IQ =	67 (1.0 %ile)		
Performance IQ =	73 (4.0 %ile)		
Full Scale IQ =	67 (1.0 %ile)		

Index Scores:

Verbal Comp =	67 (1.0 %ile)
Perceptual Org =	74 (4.0 %ile)
Working Memory =	80 (9.0 %ile)
Processing Speed =	71 (3.0 %ile)

Dr. Heisler concluded:

"It is this examiner's opinion that considering previous testing, the plus or minus 5 error factor on the WAIS-III, but more importantly, considering his ability to function, to process and understand his environment, to communicate, engage in work, leisure, and health... Mr. Johnson cannot be accurately diagnosed as having mental retardation."

Jeffrey Kline, PhD (court-ordered expert)

(Dr. Kline was court-ordered in 2005 to conduct a pretrial mental evaluation. He reviewed records, interviewed Mr. Johnson for 110 minutes, and presented his findings in a report dated September 14, 2005.)

During Dr. Kline's interview, Mr. Johnson reported that he had been in protective custody for the last 5-6 years "due to owing one or more individuals money for smoking marijuana and not being able to pay for it." He also reported that he had worked in food service since his arrival at Potosi Correctional Center. Dr. Kline diagnosed Mr. Johnson with Alcohol, Cocaine, and Cannabis Dependence and Borderline Intellectual Functioning. Addressing the discrepancy in childhood IQ scores, it was Dr. Kline's opinion that the lowest IQ score was not accurate. He believed that testing in 1994 and 1995 was more accurate because this period was before Mr. Johnson knew that the focus of his defense would be mental retardation, and he discounted the accuracy of testing in 2003 and 2004 because of secondary gain. Dr. Kline opined that Mr. Johnson did not suffer from a mental disease or defect and was competent to proceed to trial.

**FETAL ALCOHOL SPECTRUM DISORDERS (FASD)**

As noted previously, the purpose of this assessment is to determine if Ernest Johnson has a history of lifelong deficits consistent with a fetal alcohol spectrum disorder (FASD).

Fetal Alcohol Syndrome, or FAS, is one of several conditions included under the umbrella term Fetal Alcohol Spectrum Disorders (FASD). Other FASD conditions include Alcohol Related Neurodevelopmental Disorder (ARND), Alcohol Related

Birth Defects (ARBD), static encephalopathy/alcohol exposed, Possible or Partial Fetal Alcohol Syndrome (PFAS), and Fetal Alcohol Effects (FAE). Although the two latter terms have been superseded in a diagnostic formulation developed by the Institute of Medicine in 1996, they are still used by some diagnosticians. *look up*

FASD diagnoses involve permanent birth defects caused by maternal consumption of alcohol at any point in pregnancy. Alcohol is a teratogen that inhibits and disrupts fetal development by causing *structural* and *functional* damage to developing cells, organs, and systems, including the brain and central nervous system. Because alcohol causes damage throughout the developing fetus, physical anomalies and neurobehavioral defects can be widespread. Hence, the condition is referred to as a "syndrome." The most serious and pervasive damage occurs in the central nervous system. Brain imaging studies over the last decade have shown that prenatal alcohol exposure causes significant malformation in brain structures (e.g., corpus callosum, frontal lobes, basal ganglia, cerebellum, hippocampus) that are necessary for normal development and functioning (e.g., Bookstein et al., 2001, 2002a, 2002b). Notably, even individuals who do not display the growth deficits and characteristic facial features of FAS (e.g., short palpebral fissures, flat philtrum, and thin upper lip) can have brain damage as severe as those who do (Mattson & Riley, 1994). In other words, brain damage, with its associated Central Nervous System (CNS) dysfunction, may accompany *any* diagnosis under the FASD umbrella. The most widely known condition under the FASD umbrella, Fetal Alcohol Syndrome or FAS, is diagnosed when there are observable physical abnormalities as well as CNS abnormalities. These observable physical manifestations involve facial dysmorphia and growth deficits. However, because facial characteristics and growth deficiency disappear when an individual goes through puberty, it is usually impossible to diagnose an adult with FAS. The diagnosis that is typically applied to adults with structural, neurological, and functional deficits due to prenatal alcohol exposure is Alcohol Related Neurodevelopmental Disorder, or ARND.

It is a common misconception that individuals with a diagnosis of ARND have fewer neurocognitive deficits than those with a diagnosis of FAS. In fact, research has consistently shown that compared to individuals diagnosed with FAS, those with other diagnoses under the FASD umbrella can suffer from *as many or more* of the functional deficits (Streissguth & O'Malley, 2000). In other words, even without physical stigmata, the cognitive-behavioral problems stemming from underlying brain damage can be as severe in FAE or ARND as in FAS.

Unlike most of the diagnoses in *DSM-IV-TR*, the basic diagnostic criteria established in 1973 for FAS have never changed. After the discovery of FAS in the United States in 1973, research on the condition proliferated. By 1981, the

U.S. Surgeon General had declared FAS a national health problem, and by 1989, Congress had mandated labels on all alcoholic beverage containers warning pregnant women not to drink. By 1991, not only had the primary functional deficits associated with FASD been thoroughly described in the literature, researchers also were discovering the lifelong effects of FASD on behavior (i.e., "secondary disabilities"). Thus, the condition is definitely not a new or novel concept in medicine or psychology.

## **MECHANISM OF DAMAGE**

The process that underlies Central Nervous System damage in FASD begins at the molecular and cellular levels and is generally investigated in animal studies and in nerve cells grown in culture. In general, prenatal alcohol exposure causes increased susceptibility to cell damage from free radicals that kill brain cells, thereby affecting the formation and migration of brain cells and altering the production and function of regulatory substances that help promote the orderly growth and differentiation of neurons (Michaelis & Michaelis, 1994). Neurons, or brain cells, are the building blocks of the brain. Normally, embryonic cells destined to become brain cells are formed, then move to their ultimate locations in the brain, and eventually mature into a wide variety of functionally distinct neuronal cell types as the fetus develops. Once in place, these neurons form connections with other brain cells in a predetermined pattern. Damage can occur at any point in this process, and if there is brain damage, there is functional impairment.

The first FASD autopsy involved an infant diagnosed with FAS who died shortly after birth in 1973. Examination revealed extensive brain damage, including microcephaly (small head circumference), cell migration anomalies, callosal dysgenesis (malformation of the corpus callosum), and a massive neuroglial, leptomeningeal heterotopia (i.e., clumps of gray matter located in the wrong part of the brain) covering the left hemisphere (Mattson & Riley, 2002). Autopsies since that time have shown consistent structural abnormalities in the brains of FAS-affected infants. In fact, relatively recent advances in brain imaging research have revealed reduced overall brain size in some individuals living with FASD and disproportionate reductions in the size of specific brain structures (Roebuck, Mattson, & Riley, 1998). Notably, FASD is the only known factor reliably associated with alterations in the geometry of the corpus callosum (Riley, et al., 1995; Swayze, et al., 1997). The corpus callosum is the band of nerve fibers deep in the brain that functions as the communication link between the right and left lobes. Approximately 7 percent of children with FAS lack a corpus callosum altogether, an incidence rate 20 times higher than that in the general population (Riley, et al., 1995). Damage to the corpus callosum and adjacent prefrontal cortex has been associated with a relatively consistent pattern of executive

function deficits in FASD-affected individuals (Bookstein et al., 2001). Studies also have shown that prenatal alcohol exposure damages the basal ganglia (another deep-brain structure), which impairs spatial memory and set shifting in animals (Mattson, et al., 1996; Mattson & Riley, 1999) and a variety of cognitive processes in humans (Bannister, 1992). Another frequent finding is reduced size of the cerebellum (Mattson, et al., 1994; Sowell, et al., 1996), a structure involved in balance, gait, coordination, and cognition (Riley, et al., 1995). Given the damaging effects of prenatal alcohol exposure on the developing brain, an FASD diagnosis is particularly relevant in terms of an individual's judgment, reasoning ability, and impulse control.

### **DOSE, EXPOSURE, and TIMING**

Alcohol exposure at any point in gestation damages the CNS since the brain develops throughout the entire pregnancy (Guerri, 2002). The minimum quantity of alcohol required to produce adverse fetal consequences is still unknown (Roebuck, Mattson, & Riley, 1999). Moderate alcohol consumption can be harmful, especially in the case of binge drinking (Barr, et al., 2006). For example, a recent study found that one episode of binge drinking (defined in the study as seven drinks in one episode) was more harmful to a fetus than one drink per day for seven days (Mattson, Schoenfeld, & Riley, 2001). Another study found FASD in children whose mothers consumed just two drinks per day at certain stages of pregnancy (May, et al., 2006). Even very light drinking can cause abnormalities. For example, a large-scale prospective study involving 31,000 pregnancies found that consumption of just one drink per day was associated with increased risk of growth retardation, which is present in individuals diagnosed with FAS (Mills, et al., 1984). In another study, an average of one-quarter ounce of absolute alcohol daily had adverse effects on children's verbal language and comprehension skills (Gusella & Fried, 1984). Current recommendations on clinical thresholds of alcohol consumption during pregnancy do not support the concept of a "safe level" of alcohol consumption in terms of possible damage to a fetus.

### **FASD DIAGNOSTIC PROCESS**

Diagnostic signs of Fetal Alcohol Syndrome were initially described in the 1970s when the first research studies on the topic were published. By the mid-1970s, there were four criteria identified in scientific journals: facial abnormalities, growth deficit, central nervous system abnormalities, and prenatal alcohol exposure. In 1996, the Institute of Medicine at the direction of Congress in Section 705 of Public Law 102-321, categorized five specific conditions known to be caused by prenatal alcohol exposure. Three of those categories involved variations of Fetal Alcohol Syndrome. In 2004, after two years of effort by the Centers for Disease

Control, the National Task Force on FAS and FAE, and a scientific working group composed of national experts in the field further refined the diagnostic criteria for FAS, quantifying and refining them but not changing the basic criteria from their original formulation in 1973:

I. Facial abnormalities: all three characteristic facial features:

- Smooth philtrum (University of Washington Lip-Philtrum Guide rank 4 or 5)
- Thin vermilion border (University of Washington Lip-Philtrum Guide rank 4 or 5)
- Small palpebral fissures (at or below 10<sup>th</sup> percentile )

II. Growth deficits: confirmed prenatal or postnatal height or weight deficits, or both, at or below the 10<sup>th</sup> percentile, documented at any one point in time (adjusted for age, sex, gestational age, and race or ethnicity).

III. Central Nervous System abnormalities:

A. Structural: head circumference (OFC) at or below the 10<sup>th</sup> percentile adjusted for age and sex and/or clinically significant brain abnormalities observable through imaging.

B. Neurological: problems not due to a postnatal insult or fever, or other soft neurological signs outside normal limits.

C. Functional: performance substantially below that expected for an individual's age, schooling, or circumstances, as evidenced by:

a) Global cognitive or intellectual deficits representing multiple domains of deficit (or significant developmental delay in younger children) with performance below the 3<sup>rd</sup> percentile (2 standard deviations below the mean on standardized testing), and/or

b) Functional deficits below the 16<sup>th</sup> percentile (1 standard deviation below the mean on standardized testing) in at least three of the following domains: cognitive or developmental deficits or discrepancies; executive functioning deficits; motor functioning delays; problems with attention or hyperactivity; social skills; other abnormalities such as sensory problems, pragmatic language problems, memory deficits, etc.

IV. Maternal alcohol exposure

- a) Confirmed prenatal alcohol exposure
- b) Unknown prenatal alcohol exposure



A full diagnosis of Fetal Alcohol Syndrome (FAS) requires documentation of all three facial abnormalities (smooth philtrum, thin vermilion border, and small palpebral fissures), documentation of a growth deficit at any point in the individual's life, and documentation of at least one CNS abnormality. A diagnosis of FAS can be with or without confirmed prenatal alcohol exposure.

A diagnosis of Alcohol Related Neurodevelopmental Disorder (ARND) requires confirmed prenatal alcohol exposure and either CNS neurodevelopmental abnormalities (as in III.A and III.B above) or a complex pattern of behavioral or cognitive deficits (as in III.C).

Because prenatal alcohol exposure affects other organs and structures in the developing fetus beyond the face and brain, other physical defects are also possible, including additional facial abnormalities (e.g., flat midface, short nose, micrognathia or undersized jaw, low nasal bridge, epicanthal folds, eye asymmetries, eyelid tiosis or drooping eyelids, microphthalmia, or cleft lip/palate), heart defects, kidney problems, skeletal anomalies, joint anomalies including abnormal position and function, altered palmar crease patterns, small distal phalanges, ocular problems, decreased visual acuity, involuntary eye movements, narrow maxillary dental arches, high arched palate, misaligned/misshapen secondary teeth, webbed neck, short neck, Tetralogy of Fallot, spina bifida, polythelia or supernumerary nipple, and hydrocephalus.

While solo practitioners can and do diagnose FASD, a multidisciplinary evaluation by several specialists is optimal to assess the varying structural, functional, and neurodevelopmental aspects of the condition. This diagnostic team may include a medical doctor, psychologist, neuropsychologist, and a social worker or substance abuse professional to assess maternal alcohol history. In order to rule out environmental factors as a primary causative agent, structural brain damage is typically determined through imaging techniques and assessed by a specialist trained to measure subtle structural anomalies. Assessment of hard and/or soft signs of neurological damage is the responsibility of a neurologist and/or neuropsychologist. Functional assessment of behavioral and developmental abnormalities is typically the responsibility of a psychologist, aided by the historical assessments of social workers and other specialists. Functional assessment involves an extensive record review and focuses on clinically significant impairments in primary skill domains. Finally, a physician assesses growth deficiency and FAS facial features and other physical and/or structural anomalies.

It should be noted that typically, most or all of the physical manifestations of FAS (i.e., facial abnormalities and growth deficit) disappear during puberty.

## PRIMARY AND SECONDARY DISABILITIES

CNS damage from FASD manifests in a number of basic cognitive and functional deficits, which are referred to in the literature as “primary disabilities.” Often, primary disabilities are mistaken as behavior problems that are under the volitional control of the child (e.g., distractibility or unruly behavior in school) when underlying brain damage is actually the source of the difficulty (Malbin, 1993). Recent studies have found that several specific neurobehavioral functions are often impaired in individuals with FASD, including verbal memory (Mattson, et al., 1996a), visual-spatial learning (Uecker & Nadel, 1996), attention (Mattson & Riley, 1998), reaction time (Streissguth, et al., 1986), and executive functioning (Roebuck, Mattson, & Riley, 1999). These, plus a number of other primary disabilities, have an additive effect on an individual’s ability to function appropriately and pro-socially.

Primary disabilities stemming from FASD include deficits in the following functional domains:

- cognition (e.g., mean IQ for individuals with FAS is 79; mean IQ for individuals with FAE/ARND is 90);
- achievement (e.g., learning disabilities, decreasing academic performance as schoolwork becomes more complex, poor academic achievement in relation to IQ);
- adaptive functioning (e.g., poor daily living, communication, and socialization skills; developmental delays);
- attention (e.g., attention deficits and hyperactivity);
- executive functioning (e.g., deficient impulse control, poor social awareness including self- and other-awareness, poor emotion modulation, perseveration, poor judgment, faulty reasoning, deficient cause and effect reasoning, poor generalization skills, difficulty learning from experience, confusion under pressure, poor abstracting ability, difficulty distinguishing between fantasy and reality, slower cognitive processing, “concrete” thinking);
- language (e.g., expressive and/or receptive language disorders, difficulty understanding metaphor / idioms / sarcasm);
- memory (e.g., poor working and short-term memory, inconsistent memory and knowledge base);
- motor skills (e.g., poor handwriting and other fine motor skills; delayed gross motor skill development);
- sensory integration and soft neurological signs (e.g., sensory integration disorders, tactile defensiveness, under-/over-sensitivity to stimuli); and
- social communication (e.g., intrusiveness, inability to read nonverbal or social cues, “chatty” but without substance, poor boundary awareness).



Of the 10 primary disabilities listed above, it is deficient *executive functioning* that is most responsible for many of the life problems referred to in the literature as “secondary disabilities.”

According to research that began in the 1980s and culminated with a groundbreaking publication in the mid-1990s (see Streissguth et al., 1996), disabilities stemming from FASD are categorized as either “primary” or “secondary” depending upon whether they are a direct manifestation of Central Nervous System abnormalities or whether they are mediated by environmental influences. “Primary disabilities” are defined as functional deficits that stem directly from structural brain damage and CNS dysfunction caused by prenatal ethanol exposure (e.g., Streissguth et al., 1996). Individuals with FASD are typically born with some or many of these primary disabilities, which include the ten broad deficits noted above. “Secondary disabilities” reflect the adverse life outcomes that an individual experiences as he enters adolescence and adulthood – outcomes that presumably could have been ameliorated if there had been early diagnosis and intervention. Environmental factors exert positive or negative influences on the expression of secondary disabilities but have nothing to do with primary disabilities, which are inherent in the individual’s brain damage. With effective treatment of primary disabilities in childhood, secondary disabilities can be prevented or at least reduced (Streissguth, 1997). However, without early diagnosis by age six and subsequent treatment, secondary disabilities manifest in adolescence and adulthood as severe problems in psychosocial functioning, such as mental health problems, disrupted school experience, trouble with the law, confinement, inappropriate sexual behavior, alcohol and drug problems, dependent living, and problems with employment.

A surprisingly large number of individuals with FASDs display multiple secondary disabilities (Streissguth et al., 1996; Streissguth & O’Malley, 2000):

- 90% have mental health problems such as ADHD, depression, or other mental illness;
- 60% are arrested, charged, and/or convicted of a crime;
- 50% display inappropriate sexual behavior (e.g., sexual advances, sexual touching, or promiscuity);
- 50% are confined in institutional settings (i.e., psychiatric hospital, jail, prison, residential substance abuse treatment); and
- 35% have alcohol or drug abuse problems (Streissguth, et al., 1996).

Despite the direct destructive impact of alcohol on the developing brain, seven “protective factors” have been identified that reduce the risk of “secondary disabilities” (CDC, 1996):

1. living in a stable and nurturing home of good quality,
2. not having frequent changes of household,
3. not being a victim of violence,
4. having received developmental disabilities services,
5. having been diagnosed before the age of six,
6. having a diagnosis of FAS rather than FAE, and
7. having an IQ score below 70.

Review of Ernest Johnson's history indicates that with the exception of an IQ score in 1973 that fell below 70, he had none of these protective factors prior to his instant offense.

Ernest Johnson was born too late for early detection and intervention. In 1983, the U.S. Surgeon General issued the first national health advisory warning pregnant women against drinking alcohol because of the *physical* birth defects it could cause. However, it wasn't until 2005 that the Surgeon General issued a second national advisory warning pregnant women against drinking alcohol because of the *cognitive-behavioral* deficits it could cause:

"Alcohol consumed during pregnancy increases the risk of alcohol related birth defects, including growth deficiencies, facial abnormalities, **central nervous system impairment, behavioral disorders, and impaired intellectual development.**

"No amount of alcohol consumption can be considered safe during pregnancy.

"Alcohol can damage a fetus at any stage of pregnancy. Damage can occur in the earliest weeks of pregnancy, even before a woman knows that she is pregnant.

"The **cognitive deficits and behavioral problems** resulting from prenatal alcohol exposure are lifelong."

By 1995, the year of Ernest Johnson's trial, prenatal alcohol exposure had been recognized for many years as a major known cause of primary neurodevelopmental disabilities. However, the long-term implications of these disabilities (i.e., secondary disabilities) were only starting to be recognized in the scientific community (Streissguth, 1990; Streissguth & Randels, 1988; Streissguth, et al., 1991) as longitudinal studies began to expose long-term adverse effects of prenatal alcohol exposure (Streissguth, Aase et al., 1991; Streissguth, Clarren, & Jones, 1985). Most importantly, there were increasing numbers of studies demonstrating the adverse impact of prenatal alcohol exposure on the developing brain (West, 1986), including findings that this

damage caused long-term behavioral and developmental disturbances (Spohr & Steinhausen, 1987; Streissguth & Randels, 1988; Streissguth, 1990).

## ASSESSMENT OF ERNEST LEE JOHNSON

### 1. History of prenatal alcohol exposure:

Bobby Johnson, Sr., testified in an affidavit (4-20-01) about birth mother Jean Patton's drinking pattern around the time of her pregnancy with Ernest Johnson:

*I met Ernest's mother Jean Ann at Bad Land, and we really enjoyed drinking, dancing, and being with our friends down there. I think Jean Ann was 15 years old when we first met and started hanging out together....Jean Ann and I had three pretty good years together before Ernest was born, and I was happy most of that time. We enjoyed going into Charleston on the weekends to see our friends in Bad Land. We would go into town together but then went our separate ways in Bad Land; I shot pool, and Jean Ann danced and drank. I didn't always know who she was with, or what she was doing.*

During the penalty phase of Ernest Johnson's trial in 1995, his older sister Beverly Johnson testified that their mother Jean Patton was an "alcoholic" and had been an alcoholic "for as long as I've been around her." Bobby Lee Johnson, Jr. testified about his younger brother's learning disabilities but was not asked anything about their mother's drinking pattern.

Birth mother Jean Patton, who died in 1997 of cirrhosis (an alcohol-related condition) and cancer, testified briefly during the penalty phase in 1995 but was not asked anything about her drinking history.

Medical records for Jean Ann Patton when Mr. Johnson was 14 (3/21/74, 11/16/74, 11/19/74) indicate a suicidal gesture, slightly slurred speech, below average intelligence, and a fourth grade education. She reported a "nervous breakdown" and four-week hospitalization five years earlier, which would have been when Mr. Johnson was nine. She was diagnosed with depression and inadequate personality. She was admitted on 11/18/74 to the Mid-Missouri Mental Health Center in Columbia and discharged approximately two months later with a diagnosis of chronic depressive neurosis; passive aggressive personality, dependent type; and moderate mental retardation. Medical records noted an IQ of 61. She was described as having a history of chronic depression and suicidal ideation of many years duration. Her depression reportedly dated back to her early childhood.

On 10/17/90, Ms. Patton was admitted to the hospital after expressing suicidal and homicidal ideation in the Emergency Room. After an evaluation, it was determined that her needs could best be met by alcohol rehabilitation, and on 10/24/90 she was transferred to the treatment unit. It was noted that she had a "history of multiple intoxications." She explained upon admission that she was angry at the Housing Authority and went to get a pint of gin to "go to sleep." After drinking a half pint of gin, she went to the Emergency Room to "talk to someone about feeling down." According to her commitment papers, she presented to the Emergency Room in a very intoxicated condition and was threatening to harm others and kill her physician. Four prior psychiatric admissions were noted. She reported sharing a pint of whiskey with a friend approximately 1 to 2 times per week but denied that alcohol was a problem for her. Substance abuse was one of the problems identified in her treatment planning conference, and it was noted that during her stay, she was able to acknowledge that alcohol was indeed a problem for her. She was diagnosed with Alcohol Dependence-severe, and both outpatient treatment and AA attendance were recommended.

In a defense interview (12/04/95) with Bobby Johnson, Sr., he reported that Jean Patton began drinking in her mid-teens, prior to the birth of their first child Bobby, Jr. He reported that over time, she drank "more and more" and drank on weekends when pregnant with Ernest Johnson.

Dr. Robert Smith diagnosed Mr. Johnson with Fetal Alcohol Effect (now called Alcohol Related Neurodevelopmental Disorder). In his report (3-21-96), Dr. Smith noted:

"Ms. Patton indicated that she began using alcohol at approximately age 10. She would put half of a beer with half of a soda. At the age of 14, she was abusing alcohol on a regular basis. By the time of her relationship with Bobby Johnson, Sr., she had progressed to consuming whiskey and gin on a daily basis. Her tolerance allowed her to drink a pint or more per occasion. She had also been introduced to marijuana and smoked on a near daily basis. Interviews with Bobby Johnson, Sr., have indicated that Ms. Patton drank throughout each of her pregnancies, including Ernest Johnson. Ms. Patton also supported this, indicating that her difficulty with her 'nerves' prevented her from being able to cut back even during her pregnancies. Ms. Patton's abuse of alcohol continues to the present time....In addition to alcohol and marijuana, Ms. Patton has abused sedatives, including Valium and Librium."

In the Second Penalty Phase, Dr. Smith testified that family members told him that Jean Patton drank alcohol during her pregnancy with Ernest Johnson:

"I was able to establish that she drank heavily throughout her pregnancy, and also used sedatives during that time....what we have is Jean Ann and all the family members indicating that she was a heavy user of alcohol during her pregnancy with Ernest."

2. Facial abnormalities:

In his March 1996 report, Dr. Robert Smith noted his observations after reviewing childhood photographs of Ernest Johnson:

"The facial features commonly seen in Fetal Alcohol Syndrome include short palpebral fissures, a low nasal bridge, epicanthal folds, a flat midface, an indistinct philtrum, a thin upper vermilion, and a small chin. In reviewing photos of Mr. Johnson, many of the facial features are displayed that characterize Fetal Alcohol Effect."

Dr. Smith testified during the Second Penalty Phase:

"...there's a possible smaller head circumference...Drooping eyelids...Low-set ears...there's hardly any philtrum there at all...a thin upper lip....it's very, very thin for Ernest...kind of a flat midface...with a flat forehead, the indistinct bridge across the nose...smaller eye openings and eye folds in here are also present."

Based on informal observation during his clinical interview, Mr. Johnson appeared to have a smooth philtrum and a thin upper lip compared to his lower lip. However, as facial analysis is the domain of medical doctors, no further assessment was undertaken.

3. Growth deficit:

The earliest documented indication of weight or height found in the record is a Missouri Division of Corrections report (834), which indicates that at age 18, Mr. Johnson was 6'3 1/2" tall and weighed 130 pounds.

In his 1996 report, Dr. Robert Smith wrote:

"Ms. Patton reflected upon her pregnancy with Mr. Johnson and indicated that he was born at home, was premature, and extremely small in stature and weight. She noted that early along, he was thin and often ill."

During the Second Penalty Phase, Dr. Smith testified:

"The mother said that he was born premature...was small in his size and weight.... We have...Jean Ann and the family members, including the great aunt and uncle, relating that Ernest was born prematurely, that he was underweight and small in stature, and that he remained small in stature until adolescence...that he was extremely thin and was subjected to a number of physical ailments early in life."

#### 4. Central nervous system abnormalities:

##### A. Structural Deficits

Based on consultation with Dr. Richard Adler, MD, Ernest Johnson's orbitofrontal (head) circumference is 57.0 cm, which places him between the 3<sup>rd</sup> and 5<sup>th</sup> percentiles adjusted for age/gender/weight/height, depending on the norms used (i.e., Bushby et al., 1992, or Ormeci et al., 1997). According to CDC (2004) diagnostic guidelines, this head circumference measurement meets criteria for structural brain damage and FASD (i.e., "at or below the 10<sup>th</sup> percentile adjusted for age and sex). This OFC measurement indicates that Mr. Johnson's brain is much smaller than normal and is consistent with Dr. Cowan's 1995 finding on the Halstead Impairment Index Score that Mr. Johnson's brain function was "within the brain damaged range."

##### B. Functional Deficits

Mr. Johnson's test results and behavioral history corroborate both global cognitive and intellectual deficits representing multiple domains of deficit with performance below the 3<sup>rd</sup> percentile (i.e., 2 standard deviations below the mean on standardized testing), and functional deficits at or below the 16<sup>th</sup> percentile (i.e., 1 standard deviation below the mean on standardized testing) in the following domains:

- academic achievement;
- executive functioning;
- attention/hyperactivity;
- socialization;
- communication; and
- daily living skills.

#### Global Cognitive and Intellectual Deficits

Standardized and normed IQ tests are designed to measure intellectual functioning. Most people in the United States have IQs between 80 and 120, with an IQ of 100 considered average. A diagnosis of mental retardation requires an IQ below 70-75, which is considered *significantly* below average. If a person



scores at or below this range on a standardized IQ test, he is in the bottom 2 percent of the U.S. population.

Ernest Johnson has taken 7 standardized IQ tests since third grade, and all but one of those scores (i.e., Dr. Dennis Cowan) falls below 75 taking into account the Flynn adjustment (see discussion in Diagnostic Impressions section). His first IQ test in third grade (WISC) found a score of 72 (i.e., Flynn-adjusted IQ score of 66.3), and his most recent IQ test this year (WAIS-III) found a score of 70 (i.e., Flynn-adjusted score of 66.7). Thus, the scores at age eight and age 48 are virtually identical and place Mr. Johnson at approximately 2 standard deviations below the mean in terms of his intellectual functioning. As these results are based on standardized testing using reliable instruments, they establish lifelong global deficits in cognition and intellectual functioning. These results also are consistent with FASD diagnoses. Although it is a common perception that individuals with FAS are mentally retarded, the mean IQ for individuals with FAS is 79 and 90 for those with FAE/ARND (Streissguth et al., 2004).

#### Achievement Deficits and Learning Disabilities

In 1975, Congress passed the Education for All Handicapped Children Act, better known at the time as Public Law 94-142. This landmark legislation required that schools provide disabled students (e.g., physical handicaps, mental retardation, speech, vision and language problems, emotional and behavioral problems, other learning disorders) with a "free appropriate public education." Reauthorized in 1990, 1997, and 2004, the law was renamed the Individuals with Disabilities Education Act (IDEA) and spawned the delivery of services to millions of students previously denied access to education geared toward their learning abilities. It was not until 1990 that special education classes became self-contained, and specially trained teachers tailored their lessons to each student's individual needs (Office of Special Education and Rehabilitative Services, U.S. Department of Education). Thus, although he was designated a "Special Education" student, when Ernest Johnson attended school there was very little in the way of resources to either identify his cognitive deficits or intervene with appropriate services.

Grade reports through seventh grade (1440, 1437) indicate that throughout elementary school, Mr. Johnson was enrolled in ungraded classes. He repeated second grade and third grade and was promoted to junior high (seventh grade) with his age peers. He was placed in Special Education beginning in his second year of third grade, where he remained through the end of junior high (eighth grade). The specific services he received with this designation are unknown, although it is highly unlikely he was in a self-contained classroom given that this particular service wasn't mandated until 1990.

### Ernest Johnson's Academic History

Academic Year	Age	Grade Level	Category/Result
1966/67	6	1	ungraded
1967/68	7	2	ungraded
1968/69	8	2 (year #2)	ungraded
1969/70	9	3	ungraded
1970/71	10	4	ungraded
1971/72	11	3 (year #2)	Special Education
1972/73	12	5	Special Education
1973/74	13	7	Special Education
1974/75	14	8	Special Education
1975/76	15	9	failed 9 <sup>th</sup> grade
12/10/76	16	9 (year #2)	dropped out

As can be seen in the above chart, Mr. Johnson was retained three times during his academic history: twice in elementary school and once in high school. He received his first academic marks in junior high. In seventh grade Special Education, he received 2 Inferior grades during his first semester (Science, Music) and passed the rest of his classes that year. In eighth grade Special Education, he received 6 out of 7 Inferior grades the first semester (Language Arts, Math, Social Studies, Science, Music, Art) and passed P.E. In the second semester, he received 2 Inferior grades (Language Arts, Social Studies) and passed his other classes. He was mainstreamed in ninth grade, which was his first year of high school. A grade report that year (1435) indicated that he failed 3 out of 7 classes his first semester (History, Vocational Agriculture, Math 1) and received 4 Inferior grades (English, Physical Science, Developmental Reading, P.E.). In the second semester, he failed 3 classes (History, Vocational Agriculture, Math), received 3 Inferior grades (English, Physical Science, Developmental Reading), and obtained a Satisfactory in P.E. Overall, he did not meet minimal grade requirements and was not promoted to tenth grade. According to his high school grade transcript, he dropped out of school on December 10, 1976, three months into his second year of ninth grade.

Mr. Johnson achieved the following scores on achievement tests in elementary school (1438-9):

#### Achievement Test Scores: Percentiles (Grade Equivalent)

Grade	Date	Reading	Math	Language Arts
Grade 2	4/69	1% (1.0)	*	*
Grade 3	4/70	2% (1-5)	4% (2-4)	9% (2-4)



Grade 4	4/71	1% (1-6)	*	2% (2-4)
Grade 3*	4/72	29% (3-1)	*	13% (2-5)
* First year where his transcript is designated "Special Education"				
Grade 5	4/73	2% (2-8)	2% (3-4)	2% (2-9)
Grade 7	4/74	7%	8 %	2%
Grade 9	10/75	2%	21%	6%

\* untested

Testing after the instant offense was consistent with Mr. Johnson's early history. According to neuropsychological testing by Dr. Dennis Cowan, PhD (12-13-95), Mr. Johnson performed within the mild range of neuropsychological impairment on the Aphasia Screening Test, where he showed numerous spelling errors and an inability to perform simple calculations in his head without the aid of pencil/paper. His reading grade level was measured at the 5<sup>th</sup> grade level of functioning. (1809) Reading comprehension (i.e., the ability to fully understand what he reads) was "very markedly impaired." Dr. Cowan noted that Mr. Johnson would likely skip over words he did not know or understand, and he concluded:

"Such dysfunction could be consistent with a premorbid/congenital learning disability and most likely has been evidenced throughout his entire life."  
(1910)

Dr. Carole Bernard testified in the first PCR in 1996 that when she tested Mr. Johnson, he had "very poor writing skills, his sentence structure was very simplistic. He often didn't complete a sentence but either started a new one or wrote an incomplete one. I also saw several letter and word reversals that led me to think he might have some learning disability." (70)

Achievement testing by Dr. Denis Keyes in December 2003 was consistent with all earlier achievement test data:

*Woodcock-Johnson Psychoeducational Battery – III (Pt. 2):*

Cluster/Test	AE	PR	SS
Oral Language	9-5	28	91
Broad Reading	9-4	13	83
Broad Math	11-0	13	83
Broad Written Language	9-2	18	86
Math Calculation Skills	10-9	12	82

During the Second Penalty Phase, Dr. Robert Smith testified that Jean Patton and other family members reported that Ernest Johnson was developmentally delayed in early childhood:

"(He was) delayed in terms of some of the normal things that we look for in child development. Things that I was most interested in were things like walking, talking, responding to external stimuli, interacting with the environment...For all of those areas, the family reported that Ernest was delayed."

Dr. Smith also testified about the presence of primary disabilities in Mr. Johnson:

"(There is) attention deficit... This is documented in the school records for Ernest as a difficulty that he has, and in the testing that others have done: hyperactivity...(There are) temper outbursts...we know that people with FAS and FAE have a low frustration tolerance, tend to become angered easily and act out....we have...documentation that Ernest had an occasion, when under the influence, and drugs in particular, (he) acted out in an angry fashion...."

In recent testing by Dr. Paul Connor in August 2008, the following achievement test scores were obtained:

*Woodcock Johnson Tests of Achievement – Third Edition:*

Subtests	Standard Score	Percentile	Grade Equivalent
Letter-Word Reading	85	16	4.6
Calculation	86	18	5.3
Spelling	80	9	3.3
Passage Comprehension	90	25	5.1
Math Fluency	78	7	4.6
Academic Knowledge	80	9	3.1

With few exceptions, Ernest Johnson's achievement scores have remained 1 or more standard deviations below the mean from childhood to the present. Such scores reflect significant functional deficits in learning and achievement and are consistent with FASD criteria, which require functional deficits below the 16<sup>th</sup> percentile, or 1 standard deviation below the mean on standardized testing. Based on these results, Dr. Connor concluded that Mr. Johnson's overall academic functioning was consistent with a diagnosis of Learning Disorder NOS.

Observational information from family members and teachers provided convergent corroboration regarding Ernest Johnson's achievement discrepancies and learning disabilities:

- Birth mother Jean Patton reported that her son was delayed from birth and learned to talk late. (1676)
- Birth father Bobby Johnson, Sr., testified in an affidavit (4-20-01) that his son Ernest "was always behind the other children, not understanding the things they could understand." (6)
- Bobby Johnson, Jr., reported that his younger brother was very slow in school and "could not pick up his lessons taught in school." (1691) During trial testimony, Bobby Johnson, Jr., noted that his brother was in "special ed classes...for slow learners." (2547) He also recalled the following in his testimony:

*I can remember helping him with his work...also Beverly...I knew that he had problems grasping things...I knew he was trying, and I would continuously try to go over (assignments) with him and try to find an easier way for him to grasp it. (2548)*

- Robin Seabaugh, certified special education teacher for the mentally retarded, testified in the Third Penalty Phase that she taught a developmental reading class for students in ninth grade who had not learned how to read and who "struggled in the regular classroom..." Ernest Johnson was in her ninth grade class in 1975/76, and she noted that he was in special education classes from fourth through the eighth grade. (1219-20) She described him as "very quiet" and said he was in the "basic track," which was for the "slower-ability" students, where he "didn't do well at all." (1223) She said he was in a self-contained classroom in eighth grade (1224), and he flunked ninth grade and had to repeat the year. His reading level at the time was "very low" and at the 2.1 level (just beyond the beginning point of second grade). (1225) She noted that he passed the first semester of her class but not the second semester. She described his intelligence as "very low." (1226) She explained that even though a student might be in the eighth grade, if he had an IEP and was in special education, he could be reading at a second grade level. (1237)
- Steven Mason, Mr. Johnson's art teacher during his last semester in school (1976/77; repeat of ninth grade), testified as follows during the Third Penalty Phase:

*He struggled...didn't really understand the instructions and pretty much had a hard time doing everything he tried to do in class...you're supposed to take your clay...pat it in your hand, and roll it on the table gently, and spread your hand to make some coil, and you stack these*

*coils and you join them together...90 percent of my students do that the first time, and he struggled with that every time. He never did (it), (he) couldn't get it. (1240)*

According to Mr. Mason, Ernest Johnson couldn't read his assignments:

*He couldn't (read the assignments) because whenever he read them, he didn't do the project...I went to a couple of counselors and asked them why did they put Ernest in class because he just...didn't do anything. (1241) ...I didn't see the understanding of just the basic principles that we were going through in class. (1242) ...whenever he tried to use a ruler...the whole ruler would move. He just didn't put enough pressure to do something simple like that....(His compass) would slide all around, or it would flop and the circle would be uneven...I just tried to help him, and he just couldn't do it. (1243)*

Mr. Mason also noted that Ernest Johnson was a below-average student:

*Ernest was very much below. He didn't complete any of his projects. He had an F in my class...(we had a) section on pen and ink...his paper just was...drops here and drips there...I would ask him, 'You need to hold this. Why don't you hold your pen this way?'... Thirty seconds later, he would be doing the same thing, dripping, and not doing a good job. (1244) ...I gave a little lecture and all the kids took notes, and you had to keep your notes in a little folder, and his folder was blank all the time he was in there. He never did take notes. And when we had a test, it was usually the first side (of the paper) would have three or four answers that were wrong, and the back half would be blank. (1245)*

Mr. Mason recommended at the time that Mr. Johnson should be in special education during his high school years:

*I thought he shouldn't be in my class, (that) he should be in a special education class...Beginning Art I is a class where you almost have to try to fail. If you have any kind of average work (1247), and you have a basic common sense of understanding, you'll have some degree of success in my class...he probably was my first student that absolutely got an F....(in) 1975/76, he was in the ninth grade and he flunked... And when I got him, I guess he was a second-time-around ninth-grader and didn't complete the school year. (1252)*

DOC records were consistent with school records. For example, in a Missouri Division of Corrections Diagnostic Center Report (6-15-79) when Ernest Johnson

was 19, his verbal abilities measured in the "below average" range. His testing was halted because he was "felt to have reading disabilities" and could barely read "at the sixth grade level during the interview." (832)

#### Executive Function Deficits

Executive skills include impulse control, judgment, decision making, emotion control, ability to anticipate consequences, cause-and-effect reasoning, ability to generalize, and ability to learn from experience. Individuals with FASD typically act on impulse and are motivated by immediate gratification. As might be expected, stealing is almost universal in this population, typically beginning in childhood.

Following the instant offense, standardized testing revealed specific, measurable deficits in Mr. Johnson's executive functioning. According to neuropsychological testing by Dr. Dennis Cowan, PhD (12-13-95), Mr. Johnson's performance on tests which assessed higher level abstract thinking abilities, judgment, and decision making capacity fell within the severe range of neuropsychological impairment. Dr. Cowan noted:

"His thinking processes and problem solving approaches tend to be very simplistic and concrete. His performance on the Wisconsin Card Sorting Test was found to be within the severe range of neuropsychological impairment. On this particular test, he was only able to complete four out of the six "sorts." Furthermore, he manifested a total of 45 perseverative errors, which far exceeds the allowable cutoff of 16-18 perseverative responses. While told he was making an incorrect response, he was unable to shift his line of thinking so as to obtain the correct response. On the Category Test, his performances were also found to be within the severe range of neuropsychological impairment. The patient's speed of mentation or how fast he is able to think was found to be within the mild range of neuropsychological impairment. He tends to think rather slowly and will miss crucial information when information is presented to him in too rapid of a fashion." (1809)

Dr. Cowan also found deficits in sequential, cause-and-effect reasoning:

"The patient's abilities to engage in sequential reasoning and to be able to see cause-and-effect relationships was found to be within the mild range of impairment. He is very stimulus bound and is likely to respond on a more 'gut-level' reactionary mode." (1810)

According to recent testing by Dr. Connor, Mr. Johnson demonstrated executive function deficits (i.e., one of more standard deviations below the mean) in a

number of areas including generation of ideas in both verbal and nonverbal modalities, difficulty inhibiting well-learned responses, significant difficulties multi-tasking, trouble developing and maintaining problem solving strategies, and slowed processing of information.

Dr. Connor's recent findings were corroborated by convergent evidence from Department of Corrections personnel. In 1979, a Diagnostic Center report noted that he was "very childlike and unintelligent," adding:

"He is apparently impulsive and has very little insight as regards his responsibility for his actions. Although he has serious feelings of regret about his present incarceration, it does not appear likely that he is capable of the judgment necessary to prevent him from engaging in criminal behaviors in the future. A successful social adjustment on Johnson's part could not be accomplished without the use of a controlled environment, strong guidance and community support following his release." (833)

In 1979, parole officer Sherry Aslin noted in an Investigation Report (830-31):

"From working with this client, this officer sees Johnson as an impulsive type of individual, getting what he wants first and then thinking about the consequences of how he got it....whether he will be able to achieve a life style of not breaking the law is questionable....The possibility of Johnson ever being able to attain a high school education is questionable.... Johnson's work experience has been mostly that of a farm laborer." (Board of Probation and Parole Investigation Report, 4-24-79)

Mr. Johnson's law-breaking behavior prior to the instant offense involved impulsive crimes of theft that revealed recurrent problems with executive functioning and self-regulation:

After pleading guilty for stealing a car in 1979, he stated that he got the idea to take the car when he saw it parked with keys in it. His first impulse was just to drive it around Charleston and leave it parked. However, after driving it for a while, he decided to visit his girlfriend in Cairo. After he visited her, he told the tires, wheels, and jumper cables out of the trunk of the car for \$33 at a junk yard. (State of Missouri Board of Probation and Parole, Investigation Report, 4-24-79)

During the investigation noted above, he also admitted two impulsive juvenile crimes:



He broke into a trailer and stole a half gallon bucket of mobile home keys, for which he received a week in jail. In a second incident at age 15, he stole a stereo system and was placed on probation.

Another crime at age 17 was noted in the Investigation Report:

He was charged with second degree burglary after he and a co-defendant broke into a Laundromat, and the co-defendant stole money from a money changing machine.

At age 19, Mr. Johnson was charged for stealing a portable cassette player from the back seat of a car. He admitted that while walking to his girlfriend's house, he stole the cassette player on impulse. This arrest violated his parole, and he was returned to prison. After his release from prison, he was arrested for another impulsive crime involving a purse snatching. He also was charged with burglary. He told authorities that he, a female accomplice, and ten other male accomplices entered a Sears store with the intent to steal items. He and the female were arrested at the scene, and he subsequently told police he was "souped up" by the others to commit the offense. He was sentenced to eight years in prison and began serving his sentence at the age of 21. This was his second felony incarceration. While in prison, he stole a watch from another inmate (984), and it was determined that it was unsafe for him to remain at the Central Missouri Correctional Center because he was a "known thief." He proceeded to get numerous write-ups for relatively minor rule infractions, many of which involved stealing: in February 1983, cheese and a turkey roll were found in his room (1094); that same month, he was found coming from the dish room with a bag of coffee stuffed down the back of his pants (1091); and in May 1983, he took a package of yeast from the serving line. (1087) All of these behaviors -- including his tendency to be easily influenced by others -- are consistent with executive function deficits.

At age 26, Mr. Johnson was paroled and continued to demonstrate executive function deficits within the community. Directed to go directly to a 90-day drug treatment program after his release, he went instead to his girlfriend's home. A parole violation was issued, and he remained on the run for eight months. He was eventually arrested and returned to prison in April 1987. He obtained several rule violations over the next two years and was finally released in August 1989 to PMI, where staff viewed his prognosis for successfully completing probation as "poor." After he left PMI in October 1989, he moved in with his sister Beverly but was unable to find work. In February 1990, he appeared in court and pled guilty to possession of a hash pipe. He freely admitted that the pipe was his, and he'd used marijuana twice since his release from PMI. On June 4, 1990, he successfully completed parole requirements. Less than a year later, he was arrested for second degree

burglary after entering a sorority house looking for aluminum cans to sell. He pled guilty to the charge and was sentenced to four years in prison. Again, he had multiple rule infractions in prison and was released to PMI in April 1993. He moved from PMI to his girlfriend Deloris Grant's home and worked odd jobs when he could find them. He reported smoking crack cocaine while on parole. In January 1994, he was arrested for a misdemeanor assault when he struck Ms. Grant as she tried to leave a party they were attending. He was issued a parole violation for the assault and his admitted cocaine use at the time and was directed to receive outpatient counseling for his drug problem. He made contact with the Mid-Missouri Mental Health Center but was put on a waiting list for services. The instant offense occurred one month later.

#### Problems with Attention and Hyperactivity

According to neuropsychological testing by Dr. Dennis Cowan, PhD (12-13-95), Ernest Johnson's attention and concentration skills fell in the mild range of neuropsychological impairment. Dr. Cowan noted:

"This patient tends to have a considerable degree of difficulty in being able to hold and sustain his attention and concentration for any extended period of time." (1809)

On a standardized measure of attention administered by Dr. Connor, Mr. Johnson achieved the following result:

CPT (mean=50, sd=10)

	<u>T-Score</u>	<u>Percentile</u>
Omissions	115.41	99.00
Commissions	65.98	95.52
Reaction Time	43.14	24.61
Variability of Reaction Time	87.86	99.00
Confidence Index		99.90

According to Dr. Connor, Mr. Johnson's overall performance on this task indicated a Confidence Index Associated with ADHD to be 99.90%. He made many errors of omission (severely impaired range) and commission (mild to moderately impaired range), with his scores falling one or more standard deviations beyond the mean. Dr. Connor concluded:

"Mr. Johnson's performance on this test indicates significant difficulties with maintenance of attention and impulsivity. His pattern of performance is consistent with a diagnosis of Attention deficit Hyperactivity Disorder, Combined Type and is quite consistent with past research on FASD. It is often found that attention is impaired, especially in the variability of reaction times, with individuals with FASD."



### Adaptive Skill Deficits

Adaptive skills include social interaction and communication skills, personal living skills, and community living skills. Individuals with prenatal alcohol impairment typically have adaptive skill deficits in multiple domains. In Mr. Johnson's case, there is documented evidence of adaptive skill deficits in school records (i.e., poor academic performance) and in adult DOC records (e.g., poor work history). In late 2003, Dr. Denis Keyes performed the first standardized assessment of Mr. Johnson's functioning with two measures: Vineland Adaptive Behavior Scales and Scales of Independent Behavior-Revised, finding the following:

*Vineland Adaptive Behavior Scales*  
(informants: 4 siblings + former teacher Robin Seabaugh)

Domain	SS	PR	AE
Communication	25	<.01	4-6
Daily Living Skills	20	<.01	4-8
Socialization	20	<.01	3-9
Composite (Full Scale)	20	<.01	4-8

Scores in all areas of adaptive functioning fall 3 standard deviations below the mean, which indicates severe impairment. These scores are consistent with FASD.

*Scales of Independent Behavior – Revised*  
(self-report)

Domain	SS	PR	AE
Social Interaction/Communication	61	0.4	
Personal Living Skills	72	3.0	
Community Living Skills	50	0.1	
Broad Independence (Full Scale)	59	0.3	12-6

Dr. Keyes noted that Mr. Johnson scored himself higher on adaptive functioning than did those who had observed him over the years, which was fairly typical. Despite being higher, his self-rated scores were still significantly deficient in all domains. He perceived that he had a relative strength in Personal Living Skills (e.g., hygiene, cooking, cleaning, etc.), which increased his age equivalent full-scale score to that of a twelve-and-a-half year old.

According to family members, Ernest Johnson began showing adaptive skill deficits in early childhood. He was delayed in talking, and his siblings report ongoing social delays in communication. Dr. Keyes testified in the Third Penalty Phase that his brother and sister reported:

"In conversation, he would keep talking on and on and on, or he would just be quiet. There was no give and take of normal conversation."

Reliable convergent evidence for their reports comes from Mr. Johnson's achievement scores in elementary school, where language arts scores were consistently one or more standard deviations below the mean throughout school. Additional convergent evidence of communication deficits were detected in independent neuropsychological evaluations conducted by Dr. Keyes in 2003 and Dr. Connor in 2008, both of whom found that Mr. Johnson's communication skills were consistently below sixth grade level.

With regard to socialization deficits, Bobby Johnson, Jr., reported that his younger brother was frequently taunted in school because he was quiet, kept to himself, and tended to be "easily influenced by others." As he got into his mid-teens, he "tried to fit into the crowd and started getting into trouble." Bobby, Jr., blamed himself for his brother's legal problems because he left him alone with their grandmother when he went to live in Chicago. He reported that he was not available to help guide his younger brother away from trouble and that his brother's life "changed for the worst" at that point. (1691)

Dr. Cowan noted in his report (3-21-96) that Mr. Johnson had no close friends during childhood, and those he associated with in his teens and young adult years "were individuals who used alcohol and other drugs." His experience with women "was also limited." The only exception in this pattern was his relationship with Mary (Deloris) Grant. This information was substantiated by independent reports from Mr. Johnson's brother, sister, stepbrother and stepsister.

Dr. Keyes also described socialization deficits during his testimony in the Third Penalty Phase:

"...both his brother and his sister said his (socialization) behaviors were severely deficient....He had tantrums when he was younger. He'd forget to keep a secret. If he was denied his own way, he'd go into tantrums. He didn't know how to use a fork and a spoon. He used his fingers....When he was young, he didn't have a best friend or a friend of the opposite sex."

Mr. Johnson's adaptive skill deficits also affected his ability to maintain a job. According to DOC records, he had no history of successful employment. In addition, Tom Powell, treatment coordinator at a DOC halfway house (PMI), testified in the penalty phase of the 1994 trial that Mr. Johnson had trouble holding on to menial jobs: "...there was a problem with some boxes, the labels were all wrong." (2567)

There also is no evidence that Mr. Johnson was ever able to live independently. Throughout much of his 20s, he lived with relatives, and at the time of his instant offense, he was living with Deloris Grant, who was employed full time. In addition, Dr. Keyes testified during the Third Penalty Phase that Mr. Johnson was unable to use public transportation.

Mr. Johnson's conduct as a young adult continued to reflect numerous problems in adaptive functioning. According to a social history prepared by James Dempsey, he was paroled in 1979 at age 19 and advised by his parole officer to attend intake meetings and to meet other requirements: getting a social security number, applying for vocational training, checking out GED classes, and obtaining a driver's license. He failed to attend screening for the vocational training because he forgot about it, and he failed to get a social security number or his driver's license. When he requested permission to move to Chicago where his brother lived, he failed to provide the requested information for the transfer.

Ernest Johnson's communication skills also were significantly impaired. Intelligence testing in December 2003 by Dr. Denis Keyes found deficits in verbal IQ abilities on the WAIS-III (Verbal IQ = 69). Similarly, intelligence testing in July 2004 by Dr. Gerald Heisler (testing administered by psychometrician Wayne Bradshaw) also found significant deficits in verbal IQ skills on the WAIS-III (Verbal IQ = 67). Consistent with these scores, adaptive skills testing by Dr. Denis Keyes in 2003 found a significant deficit in Communication skills on the Vineland: Mr. Johnson's functional capacity in this domain was less than that of a five-year-old child. Dr. Keyes also testified in the Third Penalty Phase that because Mr. Johnson's language skills were impaired, this also affected his ability to hold jobs:

"He was unable to read and write at any level that would have suggested he could have gotten a job."

**In summary, data from standardized testing and collateral sources provide convergent, reliable evidence that Ernest Johnson has displayed lifelong functional deficits consistent with FASD in six functional domains: academic achievement, executive functioning, attention and hyperactivity, socialization, communication, and personal/community living skills (i.e., work, independent living, public transportation).**

## **SECONDARY DISABILITIES**

According to records, Mr. Johnson exhibited many of the secondary disabilities associated with FASDs: disrupted school experience (he dropped out of school before successfully completing ninth grade), alcohol and drug problems (he

began abusing substances and alcohol at an early age), problems with employment (he was never able to sustain gainful employment), dependent living (he either lived with relatives or a girlfriend when he was in the community), trouble with the law (he began stealing in his early teens and continued to steal in his adult years), and confinement (he was incarcerated most of his adult years prior to the instant offense). There also is some likelihood Mr. Johnson had mental health problems as well in that he showed symptoms of attention deficit/hyperactivity disorder in childhood, according to Dr. Robert Smith. Forensic testing by Dr. Cowan also indicated deficits in attention and concentration.

In the Second Penalty Phase, Dr. Smith noted the presence of three secondary disabilities:

"(There is) eventually his dropping out of school because of his frustration...(There is) drug abuse, and alcohol abuse. What we know from Ernest and...from family members that he began using alcohol and drugs at a young age...Stealing (is) a common trait among the children with FAS and FAE as they become adolescents and go into early adulthood. We have Ernest being involved in lots of illegal behavior..."

Awareness that FASD is a birth defect with pervasive and permanent neurodevelopmental effects has led to increasing awareness in the legal profession that a different level of attribution is warranted for individuals with this condition (Fast, Conry, & Looock, 1999; Baumbach, 2002). Rather than assuming individuals become unmotivated, manipulative, and self-defeating solely because of poor parenting experiences and/or free will, research over the last 15 years has shown consistently that *untreated primary disabilities* are the basis for maladaptive behaviors as these untreated disabilities lead to impaired executive functioning.

Notwithstanding the fact that environmental influences can play a significant role in the expression of secondary disabilities, it also has been established in the scientific research that individuals with FASD have structural brain damage that makes it highly unlikely they will be able to successfully withstand the negative influence of environmental risk factors without appropriate support and treatment that begins in childhood. As Streissguth and colleagues note (Streissguth et al., 2004), one of the strongest correlates of adverse outcomes in individuals with FASD is lack of an early diagnosis: "The longer the delay in receiving diagnostic information, the greater the odds of adverse outcomes."

Thus, the research supports a conclusion that in order for Ernest Johnson's offense conduct to have been prevented, he needed appropriate identification and intervention early in his life. Had he received appropriate treatment for his

primary disabilities in childhood, it is highly likely that his secondary disabilities would have been more manageable and less extreme, if they had developed at all. This conclusion is based upon multiple studies of secondary disabilities in the 1980s and beyond (Abel, 1984; Aronson & Olegard, 1987; Spohr & Steinhausen, 1987; Streissguth et al., 1985, 1996; Streissguth et al., 1999; Yates et al., 1998), including research that I participated in during my postgraduate training.

## TEST RESULTS

### Observations

Mr. Johnson was interviewed and tested at Potosi State Prison in Missouri. He presented as a tall man with missing front teeth. Eye contact was good. Speech was slightly slurred. He was cooperative with the interview and testing and appeared to put forth good effort. He warmed quickly after some initial nervousness. During testing, he became self-deprecating when he couldn't recall information on one of the measures and laughed at himself. He denied any current mental health symptoms, including thought disorder or suicidal/homicidal ideation. He appeared motivated to respond accurately to testing and asked questions to ensure his understanding. Thus, his results are considered to be an accurate representation of the factors surveyed.

### Behavior Rating Inventory of Executive Function-Adult (BRIEF-A)

Executive functions are a set of interrelated control processes involved in the selection, initiation, execution, and monitoring of cognition, emotion, and behavior, as well as aspects of motor and sensory functioning. The BRIEF-A is a standardized self-report measure that captures an individual's executive functioning, or self-regulation, in his everyday environment. It is composed of 75 items within nine non-overlapping theoretically and empirically derived clinical scales that measure different aspects of executive functioning: Inhibit, Shift, Emotional Control, Self-Monitor, Initiate, Working Memory, Plan/Organize, Task Monitor, and Organization of Materials. It also includes three validity scales: Negativity, Infrequency, and Inconsistency. The clinical scales form two broader indexes – the Behavioral Regulation Index (BRI) and the Metacognition Index (MI) – and an overall summary score, the Global Executive Composite (GEC). The BRIEF has demonstrated evidence of reliability, validity, and clinical utility for ecologically valid assessment of executive functioning in individuals with a range of conditions across the adult age spectrum.

Ernest Johnson and his sister Beverly Johnson were separately administered the BRIEF-A. Both responded to items in a manner consistent with valid profiles:



#### Ernest Johnson

Scale	Inhib	Shift	Emo Contr	Self-Mon	Init	Work Mem	Plan/Org	Task Mon	Org Mat	BRI	MI	GEC
T-score	79	77	63	68	62	70	67	57	44	73	61	67
%ile	>99	98	90	96	87	95	95	82	43	96	86	92

#### Beverly Johnson

T-score	79	66	66	55	69	76	74	66	40	71	67	70
%ile	99	98	96	80	98	>99	98	99	43	98	95	98

The mean score for each scale is 50; clinically elevated scales fall at or above a T-score of 65. Beverly Johnson sister rated 7 out of 9 scales in the clinically elevated range, which indicated that she viewed her brother as having multiple executive function deficits. His two areas of relative strength, according to her responses, are Self-Monitoring and Organization of Materials. Mr. Johnson rated himself as deficient in 5 out of 9 categories (listed in descending order of severity):

**Overall, both Ernest Johnson and his sister perceive that he has global deficiencies in executive functioning, indicating convergent evidence of significant deficits in his ability to inhibit impulses and change strategies mid-stream. He also has deficits in his ability to systematically solve problems by planning and organizing his behavior and sustain his task-completion efforts in active working memory. His executive function deficits are consistent with FASD and consistent with his neuropsychological testing.**

#### Gudjonsson Suggestibility Scale 1 (GSS1)

The GSS1 is a test used to address the susceptibility of an examinee to endorsing information, particularly in the context of interrogative questioning involving misleading cues. The examinee is read a short story containing 40 distinct elements. The examinee is then asked to recall as much of the story as possible. The maximum score achievable is 40. Up to 50 minutes later, 20 pointed questions are asked. After the first round of questions, the examinee is told that some of his answers are not correct, and the questions are then repeated. It is noted how many times the examinee succumbs to the misleading questions on the first round and how many times he changes his answers from the first to the second round. The total of the two is reported as "Total Suggestibility."

Mr. Johnson appeared to cooperate fully with the testing procedure, and his scores are reported below:

	Mr. Johnson's Score	Maximum Possible Score	Norms: General Population	Norms: Court Referrals	Norms: Intellectual Disabilities*
Immediate Recall	5	40	21	12	7
Delayed Recall	3	40	20	10	5
Yield 1	7	15	5	6	8
Shift	3	20	3	4	4
Total Suggestibility	10	35	8	10	13

\* IQ = 51 – 75

Mr. Johnson's immediate and delayed memory is markedly poor compared to other individuals involved in a forensic context and poor when compared to individuals with intellectual disabilities. His tendency to yield to leading questions is somewhat higher than others involved in a forensic context and somewhat lower than those with intellectual disabilities. His tendency to change his answers in response to negative feedback is somewhat less than both groups. His total suggestibility is about average compared to others involved in forensic context and somewhat better than average compared to individuals with intellectual disabilities. Compared to adults in the general population, Mr. Johnson's scores reveal some tendency toward suggestibility.

As an adjunctive test, Mr. Johnson completed the Gudjonsson Compliance Scale (GCS). The GCS is a 20-item scale that measures an individual's susceptibility to being "coerced" or "led" into criminal activity by more forceful accomplices. He endorsed 13 out of 20 items. This score is elevated and close to the mean ( $M=14.3$ ) of "alleged false confessors." His sister Beverly Johnson rated her brother on the GCS in terms of his adult functioning and indicated that he met 19 out of 20 traits, which is more than 1.0 standard deviation above the mean for "false confessors."

#### Fetal Alcohol Behavior Scale (FABS)

The FABS was developed at the University of Washington in research on individuals with fetal alcohol behavior disorders (Streissguth et al., 1998). The behaviors assessed in this scale correspond to those most frequently observed in individuals with FASD conditions and fall in the following general categories: communication and speech, personal manner, emotions, motor skills and activities, academic/work performance, social skills/interactions, and bodily/physiologic functions.

Total Score	Mr. Johnson's Score	Median: FASD Cohort	Mean: FASD Cohort	Mean: Normal Cohort
36	21	21.0	20.3	5.0

Mr. Johnson's score on the Fetal Alcohol Behavior Scale is identical to the median of scores in the FASD sample population and more than four times higher than scores in a sample of normal individuals. This high concordance with behaviors known to be associated with FASD represents a "signature" behavior pattern that is unique to individuals affected by prenatal alcohol exposure.

#### Symptom Checklist-90-Revised (SCL-90-R)

The SCL-90-R screens for a broad array of psychological problems and symptoms of psychopathology. Overall, Mr. Johnson's symptom profile reveals a pattern and magnitude in the clinical range. He endorsed a marked number and intensity of symptoms, indicating significant psychological distress.

#### **DIAGNOSTIC IMPRESSIONS**

Testing data and school history support a diagnosis of Learning Disorder NOS. Dr. Connor also noted that based on his neuropsychological testing, Mr. Johnson also met criteria for Attention-Deficit/Hyperactivity Disorder.

**Based on reliable evidence of significant global deficiencies in cognitive functioning and adaptive behavior deficits in seven functional domains, it is my opinion to a reasonable degree of psychological certainty that in addition to the disorders noted above, Ernest Johnson also meets criteria for Mild Mental Retardation.** This opinion is consistent with a physical examination finding by Dr. Richard Adler that Mr. Johnson's orbitofrontal circumference falls at or below the 5<sup>th</sup> percentile. According to the CDC (2004), this OFC measurement is well below the threshold for establishing structural brain damage (i.e., 10<sup>th</sup> percentile).

Mild Mental Retardation refers to individuals who used to be categorized as "educable." Approximately 85% of individuals who are mentally retarded fall in the Mild range of mental retardation. The *DSM-IV-TR* describes the functional level of this group as follows:

"As a group, people with this level of Mental Retardation typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas; and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they 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, especially when under unusual social or economic stress." (p. 43)

According to the *DSM-IV-TR*, Mental Retardation is a lifelong condition involving *significantly subaverage general intellectual functioning* (Criterion A) that is accompanied by significant limitations in *at least two areas of adaptive functioning* (Criterion B), with an onset before age 18 (Criterion C).

The *DSM-IV-TR* also notes: "**early alterations of embryonic development**" is a predisposing factor for mental retardation, and prenatal damage due to toxins such as maternal alcohol consumptions is listed as an example in this category (p. 45).

#### **Criterion A: General Intellectual Functioning**

"General intellectual functioning" is defined as an intelligence quotient (IQ) obtained by assessment with one or more standardized, individually-administered intelligence tests (e.g., WISC/WAIS, Stanford-Binet, Kaufman). Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). The *DSM-IV-TR* notes there is a measurement error of approximately 5 points in assessing IQ (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. (*DSM-IV-TR*, pp. 41-2)

Flexibility in the IQ threshold also is important because tests given at different times may show slight variations due to test differences and testing error. The standard error measurement on IQ tests is generally three to five points. The Flynn Effect is another factor that affects test scores. The Flynn Effect refers to the rise of average IQ test scores over the generations, with an increase every decade of approximately 3 IQ points (i.e., an annual increase of .33). Because of this phenomenon, IQ tests are re-normed periodically, and the mean is reset to 100. The revised versions are then standardized on new samples and scored with respect to those samples alone. The Flynn effect is identified in several IQ test manuals, such as the WAIS-III. Furthermore, the AAIDD has firmly instructed clinicians to allow for it:

"On average, the Full Scale IQ increases by approximately 0.33 points for every year elapsed since the test was normed (Flynn, 1999). 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 norm 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" (*User's Guide: Mental Retardation, Definition, Classification and System of Supports*, 10<sup>th</sup> Ed., Washington, DC: American Association of Individuals with Developmental Disabilities/AAIDD, p. 20).

Ernest Johnson has taken 7 standardized IQ tests since third grade, and his scores with the Flynn adjustment are shown in the following table:

Test and Date	Full Scale IQ	Administrator	Normed Test Dates	Flynn Effect w/ Coefficient of .3	Adjusted Score after Flynn Effect
WISC 10-6-68	72	Charlotte Huffstutter	1949	-5.7	66.3
WISC 10-4-72	63	Charlotte Huffstutter	1949	-6.9	56.1
WAIS-R 11-5-94	78	Carole Bernard	1981	-3.9	74.1
WAIS-R 12-13-95	84	Dennis Cowan	1981	-4.2	79.8
WAIS-III 12-6-03	67	Denis Keyes	1997	-1.8	65.2
WAIS-III 7-21-04	67	Wayne Bradshaw	1997	-2.1	64.9
WAIS-III 8-2-08	70	Paul Connor	1997	-3.3	66.7

83-04 71 Paul Connor 1997 -3.6 66.4  
All but one of the 7 IQ tests administered to Mr. Johnson since age eight have found scores in the mental retardation range, and his IQ score at age eight is almost identical to his IQ score at the current time.

#### **Criterion B: Adaptive Behavior Impairments**

According to the *DSM-IV-TR*, adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. Adaptive functioning may be influenced by various factors, including general medical conditions that may coexist with Mental Retardation (e.g., FASDs). The *DSM-IV-TR* notes that evidence for adaptive deficits may come from one or more reliable independent

sources (e.g., teacher evaluation and educational, developmental, and medical history) as well as standardized scales of adaptive functioning (e.g., Vineland). Mental retardation requires significant limitations in two or more of the basic skill areas necessary to cope with the requirements of everyday life (e.g., communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. Results of the current assessment found reliable convergent evidence of adaptive skill deficits in 7 areas:

#### Communication

- According to family members, Ernest Johnson was developmentally delayed in talking, and his siblings reported ongoing social delays in communication. For example, Dr. Keyes noted in the Third Penalty Phase that Bobby, Jr., and Beverly Johnson reported observations of their brother's communication difficulties:

"In conversation, he would keep talking on and on and on, or he would just be quiet. There was no give and take of normal conversation."

- Reliable convergent evidence for these sibling reports comes from Mr. Johnson's achievement scores in elementary school, where language arts scores were consistently one or more standard deviations below the mean throughout school.
- Additional convergent evidence of communication deficits were found in independent neuropsychological evaluations conducted by Dr. Keyes in 2003 and Dr. Connor in 2008, both of whom found that Mr. Johnson's communication skills were consistently below sixth grade level.
- Standardized assessment with the Vineland Adaptive Behavior Scales in 2003 by Dr. Denis Keyes indicated that Mr. Johnson's communication skill level fell below the .01 percentile (i.e., 3 standard deviations below the mean).
- IQ testing on the WAIS-III in December 2003 by Dr. Keyes found a Verbal IQ of 69 (i.e., approximately 2 standard deviations below the mean), IQ testing on the WAIS-III in July 2004 by Wayne Bradshaw found a Verbal IQ of 67 (i.e., more than 2 standard deviations below the mean), and IQ testing on the WAIS-III in August 2008 by Dr. Paul Connor found a Verbal IQ of 70 (i.e., approximately 2 standard deviations below the mean). Thus, verbal skill scores were consistent across three independent administrations of cognitive testing.

## Socialization

- Mr. Johnson reported to social historian James Dempsey that he did not have many friends in childhood and that his peers used to tease him in grade school.
- Bobby Johnson, Jr., reported that his younger brother was frequently taunted in school because he was quiet, kept to himself, and tended to be "easily influenced by others." As he got into his mid-teens, he "tried to fit into the crowd and started getting into trouble." (1691)
- Dr. Cowan noted in his report (3-21-96) that Mr. Johnson's brother, sister, stepbrother and stepsister independently reported that he had no close friends during childhood, and those he associated with in his teens and young adult years "were individuals who used alcohol and other drugs." His experience with women "was also limited." The only exception in this pattern was his relationship with Mary (Deloris) Grant.
- Dr. Keyes described socialization deficits during his testimony in the Third Penalty Phase:

"...both his brother and his sister said his (socialization) behaviors were severely deficient....He had tantrums when he was younger. He'd forget to keep a secret. If he was denied his own way, he'd go into tantrums. He didn't know how to use a fork and a spoon. He used his fingers....When he was young, he didn't have a best friend or a friend of the opposite sex."

- In his interview for the current evaluation, Mr. Johnson stated:

*I had an invisible friend. I can't remember his name. I played with him every day. I had nobody else to play with. My sister and brother would go to school. I played with him till I was in school. I was like a loner in elementary school. I was slow....I always talked slow....Kids made fun of me....They used to call me 'grandma's boy.' I was. Everywhere she went, I went....I'd be right there, holding her dress till I was ten or eleven....They'd make fun of my clothes....When I got to the 7<sup>th</sup> and 8<sup>th</sup> grade, I was out back in a trailer for special ed. They saw I was different and called me names: 'dummy, retard.' In my mid-teens, I played basketball and had friends there. They were all using drugs.*

- Standardized assessment by Dr. Keyes in 2003 with the Vineland (where one of the informants was a former teacher) provides reliable convergent

evidence of socialization deficits: Mr. Johnson's Social Skills fell below the .01 percentile (i.e., 3 standard deviations below the mean).

#### Self-Direction (Executive Functioning)

- In 1979, a Diagnostic Center report noted that Mr. Johnson was "very childlike" and "apparently impulsive" and had "very little insight as regards his responsibility for his actions." The report also noted that it did not appear he was "capable of the judgment necessary to prevent him from engaging in criminal behaviors in the future" and recommended that in order to be successful, he needed "a controlled environment, strong guidance and community support following his release."
- In 1979, parole officer Sherry Aslin noted in an Investigation Report that Mr. Johnson was "an impulsive type of individual, getting what he wants first and then thinking about the consequences of how he got it." She viewed his ability to attain a high school education as "questionable."
- Mr. Johnson's law-breaking behavior prior to the instant offense involved impulsive crimes of theft that revealed recurrent problems with executive functioning and self-regulation.
  - At age 14 or 15, he broke into a trailer and stole a half gallon bucket of mobile home keys;
  - At age 15, he stole a stereo from a home;
  - At age 17, he and a co-defendant went into a Laundromat, and the co-defendant stole money out of the change machine;
  - At age 18, he saw keys in the ignition of a car and went joy riding to his girlfriend's house, eventually selling two tires, wheels, and jumper cables from the car for a small amount of money;
  - At age 19, he stole a portable cassette player from the back seat of a car and also stole a golf cart from the governor's home;
  - At age 21, he and a young teenage girl snatched purses belonging to two women and stole food stamps out of the purses; he and this accomplice also broke into a Sears store and stole stereo equipment;
  - At age 23, he stole cheese and a turkey roll from the prison food service department and on two later occasions stole 2 pounds of coffee and yeast; and
  - At age 31, he entered a sorority house without permission to take aluminum cans so he could sell them.

- At age 26, Mr. Johnson was paroled and continued to demonstrate self-regulation deficits within the community:
  - Directed to go directly to a 90-day drug treatment program after his release, he went instead to his girlfriend's home. A parole violation was issued, and he remained on the run for eight months before being returned to prison.
  - Released in 1989 to PMI, he soon moved in with his sister Beverly but was unable to find work.
  - In February 1990, he appeared in court and pled guilty to possession of a hash pipe. He freely admitted that the pipe was his, and he'd used marijuana twice since his release from PMI.
  - Less than a year after completing parole in 1990, he was charged with second degree burglary after entering the sorority house for aluminum cans and was sentenced to four years in prison.
  - As in his previous prison terms, he had multiple rule infractions and was again released to PMI in April 1993 and then to his girlfriend Deloris Grant's home, working odd jobs when he could find them and smoking crack cocaine on a daily basis.
- During his interview for the current evaluation, Mr. Johnson reported that he was "always getting into stuff" in childhood (e.g., taking food items from the kitchen), and he began stealing food and clothing around age 15. His description of his initial episodes of stealing reveals the childlike quality of his cognitive processing:

*I used to think I was the first black cowboy. I had a horse, right? I'd get on my horse and ride to the firecracker stand and steal their money in a box and ride off. I really had a horse. I had cowboy boots, a cowboy hat. I watched cowboy shows, Rawhide, Big Valley, Rifle Man, Bonanza. I did this (stealing) about 10-11 times. I did it at different firecracker stands. I bought my sister school clothes with the money. Back then, they had reversible slacks, and I had 5-6 pairs. I didn't need any more, but I would buy some every now and then. I would mostly buy (Beverly) clothes because I knew she wanted to look good. I loved my sister.*

According to Mr. Johnson, he moved from stealing cash boxes at firecracker stands to stealing a golf cart from the governor's home. When asked why he did that, he stated: "I had never rode anything like that before. It looked cool, like a real car."



- Standardized assessment with the Behavior Rating Scales of Executive Function-Adult Version found clinical elevations of one standard deviation or more on all scales but Organization of Materials when scored by Mr. Johnson and on all scales but Organization of Materials and Self-Monitoring when scored by his sister Beverly. Their assessments indicate significant self-regulation deficits in impulse control, ability to change strategy midstream if the situation calls for it, multi-tasking, ability to independently generate ideas and to problem-solve, ability to modulate emotional responses, and ability to plan and organize effectively and strategically (including foreseeing possible consequences and developing contingency plans).
- Recent standardized testing by Dr. Connor provided reliable convergent evidence of executive skill deficits with results that fell one of more standard deviations below the mean in a number of areas including generation of ideas in both verbal and nonverbal modalities, difficulty inhibiting well-learned responses, significant difficulties multi-tasking, trouble developing and maintaining problem solving strategies, and slowed information processing.

#### Daily Living Skills

- None of the records reviewed indicated that Mr. Johnson had ever been able to live independently in the community. Throughout much of his 20s, he lived with relatives, and at the time of his instant offense, he was living with Deloris Grant, who was employed full time.
- Mr. Johnson reported in his interview for the current evaluation that he lived with his grandmother and father throughout his teens except for summers in his mid-teens with his mother. During his 20s and early 30s, he reported that he lived with girlfriends when he wasn't living with family. He reported that he has never lived on his own.
- Step-brother Albert Patton reported in a memo (12-9-04) that it was his observation that Mr. Johnson "had a difficult time taking care of his everyday needs." He "never fixed a meal for himself" and "could not wash his clothes by himself."
- Former girlfriend Gloria Johnson met Mr. Johnson in the mid-1980s and dated him off and on for approximately five years. They lived together for 6-8 months at one point in their relationship. She reported in a memo (2-10-05) that during this period of time, she did not recall that he ever had a job except for an occasional odd job that would last "no more than a week or so." It was her recollection that he "could not do much on his own," and

on one occasion, he brought her a job application for a fast food restaurant and asked her to complete it for him. She did not recall that he ever fixed himself a meal, and on one occasion when he tried to do the laundry at her house, "he had no clue."

- Dr. Keyes testified during the Third Penalty Phase that Mr. Johnson was unable to use public transportation.
- Standardized assessment by Dr. Keyes in 2003 with the Vineland provides reliable convergent evidence of deficits below the .01 percentile (i.e., 3 standard deviations below the mean) in personal and community skills

#### Functional Academic Skills

- Mr. Johnson was retained three times in school: twice in elementary school and once in high school.
- Once he began receiving grades for his academic performance in junior high, his grades in many classes were inferior even though he was in the Special Education track where coursework was presumably geared to skill level.
- Achievement test scores throughout school provide reliable convergent evidence of broad deficits in functional academics (i.e., 1 or more standard deviations below the mean).
- Dr. Keyes' standardized achievement testing in 2003 found Reading, Math, and Written Language skills that were approximately 1 standard deviation below the mean.
- Dr. Connor's achievement testing in 2008 revealed scores 1 or more standard deviations below the mean in Letter-Word Reading, Spelling, Math Fluency, and Academic Knowledge.

#### Work

- Mr. Johnson told social historian James Dempsey that it was very difficult for him to find work in Charleston, Missouri, and that the only jobs he could find were chopping beans or working in the fields for very low wages.
- In his interview for the current evaluation, Mr. Johnson reported: "I was never the working type....I found little jobs like cleaning up and stuff like



that, but I wouldn't stick with it because it wasn't what I wanted. I wanted a job that was paying big money." He reported that he'd had "only three real jobs" in his entire life: he was a janitor at an automotive company for 3-4 months ("I just did this to get out of the halfway house"), a cook at Wendy's for a few weeks, and a stock boy at Walgreens in Chicago for two months ("my brother was the manager...I was drunk half the time").

- In 1979, parole officer Sherry Aslin noted in an Investigation Report that Mr. Johnson's work experience has been "mostly that of a farm laborer."
- A DOC Chronological Data Sheet (9/83) noted "no particular vocational training skills" and a work history consisting of "a few menial labor jobs and some general labor work," which caused the official to note that Mr. Johnson had "very little meaningful work (experience)."
- Tom Powell, treatment coordinator at PMI, testified in the penalty phase of the 1994 trial that Mr. Johnson even had trouble holding on to menial jobs.

#### Health

- Mr. Johnson told social historian James Dempsey that he started drinking alcohol at age 14 or 15. His alcohol consumption increased significantly at age 17, when he would drink about twelve beers per night along with gin every other night. Around age 32, his drinking escalated to a case of beer per night. He also had numerous blackouts and had to drink in the mornings to make the sickness go away. He reported that he began smoking marijuana at age 15 (a \$25 bag of marijuana per week) and would sell marijuana cigarettes in high school to pay for his habit. At age 27, cocaine became his drug of choice. He soon began smoking approximately one gram of crack cocaine per day. He continued to use cocaine during his incarceration in his late 20s, noting that it was "many times easier getting drugs while incarcerated." After being sent to PMI at age 32, he continued using cocaine and drinking alcohol. After his release from PMI at age 33, his cocaine habit increased to an "eight ball" per day (3.5 grams). He hustled to pay for his drug habit, which soon increased to 5.5 grams per day. He reported to Mr. Dempsey that on the day of instant offense, he smoked three eight balls of crack cocaine.
- According to official records, in 1990 Mr. Johnson was under the influence of alcohol when charged with hitting his girlfriend. In 1991, when arrested for breaking and entering, he was under the influence of alcohol, and cocaine and marijuana. According to Mr. Johnson's report during his interview for the current evaluation, he was under the influence of alcohol

and drugs during all of his criminal activity from age 15 through the instant offense. He reported only rare, brief times from age 15 through 33 when he would go more than a day without drinking and using illegal drugs.

- Mr. Johnson told James Dempsey that when he was in PMI's drug program, he used drugs the entire time.
- Two reliable informants confirmed that Mr. Johnson had a substance abuse problem: Dennis Booth (parole officer) and Reverend Clanton Dawson (pastor).

### ***Criterion C: Manifestation before Age 18***

Mental retardation manifests during an individual's developmental period, which is usually considered birth through age 18. Mental retardation is virtually impossible for an adult to fake because when evaluating whether an adult is mentally retarded, examiners not only look at IQ test results but also at school reports, childhood test records, and other evidence that would show whether intellectual and adaptive problems developed during childhood. With respect to Mr. Johnson, primary source documents establish significant cognitive and adaptive skill deficits in childhood (e.g., Special Education designation, grade retention three times, consistently deficient achievement scores over five years, and two IQ scores at age eight and twelve that fell within the mental retardation range). These records provide reliable evidence that his mental retardation manifested during childhood. Two recent neuropsychological evaluations conducted in 2003 and 2008 provide reliable standardized information that Mr. Johnson remains significantly impaired in multiple domains of cognitive and adaptive functioning.

### **DIFFERENTIAL DIAGNOSIS**

Several factors are relevant in terms of possible diagnoses that might account for some or all of Mr. Johnson's broad deficits as well as his instant offense conduct:

- 1) He has a history of head injury: At eight years of age, he fell off a wagon and sustained a head injury of unknown severity, and in 1989, he was struck in the head by a metal folding chair and treated at a hospital.
- 2) He has a history of substance dependence: He began drinking alcohol around age 12. By age 17, he was drinking up to twelve beers and some gin on a daily basis. By age 32, he was drinking up to a case of beer per day. He suffered from black-outs and other signs of withdrawal and drank in the morning to diminish sickness. He began smoking marijuana at age

15, and he was smoking crack cocaine by his late 20s. His use of crack had increased to 5.5 grams per day by his early 30s. He reported that on the day of the instant offense (February 13, 1994), he had smoked "three eight-balls" of crack (approximately 10.5 grams) as well as consuming up to 60 ounces of beer.

Dr. Smith concluded in his 1996 report that Mr. Johnson met criteria for Alcohol, Cocaine, and Cannabis Dependence. Dr. Parwatikar testified in the Third Penalty Phase that Mr. Johnson suffered from cocaine and alcohol dependence at the time of his instant offense.

Dr. Kline, who conducted the only court-ordered evaluation found in the record, also diagnosed Mr. Johnson with Alcohol, Cocaine, and Cannabis Dependence.

- 3) Acute cocaine intoxication: Dr. Parwatikar, forensic psychiatrist, testified in the Third Penalty Phase that he examined Mr. Johnson for two-and-a-half hours, and it was his opinion that Mr. Johnson suffered from cocaine intoxication delirium at the time of the offense. His opinion was based on Mr. Johnson's report that he'd used three eight-balls (8-11 grams of cocaine) on the day of the instant offense. (PCR Record on Appeal)

Dr. Carole Bernard also testified in the first PCR that based on her review of the records and Mr. Johnson's self-report, it was her opinion he was suffering from cocaine intoxication at the time of the instant offense. (60)

- 4) Deficient cognitive functioning due to genetic factors, non-alcohol related prenatal factors, or post-natal factors (e.g., environmental factors): There is no evidence in the record involving specific genetic conditions on either side of Mr. Johnson's family. However, both ancestors and descendants of birth mother Jean Patton had substance abuse problems. Moreover, medical records indicate that Jean Patton was mentally retarded and, with the exception of Bobby, Jr., and Beverly Johnson, all of her children were mentally retarded. Neglect and an impoverished childhood environment also may have adversely impacted Mr. Johnson's neurodevelopmental functioning as well as other environmental factors such as residential and caregiver instability, physical and sexual abuse, lack of a consistent father figure, chronic exposure to alcohol and drug abuse by his parents, and rejection by both parents in childhood and adolescence.
- 5) Antisocial personality disorder: Of the 8 forensic experts involving in this case since 1993, only Dr. Peters, DO, concluded that Mr. Johnson met criteria for Antisocial Personality Disorder, and he reached this conclusion without having conducted a face-to-face interview. According to the *DSM-*

*IV-TR*, Antisocial Personality Disorder requires evidence of a conduct disorder by age 15, at least three of the following criteria: repeated unlawful behavior, deceitfulness, impulsivity, irritability and aggressiveness as indicated by repeated physical fights and assaults, reckless disregard for safety of self or others, consistent irresponsibility, and lack of remorse. The *DSM-IV-TR* also notes:

"When antisocial behavior in an adult is associated with a Substance-Related Disorder, the diagnosis of Antisocial Personality Disorder is not made unless the signs of Antisocial Personality Disorder were also present in childhood and have continued into adulthood." (p. 705)

Thus, while Mr. Johnson did show evidence of repeated unlawful behavior, impulsivity, and consistent irresponsibility, he also showed evidence of substance abuse beginning around age 12, with symptoms of that abuse escalating through his teens and into his adult years. As there is no documented evidence of conduct disorder symptoms preceding his substance abuse and no documented evidence of antisocial symptoms that occurred during a period of sobriety, Antisocial Personality Disorder is ruled out. This opinion is consistent with structured SCID-II assessment of Conduct Disorder and Antisocial Personality Disorder symptoms in the current evaluation and with perceptions of Mr. Johnson's behavior by six family members, one acquaintance, one former employer, one pastor, the counselor at Mr. Johnson's halfway house (a former pastor and probation officer), and Mr. Johnson's probation officer at the time of his instant offense, all of whom reported characteristics and behaviors that were inconsistent with Antisocial Personality Disorder:

- Bobby Johnson, Sr. (biological father) reported that Ernest Johnson was always respectful of others and did not get into fights. The only trouble he got into as he got into his teens years was stealing. (1674)
- Jean Patton (biological mother) reported that Ernest Johnson never picked on people, but if someone bothered him, he would fight back. (1677)
- Bobby Johnson, Jr. (brother), reported that his younger brother was the comedian type who did silly things to make people laugh. He also reported that his brother was never the type to pick fights with others. (1691)

- Rosie Green (maternal grandmother) reported that her grandson was a "good child" who was "very polite to people and never rude." She could not remember him getting into any trouble as a child. She noted that her daughter "used to whip Ernest as a child to make him mind her," but she never had any major problems from him in terms of his behavior. She reported that he never used drugs as a child and young adolescent. (1678)
- Rose Lawson (half-sister) reported that Ernest Johnson was not the violent type. (1687)
- Albert (Earl) Patton (half-brother) reported that Ernest Johnson was never a troublemaker or one to pick fights with people and that he was "always into his women and not into bothering people." (1692)
- Gregg Logan (college friend of Ernest Johnson's older brother Bobby, Jr.) reported that Mr. Johnson was always in trouble for stealing things but was not a violent person. He described him as "always a mild-mannered individual." (1693)
- Dennis Booth (Ernest Johnson's Parole Officer from late summer 1993 until his arrest in 1994) reported that when he would shoot basketball with Mr. Johnson at PMI and he and others would foul him "very hard," Mr. Johnson never got angry but simply continued the game with a positive attitude. He reported that Mr. Johnson was "always polite and thoughtful of others," "always straight" with him, and "never lied" to him. He reported that Mr. Johnson would tell him the truth about things, including breaking the law, even though he knew he would get into trouble. Mr. Johnson came to him at one point and disclosed that he had a serious problem with alcohol and cocaine, and Mr. Booth advised him to check himself in to treatment, which Mr. Johnson did (he was put on a waiting list). He described Mr. Johnson as a "good person" who was "not a bully nor antisocial." (1694) He noted that the instant offenses were "totally uncharacteristic" of him, and he "could never have committed a crime like he's accused of unless he was crazed out of his mind." (1695) Mr. Booth also testified about Mr. Johnson's honesty in 1995 during the penalty portion of the trial, noting that he never had to urine-test Mr. Johnson because "he admitted to usage, so there wasn't a need...." (2528) He also reiterated in his testimony that he had never seen Mr. Johnson violent or out of control. (2532)
- Tom Powell, treatment coordinator at PMI (and former Catholic priest and probation officer) reported that he knew Mr. Johnson

when he was in PMI and also played basketball with him. He reported that Mr. Johnson was a "good" person who had "feelings for others" and was "not a violent person" and "not a snitch." He described him as "soft-spoken" and as someone who did not cause problems for staff or other participants in PMI. Mr. Johnson was "always friendly" with others and had "no history of violent crimes prior to his present arrest." (1696) Mr. Powell reported that the first time Ernest Johnson was in PMI in 1989, he found a job and did well. During his second time in PMI in 1993, he was "very lethargic and depressed" and was "not able to find any work the second time around, even though he went out every day and completed the required amount of job applications daily." He suspected that Mr. Johnson was using drugs the second time in PMI even though he "never tested positive." (1697) In the penalty phase of trial, Mr. Powell also testified that Mr. Johnson was "low-key...very agreeable. The staff and residents got along well with him. He was not aggressive toward other residents. He was soft-spoken...polite." (2566) He also noted that he was "incredulous" when he learned about the instant offense: "Ernest did not appear to me to be a person who was violent by nature." (2569)

- Reverend Clanton Dawson reported that shortly before the instant offense, Ernest Johnson disclosed a serious drug problem to him and wanted his help in changing his life. Mr. Johnson told Reverend Dawson he was having difficulty with crack cocaine and "saw joining the church as a first step to recovery." Reverend Dawson reported that he counseled Mr. Johnson on two occasions and in early February 1994, he stood up in church, stated that his life was a "mess and out of control," and that he was giving it up to God. He was going to be baptized the following Sunday. Reverend Dawson perceived that Mr. Johnson was sincere and that he "was hitting bottom and wanted to make a radical change." (1698)
- Elcie (bar owner) reported that Mr. Johnson worked for him periodically and always showed up for work on time and did his job well. He said that Mr. Johnson "was never a problem or trouble maker and got along with others." (1699)
- Dr. Carole Bernard testified in the first PCR that she ruled out Antisocial Personality Disorder because "several times he expressed remorse on what he had done and that he wished that he hadn't done that and his sorrow over his use of cocaine." (70)

## **LACK OF INTERVENTION**

By the time of his instant offense, Mr. Johnson had received no interventions for any of his problems.

## **INSTANT OFFENSE**

Mr. Johnson has been convicted of capital murder and sentenced to death. Evaluations by forensic examiners indicate the following self-reports:

- In 1995, he told Dr. Cowan that although he remembered smoking approximately 10.5 grams of cocaine (three eight-balls) prior to the offense, he could not recall any of his actions at Casey's.
- In 1996, he gave Dr. Smith a detailed account of his actions on the day of the offense, ending his description with the point at which he shot the male employee. His next recollection is after the offense when he purchased two grams of crack cocaine and stopped at a woman's house to use it with her.
- In 2004, he told Dr. Heisler that he became angry when one of the female employees tried to flush the key to the safe down the toilet. However, he also told Dr. Heisler that he "shot the people before brutalizing their bodies with a hammer." According to police investigation reports, only the male victim was shot.

Except for a few details he provided to Dr. Heisler, one of which was inconsistent with the record, Mr. Johnson has never given a detailed account of his actions once he arrived at Casey's. In the current assessment, he provided a detailed description of his behavior on the day of the offense, which was consistent with details he had previously reported to Dr. Smith. He noted that on that day, he smoked more crack cocaine than he typically smoked and also drank three 40-ounce bottles of beer. He said he was distraught that day due to a break-up with his girlfriend Deloris Grant. He then stated that he shot the male employee at Casey's. He acknowledged that Rod and Antoine Grant were involved in the instant offense, but he didn't provide any specific information about the extent of their involvement.

## **OPINION**



**Overall, to a reasonable degree of psychological certainty, data in this assessment support three conclusions that are supported by convergent reliable data:**

1. Ernest Johnson meets criteria for Mild Mental Retardation based on standardized IQ testing from childhood to the present and lifelong adaptive behavior deficits in seven categories.
2. Testing in the current evaluation and data from multiple collateral sources, including professionals and official records as well as family members, provides convergent evidence of multiple primary and secondary functional disabilities consistent with an FASD diagnosis.
3. Antisocial personality disorder, suggested by Dr. Peters as the direct causal explanation for Mr. Johnson's offense conduct, is ruled out based on convergent collateral data from multiple individuals (including professionals) with firsthand knowledge of Mr. Johnson's behavior in a variety of contexts.

While assessment of environmental events indicates Mr. Johnson was exposed to numerous childhood traumas that undoubtedly influenced and increased his neurodevelopmental problems, these factors are insufficient to explain the breadth of his deficits and behaviors over the course of his life. In contrast, FASD offers a parsimonious explanation for all of the data.

With respect to how an FASD condition could have influenced Mr. Johnson's offense conduct, it is his executive functioning that is most relevant. When faced with events that trigger emotional distress, individuals with FASD often overreact and behave impulsively because of deficits in executive functioning, specifically the ability to self-monitor and foresee consequences, inhibit responses, and change behavior when it is not having the desired effect. It is not uncommon for individuals with FASD to run away, make dramatic suicidal gestures, or lash out in unfocused aggression when faced with a traumatic stressor as they lack the ability to handle frustration effectively. In some individuals with FASD, executive functions are so severely affected that there is chronic difficulty in functioning appropriately in virtually every context. In other individuals, executive function impairment is noticeable only at certain times, such as when the individual is severely stressed, encounters multiple unfamiliar environmental stimuli, and/or is under the influence of a substance that further compromises executive functioning (e.g., alcohol and/or drugs).

**In Ernest Johnson's case, data from childhood to the present reveal chronic and significant executive function deficits in three areas that are particularly relevant to the instant offense: impulse control, ability to**



strategically and effectively plan his behavior while considering possible consequences, and ability to change strategies midstream. Given these deficits, Mr. Johnson was not capable of using good judgment, reasoning, or impulse control during the robbery he planned in the instant offense just as he was not capable of using good judgment, reasoning, or impulse control in most other aspects of his life before and after the instant offense. Although he was capable of unsophisticated "planning" in terms of trying to disguise his appearance and taking a gun to Casey's, his plan for easily intimidating an employee into opening the store safe and making a quick getaway with the cash was disrupted early into the robbery. The events of the instant offense as constructed by the prosecution leave little doubt that there were unexpected events that occurred during the commission of the robbery (e.g., the male employee's disturbance after he'd been secured in a back room, the female manager's trying to flush the key to the safe down the toilet) for which Mr. Johnson had no effective contingency plan. Given his executive function deficits, exacerbated by additional disinhibition from cocaine and alcohol use preceding the offense, unrestrained rage and over-reaction were a predictable outcome to the unexpected courage and resistance shown by the store employees. His unsophisticated and ineffective "disposal" of evidence following the offense was also predictable. This analysis is not meant to diminish his culpability in this horrible crime but rather to explain the exaggerated, uncontrolled, and disorganized nature of his conduct due to the brain damage inherent in his FASD condition.

Thank you for referring this case to me for assessment.

Yours truly,

A handwritten signature in black ink, appearing to read "Natalie Novick Brown".

Natalie Novick Brown, PhD

## APPENDIX A Document Review

### Social History

Undated James Dempsey

### School Records

### Medical Records

03/21/74, Mid-Missouri Mental Health Center, Columbia, 11/16/74 ,  
MO (discharge summaries for Jean Patton)  
  
11/19/74 &  
11/22/90

### DOC Records

Undated MO Division of Corrections, Classification and  
Assignment Unit (834)  
04/10/79 MO Dept of Social Services; Division of Probation  
and Parole, Adult Face Sheet  
04/24/79 State of MO Board of Probation and Parole  
Investigation Report  
04/25/79 MO Division of Probation and Parole, Adult Face  
Sheet  
06/11/79 MO DC Classification and Assignment Unit  
Diagnostic Center Psychometric Test Data  
06/15/79 Missouri Division of Corrections, Diagnostic Center  
Report  
07/21/79 Written Statement of Ernest Johnson  
07/21/79 DC Inter-Office Communication  
07/23/79 DC Inter-Office Communication  
07/25/79 DC Inter-Office Communication  
07/30/79 Report of Class Team/Adj Board/Class Committee  
12/17/79 Division of Classification and Assignment Return  
Receipt  
12/27/79 MO DOC, PV Supplement to DC Report  
12/27/79 Initial Protective Custody Hearing  
01/03/80 Handwritten Note from Ernest Johnson  
01/08/80 MO DOC Conduct Violation Report  
05/07/80 Report of Class Team/Adj. Board/Class. Committee  
05/16/80 Report of Class Team/Adj. Board/Class. Committee  
06/17/80 Review  
08/16/80 Conduct Violation Report  
09/08/80 Report of Class Team/Adj. Board/Class. Committee  
10/24/80 Report of Class Team/Adj. Board/Class. Committee

11/13/80	Report of Class Team/Adj. Board/Class. Committee
11/21/80	Review
01/26/81	Report of Class Team/Adj. Board/Class. Committee
11/24/81	Initial Protective Custody Hearing
11/25/81	MO DOC Supplement to DC Report
12/10/81	Protective Custody Hearing
12/31/81	US Dept of Justice FBI
	National Crime Information Center
01/26/82	Chronological Data Sheet
12/23/82	Chronological Data Sheet
02/07/83	MO Training Center for Men
02/15/83	MO Training Center for Men
02/24/83	Protective Custody Hearing
05/27/83	MO Training Center for Men
08/07/84	MO Training Center for Men
08/10/84	MO Training Center for Men
08/21/84	MO Training Center for Men
12/07/84	MO Training Center for Men

#### **Arrest History**

04/26/79	PSI
12/23/81	US Department of Justice

#### **Arrest Statements**

02/15/94-	Columbia Police Department Supplementary Report
02/21/94	
06/24/94	Witness Interviews
03/08/95	Competency Evaluation by Dr. Parwatikar

#### **Trial / Hearing Transcripts**

05/13/95	Trial Transcripts Volume VII (pages 1343-1548)
05/13/95	Trial Transcripts Volume VIII (pages 1549-1774)
05/15/95	Trial Transcripts Volume IX (pages 1775-1999)
05/15/95-	Trial Transcripts Volume X (pages 2000-2231)
05/16/95	
05/16/95	Trial Transcripts Volume XI (pages 2232-2442)
05/17/95	Trial Transcripts Volume XII (pages 2443-2709)
05/21/96	PCR Record on Appeal-Transcript vol.1
1999	Second Penalty Phase

2006 Third Penalty Phase

**Collateral Records: Family, Friends, Acquaintances, Professionals**

12/04/95 Interview Notes w/ Bobby Johnson Sr.  
01/25/01 Meeting Notes with Bobby Johnson, Sr.  
04/20/01 Affidavit of Bobby Johnson, Sr.

various defense interviews of family members, parole officer, PMI  
staff, friends, bar owner

2006 Steven Mason, Teacher: Testimony in Third Penalty  
Phase

2006 Robin Seabaugh, Teacher: Testimony in Third Penalty  
Phase

**Experts**

03/08/95 Dr. Parwatikar: Competency Evaluation  
05/21/96 Testimony of Dr. Parwatikar in PCR Record on  
Appeal

12/13/95 Dr. Dennis Cowan, EdD: Confidential Neuropsychological  
Consultation  
05/21/96 Testimony, Record on Appeal  
02/22/99 Deposition

03/21/96 Dr. Robert Smith, PhD: Mental State Evaluation  
1999 Testimony, Second Penalty Phase

05/13/96 Dr. Carole Bernard: Confidential Memo to File  
05/21/96 Testimony in PCR Record on Appeal

03/02/99 Dr. Jerome Peters, DO: Mental State Assessment  
1999 Testimony in Second Penalty Phase

07/21/04 Dr. Gerald Heisler, PhD: Intellectual Assessment  
07/21/04 Raw test results: WAIS-III

08/10/04 Dr. Denis Keyes, PhD: Psychoeducational Evaluation  
2006 Testimony in Third Penalty Phase

09/14/05 Dr. Jeffrey Kline, PhD: Competency Evaluation

### **Other Records**

02/20/01	Memo to Case File from Catherine Luebbering
11/09/01	Affidavit by Catherine Luebbering, Mitigation Specialist
Videotape	Testing by Wayne Bradshaw / Heisler Interview
Photos	3 childhood photographs

## **Appendix B**

### **Institute of Medicine FASD Criteria**

In 1996, the Institute of Medicine (IOM) developed five diagnostic categories related to fetal alcohol exposure:

#### **Category 1. Fetal Alcohol Syndrome (FAS) with Confirmed Maternal Alcohol Exposure**

*Requires:*

- a. confirmed maternal alcohol exposure
- b. facial dysmorphism, including short palpebral fissures and abnormalities of the premaxillary zone (e.g., flat upper lip, flat philtrum, flat midface)
- c. growth retardation, such as low birth weight, lack of weight gain over time, disproportional low weight to height
- d. neurodevelopmental abnormalities of the Central Nervous System (CNS), such as small head size at birth and structural brain abnormalities with neurological hard or soft signs (e.g., impaired fine motor skills, neurosensory hearing loss, poor tandem gait, poor eye-hand coordination)

#### **Category 2. FAS Without Confirmed Maternal Alcohol Exposure**

*Requires:*

- b. through d. above

#### **Category 3. Partial FAS With Confirmed Maternal Alcohol Exposure**

*Requires:*

- a. confirmed maternal alcohol exposure
- b. some components of the FAS facial pattern
- c. growth retardation as in Category 1
- d. CNS neurodevelopmental abnormalities as in Category 1
- e. Complex pattern of behavioral or cognitive abnormalities inconsistent with developmental level and unexplained by genetic background or environmental conditions (e.g., learning difficulties, deficits in school performance, poor impulse control, problems in social perception, language deficits, poor capacity for abstraction, specific deficits in mathematical skills, and problems in memory, attention, or judgment)

#### **Category 4. Alcohol-Related Birth Defects (ARBD)**

*Requires:*

- a. confirmed maternal alcohol exposure
- b. one or more congenital defects including malformations and dysplasias of the heart, bone, kidney, vision, or hearing systems

#### **Category 5. Alcohol-Related Neurodevelopmental Disorder (ARND)**

*Requires:*

- a. confirmed maternal alcohol exposure
- b. CNS neurodevelopmental abnormalities as in Category 1 *and/or*
- c. complex pattern of behavioral or cognitive deficits as in Category 3

## **APPENDIX C**

### **CDC Criteria (2004)**

#### **I. Facial dysmorphism**

Based on racial norms, individual exhibits all three characteristic facial features:

- a) Smooth philtrum (University of Washington Lip-Philtrum Guide rank 4 or 5)
- b) Thin vermilion border (University of Washington Lip-Philtrum Guide rank 4 or 5)
- c) Small palpebral fissures (at or below 10th percentile )

#### **II. Growth problems**

Confirmed prenatal or postnatal height or weight, or both, at or below the 10th percentile, documented at any one point in time (adjusted for age, sex, gestational age, and race or ethnicity).

#### **III. Central Nervous System Abnormalities**

##### **1. Structural**

- a) Head circumference (OFC) at or below the 10th percentile adjusted for age and sex.
- b) Clinically significant brain abnormalities observable through imaging.

##### **2. Neurological**

Neurological problems not due to a postnatal insult or fever, or other soft neurological signs outside normal limits.

##### **3. Functional**

Performance substantially below that expected for an individual's age, schooling, or circumstances, as evidenced by:

- a) Global cognitive or intellectual deficits representing multiple domains of deficit (or significant developmental delay in younger children) with performance below the 3rd percentile (2 standard deviations below the mean for standardized testing) or
- b) Functional deficits below the 16th percentile (1 standard deviation below the mean for standardized testing) in at least three of the following domains: cognitive or developmental deficits or discrepancies; executive functioning deficits; motor functioning delays; problems with attention or hyperactivity; social skills; other, such as sensory problems, pragmatic language problems, memory deficits, etc.

#### **IV. Maternal Alcohol Exposure**

- a) Confirmed prenatal alcohol exposure
- b) Unknown prenatal alcohol exposure



### **Criteria for FAS Diagnosis**

Requires all three of the following findings:

- a) Documentation of all three facial abnormalities (smooth philtrum, thin vermillion border, and small palpebral fissures);
- b) Documentation of growth deficits
- c) Documentation of CNS abnormality

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# **Appendix K**

AFFIDAVIT

Before me, the undersigned authority, personally appeared Sallie Goodin who, being duly sworn, deposed as follows:

My name is Sallie Goodin. I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of records of Charleston High School. Attached hereto are 6 pages of records from Ernest Johnson. These 6 pages of records are kept by Charleston High School in the regular course of business, and it is the regular course of business of Charleston High School for an employee or representative of Charleston High School with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the act, event, condition, opinion or diagnosis. The records attached hereto are the originals or exact duplicates of the original.

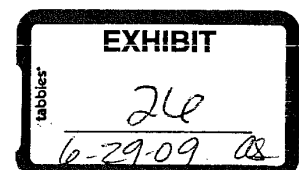
Sallie B. Goodin  
Affiant

In witness thereof I have hereunto subscribed my name and affix my official seal this 26 day of October, 1994

Hammus Kay Rowland  
Signed

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# **ATTENDANCE AND SCHOLARSHIP RECORD - Grades 9 through 12** **Charleston R-1 High School, Charleston, Mo.**

Student's Name Johanson, Ernest Lee Birth Date 6-2-25 Date Admitted 9-2-25

Grade	Year 1925 1926			Year 19 19			Year 19 19		
	Subjects	Teachers	Semester 1 2	Subjects	Teachers	Semester 1 2	Subjects	Teachers	Semester 1 2
English I (R)			E-1 I-1						
Amer. Hist. (R)			E-1 I-1						
Phys. Science			E-1 I-1						
Vo. Ag. I			E-1 I-1						
Math I (R)			E-1 I-1						
Dev. Reading			E-1 I-1						
P.E.			E-1 I-1						
No. of Solids:			1 2						
Days Absent:			1 17						
Times Tardy:									
Average									

Grading Explanation	
GRADE	PERCENTAGE
E	100-95
E-	94-90
S+	89-87
S	86-83
S-	82-80
M+	79-77
M	76-73
M-	72-70
I+	69-67
I	66-63
I-	62-60
F	under 60

Termination of Attendance \_\_\_\_\_ Date \_\_\_\_\_  
Reason: Graduation \_\_\_\_\_  
Other: \_\_\_\_\_

Legal curriculum requirements met, constitution and institution \_\_\_\_\_ Date \_\_\_\_\_  
Total Credit in Grades 9-12 \_\_\_\_\_  
Number in Senior Class \_\_\_\_\_  
Rank in Senior Class \_\_\_\_\_

Grade	Year 19 19			Year 19 19			Year 19 19		
	Subjects	Teachers	Semester 1 2	Subjects	Teachers	Semester 1 2	Subjects	Teachers	Semester 1 2
No. of Solids:									
Days Absent:									
Times Tardy:									
Miscellaneous Information:									
<div> <div>1735</div> <div>12-10-16</div> </div>									





STUDENT		SEX	BIRTH DATE	BIRTH PLACE	BOB	EDUCATION	GRADING EXPLANATION		
Johnson, Ernest		M	1974-06-30	Steel, Mo.		7th			
FATHER Johnson, Bobby				Mississippi		3rd			
MOTHER Johnson Jean Anna				Steel, Mo.					
Stop-Parent or Guardian		MISCELLANEOUS INFORMATION							
Personal Address									
With Whom Living?									
What relation are these people?		7th							
GRADUATES 7-8		1974-75		1975-76		1976-77		1977-78	
SUBJECTS		Semester 1		Semester 2		Semester 1		Semester 2	
LANG. ARTS		S		S		S		S	
MATH		S		S		S		S	
SOC. STU.		M		M		M		M	
ECL		I		I		I		I	
MUSIC		I		I		I		I	
ARTS		S		S		S		S	
PHY. ED		E		E		E		E	
DAYS PRESENT		174		174		174		174	
DAYS ABSENT		8		8		8		8	
Termination of Attendance Date		8/1/75		8/1/76		8/1/77		8/1/78	
Promoted to Grade		8		8		8		8	
Other									
GRADE		Year 19		Year 19		Year 19		Year 19	
SUBJECTS		TEACHERS		TEACHERS		TEACHERS		TEACHERS	
No. of Solids		Grade Points		Grade Points		Grade Points		Grade Points	
Days Absent		Days Absent		Days Absent		Days Absent		Days Absent	
Times Tardy		Times Tardy		Times Tardy		Times Tardy		Times Tardy	
Termination of Attendance Date		Reason: Graduation		Reason: Graduation		Reason: Graduation		Reason: Graduation	
Total Number of Credits		Total Number of Credits		Total Number of Credits		Total Number of Credits		Total Number of Credits	
Number in Senior Class		Number in Senior Class		Number in Senior Class		Number in Senior Class		Number in Senior Class	





Johnson, Ernest  
Name of Pupil

# STUDENT CUMULATIVE RECORD

NOTE: RECORD ALL CHANGEABLE ITEMS IN PENCIL

PERSONAL AND FAMILY DATA									
NAME	DATE	VERIFICATION	PLACE OF BIRTH	DATE DECEASED	RACE	CITIZEN	EDUCATION	AMOUNT-KIND	
Johnson, Ernest		60 077772	Steel, Mo.		N	Yes			
Father			Mississippi		N	Yes	Grade 7		
Mother			Steel, Mo.		N	Yes	Grade 3		
Step Parent or Guardian									
PRESENT ADDRESS	DATE	TELEPHONE	Father's Occupation	Mother's Occupation	No. of Children	No. Younger	No. Older	No. of Person Living in Home	PREVIOUS SCHOOLS ATTENDED
Rt. 3, Box 1A			Farming	Housewife	5	2	2	7	Washington
Charleston, Mo.									Wyatt, Mo.

PHOTOGRAPHS

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TEST RESULTS: ACHIEVEMENT									
TEST	DATE	SCORE	PERCENTILE	STANDARD SCORE	GRADE EQUIVALENT	REMARKS	TEST	DATE	SCORE
JOHNSON ERNEST	1-2-60	44	2	19	1.5		JOHNSON ERNEST	1-2-60	44
JOHNSON ERNEST	3-4-60	47	2	20	1.5		JOHNSON ERNEST	3-4-60	47
JOHNSON ERNEST	5-6-60	48	2	21	1.5		JOHNSON ERNEST	5-6-60	48
JOHNSON ERNEST	7-8-60	49	2	22	1.5		JOHNSON ERNEST	7-8-60	49
JOHNSON ERNEST	9-10-60	50	2	23	1.5		JOHNSON ERNEST	9-10-60	50
JOHNSON ERNEST	11-12-60	51	2	24	1.5		JOHNSON ERNEST	11-12-60	51
JOHNSON ERNEST	1-2-61	52	2	25	1.5		JOHNSON ERNEST	1-2-61	52
JOHNSON ERNEST	3-4-61	53	2	26	1.5		JOHNSON ERNEST	3-4-61	53
JOHNSON ERNEST	5-6-61	54	2	27	1.5		JOHNSON ERNEST	5-6-61	54
JOHNSON ERNEST	7-8-61	55	2	28	1.5		JOHNSON ERNEST	7-8-61	55
JOHNSON ERNEST	9-10-61	56	2	29	1.5		JOHNSON ERNEST	9-10-61	56
JOHNSON ERNEST	11-12-61	57	2	30	1.5		JOHNSON ERNEST	11-12-61	57
JOHNSON ERNEST	1-2-62	58	2	31	1.5		JOHNSON ERNEST	1-2-62	58
JOHNSON ERNEST	3-4-62	59	2	32	1.5		JOHNSON ERNEST	3-4-62	59
JOHNSON ERNEST	5-6-62	60	2	33	1.5		JOHNSON ERNEST	5-6-62	60
JOHNSON ERNEST	7-8-62	61	2	34	1.5		JOHNSON ERNEST	7-8-62	61
JOHNSON ERNEST	9-10-62	62	2	35	1.5		JOHNSON ERNEST	9-10-62	62
JOHNSON ERNEST	11-12-62	63	2	36	1.5		JOHNSON ERNEST	11-12-62	63
JOHNSON ERNEST	1-2-63	64	2	37	1.5		JOHNSON ERNEST	1-2-63	64
JOHNSON ERNEST	3-4-63	65	2	38	1.5		JOHNSON ERNEST	3-4-63	65
JOHNSON ERNEST	5-6-63	66	2	39	1.5		JOHNSON ERNEST	5-6-63	66
JOHNSON ERNEST	7-8-63	67	2	40	1.5		JOHNSON ERNEST	7-8-63	67
JOHNSON ERNEST	9-10-63	68	2	41	1.5		JOHNSON ERNEST	9-10-63	68
JOHNSON ERNEST	11-12-63	69	2	42	1.5		JOHNSON ERNEST	11-12-63	69
JOHNSON ERNEST	1-2-64	70	2	43	1.5		JOHNSON ERNEST	1-2-64	70
JOHNSON ERNEST	3-4-64	71	2	44	1.5		JOHNSON ERNEST	3-4-64	71
JOHNSON ERNEST	5-6-64	72	2	45	1.5		JOHNSON ERNEST	5-6-64	72
JOHNSON ERNEST	7-8-64	73	2	46	1.5		JOHNSON ERNEST	7-8-64	73
JOHNSON ERNEST	9-10-64	74	2	47	1.5		JOHNSON ERNEST	9-10-64	74
JOHNSON ERNEST	11-12-64	75	2	48	1.5		JOHNSON ERNEST	11-12-64	75
JOHNSON ERNEST	1-2-65	76	2	49	1.5		JOHNSON ERNEST	1-2-65	76
JOHNSON ERNEST	3-4-65	77	2	50	1.5		JOHNSON ERNEST	3-4-65	77
JOHNSON ERNEST	5-6-65	78	2	51	1.5		JOHNSON ERNEST	5-6-65	78
JOHNSON ERNEST	7-8-65	79	2	52	1.5		JOHNSON ERNEST	7-8-65	79
JOHNSON ERNEST	9-10-65	80	2	53	1.5		JOHNSON ERNEST	9-10-65	80
JOHNSON ERNEST	11-12-65	81	2	54	1.5		JOHNSON ERNEST	11-12-65	81
JOHNSON ERNEST	1-2-66	82	2	55	1.5		JOHNSON ERNEST	1-2-66	82
JOHNSON ERNEST	3-4-66	83	2	56	1.5		JOHNSON ERNEST	3-4-66	83
JOHNSON ERNEST	5-6-66	84	2	57	1.5		JOHNSON ERNEST	5-6-66	84
JOHNSON ERNEST	7-8-66	85	2	58	1.5		JOHNSON ERNEST	7-8-66	85
JOHNSON ERNEST	9-10-66	86	2	59	1.5		JOHNSON ERNEST	9-10-66	86
JOHNSON ERNEST	11-12-66	87	2	60	1.5		JOHNSON ERNEST	11-12-66	87
JOHNSON ERNEST	1-2-67	88	2	61	1.5		JOHNSON ERNEST	1-2-67	88
JOHNSON ERNEST	3-4-67	89	2	62	1.5		JOHNSON ERNEST	3-4-67	89
JOHNSON ERNEST	5-6-67	90	2	63	1.5		JOHNSON ERNEST	5-6-67	90
JOHNSON ERNEST	7-8-67	91	2	64	1.5		JOHNSON ERNEST	7-8-67	91
JOHNSON ERNEST	9-10-67	92	2	65	1.5		JOHNSON ERNEST	9-10-67	92
JOHNSON ERNEST	11-12-67	93	2	66	1.5		JOHNSON ERNEST	11-12-67	93
JOHNSON ERNEST	1-2-68	94	2	67	1.5		JOHNSON ERNEST	1-2-68	94
JOHNSON ERNEST	3-4-68	95	2	68	1.5		JOHNSON ERNEST	3-4-68	95
JOHNSON ERNEST	5-6-68	96	2	69	1.5		JOHNSON ERNEST	5-6-68	96
JOHNSON ERNEST	7-8-68	97	2	70	1.5		JOHNSON ERNEST	7-8-68	97
JOHNSON ERNEST	9-10-68	98	2	71	1.5		JOHNSON ERNEST	9-10-68	98
JOHNSON ERNEST	11-12-68	99	2	72	1.5		JOHNSON ERNEST	11-12-68	99
JOHNSON ERNEST	1-2-69	100	2	73	1.5		JOHNSON ERNEST	1-2-69	100

BINA ASSESSMENT SURVEY									
DATE	SCORE	PERCENTILE	STANDARD SCORE	GRADE EQUIVALENT	REMARKS	DATE	SCORE	PERCENTILE	STANDARD SCORE
04/73	73	3-2	25	1.5		04/73	73	3-2	25
5/72	72	2-1	24	1.5		5/72	72	2-1	24
6/71	71	1-0	23	1.5		6/71	71	1-0	23
7/70	70	0-9	22	1.5		7/70	70	0-9	22
8/69	69	9-8	21	1.5		8/69	69	9-8	21
9/68	68	8-7	20	1.5		9/68	68	8-7	20
10/67	67	7-6	19	1.5		10/67	67	7-6	19
11/66	66	6-5	18	1.5		11/66	66	6-5	18
12/65	65	5-4	17	1.5		12/65	65	5-4	17
1/64	64	4-3	16	1.5		1/64	64	4-3	16
2/63	63	3-2	15	1.5		2/63	63	3-2	15
3/62	62	2-1	14	1.5		3/62	62	2-1	14
4/61	61	1-0	13	1.5		4/61	61	1-0	13
5/60	60	0-9	12	1.5		5/60	60	0-9	12
6/59	59	9-8	11	1.5		6/59	59	9-8	11
7/58	58	8-7	10	1.5		7/58	58	8-7	10
8/57	57	7-6	9	1.5		8/57	57	7-6	9
9/56	56	6-5	8	1.5		9/56	56	6-5	8
10/55	55	5-4	7	1.5		10/55	55	5-4	7
11/54	54	4-3	6	1.5		11/54	54	4-3	6
12/53	53	3-2	5	1.5		12/53	53	3-2	5
1/52	52	2-1	4	1.5		1/52	52	2-1	4
2/51	51	1-0	3	1.5		2/51	51	1-0	3
3/50	50	0-9	2	1.5		3/50	50	0-9	2
4/49	49	9-8	1	1.5		4/49	49	9-8	1
5/48	48	8-7	0	1.5		5/48	48	8-7	0
6/47	47	7-6	-1	1.5		6/47	47	7-6	-1
7/46	46	6-5	-2	1.5		7/46	46	6-5	-2
8/45	45	5-4	-3	1.5		8/45	45	5-4	-3
9/44	44	4-3	-4	1.5		9/44	44	4-3	-4
10/43	43	3-2	-5	1.5		10/43	43	3-2	-5
11/42	42	2-1	-6	1.5		11/42	42	2-1	-6
12/41	41	1-0	-7	1.5		12/41	41	1-0	-7
1/40	40	0-9	-8	1.5		1/40	40	0-9	-8
2/39	39	9-8	-9	1.5		2/39	39	9-8	-9
3/38	38	8-7	-10	1.5		3/38	38	8-7	-10
4/37	37	7-6	-11	1.5		4/37	37	7-6	-11
5/36	36	6-5	-12	1.5		5/36	36	6-5	-12
6/35	35	5-4	-13	1.5		6/35	35	5-4	-13
7/34	34	4-3	-14	1.5		7/34	34	4-3	-14
8/33	33	3-2	-15	1.5		8/33	33	3-2	-15
9/32	32	2-1	-16	1.5		9/32	32	2-1	-16
10/31	31	1-0	-17	1.5		10/31	31	1-0	-17
11/30	30	0-9	-18	1.5		11/30	30	0-9	-18
12/29	29	9-8	-19	1.5		12/29	29	9-8	-19
1/28	28	8-7	-20	1.5		1/28	28	8-7	-20
2/27	27	7-6	-21	1.5		2/27	27	7-6	-21
3/26	26	6-5	-22	1.5		3/26	26	6-5	-22
4/25	25	5-4	-23	1.5		4/25	25	5-4	-23
5/24	24	4-3	-24	1.5		5/24	24	4-3	-24
6/23	23	3-2	-25	1.5		6/23	23	3-2	-25
7/22	22	2-1	-26	1.5		7/22	22	2-1	-26
8/21	21	1-0	-27	1.5		8/21	21	1-0	-27
9/20	20	0-9	-28	1.5		9/20	20	0-9	-28
10/19	19	9-8	-29	1.5		10/19	19	9-8	-29
11/18	18	8-7	-30	1.5		11/18	18	8-7	-30
12/17	17	7-6	-31	1.5		12/17	17	7-6	-31
1/16	16	6-5	-32	1.5		1/16	16	6-5	-32
2/15	15	5-4	-33	1.5		2/15	15	5-4	-33
3/14	14	4-3	-34	1.5		3/14	14	4-3	-34
4/13	13	3-2	-35	1.5					



SHIP RECORD														
FIRST YEAR			SECOND YEAR			Third Year			FOURTH YEAR					
Subjects	Teacher	Mark	Subjects	Teacher	Mark	Subjects	Teacher	Mark	Subjects	Teacher	Mark			
Reading	Barton	PS	Reading	Fisher	PS	Reading	Gould	PSA	Reading	Savage	PS			
Language	"	PS	Language	"	PS	Language	"	PSA	Language	"	PS			
Writing	"	PS	Writing	"	PS	Writing	"	PSA	Writing	"	PS			
Spelling	"	PS	Spelling	"	PS	Spelling	"	PSA	Spelling	"	PS			
Mathematics	"	PS	Mathematics	"	PS	Mathematics	"	PSA	Mathematics	"	PS			
Social Studies	"	PS	Social Studies	"	PS	Social Studies	"	GP	Social Studies	"	PS			
Science	"	PS	Science	"	PS	Science	"	GP	Science	"	PS			
Health	"	PS	Health	"	PS	Health	"	GP	Health	"	G.P.			
Art	"	PS	Art	"	PS	Art	Gannon	GP	Art	"	G.P.			
Music	"	PS	Music	"	PS	Music	BOOK	GP	Music	"	G.P.			
Days Present / Enrolled	133 / 175		Days Present / Enrolled			Days Present / Enrolled	160 / 175		Days Present / Enrolled	148 / 177				
Assignment Level	A		Assignment Level	E		Assignment Level	E		Assignment Level	148	177			
FIFTH YEAR 70-71														
Subjects	Teacher	Mark	Subjects	Teacher	Mark	APITUDE TEST RECORD								
Reading	Chapman	GP	Reading	Hendley	PS	Tester	Name of Test	Form	Grade	Score	M.A.	C.A.	I.Q.	Grade
Language	"	GP	Language	"	PS		WISC (G.S.)	46/60	3					77
Writing	"	GP	Writing	"	PS		MISC (Grade)	48/50	6					63
Spelling	"	GP	Spelling	"	PS									
Mathematics	"	GP	Mathematics	"	PS									
Social Studies	"	GP	Social Studies	"	PS									
Science	"	GP	Science	"	PS									
Health	"	GP	Health	"	PS									
Art	Spangier	GP	Art	Spangier	PS									
Music	Crup	GP	Music	Blackwell	PS									
Days Present / Enrolled	138 / 175		Days Present / Enrolled	174 / 174										
Assignment Level	148 / 175		Assignment Level	174 / 174										
SEVENTH YEAR 1972-73														
Subjects	Teacher	Mark	LEVEL CHANGES											
Reading	Hendley	PS	From Level A to Level B Data											
Language	"	PS	From Level B to Level C											
Writing	"	PS	From Level C to Level D											
Spelling	"	PS	From Level D to Level E											
Mathematics	"	PS	From Level E to Level F											
Social Studies	"	PS	From Level F to Level G											
Science	"	PS	From Level G to Level H											
Health	"	PS	From Level H to Level I											
Art	Spangier	PS	From Level I to Level J											
Music	Blackwell	PS	From Level J to Level K											
Days Present / Enrolled	174 / 174		From Level K to Level L											

AFFIDAVIT

Before me, the undersigned authority, personally appeared Joe Forrest who, being duly sworn, deposed as follows:

My name is Joe Forrest. I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of records of Charleston High School. Attached hereto are 1 pages of records from Charleston High School. These 1 pages of records are kept by Charleston High School in the regular course of business, and it is the regular course of business of Charleston High School for an employee or representative of Charleston High School with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the act, event, condition, opinion or diagnosis. The records attached hereto are the originals or exact duplicates of the original.

Joe Forrest  
Affiant

In witness thereof I have hereunto subscribed my name and affix my official seal this 12<sup>th</sup> day of July, 1994.

Hammy Kay Rowland  
Signed

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NAME OF STUDENT JOHNSON, LINDSEY GRADE 9  
 TEACHER L. McInture SUBJECT English I  
 HOME ROOM TEACHER Phibes SCHOOL YEAR 1975-76

PERIOD	1st QUARTER	2nd QUARTER	1st SEMESTER	3rd QUARTER	4th QUARTER	2nd SEMESTER
	I-b	Fb	I-b	I-b	I-b	I-b
ABSENCES	4	7		6	14	
DEPORTMENT	1	1		1	1	

NAME OF PARENTS Mr. & Mrs. Bob Johnson  
 ADDRESS Rt. 2, Box 108  
Charleston, Mo. 63834

GRADING EXPLANATION	SUB-LETTER EXPLANATION	DEPORTMENT RATING EXPLANATION
E = Excellent Work S = Superior Work M = Average Work I = Inferior Work F = Failing Work	The letter shown after the grade shows the grade was earned in: a = Academic (college preparatory) curriculum h = Honors work (in academic curriculum) b = Basic curriculum no sub-letter = General curriculum	1 = Good 2 = Satisfactory 3 = Unsatisfactory

CLASS GRADE REPORT • CHARLESTON JUNIOR & SENIOR HIGH SCHOOLS

NAME OF STUDENT T. L. ... GRADE 9  
 TEACHER ... SUBJECT Math I  
 HOME ROOM TEACHER ... SCHOOL YEAR 1975-76

PERIOD	1st QUARTER	2nd QUARTER	1st SEMESTER	3rd QUARTER	4th QUARTER	2nd SEMESTER
GRADE	F	F	F	M	I-b	I
ABSENCES	4	9	8	8	8	16
DEPORTMENT	3	3	3	3	3	3

NAME OF PARENTS ...  
 ADDRESS ...

GRADING EXPLANATION	SUB-LETTER EXPLANATION	DEPORTMENT RATING EXPLANATION
E = Excellent Work S = Superior Work M = Average Work I = Inferior Work F = Failing Work	The letter shown after the grade shows the grade was earned in: a = Academic (college preparatory) curriculum h = Honors work (in academic curriculum) b = Basic curriculum no sub-letter = General curriculum	1 = Good 2 = Satisfactory 3 = Unsatisfactory

CLASS GRADE REPORT • CHARLESTON JUNIOR & SENIOR HIGH SCHOOLS

NAME OF STUDENT FAINEST JONES GRADE 9  
 TEACHER ROCKE SUBJECT Math  
 HOME ROOM TEACHER ... SCHOOL YEAR 1975

PERIOD	1st QUARTER	2nd QUARTER	1st SEMESTER	3rd QUARTER	4th QUARTER	2nd SEMESTER
GRADE	F	F	F	I-	F	F
ABSENCES	7	7	11	10	13	22
DEPORTMENT	3	2	2	2	2	2

NAME OF PARENTS Mr. Bob & Mrs. Johnson  
 ADDRESS Rt. 2 Box 108 Charleston  
1443

GRADING EXPLANATION	SUB-LETTER EXPLANATION	DEPORTMENT RATING EXPLANATION
E = Excellent Work S = Superior Work M = Average Work I = Inferior Work F = Failing Work	The letter shown after the grade shows the grade was earned in: a = Academic (college preparatory) curriculum h = Honors work (in academic curriculum) b = Basic curriculum no sub-letter = General curriculum	1 = Good 2 = Satisfactory 3 = Unsatisfactory

NAME OF STUDENT \_\_\_\_\_ GRADE \_\_\_\_\_  
 TEACHER Fitzgerald SUBJECT PE  
 HOME ROOM TEACHER \_\_\_\_\_ SCHOOL YEAR \_\_\_\_\_

PERIOD	1st QUARTER	2nd QUARTER	1st SEMESTER	3rd QUARTER	4th QUARTER	2nd SEMESTER
	<u>M-</u>	<u>F</u>	<u>E</u>	<u>M-</u>	<u>E</u>	<u>S-</u>
ABSENCES		<u>6</u>	<u>6</u>	<u>12</u>	<u>10</u>	<u>22</u>
DEPORTMENT		<u>2</u>		<u>3</u>	<u>2</u>	

NAME OF PARENTS \_\_\_\_\_  
 ADDRESS \_\_\_\_\_

GRADING EXPLANATION	SUB-LETTER EXPLANATION	DEPORTMENT RATING EXPLANATION
E = Excellent Work S = Superior Work M = Average Work I = Inferior Work F = Failing Work	The letter shown after the grade shows the grade was earned in: a = Academic (college preparatory) curriculum h = Honors work (in academic curriculum) b = Basic curriculum no sub-letter = General curriculum	1 = Good 2 = Satisfactory 3 = Unsatisfactory

### CLASS GRADE REPORT • CHARLESTON JUNIOR & SENIOR HIGH SCHOOLS

NAME OF STUDENT JOHNSON, Ernest Lee GRADE 9th  
 TEACHER Phipps SUBJECT American History  
 HOME ROOM TEACHER \_\_\_\_\_ SCHOOL YEAR 1975-1976

PERIOD	1st QUARTER	2nd QUARTER	1st SEMESTER	3rd QUARTER	4th QUARTER	2nd SEMESTER
GRADE	<u>C (101)</u>	<u>F (54)</u>	<u>F (57)</u>	<u>F (54)</u>	<u>F (49)</u>	<u>F (52)</u>
ABSENCES	<u>5</u>	<u>9</u>	<u>14</u>	<u>8</u>	<u>13</u>	<u>21</u>
DEPORTMENT	<u>2</u>	<u>3</u>	<u>3</u>	<u>15</u>	<u>15</u>	<u>30</u>

NAME OF PARENTS \_\_\_\_\_  
 ADDRESS \_\_\_\_\_

GRADING EXPLANATION	SUB-LETTER EXPLANATION	DEPORTMENT RATING EXPLANATION
E = Excellent Work S = Superior Work M = Average Work I = Inferior Work F = Failing Work	The letter shown after the grade shows the grade was earned in: a = Academic (college preparatory) curriculum h = Honors work (in academic curriculum) b = Basic curriculum no sub-letter = General curriculum	1 = Good 2 = Satisfactory 3 = Unsatisfactory

### CLASS GRADE REPORT • CHARLESTON JUNIOR & SENIOR HIGH SCHOOLS

NAME OF STUDENT \_\_\_\_\_ GRADE 7  
 TEACHER Seabough SUBJECT Developmental Reading  
 HOME ROOM TEACHER \_\_\_\_\_ SCHOOL YEAR 1975-1976

PERIOD	1st QUARTER	2nd QUARTER	1st SEMESTER	3rd QUARTER	4th QUARTER	2nd SEMESTER
GRADE	<u>F</u>	<u>F</u>	<u>F</u>	<u>F</u>	<u>F</u>	<u>F</u>
ABSENCES	<u>7</u>				<u>15</u>	
DEPORTMENT	<u>3</u>	<u>3</u>	<u>2</u>		<u>2</u>	<u>2</u>

NAME OF PARENTS \_\_\_\_\_  
 ADDRESS \_\_\_\_\_  
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GRADING EXPLANATION	SUB-LETTER EXPLANATION	DEPORTMENT RATING EXPLANATION
E = Excellent Work S = Superior Work M = Average Work I = Inferior Work F = Failing Work	The letter shown after the grade shows the grade was earned in: a = Academic (college preparatory) curriculum h = Honors work (in academic curriculum) b = Basic curriculum no sub-letter = General curriculum	1 = Good 2 = Satisfactory 3 = Unsatisfactory

# CLASS GRADE REPORT • CHARLESTON JUNIOR & SENIOR HIGH SCHOOLS

NAME OF STUDENT Ernest GRADE 4  
 SUBJECT Math Science  
 HOME ROOM TEACHER \_\_\_\_\_ SCHOOL YEAR 1954

PERIOD	1st QUARTER	2nd QUARTER	1st SEMESTER	3rd QUARTER	4th QUARTER	2nd SEMESTER
GRADE	<u>I -</u>	<u>I -</u>	<u>-</u>	<u>I b</u>	<u>I b</u>	<u>I b</u>
ABSENCES					<u>10</u>	<u>12</u>
DEPORTMENT	<u>3</u>			<u>2</u>	<u>3</u>	<u>3</u>

NAME OF PARENTS Mr. & Mrs. Thompson  
 ADDRESS 1102 1/2 Ave. 6 3954

GRADING EXPLANATION	SUB-LETTER EXPLANATION	DEPORTMENT RATING EXPLANATION
E = Excellent Work S = Superior Work M = Average Work I = Inferior Work F = Failing Work	The letter shown after the grade shows the grade was earned in: a = Academic (college preparatory) curriculum h = Honors work (in academic curriculum) b = Basic curriculum no sub-letter = General curriculum	1 = Good 2 = Satisfactory 3 = Unsatisfactory

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# **Appendix L**

1	THE COURT: Now, what's your other one?	1	Your Honor, it was all just nothing.
2	MR. CISAR: D.	2	THE COURT: Let the record reflect that only
3	THE COURT: D is the deposition of Deborah	3	the direct examination has been read.
4	Turner. Any objection to it?	4	Okay. Now your next one?
5	MR. CRANE: With the same understanding, no.	5	MR. CISAR: And I'm handing Exhibit C to the
6	THE COURT: It will be admitted for the purpose	6	court reporter, for the record.
7	of reading it only.	7	THE COURT: Okay.
8	(DEFENDANT'S EXHIBIT D WAS ADMITTED INTO	8	MR. CISAR: Your Honor, I next would call --
9	EVIDENCE.)	9	it's written Deborah Turner. She pronounces it Deborah
10	* * *	10	Turner, but I'm going to use, for ease here, Deborah Turner.
11	THE COURT: Ladies and gentlemen of the jury,	11	And she'll be Ms. Carlyle here, with the Court's permission.
12	when these depositions are read to you, you need to listen to	12	THE COURT: Okay. You may proceed.
13	it just as testimony was being presented here in the	13	MR. CISAR: Ms. Carlyle, I'm on page 3, line 6.
14	courtroom. You'll not be allowed to have these transcripts	14	(DEFENDANT'S EXHIBIT D, THE DEPOSITION OF
15	later on.	15	DEBORAH TURNER, WAS READ TO THE JURY, WITH MR. CISAR READING
16	You may proceed.	16	THE QUESTIONS AND MS. CARLYLE READING THE ANSWERS.)
17	MR. CISAR: Thank you, your Honor. I'd call	17	MR. CISAR: And then that was the end of my
18	Steve Betts, by way of Michael Dennis.	18	direct.
19	THE COURT: You may proceed.	19	MR. CRANE: Cross-examination?
20	MR. CISAR: Thank you, your Honor.	20	THE COURT: Go ahead.
21	THE COURT: (To the Court Reporter:) You need	21	MR. CRANE: If you would skip over to line 1,
22	not take it down.	22	page 11.
23	MR. CISAR: Mr. Dennis, I'm going to start on	23	Are you with me, line 1, page 11?
24	Page 3.	24	MS. CARLYLE: Yes.
25	MR. DENNIS: Okay.	25	(THE READING OF THE CROSS-EXAMINATION PORTION
	1186		1188
1	MR. CISAR: Line 6 there. I'm sorry. Wait a	1	OF THE DEPOSITION RESUMED, WITH MR. CRANE READING THE
2	minute. Line 18.	2	QUESTIONS AND MS. CARLYLE READING THE ANSWERS.)
3	(DEFENDANT'S EXHIBIT C, THE DEPOSITION OF STEVE	3	MR. CRANE: Wait a minute now. I think your
4	BETTS, WAS READ TO THE JURY, WITH MR. CISAR READING THE	4	answer was "even I could have ..."
5	QUESTIONS AND MR. DENNIS READING THE ANSWERS.)	5	MR. CISAR: There was an errata. Read the
6	MR. CISAR: Hold on here. Skip down to Line	6	original answer.
7	22, please. There was somebody that walked in, your Honor, at	7	MR. CRANE: Back to line 22.
8	the proceeding at the office. That's why we're skipping.	8	(The reading of the deposition resumed.)
9	THE COURT: All right.	9	* * *
10	(The reading of the deposition resumed.)	10	MR. CRANE: And Judge, that will conclude my
11	* * *	11	cross-examination.
12	MR. CISAR: And then, Mr. Crane, you had some	12	So if you want to do redirect, page 22.
13	cross.	13	MR. CISAR: Page 22. I'm sorry. Starting at
14	MR. CRANE: No cross.	14	page 23, line 22. Are you there?
15	THE COURT: You do not want to cross?	15	MS. CARLYLE: I'm here.
16	MR. CISAR: Okay. Let's see.	16	(THE READING OF THE REDIRECT PORTION OF THE
17	THE COURT: Okay. So I understand you all are	17	DEPOSITION RESUMED, WITH MR. CISAR READING THE QUESTIONS AND
18	not reading the cross-examination?	18	MS. CARLYLE READING THE ANSWERS.)
19	MR. CRANE: No.	19	MR. CISAR: I have no more questions.
20	MR. CISAR: That's correct.	20	THE COURT: Is that it?
21	THE COURT: Okay. Continue on redirect.	21	MR. CRANE: I don't have any.
22	MR. CISAR: I'm sorry. Let me look. I don't	22	THE COURT: Further evidence by the defense.
23	think I had any. There wouldn't be any redirect if he didn't	23	MR. CISAR: May we approach, your Honor?
24	cross. There might have been a little, but I don't think it	24	THE COURT: You may.
25	was much. Hold on.	25	(COUNSEL APPROACHED THE BENCH AND THE FOLLOWIN
	1187		1189

<p>1 Q. And ma'am, where do you live?</p> <p>2 A. I live in Charleston, Missouri.</p> <p>3 Q. Okay. And your occupation?</p> <p>4 A. I am a certified mentally retarded teacher. I'm</p> <p>5 also curriculum director and A-Plus coordinator for the</p> <p>6 District of Charleston R-1.</p> <p>7 Q. In Charleston, Missouri?</p> <p>8 A. Charleston R-1 School District.</p> <p>9 Q. And that's Charleston High School and Grade School?</p> <p>10 A. Yes, it is.</p> <p>11 Q. You said you are a certified MR teacher. What is</p> <p>12 MR?</p> <p>13 A. MR is a teacher of mentally retarded.</p> <p>14 Q. Okay. And I understood, when I was growing up,</p> <p>15 special ed. classes. Is that similar?</p> <p>16 A. Yes, sir.</p> <p>17 Q. Okay. Same concept?</p> <p>18 A. Special ed. classes include the MR, which is</p> <p>19 mentally retarded, and LD, which is learning disabled.</p> <p>20 Q. Okay.</p> <p>21 A. And it also includes gifted. It's all under the</p> <p>22 umbrella of special education.</p> <p>23 Q. How so in the gifted?</p> <p>24 A. It's special education.</p> <p>25 Q. Okay. So it covers both ends of the spectrum?</p>	<p>1 eighth grade he had been in special education classes.</p> <p>2 MR. CISAR: Your Honor, may I approach the</p> <p>3 witness again? I have an exhibit I want to hand her.</p> <p>4 THE COURT: You may.</p> <p>5 MR. CISAR: Mr. Crane?</p> <p>6 BY MR. CISAR:</p> <p>7 Q. I've handed you Defendant's Exhibit E. Before I</p> <p>8 ask you about that, as part of your duties now and since your</p> <p>9 teaching, you have been in administration at Charleston?</p> <p>10 A. Yes. Since 1998 I have been in administration.</p> <p>11 Q. And as part of your duties there, you would keep</p> <p>12 records and such?</p> <p>13 A. I have access to all permanent record files, yes.</p> <p>14 Q. Okay. Defendant's Exhibit E, can you identify</p> <p>15 that, please?</p> <p>16 A. These are Ernest's permanent record files.</p> <p>17 Q. His transcripts?</p> <p>18 A. From our vault.</p> <p>19 Q. I'm sorry?</p> <p>20 A. His transcripts, yes.</p> <p>21 Q. Permanent record files?</p> <p>22 A. Permanent record files, transcripts, everything</p> <p>23 that we kept when he moved through the school system.</p> <p>24 MR. CISAR: Okay. Your Honor, I'd ask for</p> <p>25 admission into evidence Defendant's Exhibit E.</p>
1218	1220
<p>1 A. Yes, it does.</p> <p>2 Q. Do you know Ernest Johnson?</p> <p>3 A. Yes, I do. That's not the Ernest I remember. I</p> <p>4 remember a skinny little boy.</p> <p>5 MR. CISAR: May I approach the witness, your</p> <p>6 Honor?</p> <p>7 THE COURT: You may.</p> <p>8 BY MR. CISAR:</p> <p>9 Q. I show Defendant's Exhibit A. Is that closer to</p> <p>10 the Ernest you remember?</p> <p>11 A. Yes, it is.</p> <p>12 Q. Okay. How do you know Ernest Johnson?</p> <p>13 A. Ernest was -- When I came to teach in Charleston in</p> <p>14 1975, I was hired as the MR teacher, the teacher of the</p> <p>15 mentally retarded. But the principal, when he hired me, asked</p> <p>16 me to teach a developmental reading class. And the</p> <p>17 developmental reading class was specifically for students who</p> <p>18 couldn't read and students who struggled in the regular</p> <p>19 classroom. So that one hour a day I taught Ernest in a</p> <p>20 reading class.</p> <p>21 Q. Okay. And that was a developmental reading class?</p> <p>22 A. It was called Developmental Reading.</p> <p>23 Q. Okay. And had Ernest been, prior to that year, in</p> <p>24 special education classes?</p> <p>25 A. Yes. From, that I know, from fourth through the</p>	<p>1 THE COURT: Any objection?</p> <p>2 MR. CRANE: No objection.</p> <p>3 THE COURT: E will be admitted.</p> <p>4 MR. CISAR: Thank you, your Honor.</p> <p>5 <b>(DEFENDANT'S EXHIBIT E WAS ADMITTED INTO</b></p> <p>6 <b>EVIDENCE.)</b></p> <p>7 * * *</p> <p>8 BY MR. CISAR:</p> <p>9 Q. Why don't you hold onto this.</p> <p>10 A. Okay.</p> <p>11 Q. You had stated that he was in special education</p> <p>12 from the fourth through the eighth grade; is that correct?</p> <p>13 A. Yes. Yes. That's correct.</p> <p>14 Q. Was he in your mentally retarded or MR classes in</p> <p>15 the ninth grade?</p> <p>16 A. No. In the ninth grade he was put in --</p> <p>17 MR. CRANE: Well, wait a minute, Judge. I'm</p> <p>18 going to object. The question was: Was he in your mental</p> <p>19 retardation class in ninth grade?</p> <p>20 Now, this witness has testified that she taught</p> <p>21 developmental reading to the defendant.</p> <p>22 MR. CISAR: I'll withdraw the question.</p> <p>23 THE COURT: Very well.</p> <p>24 BY MR. CISAR:</p> <p>25 Q. You had a class called MR; is that correct?</p>
1219	1221

1 A. Yes, I did.  
 2 Q. What was that?  
 3 A. That was the kids who had been tested and placed  
 4 into the special education classes, into the mentally retarded  
 5 classes.  
 6 Q. That was in the ninth grade?  
 7 A. That was in the ninth grade.  
 8 Q. Was he in that class of yours?  
 9 A. No, he wasn't.  
 10 Q. All right. Why not?  
 11 A. Well, in the '70s, we -- the school districts were  
 12 divided into tracts. We had what was called the basic track,  
 13 the general track, and the academic track. Basic-track kids  
 14 were the slower kids, of course, and then the academic kids  
 15 were our college-bound kids.  
 16 We also, the school districts at that point were  
 17 being pressured because they were -- they could only have a  
 18 certain percentage of the enrollment in the special education  
 19 classes and a certain percentage of blacks in special  
 20 education classes. And that was the trend at that point in  
 21 time.  
 22 Q. So the school district was receiving pressure or  
 23 something?  
 24 A. Well, it was -- it was state and federal mandates  
 25 that was just -- they were beginning to put some restrictions

1222

1 on special education classes back in the '70s.  
 2 Q. So Ernest was not placed into the MR class for what  
 3 reason?  
 4 A. I couldn't say for sure. I'm just telling you that  
 5 during that point in time, this type of thing was going on.  
 6 Q. The schools were being mandated to --  
 7 A. The schools were being mandated to limit the number  
 8 of special ed. students that they had enrolled and the number  
 9 of blacks that they had enrolled in the special education  
 10 classes.  
 11 Q. So Ernest was put out of, I guess, from the  
 12 eighth-grade special education classes into what kind of  
 13 classes in the ninth?  
 14 A. He was placed into the basic track.  
 15 Q. Okay.  
 16 A. Which is our slower-ability kids.  
 17 Q. How did he do in that track?  
 18 A. He didn't do well at all.  
 19 Q. Why not?  
 20 A. When you take, from my 35 years of experience, when  
 21 you take a mentally retarded child, they are --  
 22 MR. CRANE: Well, now, Judge, I'm going to  
 23 object. This witness --  
 24 THE COURT: Objection will be sustained.  
 25 MR. CRANE: -- is not qualified. He's not been

1223

1 stated as mentally retarded.  
 2 THE COURT: The objection has been sustained.  
 3 Let's move on.  
 4 BY MR. CISAR:  
 5 Q. When you take an individual --  
 6 A. When you take an individual out of a self-contained  
 7 classroom that has maybe 12 kids in it with an aid, where they  
 8 receive one-on-one instruction all the time, they have  
 9 something called an IEP, which is an individual education plan  
 10 which is specifically for him, when you take a child out of  
 11 that environment and put them into a regular classroom, and  
 12 ringing the bells -- and because they're with their special  
 13 teachers seven hours a day, when you put them in an  
 14 environment where they have to move from class to class when  
 15 they ring a bell, every class that they're in has got  
 16 different kids in it, generally, it's a shock to that child.  
 17 Q. And how did Ernest perform in this environment?  
 18 A. I can only speak from my developmental reading  
 19 class, other than the grades that show up on his transcript.  
 20 He was very quiet, missed a lot of school that he  
 21 didn't miss in the eighth grade.  
 22 Q. And in the eighth grade he was in that  
 23 self-contained --  
 24 A. In the eighth grade he was in the self-contained  
 25 classroom.

1224

1 Q. And in the ninth grade he was in a basic track?  
 2 A. He was in a basic track and was absent quite a bit.  
 3 Q. Well, what were his grades in his ninth-grade year?  
 4 A. They were very poor. The students take seven hours  
 5 a day so they could have -- they will get seven credits at the  
 6 end of the year. I think he got four.  
 7 Q. Okay.  
 8 A. Which would place him in the freshman category the  
 9 following year because --  
 10 Q. So he flunked the ninth grade?  
 11 A. So he flunked the ninth grade, yes.  
 12 Q. Had to repeat it?  
 13 A. Yes.  
 14 Q. In your developmental reading class, how did Ernest  
 15 perform?  
 16 A. The development -- The reason I was asked to teach  
 17 the developmental reading class by the principal was because I  
 18 had been taught how to write an IEP, which is an individual  
 19 education plan. So each one of the students in that class had  
 20 an individual plan. The reading materials were on their  
 21 level, for instance.  
 22 His were very low. A lot of the materials that  
 23 were chosen were based on test scores that are also on his  
 24 permanent record files. His reading level was tested very  
 25 low.

1225



1 Q. Do you recall what that was?  
 2 A. 2.1, I believe.  
 3 Q. Okay. So between the second- and the third-grade  
 4 reading level?  
 5 A. Yes.  
 6 Q. Did he pass your class?  
 7 A. He passed the first semester. He did not pass the  
 8 second semester. He --  
 9 Q. Why not?  
 10 A. He missed too many days.  
 11 Q. Okay. How would you characterize Ernest Johnson's  
 12 intelligence?  
 13 A. Very low.  
 14 MR. CISAR: I have no further questions, your  
 15 Honor.  
 16 THE COURT: Cross-examination.  
 17 \* \* \*  
 18 **CROSS-EXAMINATION**  
 19 BY MR. CRANE:  
 20 Q. Hi, Ms. Seabaugh. How are you?  
 21 A. Fine. Thank you.  
 22 Q. And your education is in what?  
 23 A. I have a Bachelor's in Elementary Education and  
 24 certification in special education.  
 25 Q. Okay. You're not a psychologist?

1226

1 A. No, sir.  
 2 Q. You're not a psychiatrist?  
 3 A. No, sir.  
 4 Q. I'm trying to look at this, I guess it's  
 5 Defendant's Exhibit E. Here, let me just compare pages with  
 6 you here. I'm looking at grade seven through eight on that  
 7 one.  
 8 A. Uh-huh. That's says special ed.  
 9 Q. Yeah.  
 10 A. Uh-huh.  
 11 Q. Is that the same -- I think that's the same thing  
 12 you've got.  
 13 A. Yes, it is.  
 14 Q. It looks like that goes back to what, the  
 15 early '70s, '73, '74?  
 16 A. Yes. I had Ernest in '75-'76.  
 17 Q. Okay. That's the next question I was going to ask  
 18 you before I go on. How many -- How long did you teach  
 19 Ernest?  
 20 A. For a school year.  
 21 Q. Okay. You didn't teach him before that?  
 22 A. No.  
 23 Q. And you didn't have him after that?  
 24 A. No, sir.  
 25 Q. And those were grades what?

1227

1 A. '75 and '76.  
 2 Q. Well, what grades, though?  
 3 A. Oh, his ninth-grade year.  
 4 Q. Okay. In ninth grade?  
 5 A. In ninth grade, yes.  
 6 Q. So you didn't have him in seventh or eighth?  
 7 A. No.  
 8 Q. And in 1973-'74, did you guys just have it divided  
 9 up in two semesters? Is that the way you did it?  
 10 A. Yes. Yes.  
 11 Q. Where would he have been going to school?  
 12 A. He would have been at the junior high.  
 13 Q. Okay. And you were at the high school?  
 14 A. And I was at the high school.  
 15 Q. So your all's high school went ninth through  
 16 twelfth?  
 17 A. Yes.  
 18 Q. And you didn't have a middle school?  
 19 A. No. We had a junior high.  
 20 Q. Okay. So your junior high was --  
 21 A. Seventh and eighth.  
 22 Q. Seventh and eighth, just two grades?  
 23 A. Yes.  
 24 Q. Okay. Now, in seventh grade, it looks like  
 25 somebody wrote in "Sp. Ed."?

1228

1 A. That's special ed.  
 2 Q. Okay.  
 3 A. It means those grades that he had were special ed.  
 4 grades.  
 5 Q. Okay. And in Language Arts, the first semester of  
 6 seventh grade he got an S?  
 7 A. The grading --  
 8 Q. Yeah, I think I remember that way back then.  
 9 A. Back when we were in school.  
 10 Q. Well, what is it, E --  
 11 A. It was an E, and an S for satisfactory, and an I  
 12 for inferior, and an F --  
 13 Q. Yeah. But what about an M? You missed an M.  
 14 A. M was --  
 15 Q. Like a C?  
 16 A. Yes. M was a C.  
 17 Q. Okay. You got E, S, M, I --  
 18 A. F.  
 19 Q. -- F?  
 20 A. Uh-huh.  
 21 Q. And in Language Arts, first semester, he got an S?  
 22 A. Uh-huh.  
 23 Q. In seventh grade?  
 24 A. Yes.  
 25 Q. So that's a --

1229



<p>1 MR. CISAR: Oh, okay.</p> <p>2 MR. CRANE: Phys. Ed., E, E, S+, E.</p> <p>3 MR. CISAR: I didn't know you said Phys. Ed.</p> <p>4 I'm sorry.</p> <p>5 BY MR. CRANE:</p> <p>6 Q. And he took shop, right, Industrial Arts?</p> <p>7 A. Industrial Arts.</p> <p>8 Q. Building things?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. He got an E- in seventh grade and an M+ in</p> <p>11 eighth grade?</p> <p>12 A. Huh-uh.</p> <p>13 Q. In shop; correct?</p> <p>14 A. That's what it shows.</p> <p>15 Q. But let me ask you, ma'am: Outside of school, did</p> <p>16 you have occasion to interact with Mr. Johnson?</p> <p>17 A. No.</p> <p>18 Q. Did you ever see him at any time outside the</p> <p>19 classroom?</p> <p>20 A. Charleston is a very small town. I'm sure I did.</p> <p>21 But that's been, you know, for me to specifically say I saw</p> <p>22 him on August the 20th, I couldn't do anything like that.</p> <p>23 Q. Right. But you don't have any specific memory of</p> <p>24 his behavior outside of school?</p> <p>25 A. Not outside of school.</p> <p style="text-align: center;">1234</p>	<p>1 building for -- My special education classes were out behind</p> <p>2 the building at that point in time.</p> <p>3 Q. Is that the same way it was in junior high?</p> <p>4 A. Yes, to my knowledge. We were in a trailer, you</p> <p>5 know. The kids called it a tin can. But that what we would</p> <p>6 do is, the basic, the core classes: Math, Science, Social</p> <p>7 Studies, and English out there. And the kids would usually</p> <p>8 come in for PE because the gym was in the main building and</p> <p>9 they -- and they would go in for home ec.</p> <p>10 But even at that point in time, even though they</p> <p>11 were talking mainstreaming, which is taking the special</p> <p>12 education child and putting them in a regular classroom one or</p> <p>13 two hours a day -- it was called least restrictive</p> <p>14 environment -- some of their PE class and some of -- and the</p> <p>15 home ec. classes were also self-contained. They were all</p> <p>16 special ed. kids.</p> <p>17 Q. And Mr. Crane was talking to you and you said they</p> <p>18 were taught on their own level. Explain that to me.</p> <p>19 A. An IEP, that has to be written, by law, for each</p> <p>20 special education student.</p> <p>21 Q. And what is IEP?</p> <p>22 A. It's individual education plan.</p> <p>23 Q. Okay.</p> <p>24 A. It sets forth goals for these students, for the</p> <p>25 students to meet during the school year. And the goals are</p> <p style="text-align: center;">1236</p>
<p>1 Q. Okay. And how long ago was that?</p> <p>2 A. 1975.</p> <p>3 MR. CRANE: I think that's all the questions I</p> <p>4 have of this witness.</p> <p>5 THE COURT: Redirect.</p> <p>6 MR. CISAR: Thank you, your Honor.</p> <p>7 * * *</p> <p>8 <b>REDIRECT EXAMINATION</b></p> <p>9 BY MR. CISAR:</p> <p>10 Q. So you would have had Ernest when he was 15, maybe</p> <p>11 going on 16?</p> <p>12 A. Fourteen or 15, yeah.</p> <p>13 Q. Okay. He was born in '60. '75 he would have been</p> <p>14 in the 15 age group, give or take?</p> <p>15 A. Yes.</p> <p>16 Q. Do you know if he repeated the fourth grade, from</p> <p>17 your looking at the records there?</p> <p>18 A. Huh-uh.</p> <p>19 Q. Okay.</p> <p>20 A. I can't.</p> <p>21 Q. You can't tell that from there?</p> <p>22 A. (Shaking head.)</p> <p>23 Q. Okay. In your special education class, what would</p> <p>24 be taught?</p> <p>25 A. The core subjects. They would be sent into the</p> <p style="text-align: center;">1235</p>	<p>1 set on the abilities that they have. And some of them are</p> <p>2 very simple and some of them are more challenging. And as</p> <p>3 they get older, the goals change. We try to, as they get to</p> <p>4 be older students, a lot of their IEP goals are transitioning</p> <p>5 goals into the society and workplace and that type of things.</p> <p>6 Q. So, for example, even in the eighth grade, if you</p> <p>7 have an IEP for a student in a special ed. class, that could</p> <p>8 be at a level of second grade because that's where that</p> <p>9 student is?</p> <p>10 A. Oh, yes, yes. The goal might be the child would be</p> <p>11 able to read at a second-grade level by December of '75, for</p> <p>12 instance, if it was -- if the IEP was written at the beginning</p> <p>13 of the year.</p> <p>14 Q. Okay. In there you say there were two IQ scores</p> <p>15 that Mr. Crane was talking to you about. What were those</p> <p>16 again?</p> <p>17 A. 77 in the third grade, and 63 in the sixth.</p> <p>18 Q. In the sixth grade?</p> <p>19 A. He was tested twice.</p> <p>20 Q. Okay.</p> <p>21 MR. CISAR: I have no further questions.</p> <p>22 MR. CRANE: Nor do I, Judge.</p> <p>23 THE COURT: May this witness be finally</p> <p>24 excused?</p> <p>25 MR. CISAR: Yes, sir.</p> <p style="text-align: center;">1237</p>

1 THE COURT: Okay. You are finally excused.  
 2 You may step down.  
 3 Call your next witness.  
 4 MR. CISAR: We'd call Steve Mason, your Honor.  
 5 We're going to have to get him right now.  
 6 Thank you, Ms. Seabaugh.  
 7 THE COURT: Please come forward and raise your  
 8 right hand.  
 9 (THE WITNESS WAS SWORN BY THE COURT.)  
 10 \* \* \*  
 11 THE COURT: Okay. Please take the witness  
 12 stand.  
 13 (The witness complied.)  
 14 THE COURT: You may proceed, Mr. Cisar.  
 15 MR. CISAR: Thank you, your Honor.  
 16 STEVEN MASON  
 17 being first duly sworn, testified as follows:  
 18 \* \* \*  
 19 **DIRECT EXAMINATION**  
 20 BY MR. CISAR:  
 21 Q. Good morning.  
 22 A. Hi.  
 23 Q. Your name, sir?  
 24 A. Steven Mason.  
 25 Q. And where do you live, sir?

1238

1 A. I live in Sikeston, Missouri.  
 2 Q. And what is your occupation presently?  
 3 A. I am a corporate trainer for Applebee's.  
 4 Q. Okay. Previous occupation, sir?  
 5 A. From 1975 to 1997, I was employed by the Charleston  
 6 R-I School District as the art teacher.  
 7 Q. As their art teacher?  
 8 A. Yes.  
 9 Q. What education do you have, sir?  
 10 A. I have a BS in Education from Southeast Missouri  
 11 State University.  
 12 Q. And that's there in Cape?  
 13 A. In Cape, yes.  
 14 Q. See this individual over here at counsel table?  
 15 A. Yes, I do.  
 16 Q. Do you know him?  
 17 A. Yes, I do.  
 18 Q. What is his name?  
 19 A. Ernest Johnson.  
 20 Q. How do you know Ernest Johnson?  
 21 A. I had Ernest in a art class, a Beginning Art I  
 22 class, and probably, I'm pretty sure, in the 1976-77 school  
 23 year.  
 24 Q. Okay. So that would have been the repeat of his  
 25 freshman year?

1239

1 A. That would have been the repeat of his freshman  
 2 year.  
 3 Q. So the first or second semester?  
 4 A. I had him the first semester.  
 5 Q. All right. How was Ernest as an art student?  
 6 A. He really wasn't good at all. He struggled in  
 7 class. He didn't really understand the instructions and he  
 8 pretty much had a hard time doing everything he tried to do in  
 9 class.  
 10 Q. Well, you said he had difficulty with instructions.  
 11 How so?  
 12 A. Well, for example, I remember distinctly there's a  
 13 Beginning Art I project we call the quanting method of clay,  
 14 where you're supposed to take your clay, a ball of clay, and  
 15 pat in your hand, and roll it on the table gently, and spread  
 16 your hand make some coil. And you stack these coils and you  
 17 join them together.  
 18 Most, 90 percent of my students, do that the first  
 19 time. And he struggled with that every time. He never did,  
 20 couldn't get it. He'd rub it and mash it too hard and it  
 21 would flop and, you know, you couldn't complete the project  
 22 doing that.  
 23 Q. So that was an example of him having a hard time  
 24 with instructions. Could he follow instructions?  
 25 A. The way the class was set up, I gave the

1240

1 instructions, I let them know what we're going to do, and I  
 2 showed them an example, and I passed out a sheet. Then I  
 3 demonstrated it a little bit. And then if you had any  
 4 questions, you would hold up your hand and ask.  
 5 Of course, he never did hold up his hand and ask  
 6 any questions. So I had to come around and ask him why he  
 7 couldn't do this. And I'd just talk to him, and he'd just  
 8 have this, just like, "I don't know what you're talking about"  
 9 look; you know what I'm saying?  
 10 Q. Okay.  
 11 A. You know, a blank look.  
 12 Q. This was a mainstream class? It wasn't a learning  
 13 disabled class?  
 14 A. No, it wasn't. The arts were designed so that you  
 15 got academic kids, you got basic kids, you got all of them.  
 16 It was called mainstreaming.  
 17 Q. Okay. Could he read his assignments?  
 18 A. No. Not in my opinion, no, he couldn't. He  
 19 couldn't, because whenever he read them, he didn't do the  
 20 project.  
 21 Q. Did he have, in your opinion, the basic educational  
 22 or the basics to be able to do the things in your class?  
 23 A. No. I went to a couple of counselors and asked  
 24 them why did they put Ernest in class because he just, you  
 25 know, he just didn't do anything. He didn't accomplish

1241

1 anything, you know. I didn't see the work ethic there and I  
2 didn't see the understanding of just the basic principles that  
3 we were going through in class.

4 Q. Let's talk about that, some of those basic  
5 principles that you were going through in class. Can you give  
6 an example as to, say, base colors?

7 A. Okay. Generally in our Art I we have what you call  
8 an art spectrum with 12 colors. And all of the colors in the  
9 spectrum are made from three colors called primary colors.  
10 And supposedly, in the first, second, and third week, you know  
11 the colors are red, yellow, and blue.

12 And the way you mix these colors together is simply  
13 you just have to have a process where you take one drop of one  
14 color and mix it to another color. And the color that you're  
15 always mixing into is always the lighter color. So you're  
16 generally, what I'm saying is you always take the dark color  
17 and add it to the light color.

18 And you would, like for the orange, for example,  
19 you'd take a drop of red and add it to some yellow and you'll  
20 get a yellow-orange. A little more red will get you a regular  
21 orange. A little more red will give you a red-orange. And  
22 all his colors wound up being brown, you know. Like he would  
23 take the yellow to the red or just half and half or, you know,  
24 and but he just didn't follow instructions.

25 And, you know, this is more or less -- I would

1242

1 think that when you got to that grade, you would have a little  
2 common sense on what is dark, light, you know, graduating, you  
3 know, and he just struggled with that.

4 Q. Was he, for example, able to use a ruler in class?

5 A. No. You know, you're supposed to have a -- be able  
6 to use a compass and a ruler and, you know, a protractor. And  
7 you're basically, when you have your ruler, if you're  
8 left-handed or right-handed, you have the ruler in the  
9 opposite hand that you're writing with. So if I'm  
10 right-handed, I will hold down the ruler and use it.

11 Well, whenever he tried to use a ruler, he would  
12 just, whenever he drew on the paper, the whole ruler would  
13 move. He didn't just put enough pressure to do something  
14 simple like that.

15 Q. And he couldn't use, you said, a protractor or a  
16 compass?

17 A. Yes. For example, on a compass, you would -- It's  
18 made like a V and it has one end where you stick the pencil  
19 in. And there's a point, and you place the point on your  
20 paper after you got the pencil in and twirl it, depending on  
21 how many -- how big you want your circle, a five-inch circle,  
22 a three-inch circle. And his would slide all around or it  
23 would flop and the circle would be uneven. And you know, I  
24 just tried to help him and he just couldn't do it.

25 Q. As to your -- Was he an average, above-average,

1243

1 below-average student in your class?

2 A. Ernest was very much below. He didn't complete any  
3 of his projects. He had an F in my class.

4 Q. Well, in addition to these art projects you're  
5 talking about, what other components to your class were there?

6 A. Okay. There's also -- there's what you have,  
7 design, basic design, you know, and arrangements. Then you  
8 have a section on pen and ink. That was another area that  
9 didn't turn out well for him. The pen and ink, you know, you  
10 dip your pen in the ink well, and at the end of it you're  
11 supposed to press the lip to release the excess ink so it  
12 won't splatter anywhere. And his paper just was, you know,  
13 drops here and drips there.

14 And you know, I would ask him, "You need to hold  
15 this. Why don't you hold your pen this way? Why don't you  
16 dip it this way? Why don't you hold your paper this way."

17 Thirty seconds later he would be doing the same  
18 thing, dripping, and not doing a good job.

19 Q. How about art history? Was this a component of  
20 your class?

21 A. We briefly went over that, where I would talk about  
22 different art subjects and some of the artists and show them  
23 some of the work. We had a slide presentation to where you  
24 got to see different famous works of art, and then you had  
25 like a little exam afterwards, you know.

1244

1 And I gave a little lecture and all the kids took  
2 notes and whatever. And you had to keep your notes in a  
3 little folder. And his folder was blank all the time he was  
4 in there. He never did take notes. And when we had a test,  
5 it was usually the first side would have three or four answers  
6 that were wrong and the back half would be blank.

7 Q. Did he cause problems in your class?

8 A. No, he didn't cause any problems.

9 Q. How did he comport himself in class?

10 A. I had to move him a couple times from -- In art,  
11 you have, mostly you have tables to work on because you have  
12 to have a little room. There's not like a desk, a slanted  
13 desk that you're sitting it. I moved him from a couple of  
14 people that were -- I guess in a class you always had these  
15 guys that were cracking jokes and being funny or whatever.

16 Well, they also could crack the jokes and do their  
17 work and still manage to, you know, "Please sit down and stop  
18 doing this," and they would still turn in their work and they  
19 were, I guess, you know, good enough to do their work and kind  
20 of fiddle around in class.

21 But he was not one of those guys, and he was always  
22 at the table with one of those people. And I had to  
23 constantly move him away where somebody was, you know, more or  
24 less doing what they were supposed to do and not joking  
25 around.

1245

1 And I think that when I moved him, I thought that  
2 would make a difference, you know, if I got him next to  
3 somebody that was just never a talker, always kept at the  
4 task. And that didn't do any different. He still didn't do  
5 the work. He wouldn't complete anything.  
6 Q. You said you talked to the administration about his  
7 placement there. What recommendations did you make at the  
8 high school for Ernest Johnson?  
9 A. Well, back then there was a counselor named Ciola  
10 Morris and another named Mrs. Mabel Willard. And the MR  
11 teaching staff was basically Robin Seabaugh.  
12 And I asked Robin, I said, "Robin, I've got this  
13 guy named Ernest Johnson. I'm not trying to tell you what to  
14 do, but he's just making a flat F in my class. He can't do  
15 the work and he doesn't understand what I'm talking about."  
16 And she gave me the deal --  
17 MR. CRANE: Object to the hearsay here, Judge.  
18 THE COURT: Objection will be sustained.  
19 BY MR. CISAR:  
20 Q. Did you make any recommendation as to where he  
21 should be placed?  
22 A. I thought he should be placed --  
23 MR. CRANE: What was the question?  
24 Q. I said, did you make any recommendations --  
25 MR. CRANE: Okay. All right.

1246

1 Q. -- to where he should be placed, Mr. Johnson should  
2 be placed?  
3 A. I thought he should have been placed in maybe  
4 crafts instead of my class.  
5 Q. Did you make any recommendations as to whether he  
6 should be placed in special education, to the staff?  
7 A. Yes, I did.  
8 Q. And what was that recommendation?  
9 A. They said it was -- they couldn't do anything about  
10 it.  
11 Q. What was your recommendation?  
12 A. My recommendation is that I thought he shouldn't be  
13 in my class, he should be in a special education class.  
14 Q. Okay.  
15 MR. CISAR: One minute, your Honor, please.  
16 Q. As to his initiative, did he have any, or was he  
17 trying to do it or couldn't? I need to know about that.  
18 A. You mean work ethic?  
19 Q. Yeah.  
20 A. No, I didn't -- I didn't -- He didn't even show me  
21 any of that.  
22 Q. How did you come to -- How did you remember Ernest?  
23 A. Well, the reason why I remember him is, in my  
24 class, Art I, Beginning Art I is a class where you almost have  
25 to try to fail. If you have any kind of average work ethic

1247

1 and you have a basic common sense of understanding, you'll --  
2 you'll have some degree of success in my class. It's designed  
3 so that you can move on to maybe Art II or Art III or Art IV,  
4 which is advanced. And no, I didn't see any work ethic.  
5 Q. Well, and my question was: How did you remember  
6 Ernest?  
7 A. Because he was basically my -- that was my second  
8 year of teaching, and he probably was my first student that  
9 absolutely got an F.  
10 Q. Have you had many students that couldn't pass your  
11 class?  
12 A. Not very many, sir.  
13 Q. Was he one of them?  
14 A. He was one of them.  
15 Q. And that's how you remember him?  
16 A. Yes.  
17 MR. CISAR: No further questions, your Honor.  
18 THE COURT: Cross-examination.  
19 \* \* \*  
20 CROSS-EXAMINATION  
21 BY MR. CRANE:  
22 Q. Hi, Mr. Mason. How are you doing?  
23 A. All right.  
24 Q. What was the name of your class again?  
25 A. Art I. Art I.

1248

1 Q. And what grade was it that you had Ernest?  
2 A. Ernest would be in '76-'77. And sir --  
3 Q. Are you sure that's not '75-76?  
4 A. No. That was his -- that was -- I think, I'm  
5 pretty sure that I had Ernest in '76-'77 because he missed a  
6 lot of days and they took him off the role. He didn't  
7 complete the year.  
8 Q. Well, that was going to be another thing I was  
9 asking you. Another thing about Ernest is he missed a lot of  
10 class?  
11 A. Yes.  
12 Q. He just didn't show up?  
13 A. He, that -- he missed a lot of days.  
14 Q. Okay.  
15 A. Yes.  
16 Q. But have you got that --  
17 MR. CRANE: Where's that school record?  
18 MR. CISAR: It's on the railing over there.  
19 BY MR. CRANE:  
20 Q. Here's his school records. Here's two of them.  
21 Looks like they're pretty close to -- I'm just trying to find  
22 your class.  
23 A. Okay.  
24 Q. And this is seventh and eighth?  
25 A. No.

1249

1 crack?

2 A. Yes.

3 Q. Okay. And then sometime after that, after you stopped

4 selling him the crack, you say that he asked you for your

5 gun? ✓

6 A. Yes.

7 Q. And you went and got your gun?

8 A. Right.

9 Q. And you gave it to him?

10 A. Yes.

11 Q. But at first you had to show him how to shoot it?

12 A. Yes. ✓

13 Q. And he didn't know how to do that?

14 A. I guess. I don't know.

15 Q. And that was your gun?

16 A. I got it from him.

17 Q. Right. He had pawned it to you?

18 A. Yes.

19 Q. For crack?

20 A. Yes.

21 Q. About two weeks before that?

22 A. Right.

23 Q. So it was your gun?

24 A. Right.

25 Q. Unless he could give you money to get it back?

1 A. Right.

2 Q. And you had to show him how it loaded?

3 A. Right.

4 Q. And how to fire it?

5 A. Right.

6 Q. Mr. Grant, did I hear you correct on direct examination,

7 you said you didn't know that the bullets, that you kept

8 the bullets behind the couch?

9 A. Yes.

10 Q. That's what you said?

11 A. Yes.

12 Q. Do you remember giving a deposition in this case?

13 A. Yes. ✓

14 Q. Miss Zembles and I went down to Jeff City Correctional

15 Center?

16 A. Yes.

17 Q. And you were there?

18 A. Yes.

19 Q. And your lawyer was there?

20 A. Right.

21 Q. A man named John Tomlin?

22 A. Yes.

23 Q. Do you remember that?

24 A. Yes.

25 Q. That was March 22nd of this year?

1 A. Yes.

2 Q. And there was a court reporter there?

3 A. Right.

4 Q. And you raised your hand?

5 A. Right.

6 Q. Swore to tell the truth?

7 A. Right.

8 Q. And I told you that if you didn't understand something

9 that I asked that you needed to let me know?

10 A. Right.

11 Q. ~~And then afterwards, you said you'd understood everything~~

12 that had gone on?

13 A. Right.

14 Q. And you've had an opportunity to read this, haven't you,

15 this deposition?

16 A. Just to sign it.

17 Q. You just signed it?

18 A. Yeah.

19 Q. Didn't read it?

20 A. No.

21 Q. Didn't read it at all?

22 A. No.

23 Q. Okay. Well, do you remember at that deposition I asked

24 you -- and I'm on Page 33.

25 And just to put this in context, we were talking

1 about Ernest and the gun and giving it back to you.  
2 Okay?  
3 A. All right.  
4 Q. Question --  
5 MR. CRANE: I'm sorry. What page, again?  
6 MS. MCKERROW: 33, starting on Line 3.  
7 Q. (By Ms. McKerrow:) Question, this is my question to  
8 you. And listen to this and listen to your answer, and  
9 you tell me if this is what you said, okay?  
10 A. All right.  
11 Q. Question, "Okay. So after Ernest came back and said it  
12 wasn't right, he anticipated that your mother was coming  
13 back home?"  
14 Answer, "Yeah."  
15 Question, "Okay. Then what happened?"  
16 Answer, "Then I took the gun and put it back  
17 downstairs in the microwave. And then I went back  
18 downstairs with Debbie."  
19 Question, "Okay. Where did you keep the bullets for  
20 the gun?"  
21 Answer, "They were behind the couch in the  
22 cartridge."  
23 Question, "Behind the couch where?"  
24 Answer, "In a cartridge, what the bullets come in."  
25 Question, "Oh, like a box?"



1 Answer, "Yeah."  
2 Do you remember me asking you those questions?  
3 A. Right. ✓  
4 Q. And you gave me those answers?  
5 A. Right. ✓  
6 Q. Okay. So then you had to show Ernest how to test-fire  
7 this gun?  
8 A. Yes.  
9 Q. And Antwane was with you? ✓  
10 A. Somewhere in the back of the kitchen. He wasn't directly  
11 out there.  
12 Q. He didn't want to keep the shell casing?  
13 A. Yes.  
14 Q. Oh, he did?  
15 A. Yes.  
16 Q. Okay. So he did keep the shell casing?  
17 A. Yes.  
18 Q. And then you gave the gun to Ernest?  
19 A. Yes.  
20 Q. And you gave him one bullet? ✓  
21 A. Yes. ✓  
22 Q. And you told him, "You'd better bring my gun back or my  
23 money, whichever you want"?  
24 A. No.  
25 Q. You didn't say that?

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1 A. No.

2 Q. Okay. I want to take you back to your deposition again.

3 Find the right page. Page 29, starting on Line 5.

4 Question, I asked you, "Okay. And did you have some

5 conversation with him about this gun?"

6 And you answered, "I was telling him to bring it

7 back or bring me my money back, whichever one he chose to

8 do."

9 Do you remember me asking you that question?

10 A. Yes.

11 Q. And you gave me that answer? \_\_\_\_\_

12 A. Yes.

13 Q. Okay. So you were worried you might not get your gun

14 back?

15 A. Yes. ✓

16 Q. Because that's how you'd gotten it in the first place,

17 Ernest had pawned it to you?

18 A. Yes.

19 Q. But Ernest did bring the gun back to you?

20 A. Yes.

21 Q. And he told you it wasn't right?

22 A. Yes.

23 Q. And then he starts asking you to give him some crack

24 cocaine?

25 A. Yes.

1 Q. And he tried to pawn some clothing to you? ✓  
2 A. Yes.  
3 Q. Tried to pawn his boots?  
4 A. Yes.  
5 Q. Tried to pawn his other shoes?  
6 A. Yes.  
7 Q. Tried to pawn a CD player?  
8 A. No.  
9 Q. He didn't do that?  
10 A. No.  
11 Q. How about a telephone, did he try to pawn a telephone?  
12 A. Yes.  
13 Q. And you said no?  
14 A. Yes.  
15 Q. And you had asked Debbie Watson about that, whether that  
16 would be a good idea?  
17 A. I don't recall.  
18 Q. You don't recall that?  
19 A. No.  
20 Q. But you told him, no more?  
21 A. Right.  
22 Q. Now, I want to take you through your version of walking  
23 the girls back to the car. Okay? Do you know what I'm  
24 talking about?  
25 A. Yes.

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# Appendix M

## IN THE SUPREME COURT OF MISSOURI

ERNEST JOHNSON,	)	
	)	
<i>Petitioner,</i>	)	
	)	
v.	)	Case No. _____
	)	
ANNE PRECYTHE, Director,	)	
Missouri Dept. of Corrections,	)	
	)	
<i>Respondent.</i>	)	

**PETITIONER ERNEST JOHNSON’S PETITION FOR WRIT OF HABEAS  
CORPUS PURSUANT TO MISSOURI SUPREME COURT RULE 91 AND  
SUGGESTIONS IN SUPPORT**

**INTRODUCTORY STATEMENT**

- “On November 5, 2015 around 9 am, Ernest called me again asking me if he could go to sleep now. He did not understand that the execution was called off.”

Affidavit of Cindy Malone (Attachment C, p. 2).

- [I]ntellectual disability must be determined under clinical standards such as the DSM. *Atkins v. Virginia*, 536 U.S. 304, 318, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). The United States Supreme Court has twice reversed a death penalty conviction when a court based its determination of lack of intellectual disability on the court’s personal observations of the defendant rather than on scientific and medical criteria. *Moore v. Texas*, --U.S. --, 137

S.Ct. 1039, 1059, 197 L.Ed.2d 416 (2017) (“*Moore I*”); *Moore v. Texas*, -- U.S. --, 139 S.Ct. 666, 671, --L.Ed.2d -- (2019) (“*Moore II*”).”

*Johnson v. State*, 580 S.W.3d 895, 909 (Mo. Banc 2019) (Stith, J., dissenting, joined by Draper, C.J. & Breckinridge, J.).

Mr. Johnson would unquestionably be found ineligible to be executed if clinical criteria are applied in an adversarial process uncorrupted by error. Instead, Mr. Johnson is a 60-year-old, intellectually disabled man again facing imminent execution. Mr. Johnson’s petition to this Court seeks a simple and straightforward request: that he be afforded an opportunity to present his evidence in support of his intellectual disability to a forum applying the Supreme Court’s mandate that the law be guided by proper clinical standards. Mr. Johnson also has not had an opportunity to a fair and reliable determination of his intellectual disability because the jury received flawed instructions.

The Supreme Court clarified the legal and the clinical standards defining intellectual disability since its decision in *Atkins*. In particular, the Supreme Court has emphasized its reliance on the clinical approach to determining who is (and is not) intellectually disabled. As noted above, Chief Judge Draper and Judge Breckinridge recently made such astute observations. The added importance on clinical standards serve to highlight the problems in Mr. Johnson’s trial as the jury received unconstitutional instructions and heard evidence regarding Mr. Johnson’s intellectual disability that deviated significantly from the clinical approach mandated by the Supreme Court.

Not only is the approach previously taken flawed under *Moore I* and *Moore II*, Mr. Johnson has developed additional evidence supporting his intellectual disability diagnosis utilizing the Supreme Court's most recent decisions as well as the clinical standards for determining intellectual disability. Mr. Johnson's evidence includes additional testing and analysis by Dr. Daniel Martell (Attachment H) and Dr. Richard Adler. (Attachment I).

Dr. Martell administered the Weschler Adult Intelligence Scale, 4<sup>th</sup> Version [WAIS-IV] in May of 2019. (Attachment H, p. 25). Mr. Johnson's Full-Scale IQ was measured as 70. *Id.* p. 25. This score, and the historical record of Mr. Johnson's Full-Scale IQ scores, establishes that he suffers from significantly subaverage intellectual functioning. *Id.* p. 29. Dr. Martell also assessed Mr. Johnson's adaptive functioning. *Id.* pp. 36-61. Dr. Martell opined that Mr. Johnson has adaptive deficits in practical, social, and conceptual skills. *Id.* p. 61. Finally, recognizing Mr. Johnson has received prior accusations of malingering and lack of effort, Dr. Martell administer three tests that measure effort. *Id.* p. 25. Mr. Johnson passed all three and Dr. Martell found that all scores developed during his evaluation were valid. *Id.* p. 25.

Mr. Johnson was administered a Quantitative Electroencephalogram [QEEG] in 2020. Dr. Adler evaluated those results. (Attachment I). Dr. Adler concluded that Mr. Johnson has highly abnormal brain functioning. *Id.* p. 1. Dr. Adler found the results of the testing provide additional support for Mr. Johnson's claim he suffers in Fetal Alcohol Spectrum Disorder [FASD]. *Id.* FASD is the greatest risk factor for developing an intellectual disability. (Attachment H, p. 14).

The State's expert, Dr. Gerald Heisler, did not testify at the third penalty phase where Mr. Johnson presented evidence that he was ineligible for the death penalty due to his intellectual disability. (Record on Appeal, *State v. Johnson*, SC87825 (Mo. 2008)). Likewise, the Court's competency expert, Dr. Jeffrey Kline, did not testify. *Id.* Neither experts' opinion has been subjected to adversarial testing before a finder of fact.

Mr. Johnson petitions this Court to exercise its power to grant habeas relief, or refer to a special master, on the basis of his intellectual disability pursuant to *Atkins*, 563 U.S. 304; *Moore I*, 137 S.Ct. 1039; *Moore II*, 139 S.Ct. 666. The constitutional issues raised in this petition have **never** been considered by this Court – nor any state or federal court – applying the Supreme Court's *Atkins* and *Moore* jurisprudence.

This Court previously unanimously remanded for a determination of *Atkins*. *Johnson v. State*, 102 S.W.3d 535, 537 (Mo. Banc 2003). After the *Atkins* remand, this Court only addressed what appellate counsel presented to it: a sufficiency challenge related to Mr. Johnson's intellectual disability.<sup>1</sup> Assessing the record evidence and the new evidence before this Court, there can be no question that Mr. Johnson is intellectually

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<sup>1</sup> Mr. Johnson does not allege ineffectiveness herein for counsel raising the sufficiency claim on direct appeal; he simply notes that the manner a claim is raised has a substantial impact upon what this Court considers and the manner of its consideration.



disabled. Mr. Johnson seeks an opportunity to present evidence and challenge any evidence to the contrary.

This petition further raises substantial constitutional issues relating to the evidence presented and considered by the jury as it evaluated Mr. Johnson's intellectual abilities as well as a challenge to the jury instructions submitted to the jury. These issues are a matter of first impression with this Court and address the manner in which Missouri courts apply *Atkins* and its progeny in this and future cases.

Finally, Mr. Johnson brings a challenge to his execution based upon his unique medical condition. Mr. Johnson previously had brain surgery in order to partially remove a tumor from his brain. This surgery has left him vulnerable to seizures. The drug used to execute Mr. Johnson substantially increases the likelihood that he will experience a seizure and render the process cruel and unusual under the Missouri Constitution.

**I. ERNEST JOHNSON IS INELIGIBLE FOR THE DEATH PENALTY BECAUSE HE IS INTELLECTUALLY DISABLED AS DEFINED BY CLINICAL STANDARDS RELIED ON BY THE SUPREME COURT IN *ATKINS V. VIRGINIA*, AND ITS PROGENY.**

**a. The Execution of the Intellectually Disabled Is Cruel and Unusual Punishment.**

In *Atkins*, the Supreme Court prohibited the execution of intellectual disabled individuals under the Eighth Amendment's prohibition against cruel and unusual punishment. *Atkins*, 536 U.S. at 321. Underlying the prohibition of executing the

intellectually disabled is the recognition that doing so would serve neither of the recognized purposes of capital punishment: retribution and deterrence. Unless the death penalty “measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment.” *Atkins*, 536 U.S. at 318 (internal quotations omitted). In *Atkins*, the Supreme Court prohibited executing the intellectually disabled because doing so would not further either of these goals. According to the Supreme Court, the death penalty does not apply to the intellectually disabled with the force it does for the able-minded offender:

The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

*Atkins*, 536 U.S. at 320.

In setting forth the ban, the Court referred to two definitions of intellectual disability from the American Association on Intellectual and Developmental Disabilities (AAIDD) and the American Psychiatric Association (APA). *Id.* at 309, n. 3. The Court noted that:

[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.

*Atkins*, 536 U.S. at 318.

**b. The Supreme Court Recognizes the Critical Role Clinical Standards Play in Properly Defining Intellectual Disability.**

The Supreme Court has taken up three cases since 2002 dealing directly with the issues raised in *Atkins* and the appropriate way to handle intellectual disability claims, and in each case the Court relied upon scientific and medical texts and emphasized the importance of relying on experts in the field of intellectual disability to guide the ultimate outcome. *See Hall v. Florida*, 572 U.S. 701 (2014); *see also, Brumfield v. Cain*, 576 U.S. 305 (2015); *see also, Moore I; Moore II*.

In *Hall*, the Supreme Court highlighted the importance of the clinical definitions of intellectual disability in addressing the mandates of *Atkins*. The Court repeatedly cited relevant medical authorities in addressing the proper manner in which to evaluate claims of intellectual disability. *Hall*, 572 U.S. at 709. *Hall* presented the question of “how intellectual disability must be defined in order to implement these principles and the holding of *Atkins*.” *Id.* *Hall* reinforced the three traditional criteria for the medical community’s definition of “mental retardation” originally expressed in *Atkins*:

the medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period.

*Id.* at 710.

*Hall* further noted that it is unsurprising that “this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability.” *Id.* In *Hall*, the Supreme Court repeatedly referred to the medical journals to guide the Court’s analysis of the appropriate way in which to evaluate the use of IQ scores. *See generally, Hall, supra.* In doing so, the Court ultimately invalidated the manner in which the Florida Supreme Court interpreted and enforced the intellectual disability statute and the manner in which it had been applied as inconsistent with medical evidence and the Eighth and Fourteenth Amendments.

The Supreme Court again had an opportunity to review a case involving an intellectually disabled capital defendant and the procedural and factual roadblocks set up in *Brumfield*, 576 U.S. 305. In *Brumfield*, the Court considered whether an IQ score of 75 was inconsistent with a finding that the defendant was intellectually disabled. The Court held that a score of 75 was “entirely consistent with intellectual disability.” *Id.* at 314. In reaching this conclusion, the Court relied on expert opinions and third-party sources such as the AAMR as well as the DSM-IV. The Court in *Brumfield* thus continued the Court’s

reliance on experts in the field of intellectual disability to guide the Court's jurisprudence on this difficult subject.

The Supreme Court most recently addressed the scope of *Atkins* in *Moore v. Texas*, --- U.S. ---, 137 S.Ct. 1039 (2017). In *Moore*, the Supreme Court evaluated the Texas state court's reliance on the *Briseno* factors for evaluating intellectual disability. *Id.* at 1048. The Court held the state court's reliance on the *Briseno* factors were invalid because the factors were based on outdated medical standards resulting in the "unacceptable risk that persons with intellectual disability will be executed." *Moore*, 137 S.Ct. at 1044 (quoting *Hall*, 572 U.S. at 704).

The Court in *Moore* re-affirmed the *Hall* opinion noting the use of strict IQ cutoffs<sup>2</sup> were unacceptable in evaluating whether a defendant is intellectually disabled. *Moore*, 137 S.Ct. at 1050. Similarly, the Court noted the IQ is not definitive of intellectual disability and courts must "consider other evidence of intellectual disability where an individual's

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<sup>2</sup> The use of strict IQ cut-offs in the intellectual disability realm is a dangerous practice as the vast majority (75-89%) of the intellectually disabled fall in the upper range of IQ scores for the diagnosis. See *Mental Retardation: Definition, Classification, and Systems of Supports*, 32 (10<sup>th</sup> ed. 2002). Because this group of individuals can and will score around 70 or just above, their 95% confidence level range scores on IQ tests are going to include numbers above 70. *Id.* at 59.

IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Id.* While the state court in *Moore* considered adaptive functioning, it did so in a manner inconsistent with the clinical community's standards.

The state court relied on Mr. Moore's adaptive strengths to determine Moore did not meet the requirements for intellectual disability even though the medical community relies on an individual's adaptive deficits. *Id.* at 1050. The state court relied on Moore's life on the streets, that he was able to mow lawns, and his playing pool for money as evidence he was not intellectually disabled. *Id.* The state court also relied on his relative improvement once he was imprisoned. *Id.* The Supreme Court, though, rejected the approach the state court took in *Moore* and again relied on the medical community's standards and noted the medical community cautions against "reliance on adaptive strengths developed "in a controlled setting,"" such as a prison. *Id.* (quoting DSM-5, at 38); *see also State v. Lambert*, 126 P.3d 646, 652 (Okla. Crim. App. 2005) (the expert witnesses agreed that "mentally retarded persons adapt very well to institutional settings such as prison, and are unlikely to exhibit problems with impulse control in those settings."). The Court ultimately held the state court's reliance on the outdated *Briseno* factors hindered the proper evaluation of Mr. Moore, resulting in a significant risk an intellectually disabled person will be put to death.

The development of intellectual disability jurisprudence since *Atkins* serves only to strengthen the evidence of Mr. Johnson's intellectual disability diagnosis. Reliance on the

clinical evaluations and accepted medical standards demonstrates Mr. Johnson's clinical diagnosis of intellectual disability to be correct and undercuts any argument to the contrary. Indeed, as set forth more fully below, the limited evidence casting doubt on Mr. Johnson's intellectual disability diagnosis represents a rejection of medical and clinical standards essential to the Supreme Court's repeated mandates.

**c. Ernest Johnson Has a Demonstrated History of Subaverage Intellectual Functioning.**

Determining the intellectual functioning of an individual involves the use of standardized instruments that assess the individual's level of intellectual functioning within a confidence interval that represents the range within the individual's true score falls. *See* AAID, p. 35. A full-scale IQ test should be used to determine the individual's level of intellectual functioning. *Id.* at p. 28. There are numerous data points from Mr. Johnson's history supporting a demonstrated history of subaverage intellectual functioning.

Mr. Johnson's IQ. has been tested on numerous occasions throughout his life beginning when he was only 8 years old. His IQ scores have been remarkably consistent throughout his life with eight of the nine full-scale IQ tests within the subaverage intellectual functioning range. Mr. Johnson's lifetime test scores break down as follows:

Test Date	Examiner	FSIQ Obtained	Mid-Year Norm Date	Flynn Adjustment <sup>3</sup>	Corrected FSIQ
WISC 1968	Hufstutter	72	1948 20 years	-6.0	66.0
WISC 1972	Hufstutter	63	1948 24 years	-7.2	55.8
WAIS-R 1995	Bernard	78	1978 17 years	-5.1	72.9
WAIS-R 1995	Cowan	84	1978 17 years	-5.1	78.9
WAIS-III 2003	Keyes	67	1995 8 years	-2.4	64.6
WAIS-III 2004	Bradshaw /Heisler	67	1995 9 years	-2.7	64.3
WAIS-III 2008	Connor	70	1995 13 years	-3.9	66.1
WAIS-III 2009	Connor	71	1995 14 years	-4.2	66.8
WAIS-IV 2019	Martell	70	2007 12 years	-3.6	66.4
<b>LIFETIME AVERAGE 71.3</b>				<b>66.9</b>	

See (Attachment H, p. 30). These numbers reflect an accurate assessment of Mr. Johnson's intellectual functioning and place him well-within the subaverage intellectual functioning necessary for finding him to be intellectually disabled.

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<sup>3</sup> Researchers have established that due to the "Flynn Effect" average IQ scores increase by three points every decade. See TASSE, MARC J. AND BLUME, JOHN H., *Intellectual Disability and the Death Penalty: Current Issues and Controversies*, p. 28-29, 2018.



The average of the scores – taken over a period of 51 years – show Mr. Johnson has a lifetime IQ score of 71.3, and applying aging norms to Mr. Johnson’s a lifetime average IQ score of 66.9. Both well within the range of sub average intellectual functioning required for determining that Mr. Johnson is intellectually disabled.

**d. Ernest Johnson Has a Demonstrated History of Significant Deficiencies in More than Two Adaptive Functions as defined by Missouri Law.**

Under Missouri Law, the question was whether Mr. Johnson demonstrated “continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work.” Mo. Rev. Stat. § 565.030.6. The evidence supporting Mr. Johnson’s adaptive deficits is overwhelming and undisputed by evidence that would be relied on by clinicians in making a determination of an individual’s adaptive functioning.

Clinical experts rely on standardized adaptive behavior testing instruments to determine whether an individual is approximately two standard deviations or more below the mean in any of the adaptive domains. *See* AAIDD, p. 31. Mr. Johnson’s trial expert, Dr. Denis Keyes, relied on several standardized tests for adaptive functioning. (Record on Appeal, Vol. III, p. 1610, *State v. Johnson*, SC87825 (Mo. 2008); Attachment L, p. 1). Additional defense experts, Dr. Paul Connor and Dr. Martell also relied on a battery of standardized tests to reach their conclusions regarding Mr. Johnson’s deficits. (*See*

Attachments H and K). Notably, neither Drs. Kline nor Heisler, non-testifying experts relied on by the State, administered any standardized tests for determining Mr. Johnson's adaptive functioning. Their conclusions, as a consequence, have to be evaluated in light of their rejection of standard clinical practice in making their assessments. The Supreme Court's jurisprudence in this area relies on the clinical approach to assessing intellectual disability and mandates courts assess intellectual disability by relying on sound clinical practices. With this understanding, the overwhelming evidence available to this Court establishes Mr. Johnson's deficits in two or more adaptive functions.

*i. Functional Academics*

The results of Dr. Keyes testing established that Mr. Johnson functioned at a third-grade level. (Record on Appeal, Vol. III, p. 1610, *State v. Johnson*, SC87825 (Mo. 2008)). Dr. Connor tested Mr. Johnson's academic performance in 2008 and again in 2009 determined Mr. Johnson tested at the 4<sup>th</sup> grade level on most subjects. (Attachment K, p. 7). Mr. Johnson showed strengths in arithmetic calculation, but even in this subject he performed only at the 5<sup>th</sup> grade level. (*Id.*). These results were consistent with Mr. Johnson's functioning throughout his time in school. (Attachment Q).

Mr. Johnson attended Washington School, a segregated all-black school. (Record on Appeal, Vol. I, p. 4, *State v. Johnson*, SC87825 (Mo. 2008)). Deborah Turner, who worked at Washington when Mr. Johnson was in first or second grade, described the school

conditions as very poor. *Id.* Turner knew Mr. Johnson and described him as a very shy, slow, and withdrawn child. *Id.* p. 5. Turner indicated that he could not grasp things quickly. *Id.* p. 18.

Robin Seabaugh taught Mr. Johnson in a developmental reading class in the ninth grade. (Record on Appeal, Vol. II, p. 1219, *State v. Johnson*, SC87825 (Mo. 2008)). She recalled Mr. Johnson being in special education classes from the fourth through the eighth grades. (*Id.* at pp. 1219-20). In the ninth grade, Mr. Johnson was placed in the “basic track” for slower-ability kids, and he did not perform well. (*Id.* at p. 1223). He missed a lot of school and received poor grades. (*Id.* at p. 1225). His reading level was very low, between the second and third grade level. *Id.* He flunked ninth grade and had to repeat it. *Id.* Seabaugh characterized his intelligence as extremely low. *Id.* p. 1226.

The chart below corroborates the above testimony and illustrates the poor academic progress throughout Mr. Johnson’s childhood.

<b>Academic Year</b>	<b>Age</b>	<b>Grade Level</b>	<b>Category/Result</b>
1966/67	6	1	Ungraded
1967/68	7	2	Ungraded
1968/69	8	2 (Year #2)	Ungraded
1969/70	9	3	Ungraded
1970/71	10	4	Ungraded
1971/72	11	3 (Year #2)	Special Education
1972/73	12	5	Special Education
1973/74	13	7	Special Education
1974/75	14	8	Special Education
1975/76	15	9	Failed 9 <sup>th</sup> Grade
12/10/76	16	9	Dropped Out

(Attachment M, p. 29).

Although the school records indicated Mr. Johnson received some satisfactory grades in the seventh grade, he was in a special education class where his grades were individualized and calibrated to his own achievement level. *Id.* pp. 1230-31. For instance, an eighth-grade special education student may be taught and measured at a second-grade level. *Id.* p. 1237. Seabaugh confirmed that Mr. Johnson had IQ scores of 77 in the third grade and of 63 in the sixth grade. *Id.* pp. 1231-32.

Steven Mason taught Mr. Johnson in an art class when he repeated the ninth grade. *Id.* p. 1239. Mr. Johnson did not do well and struggled in class. *Id.* p. 1240. He did not understand the instructions and had a hard time doing everything in class. *Id.* Mr. Johnson could not perform simple tasks, such as using a ruler, a compass, and a protractor. *Id.* p. 1243. He could not complete any of the projects and received an F grade. *Id.* p. 1244. According to Mason, the art class was basic and a student would almost have to try to fail the class. *Id.* p. 1247. Mason recommended that Mr. Johnson be placed in special education classes, but was told that the school could not do anything about that. *Id.* Mr. Johnson dropped out of school midway through his second attempt at the ninth grade. *Id.* p. 1257.

Mr. Johnson's achievement test scores throughout his schooling indicated his inability to grasp the schoolwork or to operate at grade level. His scores throughout his schooling were as follows:

Achievement Test Scores: Percentiles (Grade Equivalent)

Grade	Date	Reading	Math	Language Arts
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Grade 2	April 1969	1% (1.0)	*	*
Grade 3	April 1970	2%(1-5)	4% (2-4)	9% (2-4)
Grade 4	April 1971	1% (1-6)	*	2% (2-4)
Grade 3 <sup>4</sup>	April 1972	29% (3-1)	*	13% (2-5)
Grade 5	April 1973	2% (2-8)	2% (3-4)	2% (2-9)
Grade 7	April 1974	7%	8%	2%
Grade 9	October 1975	2%	21%	6%

(Attachment M, p. 29) (“\*” designates untested subjects).

Mr. Johnson’s poor academic achievement was noted on several occasions by the Missouri Department of Corrections (MDOC) well before the present offense. On April 24, 1979, Sherry Aslin from Missouri Probation and Parole completed an investigative report requested by the court. In the report she notes Mr. Johnson (18 at the time) was “ranked 204 in a class of 206” at the end of his freshman year. (Attachment V, p. 3). She went on to note, “The possibility of Johnson ever being able to attain a high school education is questionable.” *Id.* In a separate diagnostic report authored on June 15, 1979, the MDOC case worker noted, “He was barely able to read the SORP at the sixth grade level during the interview.” (Attachment R, p. 1). This case worker noted Mr. Johnson was “very childlike and unintelligent” during the interview process. *Id.*, p. 2.

The observations and testing data confirmed over a period of more than 40 years demonstrate Mr. Johnson’s significant deficiencies in academic performance. Indeed, there is no evidence that would support any other conclusion regarding this adaptive function.

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<sup>4</sup> First year where his transcript is designated as “Special Education.”

*ii. Home Living.*

Mr. Johnson relied on others in his life to take care of virtually every need. Mr. Johnson was incapable of operating in the community on his own. He lived with women that largely cared for him. Lisa Johnson was a former girlfriend to Mr. Johnson in the mid-1980s who testified he was quiet and did not talk too much. (Record on Appeal, Vol. II, p. 1116, *State v. Johnson*, SC87825 (Mo. 2008)). He did not have any duties around the house as he could not cook, drive, or do laundry the right way. *Id.* at p. 1117. He could not write very well. *Id.*, pp. 1117-18. He could not maintain steady employment and had no source of income. *Id.*, pp. 1117, 1127.

Even Mr. Johnson's probation officer at the time of the instant offense had concerns regarding Mr. Johnson's ability to operate successfully in the community. Officer Dennis Booth described Mr. Johnson as compliant, quiet, non-violent, and "below-average" intelligence. *Id.*, pp. 1176-77. Mr. Johnson only worked menial jobs that did not last too long. *Id.*, p. 1177. He had trouble reading and writing. *Id.*

Thomas Powell, a halfway house worker, observed Mr. Johnson and noted that he had severe difficulties with employment. *Id.*, p. 1200. He had trouble at one job because he was unable to successfully place labels on boxes. *Id.* And while in prison, Mr. Johnson was only assigned menial jobs, such as hauling trash or stacking food trays. *Id.*, p. 1145.

Mr. Johnson's difficulties in an unstructured environment were not surprising. His corrections case worker from the MDOC noted about Mr. Johnson, "A successful social adjustment on Johnson's part could not be accomplished without the use of a controlled

environment, strong guidance and community support following his release.” (Attachment R, p. 2).

Mr. Johnson’s challenges were also documented using objective, scientific testing measures. The testing administered by Dr. Keyes established that Mr. Johnson performed at the equivalent age of 4 years and 8 months for his daily living skills. (Attachment L, pp. 1-2). He also used the Scale of Independent Behavior test and determined Mr. Johnson’s overall level of independence equated to a 12-year-old boy. (Attachment L, p. 1).

Mr. Johnson’s performance in the community is the question, not his purported performance in the highly structured environment of a prison. As noted by Tasse and Blume (Tasse, M., p. 117) and as explained in *Moore I*, it would be inappropriate to “rel[y] on adaptive strengths developed “in a controlled setting,”” such as a prison. *Id.*, at 1050, (quoting DSM-5, at 38). Rather, evidence from individuals who knew Mr. Johnson in his own community are essential to conveying his significant challenges in his adaptive behavior.

### ***iii. Communication.***

Mr. Johnson’s ability to communicate has been severely compromised since he was child. He began showing signs that he was slower than other kids from a very early age. When Mr. Johnson was young, he mainly stayed close and “up underneath” his grandmother. ((Record on Appeal, Vol. II, pp. 1042, 1080-81, *State v. Johnson*, SC87825 (Mo. 2008)). The grandmother protected Mr. Johnson and called him “special.” *Id.*, pp. 1080-81, 1107-08. Mr. Johnson was slow in school and suffered difficulties grasping

things. *Id.*, p. 1039. He liked to hang around younger kids. *Id.* 1080-81. Mr. Johnson was teased about being slow and was called names like “dummy,” “crazy,” and “stupid.” *Id.*, pp. 1040, 1265. He was placed in slow learning and/or special education classes. *Id.*, p. 1041. His teacher, Mrs. Seabaugh, testified Mr. Johnson could only read at the second or third grade level. *Id.*, p. 1225. These challenges were supported by the academic testing as well.

Mr. Johnson’s standardized testing demonstrated significant deficiencies in reading and language up through October 1975 when he withdrew from school. (Attachment M, p. 29). Dr. Smith testified that Mr. Johnson’s ability to orally communicate was “fair” and noted that “mentally retarded people can communicate.” (Record on Appeal, Vol. II, p. 1458, *State v. Johnson*, SC87825 (Mo. 2008)). Dr. Smith emphasized, though, that he tested Mr. Johnson’s reading and writing skills and found them to be “significantly impaired.” *Id.*, p. 1459. While he was capable of reading and writing, he could read only at a third-grade level, his spelling was “poor” and his “punctuation and grammar were very poor.” *Id.*

Dr. Keyes concurred with Dr. Smith’s opinion. *Id.*, Vol. III, p. 1621. Dr. Keyes testified that Mr. Johnson’s oral communication skills are “probably somewhat better than his receptive communication, which is to say that he’s able to talk in a way that makes himself understood better than he can understand the information that is coming into him.” *Id.*, Dr. Keyes premised his testimony upon objective evidence.



Dr. Keyes administered the Vineland Adaptive Behavior Scales to Mr. Johnson. Mr. Johnson received scores at the 4 ½-year-old age equivalent level. (Attachment L). These tests demonstrated that his communication skills, while comparatively high to his other adaptive functions, were significantly deficient to the average adult. (Attachment L, pp. 1-2). In addition, Mr. Johnson’s school records show he was placed in developmental reading and received either failing grades or the equivalent of a ‘D-’ on his report card. *Id.* All of this evidence supports the finding of significant deficiency in the communication adaptive function.

#### *iv. Self-Direction*

Mr. Johnson has significant deficits in self-direction as evidenced by his inability to conform his actions to the law. Throughout his history, Mr. Johnson has been charged and convicted of various offenses – most of them property-related and indicative of a drug addiction. This behavior manifested itself in repeated criminal convictions throughout his life. His caseworker in prison even recognized the need for substantial supports in the community when he would be released from prison as far back as 1979. In that report, the caseworker prophetically recognizes: “Although [Johnson] has serious feelings of regret about his present incarceration, it does not appear likely that he is capable of the judgment necessary to prevent him from engaging in criminal behaviors in the future.” (Attachment R, p. 2). This report was issued during the developmental phase of Mr. Johnson’s life and clearly identifies significant deficiencies in Mr. Johnson’s adaptive functioning.

The State's sole response was to focus on the circumstances of the instant criminal offense, but the crime itself does not establish – from a clinical perspective – whether Mr. Johnson is intellectually disabled. This Court based its finding in large measure on the amount of planning and preparation by Mr. Johnson noting, “Dr. Keyes later admitted that Johnson took logical, precise, intelligent steps to prepare, execute, and avoid apprehension for the murders.” *Johnson*, 244 S.W.3d at 154. Setting aside that the State apprehended Mr. Johnson quite easily and he is facing execution, these types of facts, as noted in *Atkins*, do not support an accurate finding of intellectual disability absent other clinical data supporting such.

As *Atkins* recognized, those with intellectual disability do commit crimes for which they must be punished – but the fact of committing a crime cannot be boot-strapped to permit the execution of an otherwise intellectually disabled person applying proper clinical criteria. The fact that Mr. Johnson planned to commit the crimes does not, standing alone, undermine the evidence that he was significantly deficient in self-direction. *See Black v. Bell*, 664 F.3d 81 (6th Cir. 2011) (Intellectually disabled defendant convicted of triple homicide; hid the firearm to avoid detection); *see also Hughes v. Epps*, 694 F.Supp.2d 533, 536-37 (N.D. Miss. 2010) (Intellectually disabled defendant sought to hide the body of his victim and the clothing worn during the murder). Rather, the crime is in fact a “maladaptive behavior” to be considered in the broader context of his life history. (Record on Appeal, Vol. III, p. 1705, *State v. Johnson*, SC87825 (Mo. 2008)).

In conclusion, the Missouri Legislature established three particular criteria for determining whether an individual is intellectually disabled – subaverage intellectual functioning, deficiencies in two or more adaptive functions, and onset of intellectual disability prior to age 18. All of the evidence available to this Court establishes Mr. Johnson has met or exceeded each of the necessary elements.

**e. The process employed to determine Mr. Johnson’s intellectual functioning was fatally flawed in light of the United States Supreme Court Precedent.**

With the context of the Supreme Court’s *Atkins* jurisprudence in mind it is important to understand the process by which the courts in this state determined that Mr. Johnson, a man with an IQ of 67, was not intellectually disabled. Mr. Johnson has been denied even the most basic protections necessary to a capital defendant and has been placed through fact-finding processes that cannot reasonably be expected to produce reliable results, casting significant doubt on the decision to sentence him to death.

**f. The State’s intellectual functioning testing is inherently unreliable and cannot be used to determine intellectual functioning.**

Prior to the third sentencing hearing Mr. Johnson was evaluated by several psychologists regarding the issue of competency and intellectual disability. The exams were conducted by Dr. Denis Keyes (defense expert on intellectual disability), Dr. Jeffrey Kline (court expert on competency - not asked to determine intellectual disability), and Dr.

Gerald Heisler (state expert on intellectual disability). Dr. Keyes found Mr. Johnson to be intellectually disabled, Dr. Heisler did not. While experts offering differing opinions is not unusual, what is unusual is that the State's expert did not testify and has never been subjected to an adversarial proceeding.

Dr. Heisler did not personally administer an IQ test to Mr. Johnson. The test was administered by Mr. Sonny Bradshaw, yielding a full-scale score of 67. Dr. Heisler discounted the 67 on the basis of Bradshaw's belief Mr. Johnson was malingering, which Bradshaw did not verify through the use of clinical testing instrument. Indeed, Bradshaw's unverified opinion is rebutted by sound clinical practices. Dr. Keyes IQ testing yielded an identical score. Consistency among IQ scores actually rebuts any finding of malingering. *See United States v. Nelson*, 419 F.Supp.2d 891, 903 (E.D. La. 2006) ("It is simply impossible for the Court to conclude that Nelson has been malingering since age 11 and has been able to manufacture the identical testing pattern for all those years."). Further, Dr. Martell notes validity sub-tests within the IQ test administered by Bradshaw actually demonstrated appropriate effort by Mr. Johnson and no malingering. *See Attachment H*, p. 31. In short, Mr. Johnson was not malingering.

Thus, Dr. Heisler cannot be seriously or credibly relied upon to determine Mr. Johnson's intellectual disability because he violated settled clinical practices regarding how to diagnose intellectual disability. Indeed, the State prosecutor had such little confidence in Dr. Heisler that he chose not to call him as a witness after he was thoroughly cross-examined during a pretrial deposition.

The reports and conclusions from Dr. Heisler are scientifically unreliable in that they steadfastly avoid using clinically accepted practices to determine intellectual disability. Evaluations which fall outside accepted clinical practice should not be considered, or at the very least, should not be used to support a finding of no intellectual disability. *See Atkins v. Virginia (Atkins II)*, 631 S.E.2d 93, 94-99 (Va. 2006) (on remand from Supreme Court, it was reversible error for the trial court to admit the testimony of an unqualified expert); *see also United States v. Nelson*, 419 F.Supp.2d 891, 903 (E.D. La. 2006) (nothing that state's expert opinion was deserving of less weight than other experts because he "does not have any special expertise in mental retardation.").

*i. Dr. Jeffrey Kline.*

Dr. Kline has never testified at an adversarial proceeding before a fact finder. Dr. Kline was appointed by the trial court to conduct a mental competency examination pursuant to §552.020.1 RSMo. The purpose of the exam, according to the statutes and the trial court's order was to determine whether Mr. Johnson "lacks capacity to understand the proceedings against him or to assist in his own defense." *Id.* Dr. Kline was not asked by the trial court to opine regarding Mr. Johnson's intellectual disability claim. However, the state prosecutor used Dr. Kline's unsolicited opinion as a basis to argue Mr. Johnson did not meet the definition for intellectual disability.

Dr. Kline's *post hoc* opinion of Mr. Johnson's intellectual abilities cannot be relied upon to reach an accurate assessment of Mr. Johnson's intellectual disability claim. First, Dr. Kline did not conduct any independent testing to evaluate Mr. Johnson's intellectual

abilities. Dr. Kline instead relied on prior testing data and then chose to disregard some of the data without a scientific basis for doing so. For instance, Dr. Kline rejected Mr. Johnson's IQ scores of 67 reported by Drs. Heisler and Keyes solely on the basis Mr. Johnson might have had an incentive to artificially lower his score.

Setting aside that recent testing confirms the consistencies of scores over time, even then, Dr. Kline failed to assess how previous testing was also consistent with those scores. It is non-sensical and absurd to suggest that from Dr. Kline's perspective a borderline-intellectually disabled person could trick two other clinically trained professionals and the test. He offers no proof that occurred nor does he address the scoring data itself that supports the accuracy of the testing data.<sup>5</sup>

Second, Dr. Kline's opinion focuses almost exclusively on Mr. Johnson's IQ scores as a basis for determining his intellectual abilities. IQ scores are not determinative of whether someone is intellectually disabled or not for purposes of eligibility for the death

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<sup>5</sup> Neither Kline nor the State of Missouri can support their speculation that someone who is at best borderline ID (under their theory) could get an identical score on an IQ test within a year of each other. The correct clinical and scientific answer is that Mr. Johnson's IQ consistently hits 67 because that is the level of his functioning. Recent testing (now a decade later) again yielded a 67. (Attachment H, p. 25). Science should always trump baseless supposition.

penalty. § 565.030.6 RSMo. Regardless, the consistency of the IQ scores over time, the duplicative full-scale IQ scores of 67, demonstrate a satisfaction of one of the three clinical and legal criteria for intellectual disability, and undermines Kline's unscientific opinion.

Third, Dr. Kline also emphasizes that there was no determination of intellectual disability prior to the age of 18. Dr. Kline misstates the statutory requirements for determination of intellectual disability. *Id.* Onset of intellectual disability is the determination and not whether the diagnosis was made prior to 18. *Id.* While Mr. Johnson was not diagnosed as intellectually disabled prior to 18, he was placed in special education classes for much of his time in school and his state testing assessments showed him to be at or near the bottom of every academic area tested.<sup>6</sup>

Finally, Dr. Kline does not address adaptive functioning in his report. Dr. Kline addresses Mr. Johnson's intellectual abilities but simply ignores a necessary element relevant to Missouri's statutory scheme. *Id.* This determination is essential clinically and, importantly to Mr. Johnson, legally necessary to determine whether an individual is intellectually disabled for purposes of the death penalty. It is similar to, if not identical to,

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<sup>6</sup> Mr. Johnson cannot be faulted for the paucity of resources available at his racially segregated school in rural Missouri 50 years ago. That there was no such intellectual disability determination is more an indictment of a segregated and underfunded school system, as opposed to a lack of evidence of intellectual disability.

the clinical missteps that formed the basis of the Supreme Court's reversals in *Hall*, *Brumfield*, and *Moore*. The failure to address this issue renders Dr. Kline's opinion invalid for purposes of the jury relying on his opinion of Mr. Johnson's intellectual disability.

***ii. Dr. Gerald Heisler.***

Dr. Heisler has never testified at an adversarial proceeding before a fact finder. Dr. Heisler was retained by the State prosecutor for the purpose of determining whether Mr. Johnson was intellectually disabled. To find Mr. Johnson was not intellectually disabled, Dr. Heisler ignored virtually every accepted practice utilized by experts in the field of intellectual disability.

Dr. Heisler did not conduct the intelligence testing himself. Instead, he relied on the work of an untrained, unqualified test administrator, Wayne "Sonny" Bradshaw. Mr. Bradshaw was a bachelor's level technician who had never taken a course on administering or interpreting the WAIS or any other IQ test he administers. (Attachment U, p. 14). Mr. Bradshaw gained experienced "on the job" as well as administering the tests on students and nurse's aide "or whoever I can get to sit still for me." *Id.* p. 16. According to Mr. Bradshaw, he was provided with a test to administer and did not have any authority or training to provide any additional testing to Mr. Johnson. (*See* Attachment U p. 6-7). He had never administered assessments of adaptive deficits, which his department does not normally use. *Id.* p. 7. He also had never administered the Test of Memory Malingering [TOMM]. *Id.* p. 8. He testified that, as an employee of the mental health facility, "we don't normally see mentally retarded people." *Id.*



During the course of the testing by Mr. Bradshaw, he believed that Mr. Johnson was malingering. He made a note of this but performed no tests to confirm his suspicion even though this was and is the accepted practice in the medical community. *See* Anne L. Shandera, et. al., *Detection of Malingered Mental Retardation*, PSYCHOLOGICAL ASSESSMENT, Vol. 22, No. 1, 50 (2010) (“Psychologists conducting evaluations in forensic settings must address the possibility of malingered symptoms using objective procedures.”) Further, he did not explain how he arrived at his conclusions given his limited on-the-job training or how he would be qualified to make such a clinical interpretation, especially given that his facility did not see many intellectually disabled people. (Attachment U, p. 8). When asked to explain why he thought Mr. Johnson was not giving good effort, Mr. Bradshaw has explained that “he just knew.” (Attachment E, ¶ 8). The test administered by Mr. Bradshaw indicated that Mr. Johnson had a full-scale IQ of 67.

Dr. Heisler was not present for Mr. Bradshaw’s testing, and only conducted an interview with Mr. Johnson prior to reaching his conclusions. Dr. Heisler ultimately ignored the full-scale IQ test of 67 based on Mr. Bradshaw’s belief that Mr. Johnson was malingering. Dr. Heisler did not take any clinical steps to confirm the suspicion of malingering and instead relied solely on the assumptions of his untrained and unqualified technician, even though this goes against accepted medical practices. Christopher L. Ray, Chalmers P. Wylie, *Assessment of Feigned Cognitive Impairment: A Cautious Approach to the Use of the Test of Memory Malingering for Individuals with Intellectual Disability*, Open Access Journal of Forensic Psychology, Vol. 4, p. 39 (2012) (“One way to reduce

inaccuracies in the identification of feigned cognitive impairment in forensic evaluations is to regularly administer effort tests such as the TOMM. Such tests are important tools that forensic examiners should consider administering given the aforementioned prevalence rates of feigned cognitive impairment among individuals evaluated in forensic settings.”)

<sup>7</sup>. Dr. Heisler has now admitted that Mr. Bradshaw was not qualified to determine whether Mr. Johnson was malingering. (Attachment E, ¶ 12).

Even more troubling was the conclusions reached by Dr. Heisler, without conducting any testing, regarding adaptive functioning. Medical experts make clear that “[s]ignificant limitations in adaptive behavior are established through the use of standardized measures . . .” INTELLECTUAL DISABILITY, DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORT, *supra*, at p. 47. Dr. Heisler used no objective measurements in reaching his conclusions. In addition, the medical practice is to “obtain[] information regarding the individual’s adaptive behavior from a person or persons who knew the individual well.” *Id.* Dr. Heisler, though, chose not to speak to any individual that could provide any insight whatsoever regarding Mr. Johnson’s abilities prior to writing his report. Thus, he did not have to account for the evidence establishing that Mr. Johnson’s

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<sup>7</sup> As discussed, *infra*, Dr. Keyes did administer the TOMM to Mr. Johnson and concluded, based upon a of 48/50, the Mr. Johnson was not malingering.

development was delayed, he was isolated, alone and bullied as a child, and he was easily influenced by others.

Finally, Dr. Heisler focused on petitioner Johnson's perceived maximum performance rather than on the typical performance in evaluating his adaptive behaviors. *See* The AAIDD Ad Hoc Committee on Technology and Classification, *INTELLECTUAL DISABILITY, DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORT*, at p. 47 (11<sup>th</sup> Ed. 2010) ("The assessment of adaptive behavior focuses on the individual's typical performance and not their best or assumed ability or maximum performance.") In Mr. Johnson's case, Dr. Heisler noted that petitioner was capable of obtaining employment in assessing the leisure and work adaptive function. However, the skills possessed by individuals with intellectual disability vary considerably, and that they have one or more skills (that might be thought by some laypersons as inconsistent with the diagnosis, such as holding a menial job) cannot be taken as disqualifying. An intellectual disability expert expects to see strengths because persons in the upper range of IQ scores for the diagnosis, which are the vast majority of the intellectually disabled, "are generally able to fulfill all expected adult roles." *See* American Psychological Association, *Manual of Diagnosis and Professional Practice in Mental Retardation* 18 (John W. Jacobson and James A. Mulick eds.), (1996).

Dr. Heisler's work lead to an unreliable result when he steadfastly rejected nearly every accepted medical practice for evaluation of intellectual disability. And recognizing that his results were unreliable and unscientific, the prosecutor chose not to subject Dr.

Heisler to cross-examination. Instead, the prosecutor introduced the unsupported findings to the jury through cross-examination of the defense expert, Dr. Keyes.

**g. Mr. Johnson's jury was misled by the State's encouragement to ignore the science and clinical standards.**

In closing argument, the State encouraged the jury to ignore the only expert to testify specifically on intellectual disability, Dr. Keyes, and instead “use their own common sense.” (Record on Appeal, Vol. III, p. 1796, *State v. Johnson*, SC87825 (Mo. 2008)). The prosecutor further argued that Mr. Johnson could not be intellectually disabled because “he’s got street smarts.” *Id.* p. 1798. The prosecutor also told the jury to ignore clinical practice and consider his functioning in prison as evidence that he was not intellectually disabled, even though Dr. Keyes had cautioned against relying on prison behavior. *Id.* The prosecutor argued Mr. Johnson was not intellectually disabled because in prison “[h]e does fine. He’s got a TV in his room, he’s got cable TV, plays cards, plays basketball, rec four or five times a day, gets to shower whenever he wants . . . .” *Id.* He also argued that because Mr. Johnson was not diagnosed during the developmental period, the diagnosis was just “something they’re using to get him out of appropriate punishment.” *Id.* p. 1800. It is this kind of pandering to lay stereotypes about what the intellectually disabled can and cannot do that lead to the erroneous verdict that Mr. Johnson was not intellectually disabled, in spite of the fact that not a single state expert took the stand to testify to that opinion.

One juror recently signed an affidavit which illustrates just how far the jury's verdict was from the actual science of intellectual disability. The juror held the mistaken belief that in order to show that Mr. Johnson was intellectually disabled, the defense somehow had to prove that Mr. Johnson "did not know right from wrong." (Attachment F, p. 1 ¶ 2). The juror stated that if the defense had "proved he didn't know what he was doing, I would have believed it, but the defense didn't. They didn't show that he did not know right from wrong." *Id.* Of course, this is not the question put to the jury on intellectual disability because guilt phase culpability was no longer at issue. *See Atkins*, 536 U.S. at 318 ("Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial.")

The juror also found that Mr. Johnson was not intellectually disabled based upon courtroom demeanor: "I observed Mr. Johnson in court. He sat motionless during the trial. I thought he understood what was going on. A lot of people with mental retardation would have had a hard time sitting there and paying attention. There was level of comprehension on his face." *Id.* In *Atkins*, the Supreme Court noted a concern about lay stereotypes about the intellectually disabled, including "unwarranted impressions" regarding a defendant's "demeanor." 536 U.S. at 321.

Despite the fact that this juror found that Mr. Johnson's face showed a "level of comprehension," affidavits from multiple defense team members belie this assertion. Elizabeth Carlyle served as counsel for Mr. Johnson at his final resentencing. During the trial, contrary to the juror's impression, Mr. Johnson's level of comprehension and

attention were not at odds with his intellectual disability. Ms. Carlyle explains that while Mr. Johnson was interested in looking at her computer at counsel table, that was simply due to the fact that he was unfamiliar with computers and he was noticing photos on her computer that were unrelated to trial. (Attachment B, ¶ 5-6). Mr. Johnson’s participation at trial was “consistent with my impression of his lack of general knowledge . . . . Most of my clients are able to understand at least basic legal information about their case much better than Mr. Johnson.” *Id.* at ¶ 7. Mr. Johnson “did not make any suggestions about the conduct of the trial.” *Id.* at ¶ 6.

Cindy Malone served as Mr. Johnson’s mitigation specialist in post-conviction proceedings and she noted from the outset of her involvement that it was “abundantly clear . . . that Ernest was born with an intellectual disability.” (Attachment C, p. 1). Fellow inmates informed her that even when tasked with simple chores such as mopping and sweeping the kitchen, “Ernest would continuously mop himself into a corner,” and that he would repeatedly burn the food he tried to cook in the microwave because he just could not manage to work the buttons. *Id.* At a legal visit in which the attorney noted she shared the same birth year as Mr. Johnson – 1960 – the attorney and Ms. Malone waited several minutes for Mr. Johnson to attempt to do the math to figure out how old that would currently make both Mr. Johnson and the attorney. *Id.* Eventually, they gave up waiting and simply told him the answer. *Id.* p.2

Ms. Malone was on the case when Mr. Johnson had a golf ball sized tumor partially removed from his brain. *Id.* p. 2. Mr. Johnson could not grasp the doctors’ explanation of

his after-care plan and Ms. Malone received a frantic call from Mr. Johnson's sister in which Mr. Johnson had told her that they wanted "to cut his head open again." *Id.* Mr. Johnson could not understand that the doctors simply wanted to perform follow-up MRIs to gauge his progress. *Id.*

Ms. Malone also occasionally received calls from Mr. Johnson after she was no longer on the case. Mr. Johnson was previously set to be executed in November 2015. Ms. Malone had received several calls from Mr. Johnson that day and evening. At around 6 p.m., Mr. Johnson's execution was stayed by the United States Supreme Court. When Ms. Malone spoke to Mr. Johnson the next day around 9 a.m., Mr. Johnson asked her if it was okay to go to sleep, as he did not comprehend that his execution had been called off the evening before. *Id.* p. 2.

Nancy McKerrow represented Mr. Johnson during his first trial and sentencing and her observations are in line with those of Ms. Malone and Ms. Carlyle. (Attachment A). Mr. Johnson was easy to deal with as a client, but he also "could not provide us with the type of feedback about the legal issues or the facts of the case to be very helpful." *Id.* at ¶ 4. Although provided with a copy of discovery, he did not appear to read it and his "inability to participate in the legal process against him carried through the trial." *Id.* Mr. Johnson's level of comprehension and participation contrasted with that of other defendants and "Ernest stood out to me for his overall deferential nature and inability to help his trial team." *Id.* at ¶ 5.

Valerie Leftwich represented Mr. Johnson during his post-conviction proceedings. (Attachment G at ¶ 4). As with other defense team members, Ms. Leftwich was left with the impression that because of his intellectual limitation, Mr. Johnson “was not able to meaningfully assist us with this case.” *Id.* He could not provide feedback after being provided written material and he could not provide any helpful information about witnesses. *Id.* at ¶ 5. Ms. Leftwich had to cover the same ground over and over again in attempting to explain things to Mr. Johnson, but he was simply unable to grasp the information. *Id.* Like Ms. McKerrow, Ms. Leftwich negatively contrasted Mr. Johnson’s level of participation with that of other criminal defendants. *Id.* at ¶ 7.

Bill Swift represented Mr. Johnson during two of his appeals to this Court. (Attachment D, ¶ 4). His interactions with Mr. Johnson contrasted with his experience with other clients, as Mr. Johnson simply could not engage at any level in regard to his legal issues. *Id.* at ¶ 5. Mr. Johnson was simply “a passive recipient of information.” *Id.* at ¶ 6.

The prosecutor urged the jury to ignore science and be led by “common sense.” As a result, an intellectually disabled man now faces imminent execution unless this Court steps in and makes good on the promise of *Atkins* and *Moore* – that the intellectual disability decision must be guided by clinical practice and not by lay stereotypes.

#### **h. Dr. Martell’s report**

Dr. Daniel Martell recently tested and evaluated Mr. Johnson and found that he “meets all of the current criteria for Intellectual Disability pursuant to *Atkins v. Virginia*.” (Attachment H, p. 2). Dr. Martell is a clinical psychologist who is board certified in forensic



psychology and has served as the President of the American Academy of Forensic Sciences. *Id.* p. 2. Dr. Martell has consulted on *Atkins* cases throughout the country, both for the defense and the prosecution. Notably, Dr. Martell served as the expert witness for the State in the case against Daryl Atkins, the defendant in the Supreme Court case of the same name. *Id.* Dr. Martell explains why many of the intellectual disabled go undiagnosed, even by mental health experts: “[c]ounter to popular belief, many individuals with Intellectual Disability are not immediately identifiable by the way they look or after limited interactions, and the diagnosis can be missed if it is not the primary focus of a clinical examination.” *Id.* p. 28.

Dr. Martell gave Mr. Johnson both IQ and neuropsychological tests. *Id.* p. 26. In order to ensure that Mr. Johnson gave good effort, Dr. Martell gave him three validity tests, all of which Mr. Johnson passed. *Id.* On the IQ test, the WAIS-IV, Mr. Johnson received a full-scale IQ of 66, after adjustment for measurement error. *Id.* This score is consistent with his other IQ testing, which squarely places him in the significantly subaverage category. *Id.* From 1968 to 2019, Mr. Johnson has been given nine IQ tests that are considered diagnostic for intellectual disability. *Id.* p. 30. Mr. Johnson’s scores on *eight* of these nine tests all qualify him for the diagnosis of intellectual disability, including the testing of the State’s own expert. *Id.* The sole outlier test, a test for which the raw data no longer exists, still has Mr. Johnson achieving only a 78.9 on the full-scale IQ, with adjustment for measurement error. *Id.* pp. 28, 34. On tests of academic achievement, Mr. Johnson scored in the bottom 1%, with his abilities commensurate with an early elementary school level.

*Id.* p. 27. On tests of language, Mr. Johnson was severely impaired, scoring in the bottom 99.6% of the population. *Id.*

Dr. Martell notes that contrary to science and clinical standards, the expert who accused Mr. Johnson of poor effort at testing, Dr. Heisler, did not actually examine Mr. Johnson himself and the IQ testing he relies on actually shows that Mr. Johnson gave good effort on the test given to him. *Id.* p. 31. Embedded into the WAIS-III that Bradshaw gave Mr. Johnson are two tests of validity, both of which Mr. Johnson passed on his administration with Bradshaw. *Id.* In addition, Mr. Johnson's score on the test given by his own expert was exactly the same as the test given by Bradshaw: a 67. *Id.* Mr. Johnson also passed the objective tests of effort given by his expert. *Id.* "[I]t is extremely unlikely that a person with Mr. Johnson's history of adaptive deficits could 'fake' on two IQ tests a year apart and be able to obtain the exact same score." *Id.* In fact, the 51-year IQ test history of Mr. Johnson shows "remarkably consistent" results, illustrating a case of "convergent validity" on the question of IQ score. *Id.*

Dr. Martell also determined that Mr. Johnson has adaptive deficits in all three diagnostic categories of practical, social, and conceptual skills. *Id.* p. 38. Mr. Johnson was delayed in walking and talking and it was acknowledged among those who knew him that Mr. Johnson was always slow, struggling significantly in school. *Id.* p. 40. A clear indication that Mr. Johnson has deficits in conceptual skills is that he was held back in school twice, placed in special education, and had "documented deficits on standardized academic achievement testing from the time he started in school." *Id.* pp. 40, 45. His art

teacher during the year he repeated ninth grade, Mr. Mason, testified that even in that subject, “Mr. Johnson pretty much had a hard time doing everything.” *Id.* at 43. He could not even accomplish such basic tasks as using a ruler to draw a straight line. *Id.* at 44. A report from the Missouri Department of Corrections notes that on their own testing, Mr. Johnson was “barely able” to read the sixth-grade reading level material provided and the report notes the childhood IQ score of 70. *Id.* A corrections case worker described Mr. Johnson as “very childlike and unintelligent.” *Id.*

In the social domain of adaptive behavior, Mr. Johnson shows marked impairments in his language skills and in his relationships, he is likely to be manipulated and taken advantage of by others. *Id.* at 47. On neuropsychological tests, Mr. Johnson scores in the bottom 1% for verbal fluency and in the bottom 2% for expressive and receptive language skills. *Id.* These objective test results are supported by anecdotal evidence from peers that Mr. Johnson had a hard time making friends and expressing himself and as a result, was vulnerable to being misled by others. *Id.* at 48-49.

In the domain of practical adaptive skills, Mr. Johnson shows significant impairment in self-care, work skills, and personal safety. *Id.* at 51. Mr. Johnson had a hard time taking care of his own basic needs and he was described as fairly incompetent in most areas -- save for the most basic ability to dress and wash himself. *Id.* at 54. In sum, Mr. Johnson has never been able to live independently but has had to rely on others to support him. *Id.* at 55. When he was placed for employment, his probation officer testified that he could not even handle the simplest of tasks, losing one job because he could not even put labels on

boxes in the correct manner. *Id.* at 58. Mr. Johnson only ever held the most menial of jobs and struggled to read and write. *Id.* at 59. When he applied for a job at Hardee's, he asked a friend to fill out the job application for him. *Id.*

Although not necessary for diagnosis, Dr. Martell also identified several risk factors in Mr. Johnson's background that made him especially vulnerable to intellectual disability: 1) genetic predisposition, 2) fetal alcohol exposure, 3) a history of head injuries, 4) child abuse and neglect, and 5) poverty and malnutrition during the developmental period. *Id.* at 12.

In terms of genetic predisposition, it has long been recognized that intellectual disability runs in families and having a parent or a sibling with the disorder "significantly increases the likelihood of having an intellectual disability." *Id.* In Mr. Johnson's case, both his mother and his brother are intellectually disabled. *Id.* His mother was tested in 1974 and her full-scale IQ was 61, accompanied by impairments in adaptive functioning. *Id.* His brother, Danny, was born with profound intellectual disability and other birth defects that required him to be institutionalized throughout most of his life. *Id.* at 12, 15. These simple genetic facts significantly increase the risk that Mr. Johnson also has intellectually disability. *Id.*

In addition, no less than three experts have agreed that Mr. Johnson also suffers from Fetal Alcohol Exposure. *Id.* at 14. Well-established science links maternal alcohol use with intellectual disability and it is the "leading known risk factor for intellectual disability." *Id.* It is undisputed and was well-established that Mr. Johnson's mother, Jean

Ann Patton, had a long-standing history of alcohol and drug abuse and she was unable to quell her addictions during her pregnancy with Mr. Johnson. *Id.* Mr. Johnson was born at home, was premature, and “extremely small in stature and weight.” *Id.* Dr. Martell notes that Mr. Johnson’s intellectual disability, as well as his brother Danny’s, “is likely to be the direct result of his mother’s abuse of alcohol and other drugs during her pregnancy.” *Id.* at 15.

Another risk factor for intellectual disability is a history of head injuries during the developmental period. *Id.* at 16. Mr. Johnson’s history reveals at least two significant head injuries, injuries that include a loss of consciousness. *Id.* Being the victim of child abuse also increases the risk for intellectual disability and “the abandonment, neglect, abuse, and deprivation that Ernest Johnson experienced during his early years had a significant impact on his development.” *Id.* at 17. This abuse was severe in nature and included parents and caregivers who were physically violent. *Id.* at 18-19. As just one small example of the severity of this abuse, Mr. Johnson’s father would chase and shoot at his own children with a gun. *Id.* Mr. Johnson’s mother was similarly violent, especially when intoxicated, and even his grandmother, the bright spot in his young life, would beat the children to the point that they had welts and cuts upon their bodies. *Id.* Mr. Johnson, in particular, received more than his fair share of physical abuse and was singled out by the father as deserving of additional physical violence. *Id.* at 19. Another caretaker would force the three children to lie across the floor in a row and he would then whip all of them “with belts and extension cords.” *Id.* The children were told they would be killed if they told. *Id.*

Mr. Johnson also suffered from one of the most insidious and damaging forms of child abuse - sexual abuse. *Id.* at 19. His own mother would prostitute out Mr. Johnson to older women (ages 30-40) in exchange for money or alcohol. *Id.* In order to ensure his compliance, his mother would encourage Mr. Johnson to drink alcohol or smoke marijuana so that he would be “‘in the mood’ before introducing him to an older woman.” *Id.*

Mr. Johnson also grew up in abject poverty and experienced malnutrition as a child which “exposed him to significant risks for abnormal brain development.” *Id.* p. 20. As an illiterate sharecropper, Mr. Johnson’s father struggled to support the family and the combination of abuse and poverty experienced by Mr. Johnson, was “particularly toxic.” *Id.* at 21. The family was so poor that the children had to resort to shoplifting to provide for their own basic needs and this survival behavior was deemed acceptable by Mr. Johnson’s caregivers. *Id.* at 22.

In summary, Dr. Martell has opined, without hesitation, that Mr. Johnson meets all the criteria for the diagnosis of intellectual disability. This opinion is supported by “substantial ‘convergent validity’ from anecdotal, contemporaneous, and empirical data sources.” *Id.* at 65. Only one area of the three adaptive domains need to be deficient in order to meet the diagnosis. Mr. Johnson has deficits in all three areas. *Id.* His intelligence testing, with nine IQ scores over the span of 50 years, is remarkably consistent. *Id.* at 31, 65. Both his intellectual and adaptive deficits “find their origin in the developmental period.” *Id.* at 65. Mr. Johnson’s intellectual disability is not a close case – it is a convincing and overwhelming one.

### **i. Dr. Richard Adler's Report**

Dr. Adler is a board-certified psychiatrist with over two decades of experience in forensic psychiatry and expertise in Fetal Alcohol Spectrum Disorders (FASDs). (Attachment I, p. 1). Dr. Adler recently evaluated Mr. Johnson using the Quantitative Electroencephalogram (QEEG), an objective test designed to provide data about brain functioning. *Id.* at 1-2. One of the benefits of the QEEG is there is no opportunity for malingering because the test measures electrical activity in the brain. *Id.* at 3.

The results of the QEEG show that Mr. Johnson has a “highly abnormal functioning brain.” *Id.* at 1. The electrical abnormalities in his brain are widespread, occurring in “all brain areas, that is – frontal, parietal, temporal, occipital and limbic, and on the right and left side.” *Id.* at 5. The results are also consistent with the underlying presence of FASD. *Id.* at 7. As noted by Dr. Martell, maternal drinking during pregnancy is the number one risk factor for the development of intellectual disability. (Attachment H, p. 14). The results were also consistent with Mr. Johnson’s history of head trauma. *Id.*

Importantly, some of Mr. Johnson’s most glaring abnormalities occur in the limbic lobe of the brain, an area “critically important to the ability to understand, integrate and manage strong impulses (including violence).” *Id.* at 17. Dr. Adler’s report shows that Mr. Johnson’s intellectual disability is supported by objective evidence of globally significant brain impairment that is indicative of both head trauma and maternal drinking during pregnancy.

- j. Habeas relief should be granted or alternatively this case should be remanded for further factual development on the intellectual disability question.**

Given the developments in Supreme Court jurisprudence since the resentencing, it has become clear that Mr. Johnson did not receive a determination of intellectual disability that was guided by the dictates of science or clinical standards. Habeas relief should be granted. Alternatively, this Court should remand this case for further factual proceedings, in front of a Special Master. At this proceeding, Mr. Johnson can finally confront on the stand any expert witness from the State who attempts to opine that he is not intellectually disabled.

**II. THE JURY INSTRUCTIONS ON INTELLECTUAL DISABILITY VIOLATED MR. JOHNSON'S CONSTITUTIONAL RIGHTS.**

Mr. Johnson's resentencing jury was unconstitutionally instructed that he must prove to them, unanimously, that he is intellectually disabled. However, because *Hurst v. Florida*, 577 U.S. 92 (2016), *Ring v. Arizona*, 536 U.S. 584 (2002) and *Atkins*, 536 U.S. 304, make it clear that the lack of intellectual disability is a finding that renders him ineligible for death, the Sixth Amendment requires that the *State* prove that Mr. Johnson is *not* intellectually disabled. In addition, the jury instructions did not clarify that intellectual disability should also be considered as an independent mitigating factor, for which unanimity is constitutionally forbidden under *Maryland v. Mills*, 486 U.S. 367, 384 (1988)



and *McKoy v. North Carolina*, 494 U.S. 433, 435 (1990). The jury instructions in this case violated both of these constitutional directives, resulting in a death sentence for an intellectually disabled man and creating the possibility that a lone holdout juror prevented Mr. Johnson from receiving the protection of *Atkins*.

Mr. Johnson's jury was instructed that before he could qualify for a life sentence under the protection of *Atkins*, they must "unanimously find" that he had proven that he was intellectually disabled by a preponderance of the evidence. (Attachment S, p. 6). This requirement of unanimity was again reiterated in Jury Instructions #7, 11, 12, 16, 17 and 21: "[i]f you did not unanimously find by a preponderance that the defendant is mentally retarded. . . ." (Attachment S, p. 7, 12, 14, 19, 21, 25).

The verdict forms again reiterated that the jury must find unanimously that Mr. Johnson had proven intellectual disability. (Attachment S, pp. 31, 35, 39). Jury instructions submitted by the defense, which would have instructed the jury that the State had the burden of proving that Johnson *was not* intellectually disabled, beyond a reasonable doubt, were rejected. (Attachment X, pp. 1-2, 4, 6, 8-9, 10-13). The signed verdict forms reflecting the findings of the resentencing jury only lay out their findings in aggravation. (Attachment T, pp. 1-3). There is no signed verdict form directly addressing their finding on the intellectual disability question or on mitigation. The instructions require an automatic progression to the capital weighing process if a single juror did not believe Mr. Johnson was intellectually disabled.

To complicate matters, the jury was first instructed on intellectual disability, then on aggravating factors, and then on mitigating factors. The jury received no clarification as to how they, as an individual juror, could consider intellectual disability as an independent mitigating circumstance. Thus, there was no guidance regarding the burdens of proof and lack of unanimity that are attendant to mitigating circumstances - after receiving multiple instructions requiring unanimity as to intellectual disability. *See Mills*, 486 U.S. at 384 (striking down jury instructions on mitigating circumstances that could be interpreted as requiring unanimity because the “the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk.”); *McKoy*, 494 U.S. at 435 (holding that in regard to mitigating circumstances “North Carolina’s unanimity requirement violates the Constitution by preventing the sentencer from considering all mitigating evidence.”).

The post-*Atkins* jury instructions actually made it *more difficult* for Mr. Johnson to have a jury spare him because of his intellectual disability. Prior to *Atkins*, Mr. Johnson could at least present his intellectual disability as a mitigating circumstance that any single juror could find supported a life sentence, without a requirement of unanimity. In a cruel twist of fate, these instructions actually provided him less protection due to his disability, something surely not contemplated by the Supreme Court when it rendered its decision in *Atkins* and this Court’s unanimous remand for a consideration of *Atkins* in this case.

- a. ***Hurst*, *Ring* and *Atkins* require the state to prove that Mr. Johnson is not intellectually disabled. It was unconstitutional to require Mr. Johnson to prove his intellectual disability unanimously.**

In *Atkins*, the Supreme Court concluded that the Constitution “places a substantive restriction on the state’s power to take the life of a mentally retarded offender.” *Atkins*, 536 U.S. at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). In *Ring v. Arizona*, 536 U.S. 584 (2002), decided the same year as *Atkins*, the Supreme Court further held that death penalty eligibility factors must be proven to a jury. *Blakely v. Washington* reiterated that “every defendant has the right to insist that the prosecutor prove to a jury all facts essential to the punishment.” 542 U.S. 296, 313 (2004). *Ring* made it clear that “[i]f a State makes an increase in a defendant’s authorized punishment contingent upon the finding of a fact, that fact – no matter how the State labels it – must be found by a jury.” 536 U.S. at 602.

*Ring* established that for purposes of the Sixth Amendment, there is no difference between an element of the offense of capital murder and an aggravating circumstances finding that makes a capital-murder defendant eligible for a death sentence. “[T]he characterization of a fact or circumstance as an ‘element’ [of a crime] or a ‘sentencing factor’ is not determinative of the question ‘who decides,’ judge or jury.” 536 U.S. at 605. A capitally charged defendant may demand a jury trial of any fact that is a prerequisite to *either* the entry of a capital conviction *or* the actual imposition of a sentence of death. *Id.* at 609. More recently, in *Hurst*, the Supreme Court overruled prior decisions which had

held that Sixth Amendment did not require a jury to find the specific findings underlying the death sentence because those decisions “were irreconcilable with *Apprendi*.” *Hurst*, 577 U.S. at 101.

It is also important to view the June 2002 decisions of the Supreme Court in *Atkins* and *Ring* against the backdrop of constitutional rules for capital sentencing that these cases did not disturb. The most important of these rules is *Lockett v. Ohio*, 438 U.S. 586 (1978), which holds that a capital defendant has an Eighth Amendment right to have his or her sentencer consider “any aspect of the defendant’s character and record or any circumstances of his or her offense as an independently mitigating factor.” *Id.* at 607.

In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Supreme Court specifically held that this rule gives a capital defendant the right to present evidence of mental deficiencies – including deficiencies that can support the diagnosis of intellectual disability – to juries sitting at the sentencing phase a capital case, as bearing on the jury’s “reasoned moral response . . . in rendering its sentencing decision.” 492 U.S. at 328. The Supreme Court in *Atkins* did not overrule this aspect of *Penry*. The Court held only that a capital defendant’s right to submit evidence of intellectual disability to a sentencing jury in mitigation was *insufficient* to satisfy the Eighth Amendment’s prohibition against excessive punishment, and that the Eighth Amendment therefore required announcement of an *additional* rule that “the mentally retarded should be categorically excluded from executions.” *Atkins*, 536 U.S. at 318.

Thus, after *Atkins* and *Ring*, the absence of intellectual disability is a *constitutional precondition* for the imposition of a capital sentence that “operates as the functional equivalent of an element of a greater offense” exposing the defendant to a capital sentence. *Ring*, 536 U.S. at 609 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494, n. 19 (2000)). Read together, the cases very clearly say that the Sixth Amendment jury trial right attached to elements that are required to narrow the scope of the criminal offense. *Atkins* adds just such an element. There the court stated: “Thus, *pursuant to our narrowing jurisprudence*, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.” *Atkins*, 536 U.S. at 319 (emphasis added).

The Supreme Court in *Atkins* made it clear that allowing evidence of intellectual disability in the mitigation phase was not sufficient to protect the rights of the intellectually disabled. The Court found such due to the “risks” involved of a more severe penalty because “defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes,” as well as it being “a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury...a special risk of wrongful execution.” 536 U.S. at 320-21 (internal citations omitted).

The instructions in this case allowed a single holdout juror on the *Atkins* question to prevent Mr. Johnson from receiving a life sentence, in spite of his intellectual disability. The jury was repeatedly told they must be unanimous on the intellectual disability question,

and it was never clarified in the instructions on mitigation that intellectual disability could then be considered *without* the requirement of unanimity. In addition, because the Eighth Amendment no longer allows the intellectually disabled to be executed, the protection of mitigation is insufficient, especially when the jury was repeatedly told that intellectual disability must be found unanimously, which is not how mitigating circumstances are found and actually require Mr. Johnson to meet a higher burden. *See Penry*, 492 U.S. at 346-47, *overruled by Atkins*, (Steven, J., dissenting) (“The consideration of mental retardation as a mitigating factor is inadequate to guarantee, as the Constitution requires, than individual who is not fully blameworthy for his or her crime because of a mental disability does not receive the death penalty). Their very disability “jeopardize[s] the reliability and fairness of capital proceeding.” *Atkins*, 536 U.S. at 306-07.

In *State v. Jimenez*, 924 A.2d 513 (N.J. 2007), the court examined the intersection of the non-unanimity requirement for mitigating evidence and the *Atkins* decision. *Id.* at 515-16. The court held that the jury could not be required to find intellectual disability unanimously:

We conclude that because mental retardation is a conclusive mitigating factor, and because mitigating factors do not have to be found unanimously, a unanimous jury finding of mental retardation is not required to preclude a death sentence. Stated differently, if a single juror finds that a defendant has met the burden of proof for mental retardation, the defendant shall not be subject to a death sentence.

*Id.* at 515. This holds true to *Atkins* by protecting the intellectually disabled from execution and Eighth Amendment jurisprudence which protects the individuality of jurors in regard to their determination of mitigating factors. *See also*, Marla Sandys, Adam Trahan, & Heather Pruss, *Taking Account of the “Diminished Capacities of the Retarded”: Are Capital Jurors up to the Task*, 57 DePaul Law Review 679, 687 (2008) (noting that in interviews done by the Capital Jury Project regarding the question of intellectual disability, it was “abundantly clear” there was a “difficulty in convincing an entire jury that a defendant is mentally retarded,” and that to the extent “the defendant’s mental retardation was the reason to vote for life,” that decision was made by individual jurors, not the jury as a whole).

By requiring Mr. Johnson to prove to the jury unanimously that he is intellectually disabled, the jury instructions in this case allow the state to execute him even though it is more likely than not that he is intellectually disabled. The instructions allow a single juror to prevent Mr. Johnson from receiving the protection of *Atkins*, even if eleven jurors find by a preponderance of the evidence that he is intellectually disabled. Given the categorical ban placed upon the execution of the intellectually disabled in *Atkins*, these instructions cannot withstand constitutional scrutiny.

- b. The jury instructions misled the jury into believing that intellectual disability must be found unanimously before it could constitute mitigation. This approach violates long-standing Supreme Court precedent.**

The instructions in this case also mislead the jury into believing that if they did not find that Mr. Johnson had proven his intellectual disability unanimously, they could not individually use intellectual disability as an independent mitigating circumstance that could also justify a life sentence. “[M]ental retardation for purposes of *Atkins*, and mental retardation as one mitigator to be weighed against aggravators, are discrete issues.” *Bobby v. Bies*, 556 U.S. 825, 829 (2009); *see also Allen v. Buss*, 558 F.3d 657, 662 (7th Cir. 2009) (“[T]here is a difference between using mental retardation as a mitigating factor and categorically excluding mentally retarded persons from the death penalty altogether. One is a balancing test and the other is a ban.”) (citing *Atkins*, 536 U.S. at 320–21). The jury was instructed that they must first make the intellectually disability decision, then the aggravating factor decision, and then determine mitigating circumstances. There was no clarification that intellectual disability could also be an independent mitigating circumstance, that each juror, individually, could find proven and thus, support a life sentence. *See id.* In fact, in instructing the jury on the specific mitigating circumstances that they should consider, they were not instructed on intellectual disability, only that they should consider whether Johnson was under “extreme mental or emotional disturbance,” or that his capacity to conform his conduct to the law was “substantially



impaired.” (Attachment S, p. 10). Although they were instructed that they could consider “any other facts and circumstances” they found mitigating, this came after they were instructed multiple times that they must first determine unanimously whether Mr. Johnson had proven his intellectual disability. This violates long-established rules about non-unanimity and the consideration of mitigating evidence.

In *McKoy*, the jury was instructed they could return a life sentence even if they did not unanimously find any mitigating circumstance, but they were also instructed that a mitigating circumstance did not exist unless it was found unanimously. 494 U.S. at 439. The Supreme Court held these instructions violated the Constitution because “[t]he unanimity requirement thus allows one holdout juror to prevent the others from giving effect to evidence that they believe calls for a ‘sentence less than death.’” *Id.* Similarly, Mr. Johnson’s jury was instructed that intellectual disability must be found unanimously and the later instructions on mitigation did nothing to clarify that it could still be considered as a mitigating circumstance that did not require unanimity. Thus, the instructions allowed a lone juror to prevent Mr. Johnson’s intellectual disability from being given effect to as mitigating evidence, something forbidden under *McKoy*.

Because established Supreme Court law requires the jury to be able to give effect to mitigating circumstances that are not unanimously found, the instructions cannot allow a fact to “become ‘irrelevant’ to mitigation merely because one or more jurors either did not believe that the circumstance had been proved as a factual matter or did not think that the

circumstance, though proved, mitigated the offense.” *McKoy*, 494 U.S. at 440-41. These instructions had that precise effect on the question of Mr. Johnson’s intellectual disability.

*McKoy* flowed from the Supreme Court’s prior decision in *Mills*, 486 U.S. 367, which involved the interpretation of capital jury instructions on mitigation. The *Mills* Court noted that “[i]n reviewing death sentences, the Court has demanded even greater certainty that the jury’s conclusions rested on proper grounds.” *Id.* at 376. Although it was plausible that the jury interpreted the instructions so as not to require unanimity in regard to mitigating circumstances, “there [was] at least a substantial risk that the jury was misinformed.” *Id.* at 381. Because the instructions may have led the jury to believe that they could not give effect to a mitigating circumstance unless it was unanimously found, the instructions could not survive constitutional scrutiny:

We conclude that there is a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance. Under our cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk.

*Id.* at 384. In this case, the instructions clearly told the jury that they had to unanimously find intellectual disability before it could justify a life sentence for Mr. Johnson. Later instructions did nothing to clarify that this was not the case.

A similar conclusion was reached in *State v. Blackwell*, 801 S.E.2d 713 (S.C. 2017). There the court held that even though the jury had found that the defendant was not intellectually disabled under *Atkins*, they still needed to determine whether the evidence qualified as an independent mitigating circumstance:

the question remains how the jury should review evidence of mental retardation in the event it finds the defendant is not mentally retarded. While such a finding eliminates the absolute bar on the imposition of the death penalty under *Atkins*, it does not negate the existence of evidence that may establish a mitigating circumstance.

*Id.* at 734. The court went on to find that even though the defendant's intellectual functioning may not meet the diagnostic criteria for protection under *Atkins*, it still could qualify as a mitigating circumstance. *Id.*

Although the jury was instructed that they could consider "any other facts and circumstances" they found mitigating, this came after they were instructed multiple times that they must first determine unanimously whether Mr. Johnson had proven his intellectual disability. They received no instructions remedying this unanimity requirement as to the existence of intellectual disability as a mitigating fact. This violates long-established rules

from *McCoy* and *Mills* requiring non-unanimity and the unfettered consideration of mitigating evidence.

**c. Mr. Johnson’s claims regarding his intellectual disability are appropriate for Rule 91 relief.**

In *Clay v. Dormire*, 37 S.W.3d 214 (2000), this Court noted that Rule 91 relief is allowed under the “manifest injustice” standard in capital cases for claims involving errors committed during the sentencing process. *Id.* at 218. In doing so, the Court noted that they were following the lead of the United States Supreme Court, which had more expansively interpreted the term “actual innocence” in the context of the death penalty. *Id.* at 218 n.1., citing *Sawyer v. Whitley*, 505 U.S. 333, 345-47 (1992). *Clay* contrasted the relief available to capital defendants in habeas corpus with the more limited nature of sentencing relief available for non-capital defendants. *Id.* at 218.

In *State ex rel. Koster v. McElwain*, 340 S.W.3d 221 (Mo. Ct. App. W.D. 2011), involving a Rule 91 petition, the lower court first held a hearing and determined that the defendant, who had been convicted of murder, had established a gateway claim of innocence, allowing procedurally defaulted claims to be reviewed and the writ of habeas corpus to be granted. *Id.* at 229. On appellate review of that decision, the court noted that “[a] writ of habeas corpus does not declare or determine the guilt or innocence of a defendant. A writ of habeas corpus merely operates to vacate a conviction where principals of justice and fundamental fairness require.” *Id.* at 232. The court rejected the State’s argument as “erroneous” that a habeas court has no authority to address constitutional

errors if the claims could have been raised at trial, direct appeal, or post-conviction. *Id.* at 243.

The court noted that Missouri had chosen to follow the Supreme Court's jurisprudence in the federal habeas context, which allows habeas review when there has been a miscarriage of justice. *Id.* at 243-44, citing *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000). Under that standard, the petitioner must show a constitutional violation that has "probably resulted" in the conviction of someone who is innocent. *Id.* at 244, citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The court held that "[t]here is, therefore, a procedural path which can permit a habeas court to consider procedurally defaulted constitutional claims. . . . If a habeas record establishes a showing of the gateway of innocence, then the habeas court is entitled to review the merits of *all* procedurally defaulted claims of constitutional infirmity." *Id.* at 245 (emphasis added).

The Supreme Court has held that in the context of the death penalty, actual innocence encompasses death eligibility. *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). In this realm, a large body of Eighth Amendment law had developed which aims to adopt procedural safeguards which narrow the "class of offenders upon which the sentence is authorized to impose the death penalty." *Id.* at 341-42. The Supreme Court's decision in *Atkins* represents just such a narrowing safeguard. *See Atkins*, 536 U.S. at 319 (noting that their decision to exempt the intellectually disabled from execution was "pursuant to our narrowing jurisprudence."). *Sawyer* specifically held that innocence of the death penalty does not just encompass aggravating factors, but "that some other condition of eligibility

had not been met.” 505 U.S. at 345. Because Mr. Johnson’s intellectual disability excludes him from the class of offenders that can be put to death, it renders him innocent of the death penalty, allowing this Court to consider 1) the substantive question of his ineligibility for the death penalty given his intellectual disability and 2) whether the jury was improperly instructed that they had to unanimously find that Johnson was intellectually disabled.

In a similar procedural posture, where the capital petitioner was found not intellectually disabled by a jury and had been denied relief on that claim in his first post-conviction proceeding, the Texas Supreme Court nevertheless allowed a successive post-conviction claim to proceed based upon intellectual disability and stayed the execution. *Ex parte Milam*, No. WR-79,322-04 (Tex. Crim App. Jan. 15, 2021). The claim was remanded to the trial court for a review of the claim on the merits. *Id.*

Mr. Johnson has presented enough evidence of intellectual disability to establish “a gateway permitting review.” *McElwain*, 340 S.W.3d at 245. As outlined in this petition, the State did not present testimony from a single expert at trial disputing his intellectual disability, instead relying on specious arguments that played on stereotypes at odds with the clinical understanding of intellectual disability and backdoor evidence from a non-testifying expert whose evaluation did not even come close to comporting with clinical practice. If this Court feels that more fact-finding on the underlying question of intellectual disability is required, this case should be remanded so that the ultimate question of Mr. Johnson’s disability can finally be determined at an adversarial hearing where any opinion of a State’s expert can be tested through cross-examination.

Mr. Johnson has shown enough evidence of intellectual disability to show a gateway claim of innocence of the death penalty and a presumptively prejudicial error in the jury instructions on that question that has never been reviewed by any court. *See McElwain* 340 S.W.3d at 255-56 (holding that once a meritorious constitutional violation has been found in habeas, the petitioner is entitled to the presumption of prejudice that “would have been afforded to the defendant on direct appeal.”).

In *McKim v. Cassady*, 457 S.W.3d 831 (Mo. 2015), this Court also noted that Rule 91 habeas relief not only allows a gateway claim of actual innocence, but also a freestanding claim of actual innocence. *Id.* at 842. Given that this Court has previously pronounced it follows the Supreme Court’s definition of that term in terms of eligibility in capital cases, *McKim* would also indicate that Mr. Johnson’s substantive claim of intellectual disability also has a home in this court, as it is a freestanding claim of innocence of the death penalty. *See State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003) (holding that because the execution of an innocent person “is a manifest injustice, a habeas petitioner under a sentence of death may obtain relief” upon a showing of actual innocence alone, independent of any constitutional violation).

In *Amrine*, this Court specifically noted that continuing duty in death penalty cases to avoid wrongful executions, in addition to wrongful convictions. *Id.* at 547. And although following the lead of the Supreme Court in terms of defining “manifest injustice,” the Court also noted that the state standard for relief for a freestanding claim of innocence is not

required “to impose a high a standard as would a federal court,” because “this Court is not affected by the federalism concerns that limit the federal courts’ jurisdiction.” *Id.* at 548.

More recently, in *Edwards v. Steele*, 533 S.W.3d 238 (Mo. Ct. App. E.D. 2017), Rule 91 was relief was granted on the basis that the defendant, convicted of capital murder at 17, was given a sentence that violated the Eighth Amendment, because the statutory scheme prevented consideration of his youth and related circumstances. *Id.* at 240. Like Johnson, Supreme Court developments in Eighth Amendment law made it appropriate to consider his claim in habeas corpus. *Id.* at 241. Since Johnson’s claim was decided on direct appeal and post-conviction, and as explained in this petition, the Supreme Court has provided additional guidance which illustrates that the prior determination of intellectual disability must be guided by the dictates of clinical practice, not lay stereotypes and clinically inappropriate evaluations, as was done in Mr. Johnson’s case.

### **III. MR. JOHNSON’S EXECUTION BY LETHAL INJECTION WILL CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE MISSOURI CONSTITUTION**

Due to a unique and specific medical condition of Mr. Johnson, there is a substantial and unjustifiable risk that Missouri’s lethal injection protocol will affect Mr. Johnson differently than an average, healthy inmate and will cause Mr. Johnson serious harm and severe “pain akin to torture.” *Johnson v. Precythe*, -- U.S. --, 141 S.Ct. 1622, 1628 (2021) (J. Sotomayor dissenting). Therefore, proceeding with the execution using the state’s



current protocol will violate the State of Missouri's constitutional prohibition against cruel and unusual punishment. Mo. Const. art. I, § 21.

Mr. Johnson was diagnosed with an atypical parasagittal meningioma brain tumor in 2008. He had a craniotomy surgical procedure in August 2008 where a portion of the tumor was removed. The remaining portion of the tumor, however, could not be safely removed and remains in Mr. Johnson's brain. An MRI was conducted on Mr. Johnson's brain revealing the craniotomy procedure resulted in scarring tissue and a brain defect that causes chronic medical problems.

There is a substantial and unjustifiable risk that the lethal injection drugs will trigger uncontrollable and severely painful seizures and convulsions due to Mr. Johnson's unique brain defect and condition. Mr. Johnson seeks discovery and a hearing on the question of whether the lethal injection procedure will constitute cruel and unusual punishment under Mo. Const. art. I, § 21.

Jurisdiction is conferred by Rule 91.02 of the Missouri Rules of Civil Procedure which provides that the Missouri Supreme Court may be the court of first instance where the punishment is a sentence of death. Subject matter jurisdiction is conferred by *McIntosh v. Haynes*, which provides that a prisoner may file a claim under Rule 91 pleading cruel and unusual punishment due to the conditions of the punishment even if the detention itself is deemed legal. 545 S.W.2d 647, 653 (Mo. 1977).

**a. Mr. Johnson's Medical Condition**

Mr. Johnson suffers from an atypical parasagittal meningioma brain tumor. The tumor was discovered in or about 2008. A meningioma is a tumor that arises from a layer of tissue called the meninges that covers the brain and spine. A meningioma is typically slow growing.

Mr. Johnson had a craniotomy surgical procedure on August 28, 2008, to remove a portion of the meningioma. (Attachment O, ¶ 9). The entire meningioma could not be removed during the craniotomy. *Id.* A portion of the tumor remains in Mr. Johnson's brain. *Id.*

The craniotomy procedure resulted in a hole in the skull of Mr. Johnson that is still present. The craniotomy also resulted in a significant brain defect as a portion of Mr. Johnson's brain has been removed or compressed due to the existence of the tumor and the craniotomy procedure. This defect is depicted as a dark space or a hole in the brain. (Attachment O, ¶ 6).

An MRI documents a brain defect and scarring tissue in an area of the brain responsible for the movement and sensation of the legs. The remaining portion of the meningioma, the scarring tissue, and the brain defect can create disrupted areas of electrical brain activity manifesting as violent and uncontrollable seizures. (Attachment O, ¶ 10). Since the surgical procedure, Mr. Johnson has been diagnosed with a seizure disorder, epilepsy. *Id.* Medical records document Mr. Johnson being prescribed anti-seizure

medications due to his condition. *Id.* His brain defect, scarring, and tumor cause these seizures. *Id.*

The administration of the lethal injection drug pentobarbital creates a substantial and unjustifiable risk that violent and uncontrollable seizures could be triggered during the execution due to the lethal injection drugs' interaction with the remaining meningioma, scarring tissue, and brain defect. (Attachment O, ¶ 14). There is a substantial and unjustifiable risk that such violent and uncontrollable seizures will result in a severely painful and prolonged execution in light of Mr. Johnson's specific and unique medical condition. *Id.*

#### **b. Missouri's Lethal Injection Protocol**

Missouri's lethal injection protocol calls for the administration of 5 grams of pentobarbital, divided into two syringes, and administered through an IV line into the execution chamber, where the prisoner is alone and strapped to a gurney. No medical personnel are close at hand, and the prisoner is monitored remotely from the execution support room. Although medical personnel insert the IV lines at the outset, the lethal drug itself is injected by non-medical personnel pushing syringes into the IV line at a predetermined flow rate.

Pentobarbital is a drug within the barbiturate class and is the agent that will be used in the Missouri lethal injection protocol. (Attachment O, ¶ 12). All barbiturates are derived from the parent compound barbituric acid. *Id.* Relevant properties of barbiturates have a variety of effects on the central nervous system that include both excitatory and inhibitory

states. *Id.* A barbiturate acts by depressing the central nervous system, particularly on certain portions of the brain. *Id.*

Methohexital is in the barbiturate class and is a close cousin to pentobarbital as it shares a common central molecular structure. Methohexital is commonly used in electroconvulsive therapy (ECT) which is a treatment for intractable depression. (Attachment O, ¶ 12). The ECT procedure requires producing a seizure for a brief and controlled duration. *Id.* This procedure is repeated on at least 10 separate occasions. *Id.* During the induced seizure, brief unconsciousness is necessary as the seizure is painful and disturbing. *Id.* In extensive research, methohexital has been shown to intensify and prolong seizures and is the drug of choice for ECT procedures. *Id.* Methohexital and other barbiturates have been shown to produce seizures in individuals without an underlying seizure disorder or epilepsy. *Id.* In individuals with pre-existing epilepsy, the production of a seizure is even more certain and more likely to occur when the brain is exposed to the barbiturate because it is a seizure-producing drug. *Id.*

The procedure itself begins with the insertion of the IV lines, one in each arm (or a central line in the femoral, jugular, or subclavian vein if venous access in the arms is limited). (Attachment W, p. 1). About 15 to 30 minutes before the lethal drug is injected, a saline solution, which has historically been colored with methylene blue (or another dye) is injected into the prisoner to determine if the lines are clear. *Id.* The gurney is position so medical personnel can remotely observe the prisoner's face, directly, "or with the aid of a

mirror.” *Id.* at 2. Medical personnel monitor the prisoner remotely during the execution. *Id.*

Non-medical personnel administer the lethal drugs through syringes into the IV lines. (Attachment W, p. 2). After the administration of the initial 5 grams of pentobarbital, the non-medical personnel flush the IV lines with saline and methylene blue. *Id.* Shortly thereafter, the execution chamber’s curtains are closed, and medical personnel check the prisoner to determine if he is deceased. *Id.* If the prisoner is not dead, then non-medical personnel inject an additional 5 grams of pentobarbital through two additional syringes. *Id.*

During the administration of the lethal drug, no one is present in the execution chamber other than the prisoner and no medical personnel are at hand. The prisoner is monitored only remotely from the execution support room. The members of the execution team only enter the execution chamber when the curtains are closed to determine if the prisoner has died. This check is performed after the administration of the first injection of pentobarbital, and then again if a second injection is needed.

If the prisoner does not die after the administration of 10 grams of pentobarbital, Missouri’s protocol provides no further guidance. (Attachment W). The protocol is completely silent as to what procedures should be followed in the event the lethal drugs trigger uncontrollable seizures. *Id.* If the prisoner is not killed by the execution, there is no protocol or equipment for resuscitating the prisoner. *Id.* If the execution is halted and the prisoner remains alive, the State of Missouri must resume medical care of the prisoner, as it is obligated to do under Article 1 §§ 10 and 21 of the Missouri Constitution.

In individuals with pre-existing epilepsy or a seizure disorder, like Mr. Johnson, the production of such a seizure is even more certain and more likely to occur when the brain is exposed to drugs that have been shown to produce and promote seizures. (Attachment ), ¶¶ 12-14). A seizure-promoting compound like pentobarbital will increase the likelihood of a seizure with a very high degree of probability. *Id.* at ¶ 15. No medical personnel will be at hand, instead, the personnel will be watching from the execution support room, unable to lend any medical aid to Mr. Johnson in the event of a seizure. Missouri's protocol is grossly inadequate to address the significant risks to Mr. Johnson during an execution, risks that could cause an excruciating and severely painful procedure.

**c. Affidavit of Dr. Joel Zivot**

Dr. Joel Zivot is a highly trained, board-certified physician. He serves as an associate professor and senior member of the Department of Anesthesiology and Surgery at Emory University School of Medicine in Atlanta, Georgia. (Attachment O, ¶¶ 1-3; Attachment P). He holds board certifications in Anesthesiology and Critical Care Medicine. *Id.* Dr. Zivot has practiced anesthesiology and critical care medicine for 20 years and has personally performed, or supervised, the care of over 40,000 patients. (Attachment O, ¶ 2). Dr. Zivot has reviewed the medical records for Mr. Johnson and traveled to Potosi Correctional Center to examine Mr. Johnson in person. *Id.* at ¶ 5.

Upon physical examination, Dr. Zivot observed a large scar on Mr. Johnson's head from the prior cranial surgery. *Id.* ¶5. Dr. Zivot observed that Mr. Johnson's right leg was weaker than his left leg and he had hyperreflexia on the deep tendon reflexes of his right

leg. *Id.* ¶5. Upon his review of the medical records and MRI images for Mr. Johnson, Dr. Zivot observed a small hole in the top of Mr. Johnson's skull. He also observed a black region in the brain area that represents missing brain tissue. Dr. Zivot estimates that the total quantity of the brain is 15 to 20%. The brain defect is irreversible. *Id.* at ¶ 6. Mr. Johnson's brain defect is in the region of the brain responsible for movement and sensation of the legs. (Attachment O, ¶ 7). This corresponds with Mr. Johnson's complaints and physical observations about leg weakness, imbalance, and hyperreflexia. *Id.* at ¶ 8. The brain defect will not improve over time and the associated weakness and imbalance will not improve. *Id.*

Dr. Zivot also observed that Mr. Johnson has a seizure disorder which is a direct result of the brain surgery. *Id.* at ¶ 10. According to Dr. Zivot, scar tissue in the brain and the brain defect creates disrupted areas of electrical brain activity. *Id.* Based on his review of Missouri's execution protocol and Mr. Johnson's medical records and images, Dr. Zivot opines that the use of pentobarbital will increase the likelihood of a seizure in Mr. Johnson with a very high degree of probability. *Id.*

A drug-induced seizure would likely manifest as a violent shaking of the legs which can then spread to the rest of the body and then produce unconsciousness. The seizure may be self-limiting or could last for a prolonged period of time. Outwardly, the seizure is striking and an alarming event that is seen as a total body shaking and straining. During such a seizure, physically restraining a seizing individual is very difficult and will not result

in a resolution of the seizure. Such seizures can result in significant muscle pain and disorientation. *Id.* ¶ 11.

Based on the condition of Mr. Johnson, which includes his brain tumor, brain defect, and scarring, a substantial risk of serious harm will occur during his execution as a result of a violent seizure that is induced by pentobarbital. *Id.* ¶ 14. The use of pentobarbital during the execution protocol significantly increases the likelihood that a seizure will occur in Mr. Johnson. Pentobarbital, a drug in the barbiturate class, produces a variety of effects on the central nervous system of the patient. A similar drug, Methohexital, a barbiturate and close cousin of pentobarbital, is used in electroconvulsive therapy to produce seizures in a patient. Methohexital is known to induce seizures in patients without pre-existing seizure disorders as seen in Mr. Johnson. In patients like Mr. Johnson, with a known pre-existing seizure disorder, the introduction of the barbiturate to the body is even more certain and more likely to produce a seizure in the patient. Mr. Johnson's seizure disorder creates a unique and substantially important risk that is significantly increased when exposed to any drug that promotes seizures. Mr. Johnson's seizure threshold is substantially lower than the general population and any further lowering of that threshold will increase the likelihood of a seizure with a very high degree of probability. Further, pentobarbital cannot reduce pain and is known to exaggerate pain or make it worse. Thus, the drugs used by the state of Missouri to execute prisoners have a unique capacity, in this case, to substantially increase the likelihood of a severely painful execution of Mr. Johnson. *Id.* at ¶¶ 10, 12, 14.



Dr. Zivot also opines that the risk of a pentobarbital seizure in the case of Mr. Johnson cannot be dismissed because Mr. Johnson has a pre-existing seizure disorder. Due to the unique medical condition of Mr. Johnson, the use of pentobarbital in a person with a pre-existing seizure disorder increases the likelihood of a resulting seizure to a very high degree of probability.

**d. The prior federal litigation indicates that Mr. Johnson has a colorable claim in state court.**

There has been an extensive litigation of the lethal injection claim in federal court, resulting in stays and remands stretching over a number of years. Of critical importance to this Court is the most recent and dispositive finding by the Eighth Circuit not disturbed by the Supreme Court's denial of *certiorari*.

The Eighth Circuit most recently found that due to his medical conditions and interaction with the execution drugs "Johnson raised a plausible allegation that the State's method of execution will cause severe pain." *Johnson v. Precythe*, 954 F.3d 1098, 1101 (8th Cir. 2020). However, the Eighth Circuit denied Mr. Johnson's claim on the basis that he did not plead an appropriate alternative execution method and denied him the right to amend his original pleading. *Id.* at 1104.

Mr. Johnson then filed a writ of certiorari with the Supreme Court appealing this decision and certiorari was denied on May 24, 2021, in a 6-3 decision. *Johnson*, 141 S. Ct. 1622. The State did not contest that Mr. Johnson "raised a plausible allegation that the State's method of execution will cause severe pain." *Johnson*, 141 S.Ct. at 1628

(Sotomayor, J., dissenting). Justice Sotomayor wrote a dissent to the denial of certiorari indicating the acceptance of the plausibility of the claim of cruel and unusual punishment still stands: “Johnson has plausibly pleaded that, if he is executed using pentobarbital, he will experience pain akin to torture. Those factual allegations must be accepted as true at this stage of the litigation.” *Johnson*, 141 S.Ct. at 1628 (Sotomayor, J., dissenting).

Because Missouri does not require Mr. Johnson to plead an alternative method of execution, the Eighth Circuit’s finding that he had plead a plausible claim should also hold true in this court. To the extent this Court would require Mr. Johnson to plead an alternative method of execution, Mr. Johnson alleges that execution by firing squad is an acceptable alternative method. To the extent that requiring an alternative method would be a new pleading requirement, Mr. Johnson would request an opportunity to address that issue further.

Although the source and efficacy of the drugs used in Missouri’s lethal injection protocol is unknown (whether manufactured in a controlled laboratory setting as authorized by the United States government or obtained through a compounding pharmacy), the use of the lethal injection drugs used by the Missouri Department of Corrections under its current protocol creates a substantial and unjustifiable risk that Mr. Johnson will suffer a severely painful execution by the triggering of violent and uncontrollable seizures and convulsions, which constitutes cruel and unusual punishment in violation of Article 1 §§ 10 and 21 of the Missouri Constitution.

Mr. Johnson has a life and liberty interest under the Due Process Clause of Article 1 § 10 of the Missouri Constitution in not being executed by the State in violation of the Cruel and Unusual Punishment clause of Article 1 § 21 of the Missouri Constitution. Mr. Johnson's allegations, if taken as true, would constitute cruel and unusual punishment per the Eighth Circuit's ruling in *Johnson*, 954 F.3d 1098. He, therefore, has satisfied requirements to state a claim upon which relief can be granted and is entitled to have the merits of the claim heard per this Court's ruling in *McIntosh v. Haynes*, 545 S.W.2d 647, 653 (Mo. 1977).

If not enjoined by the Court, the Defendants and their agents, representatives, and employees will violate Plaintiff's right to be free from cruel and unusual punishment as guaranteed by Article 1 §§ 10 and 21 of the Missouri Constitution. This course of conduct will cause Plaintiff to suffer irreparable injury. Plaintiff does not have a plain, speedy, and adequate remedy at law for such an injury. Accordingly, injunctive relief is appropriate. This issue should also be remanded to a Special Master for further factual development on this question.

#### **IV. CONCLUSION**

Mr. Johnson requests that the Court grant his habeas writ. Alternatively, Mr. Johnson requests this Court withhold setting an execution date and remand this case to a Special Master for factual development on the question of 1) his intellectual disability and 2) whether given his unique medical condition, the lethal injection protocol will cause a cruel and unusual execution. Alternatively, this case should be remanded for a new

sentencing proceeding where the jury is properly instructed on intellectual disability and Mr. Johnson is allowed to cross-examine any State experts who opine that he is not intellectually disabled. Given the clear and overwhelming evidence of his intellectual disability when the determination is guided by science and clinical standards, this Court must act to ensure that an intellectually disabled man is not executed by the State of Missouri.

Respectfully submitted,

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***COUNSEL FOR PETITIONER***

### CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June, 2021, this writ petition and all attachments were filed via the Missouri e-filing system, and a true and correct copy was served on Respondent's counsel, Assistant Attorney General, Mr. Gregory Goodwin, via electronic mail ([gregory.goodwin@ago.mo.gov](mailto:gregory.goodwin@ago.mo.gov)) by undersigned counsel.

/s/ Jeremy S. Weis

Attorney for Petitioner

# **Appendix N**

IN THE SUPREME COURT OF MISSOURI

ERNEST JOHNSON,	)	
	)	
<i>Petitioner,</i>	)	
	)	
v.	)	Case No. SC99176
	)	
ANNE PRECYTHE, Director,	)	THIS IS A DEATH PENALTY CASE
Missouri Dept. of Corrections,	)	
	)	EXECUTION DATE – OCT. 5, 2021
<i>Respondent.</i>	)	

**PETITIONER ERNEST JOHNSON’S MOTION FOR REHEARING OF THE  
RULE 91 PETITION AND REQUEST FOR STAY OF EXECUTION**

COMES NOW Ernest L. Johnson, Petitioner herein, and moves this Honorable Court for rehearing of his Rule 91 petition and his request for a stay of execution. In this motion, Mr. Johnson sets forth the material matters of law and fact that have been overlooked or misinterpreted by the Court, in accordance with Mo. S.Ct. Rule 84.17(a). Mr. Johnson requests this case be remanded to a Special Master pursuant to Rule 8.03 so credibility determinations can be reliably made, and any State witnesses and evidence relied on by this Court may be subjected to cross-examination. The appointment of a Special Master is a necessary step in having a meaningful adversarial process to determine Mr. Johnson’s intellectual disability claim. *Panetti v. Quarterman*, 551 U.S. 930, 952 (2007) (by failing to provide a hearing on a competency claim, the state court prevented the petitioner from “obtaining a constitutionally adequate opportunity to be heard.”). This process would allow the Special Master to appoint independent experts, hear evidence subject to the adversarial process, and provide for a reliable determination of Mr. Johnson’s

intellectual disability claim. Mr. Johnson also requests that his execution be stayed while these factual determinations are made by the Special Master.

## **I. INTRODUCTORY STATEMENT.**

The Court's August 31, 2021, opinion is replete with legal and factual errors that compel Mr. Johnson to file this motion and to renew his request for immediate relief. Mr. Johnson's motion is focused on Claims I and II of his Rule 91 petition. This Court's opinion should be withdrawn and relief granted for the following reasons:

- This Court's overemphasis of the facts of the crime is counter to the clinical approach and was applied in manner inconsistent with Supreme Court precedent.
- This Court deviated from the clinical standards adopted by the United States Supreme Court and utilized by experts throughout the world by applying legal and factual hurdles that reach an unreliable intellectual disability determination.
- This Court credited Dr. Heisler's report even though it was never admitted into evidence, Dr. Heisler did not testify and subject his conclusions to the adversarial process, and Dr. Heisler failed to abide by accepted clinical practices calling into question his overall assessment of Mr. Johnson.
- This Court misapprehends the statement in the DSM-5, at p. 38, which discusses the relation between the intellectual functioning prong and the



adaptive behavior prong. This language is in the process of being removed from the DSM-V-TR because of the danger it is being misused in contexts such as this, to prevent recognition of the disability in individuals who meet the diagnostic criteria.

- This Court held the jury made a factual finding regarding intellectual disability even though the verdict form merely indicates the jury could not reach a unanimous conclusion whether Mr. Johnson was intellectually disabled. *See Slip Op. p. 5.*<sup>1</sup>

These issues provide substantial justification for this Court to withdraw its August 31, 2021 opinion and to order immediate relief to avoid executing an intellectually disabled man in violation of the Eighth and Fourteenth Amendments to the constitution.

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<sup>1</sup> Mr. Johnson notes that if the Court is correct there must have been an *Eddings v. Oklahoma*, 438 U.S. 586 (1978) error. If the finding of non-ID meant the jury did not find it to exist, then it could not then have been considered as mitigation. The instructions did not distinguish the consideration as an eligibility factor versus a mitigating factor.

## II. ARGUMENT IN SUPPORT OF REHEARING

### A. THIS COURT OVEREMPHASIZED THE FACTS OF THE CRIME IN DIRECT CONTRAVENTION OF THE SUPREME COURT'S DECISION IN *ATKINS V. VIRGINIA*, *MOORE v. TEXAS (I)*, AND *MOORE V. TEXAS (II)*

In this Court's opinion, it relies heavily on the facts of the crime to reach its finding that Mr. Johnson is not a person with intellectual disability. *See, e.g.*, Slip Op. p. 12 (noting the facts of the crime "illustrate Johnson's ability to plan, strategize, and problem solve – contrary to a finding of substantial subaverage intelligence."). However, this reliance mirrors the error committed by the Texas state courts in applying the "*Briseno* factors." *Moore I*, 137 S. Ct. at 1046 n. 6 (the final *Briseno* factor posed was "did the commission of the offense require forethought, planning, and complex execution of purpose.") The United States Supreme Court condemned the *Briseno* factors and described them as "an outlier" because they deviated so substantially from the accepted clinical practices. *Moore I*, 137 S. Ct. at 1052.

While there were dissents in *Moore I*, *Moore II* noted the Court was unanimous in rejecting reliance on such factors:

Three Members of this Court dissented from the majority's treatment of Moore's intellectual functioning and with aspects of its adaptive-functioning analysis, but all agreed about the impropriety of the *Briseno* factors. As THE CHIEF JUSTICE wrote in his dissenting opinion, the *Briseno* factors were "an unacceptable method of enforcing the guarantee of *Atkins*"

and the Texas Court of Criminal Appeals “therefore erred in using them to analyze adaptive deficits.” *Moore*, 581 U. S., at \_\_\_, 137 S. Ct. 1039, 197 L. Ed. 2d 416, at 431-432 (opinion of ROBERTS, C. J.).

139 S. Ct. at 669-70. *Moore II* again reversed the state court for its continued reliance on the facts of the crime *Briseno* factor. *Id.* at 671. “Emphasizing the *Briseno* factors over clinical factors, we said, “creat[es] an unacceptable risk that persons with intellectual disability will be executed.”” *Id.* at 669 (citation omitted).

Criminal behavior is considered maladaptive behavior and because there are no objective norms for its consideration, it should not be considered in the diagnostic process. *See Brumfield v. Cain*, 808 F.3d 1041, 1047 (5th Cir. 2015) (in upholding the lower court’s finding of intellectual disability, the court credited expert testimony explaining that the presence or absence of maladaptive behavior “is not relevant to the diagnosis of intellectual disability.”). The *Atkins* ban exists because the intellectually disabled commit crimes, sometimes violent crimes. However, overemphasis on the facts of the crime is at odds with established clinical science. *See Van Tran v. Colson*, 764 F.3d 594, 608-609 (6th Cir. 2014) (“[T]he sophistication of the crime and Van Tran’s role in it are mostly irrelevant to the very narrow, clinically defined question of whether Van Tran suffers a deficit in the area of functional academics.”); *see also Hooks v. State*, 126 P.3d 636, 644 (Okla. Ct. Crim App. 2005) (“individual acts of violent crime, such as armed robbery or rape, require little or no abstract thought or complex planning.”)

The facts of the crime in *Moore* closely resemble Mr. Johnson's crime – a botched robbery that resulted in the fatal shooting of a store clerk. *Moore I*, 137 S. Ct. at 1044. In *Moore I*, the Texas courts relied upon Moore's ability to commit "the crime in a sophisticated way." *Id.* at 1047. After the remand from the United States Supreme Court, the Texas courts again relied heavily on the facts of the crime to justify its finding that Moore was not intellectually disabled. *Moore II*, 139 S.Ct. at 671. The Supreme Court again reversed this finding because it was based so heavily on lay stereotypes about what the intellectually disabled can do, in contrast with established science. *Id.* at 672.

In the original district court proceedings in *Brumfield v. Cain*, 854 F.Supp.2d 366 (M.D. La. 2012), in which the district court found Brumfield to be intellectually disabled, the court ably noted why a heavy reliance on the facts of the crime is at odds with the clinical science:

The reasons for not using maladaptive criminal behavior to assess adaptive skills are several: (1) the defendant may have gullibly acted under the direction or training of a confederate during the crime; (2) there may not be available enough accurate details about the facts of the crime from which to draw adaptive conclusions; and (3) in any event, there is a lack of normative information about actions during and following crimes to be able to meaningfully assess whether and how much a defendant's actions deviated from the mean adaptive behavior during criminal acts.

*Id.* at 394. Although these findings were overturned by the Fifth Circuit Court of Appeals in *Brumfield v. Cain*, 744 F.3d 918 (5th Cir. 2014), that decision was itself overturned by

the United States Supreme Court in *Brumfield v. Cain*, 576 U.S. 305 (2015). On remand, the Fifth Circuit upheld the grant of habeas relief based upon intellectual disability.. See *Brumfield v. Cain*, 808 F.3d 1041 (5th Cir. 2016).

This Court relied on evidence of Mr. Johnson's crime to rebut his claim of intellectual disability, Slip Op. p. 11, but there is nothing in the facts of this crime that are at odds with a finding of intellectually disability and this Court's overreliance on these facts violate well-established clinical standards. See TASSE, MARC J. AND BLUME, JOHN H., *Intellectual Disability and the Death Penalty: Current Issues and Controversies*, p. 101 (2018). The concern among clinical practitioners is that prosecutors will cherry pick the facts of the crime to "feed into misconceptions and misunderstandings of judges and jurors." *Id.* This Court engaged in this sort of cherry picking of facts to undermine Johnson's diagnosis of intellectual disability.

This Court relied on Johnson's acquisition of a firearm to infer he had a premeditated plan for the crime. Slip Op. p. 2. While Mr. Johnson did obtain a firearm prior to robbing the store, the crime was committed with three different weapons, but only the firearm was brought to the scene in advance. *Id.* The other two weapons were grabbed in the frenzy of the moment and undermine efforts to characterize the crime as well-planned. *Id.* This Court also neglects to mention the firearm was provided by Rod Grant, Ernest's drug dealer, and that Grant had to show Mr. Johnson how to use the weapon and provided him with only a single bullet. (Tr. Vol. 10, pp. 2148-2154). These facts demonstrate Johnson's lack of sophistication as well as how easily he was led by others. The crime itself at best demonstrates, as this Court held, a plan to rob to support a drug habit, and nothing

else. Slip Op. p. 2 (“confided to Rodriguez his plans to hold up a convenience store, locking all but one employee in the back room and having the remaining employee open the safe”); Slip Op. 12 (“...rob the Casey’s because he needed more money to purchase cocaine...”).

This Court also describes a plan, “wearing layers of clothing,” in order to escape detection upon fleeing the scene. Slip Op. pp. 2, 12. But Mr. Johnson then walked a well-worn path from Casey’s to his home and walked in the home with the same clothes in front of witnesses. *Id.* Thus, the clothing and the evidence was brought home; and the purpose of escaping detection was unquestionably thwarted. As this Court notes, Johnson was arrested a day later and immediately contradicted his own alibi. Slip Op. p. 3.

Thus, even if the crime were to be considered, it should be assessed for what it is – a botched robbery that led to murders to fuel a drug habit. *See, e.g., Black v. Bell*, 664 F.3d 81 (6th Cir. 2011) and *State v. Black*, 815 S.W.2d 166, 173 (Tenn. 1991) (intellectually disabled defendant convicted of triple homicide; hid the firearm to avoid detection); *Hughes v. Epps*, 694 F.Supp.2d 533, 536-37 (N.D. Miss. 2010) (intellectually disabled defendant sought to hide the body of his victim and the clothing worn during the murder). Even if it was proper to consider the facts of the crime, and it is not, this crime at best illustrates a “difficult[y] in planning **and implementation**” of a plan to rob that tragically went awry. *Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports* at p. 26 Table 3.1 (12th ed. 2021) (emphasis added). It is also important to contextualize Johnson’s conduct in relation to a child with the same level of intellectual functioning. Most adults with intellectual disabilities can achieve reading, arithmetic, and writing skills equivalent to a 5<sup>th</sup> or 6<sup>th</sup> Grader. *See Tasse, M.J.*, p. 102. A child of that age

“has the ability lie, hide, plot, and deceive to get out of trouble.” *Id.* It is not, therefore, surprising or indicative of special skills, that Mr. Johnson would be capable of committing a crime even with his significant limitations. The Supreme Court recognized these issues in twice reversing the Fifth Circuit in *Moore I and II* for overreliance on the facts of the crime when assessing Moore’s intellectual disability.

**B. THIS COURT’S RELIANCE ON DR. HEISLER’S CLINICALLY INCORRECT ASSERTION, MADE OUTSIDE THE ADVERSARIAL PROCESS, THAT JOHNSON WAS MALINGERING ON THE IQ TEST.**

This Court ignored its own evidentiary rules to credit references to a clinical report that has never been admitted into evidence and authored by a clinician who the State chose not to call as a witness to defend his conclusions. Slip Op. 11. Dr. Gerald Heisler was retained by the State to conduct a clinical exam of Mr. Johnson in preparation for a sentencing hearing. Dr. Heisler authored a report, but the State chose not to call him as a witness. Instead, the State merely asked questions of Mr. Johnson’s retained expert, Dr. Keyes, about Heisler’s conclusions. This approach allowed the State to avoid subjecting Dr. Heisler to cross-examination while injecting his conclusions into the trial court record. But Heisler’s report was not introduced as evidence and the prosecutor’s questions were not substantive evidence. This Court, though, treated the Heisler’s report and its untested conclusions as substantive evidence and as though it had been admitted and subjected to the same scrutiny given to Dr. Keyes report. This approach violated this Court’s own long-held evidentiary standards and, most importantly, relied on a report that rejected nearly every clinically accepted practice for the diagnosis of intellectual disability. *See Bruflat v. Mister Guy, Inc.*,

933 S.W.2d 829, 833 (Mo. App. W. D. 1996), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) (“a testifying expert cannot be a mere conduit for another non-testifying expert. The testimony of the expert who merely acts as a conduit for another expert’s opinion is hearsay and inadmissible.”)(citations omitted). This Court credited Heisler’s untested conclusions while at the same time rejecting the conclusions of Dr. Keyes and Martell who offered different conclusions. Slip Op. pp. 12, 14-15. There is no legal or rational basis for the Court to accept one opinion while immediately discrediting the others. This Court’s approach is in error; Mr. Johnson satisfied the pleading requirement and given the conflicting clinical reports, this Court should order an evidentiary hearing.

Dr. Heisler’s conclusion that Mr. Johnson was malingering is inconsistent with his own data and based solely on the subjective opinion of a technician. Dr. Heisler did not administer an IQ test to Mr. Johnson and instead relied on another individual, Sonny Bradshaw, to conduct the testing. Mr. Bradshaw reported to Dr. Heisler he believed Mr. Johnson was malingering, but his opinion was based solely on his subjective impression and not on an objective testing instrument. More importantly, Mr. Bradshaw’s data from the IQ test – a test that included an imbedded test to measure the test taker’s effort – objectively demonstrated Mr. Johnson was giving sufficient effort to validate the testing data. *See* Attachment H to Rule 91, p. 31. Thus, Bradshaw’s subjective opinion about Mr. Johnson’s malingering – a conclusion adopted by Heisler and this Court – was without any support in the record and should not have been relied on to invalidate the IQ test results.



Both Dr. Heisler and Mr. Bradshaw either failed to recognize there was an embedded test of effort in the test or completely failed to mention it in their assertion that Mr. Johnson was malingering. *See* Att. Y to Rule 91 at 14 (noting that Mr. Bradshaw had never taken a course on administering or interpreting the WAIS or any other IQ test); Anne L. Shandera, et. all, *Detection of Malingered Mental Retardation*, PSYCHOLOGICAL ASSESSMENT, Vol. 22, No. 1, 50 (2010) (“Psychologists conducting evaluations in forensic settings must address the possibility of malingered symptoms using objective procedures.”). Thus, it was error for this Court to even reference malingering – when in fact the scientific evidence was that no malingering occurred.

One of the reasons Mr. Johnson requested this case be remanded for additional factual findings by a Special Master is that Dr. Heisler’s conclusions were never subjected to cross-examination. The **objective** measures of validity on the IQ test Bradshaw gave, as well as Mr. Johnson’s consistency in IQ scores over the years, rebuts any **subjective** assertion of malingering. *See United States v. Nelson*, 419 F.Supp.2d 891, 903 (E.D. La. 2006) (“It is simply impossible for the Court to conclude that Nelson has been malingering since age 11 and has been able to manufacture the identical testing pattern for all those years.”). Further, the **objective** measures then and now, universally rebut any failure of effort on Mr. Johnson’s behalf.

A remand for factual finding is appropriate so Dr. Heisler's credibility, and Dr. Martell's and Dr. Adler's credibility,<sup>2</sup> can be reliably judged by a factfinder and their testimonies can be challenged through the rubric of cross-examination. Dr. Heisler has never been challenged with the fact that the embedded validity testing given by Mr. Bradshaw belies any assertion of malingering.

For those practitioners who have little or no clinical experience with the intellectually disabled, "[m]alingering may be suspected because of confusion related to a combination of psychiatric symptoms, neurological symptoms, and cognitive deficits. . ."

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<sup>2</sup> This Court rejected Dr. Adler's testimony in a sentence due to Mr. Johnson's "incentive to produce results indicating intellectual disability." Slip Op. 15. The State of Missouri never argued this point because there is no factual basis to support such a conclusion. Indeed, it is hard to imagine how Mr. Johnson could manipulate the results of a **brain scan** to demonstrate he suffers from intellectual disability. The data obtained from a QEEG is inherently objective. While the State might attempt to object to Dr. Adler's conclusions based on his reading of the data, this has nothing to do with Mr. Johnson's alleged incentive to produce specific results from the QEEG. Similarly, Dr. Martell administered specific testing to measure effort and those tests demonstrated proper effort by Mr. Johnson and validated the overall data. *See* Attachment H at 25. To the extent this Court credits Heisler's conclusions, the data from Drs. Adler and Martell represent clinically significant data warranting the appointment of a special master to assess the credibility of the conflicting evidence.

Edward Polloway, ed., *The Death Penalty and Intellectual Disability*, (AAIDD) (2015), at 270. “[A] defendant cannot readily feign the symptoms of mental retardation.” *Newman v. Harrington*, 726 F.3d 921, 929 (7th Cir. 2013); *Smith v. Sharp*, 935 F.3d 1064, 1081 (10th Cir. 2019) (citation omitted). Mr. Johnson’s consistent IQ scores over the years belie an assertion of malingering and it is significant that he obtained the exact same IQ score on his testing with Dr. Keyes: “it is extremely unlikely that a person with Mr. Johnson’s history of adaptive deficits could ‘fake’ on two IQ tests a year apart and be able to obtain the exact same score.” Rule 91 Pet, Att. H at 30. Instead, Mr. Johnson’s history of IQ scores, over a 51-year time span, indicate overwhelming proof that he fits the first prong of the diagnosis. *See id.* at 30 (noting that the consistency of scores indicates a case of convergent validity on IQ).

### **C. THIS COURT MISAPPREHENDS THE IQ SCORES IN THE CONSIDERATION OF THE INTELLECTUAL FUNCTIONING PRONG.**

In finding that Mr. Johnson did not to meet this prong, this Court proceeded from a flawed premise. This Court noted that on the previously acceptable IQ scores, “only one (out of four valid scores) that would indicate significant subaverage intelligence.” Slip Op. 11. While a simple math error, it is a dramatic substantive error. Applying science, only one of these four scores **does not** indicate significant subaverage intelligence. Stated another way, three out of four tests administered fully fall within the range of intellectual disability.

1. The Court references the 77 in 1968. This was adjusted downward to a 71 due to the Flynn Effect. With the standard error of measurement

of 5, the IQ range is 66-71, and falls within the range of intellectual disability;

2. The Court references the 63 in 1971, this score safely falls within the range of intellectual disability; and,
3. The Court references the 78 in 1994, This is adjusted downward to a 72.9 due to the Flynn Effect. With the standard error of measurement of 5, the IQ range is 67.9-77.9, and falls within the range of intellectual disability.

Contrary to this Court's finding, Mr. Johnson's IQ scores have been remarkably consistent throughout his life with eight of the nine<sup>3</sup> full-scale IQ tests within the subaverage intellectual functioning range. In focusing on IQ scores (incorrectly noting the significance of the same) and the facts of the crime, this Court failed to consider or discuss the remarkable consistency of Mr. Johnson's IQ scores with the results of Achievement Test Scores. To reiterate, they reflect cognitive shortcomings that also are evidence of adaptive deficits in the Conceptual category, established long before the crime:

<b>Grade</b>	<b>Date</b>	<b>Reading</b>	<b>Math</b>	<b>Language Arts</b>
Grade 2	April 1969	1% (1.0)	*	*
Grade 3	April 1970	2% (1-5)	4% (2-4)	9% (2-4)
Grade 4	April 1971	1% (1-6)	*	2% (2-4)

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<sup>3</sup> This Court did not address that the ninth score, given its dramatic variance from all the other scores, may be some sort of error. Attachment H to Rule 91, pp. 32-33. Mr. Johnson has pursued the raw data from that testing, but the clinician died years prior to undesigned counsel's appointment and the data is no longer available.

Grade 3 <sup>4</sup>	April 1972	29% (3-1)	*	13% (2-5)
Grade 5	April 1973	2% (2-8)	2% (3-4)	2% (2-9)
Grade 7	April 1974	7%	8%	2%
Grade 9	October 1975	2%	21%	6%

Attachment M to Rule 91, p. 29 (“\*” designates untested subjects). The above scores were supported by the testimony of teachers noting Mr. Johnson’s significant cognitive shortcomings.

Thereafter, the Court held that Dr. Adler “does not make a finding as to whether Johnson is intellectually disabled.” Slip Op. 15. This is incorrect. As noted in his most recent report, Dr. Adler noted:

Mr. Johnson was examined by me on August 7, 2008. On August 14, 2008, I issued a 28-page report, in which I made the following diagnoses (DSM-IV):

Axis I: Cognitive Disorder, NOS  
Learning Disorder, NOS  
Axis II: Mild Mental Retardation

Rule 91 Attachment I p. 2. That opinion was not retracted and was admitted as substantive evidence in Mr. Johnson’s post-conviction hearing.

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<sup>4</sup> First year where his transcript is designated as “Special Education.”

**D. THE COURT’S CREATION OF A CAUSATION REQUIREMENT BETWEEN ADAPTIVE DEFICITS AND INTELLECTUAL FUNCTIONING IS AT ODDS WITH CLINICAL PRACTICE AND JUDICIALLY MODIFIES MISSOURI’S INTELLECTUAL DISABILITY STATUTE.**

This Court commits a grievous error in stating “[i]n essence, adaptive deficits must be caused by impaired intellectual functioning.” Slip Op. 13; *see also id.* at 14 (“...suffer from a lack of causal connection to his alleged impaired intellectual functioning.”); *id.* at 16 (“this Court finds Johnson failed to prove a causal connection between his poor academic performance and his alleged intellectual impairment.”); *id.* at 17 (“Johnson again does not demonstrate a causal connection between these facts and his alleged intellectual impairment.”); *id.* at 18-19 (“Criminal behavior, absent a causal connection to intellectual impairment, however, does not support intellectual disability.”) The Court has misapprehended this language from the DSM-5 and improperly modified the statutory definition of intellectual disability. In short, this violates clinical practice and runs afoul of *Moore I* and *Moore II* that require an adherence to clinical guidelines.<sup>5</sup> The DSM-5 itself

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<sup>5</sup> It also runs contrary to *Jackson v. Payne*, --- F.4th ----, 2021 WL 3573012, at \*7 (8th Cir. Aug. 13, 2021) (in discussing the direct relation language from the DSM-5 at 38, the court notes *Moore I* does not require a petitioner to demonstrate a specific connection between the first and second prongs of the diagnosis) and *Johnson v State*, 580 S.W.3d 895, 916

recognizes the danger that their wording will be misinterpreted in the forensic context: “When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic criteria will be misused or misunderstood.” *DSM-5*, at 25. This risk has come to bear in this Court’s opinion.

Further, the State of Missouri never raised this as a basis to deny the adaptive behavior prong of the intellectual disability standard. Setting aside the waiver, this Court also did not entertain oral argument. If raised at argument or notice of this had been given as a consideration, Mr. Johnson could have firmly challenged this misapplication of the intellectual disability definition from the DSM-5.

Initially, this Court should be guided by the Missouri Statute and the Legislature’s determination that the intellectual functioning prong and the adaptive behavior prong be treated as separate co-equal factors required to be proven. This Court effectuates a rewriting of the intellectual disability by imposing or inserting a causation requirement. That remains the province of the Legislature, not this Court.<sup>6</sup>

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(Mo. banc 2019) (Stith, J., dissenting, joined by Draper, C.J. & Breckenridge, J.) (“*Atkins*, as clarified by *Hall*, *Moore I*, and *Moore II*, set out clearly how states are limited by clinical guidance in determining intellectual disability.”) The above discussions were neither addressed nor distinguished by the per curiam decision.

<sup>6</sup> This Court applied the onset prior to age 18 decided by Missouri’s Legislature even though the AAIDD 12<sup>th</sup> Edition has an onset prior to age 22. This Court should treat

Grafting on a causal/related to requirement conflicts with *Moore I* and *Moore II*. *Moore I* noted that the *Briseno* factors “incorporated” an outdated version of the AAIDD imposing a “related to” requirement. *Moore I*, 137 S.Ct. at 1046. Thereafter, the Supreme Court found that the analysis of the “related to” requirement to violate “clinical practice,” and rather than being used to refute intellectual disability, the facts the Texas court found at odds with the diagnosis should instead be considered as risk factors for intellectual disability. *Id.* at 1051 (noting the state court violated clinical practice by finding that childhood abuse and a personality order detracted from a determination that the intellectual and adaptive deficits were related). When the Texas court again applied the “related to” requirement, the Supreme Court reiterated the previous error (*see Moore II*, 139 S.Ct. at 669), and again reversed, noting:

Further, the court of appeals concluded that Moore failed to show that the “cause of [his] deficient social behavior was related to any deficits in general mental abilities” rather than “emotional problems.” *Id.*, at 570. But in our last review, we said that the court of appeals had “**departed from clinical practice**” when it required Moore to prove that his “problems in kindergarten” stemmed from his intellectual disability, rather than “emotional problems.” *Moore*, 581 U. S., at \_\_\_, 137 S. Ct. 1039, 197 L. Ed. 2d 416, at 429 (quoting *Ex parte Moore I*, 470 S. W. 3d, at 488, 526).

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Missouri Legislature’s adaptive definition with the same respect and deference accorded the onset provision.



*Moore II*, 139 S.Ct. at 671.

As noted in AAIDD, 12<sup>th</sup> Edition, p. 33 “Intellectual functioning and adaptive behavior are distinct and separate constructs, which are only moderately correlated. Equal weight and joint consideration are given to intellectual functioning and adaptive behavior diagnosis of ID.” The AAIDD describes requiring a causal connection as a “thinking error.”

This initial positioning has led to two additional thinking errors. The first is that limitations in intellectual functioning cause the limitation in adaptive behavior. This **error in thinking** is refuted by three facts: (1) the relation between intellectual functioning and adaptive behavior as **always been expressed historically and consistently as correlational, not causative**; (2) there is only a **low to moderate statistical correlation** between intelligence and adaptive behavior scores; and (3) there is **no empirical evidence to support inserting a causal interpretation** between the two.

*Id.* at 34 (emphasis added) (citations omitted from original).

This Court misinterprets the statement in the DSM-5 that “deficits in adaptive functioning must be directly related to the intellectual impairments described in [prong one].” DSM-5 at 38. This statement does not require Mr. Johnson to prove causation. In *United States v. Wilson*, 170 F.Supp.3d 347 (E.D. N.Y. 2016), the court directly addressed the government’s assertion that this language from the DSM-V requires the defendant to prove causation:

With respect to the DSM-V’s effect on the legal standard for prong two, the court finds that this single sentence is insufficient to impose a requirement

for a defendant to prove specific causation. By requiring that adaptive functioning deficits “directly relate” to intellectual functioning deficits, the DSM-V appears simply to have clarified the most logical approach to a diagnosis of intellectual disability. The court assumes that a clinician would not diagnose intellectual disability on the basis of adaptive functioning deficits that were related to something else entirely, such as a physical disability or traumatic event. However, where an individual has demonstrated significantly subaverage intellectual functioning, along with significant adaptive deficits that relate to such intellectual impairment, that individual has satisfied the first two diagnostic criteria for intellectual disability. **To require this individual to further prove that he satisfies these criteria because he is intellectually disabled would render the criteria meaningless. Indeed, the Government’s approach would transform the standard for intellectual disability into an impossible test: In order for a defendant to show that he was intellectually disabled, he would need to prove that he satisfied the criteria because he was intellectually disabled.** As though trapped on an M.C. Escher staircase, the defendant would climb to the top only to find he had returned to the bottom. Likewise, the court finds that a defendant is not required to rule out other contributing causes of his adaptive deficits in order to meet the standard for intellectual disability. The APA has clearly stated as much: **“The diagnosis criteria for [intellectual disability] do not include an exclusion criterion;**

therefore, the diagnosis should be made whenever the diagnostic criteria are met, regardless of and in addition to the presence of another disorder.” DSM-IV at 47.

*Id.* at 370-371 (emphasis added).

The Eighth Circuit has held the same. Rejecting the basis accepted by this Court, in *Jackson v. Kelley*, 898 F.3d 859, 865 (8th Cir. 2018), the Eighth Circuit held:

Furthermore, the Supreme Court also found in *Moore* that “[t]he existence of a personality disorder or mental-health issue, in short, is not evidence that a person does not also have intellectual disability.” *Moore*, 137 S. Ct. at 1051 (internal quotation marks omitted) (finding that the court of appeals erred when it used academic failure and childhood abuse to detract from a determination that the defendant’s intellectual and adaptive behaviors were related); *see also United States v. Wilson*, 170 F. Supp. 3d 347, 371 (E.D.N.Y. 2016). The Court stated that “many intellectually disabled people also have other mental or physical impairments” and the medical community actually uses those experiences as “risk factors,” causing clinicians to further explore the possibility of intellectual disability rather than “counter[ing] the case for a disability determination.” *Moore*, 137 S. Ct. at 1051; *see also Wilson*, 170 F. Supp. 3d at 371.

Like the court of appeals in *Moore*, **the district court found that Jackson’s diagnosis of anti-social personality disorder, coupled with his untreated childhood ADHD, conduct disorders, and communications**

**disorders, indicated that his adaptive deficits were not related to subaverage intellectual functioning. However, prior to issuing its order, the district court did not have the benefit of the Supreme Court's finding that the existence of additional personality disorders or mental-health issues is not evidence weighing against an intellectual disability determination.** In light of the Court's decision in *Moore*, we believe the district court erred by placing too much emphasis on the existence of other diagnosed disorders to find that Jackson was not intellectually disabled.

*Id.* (emphasis added).

Instead of utilizing an objective measure of adaptive behavior, Dr. Heisler attributed Mr. Johnson's poor academic record to his "impoverished background" and "substance abuse before age 10." Dr. Heisler report at 4 (Attached as Rehearing Att. 1). Dr. Heisler's statement demonstrates his lack of knowledge about clinical assessments of intellectual disability and undermines his qualifications to provide a reliable opinion. There is no requirement that Mr. Johnson prove that his deficits are caused by his intellectual disability and the circumstances of his background are risk factors for intellectual disability – they do not detract from it. *See Moore I*, 137 S.Ct. at 1047, 1051 (noting that alternative causes for adaptive deficits cited by the State included drug abuse and "an abuse-filled childhood"; however academic failure and a traumatic childhood experiences are risk factors for intellectual disability). If Mr. Johnson had been properly diagnosed and cared for as a child it is more than likely he would not have formed maladaptive coping mechanisms, like drug addiction, that fueled this crime.

This court's misapprehension of the DSM-5 is another reason that this case should be remanded for factual development. The language from the DSM-5 that this Court relied on will be removed in the DSM-5-TR, which is the process of publication. *See* Letter of Appelbaum, MD (attached as Att. 2). The DSM-5-TR is set to be published in 2022. *Id.* The language is being taken out because of a recognition of the "confusion this sentence caused in the diagnostic process, appearing to add a diagnostic criterion beyond the official criteria set. That was not the intent of the sentence and thus, to avoid such confusion, the sentence was removed." *Id.*

This Court's confusion in applying the DSM-5 is understandable given the complexity of the subject matter and the degree of expertise required. The DSM-5 is published by the American Psychological Association (APA) and the text states in the introduction, "Clinical training and experience are needed to use the DSM for determining a diagnosis. The diagnostic criteria identify symptoms, behaviors, cognitive functions, personality traits, physical signs, syndrome combinations, and durations that require clinical expertise to differentiate from normal life variation and transient responses to stress." DSM-5, p. 5. Despite these admonitions, this Court undertook the task of determining whether Mr. Johnson met the DSM-5 definition of intellectual disability without the benefit of clinical expertise, or an adversarial process informed by competent

clinicians relying on sound clinical practices.<sup>7</sup> This Court should remand this case so that proper clinical standards, explained by testifying experts, can be followed in determining Mr. Johnson's intellectual disability.

**E. THE VERY NATURE OF ADAPTIVE BEHAVIOR ASSESSMENT REQUIRES RELIANCE ON FAMILY MEMBERS WHO KNEW MR. JOHNSON DURING THE DEVELOPMENTAL PERIOD. THIS COURT ALSO IGNORED OBJECTIVE TESTIMONY FROM TEACHERS WHICH FULLY SUPPORT A FINDING THAT JOHNSON HAS EVIDENCED ADAPTIVE BEHAVIOR DEFICITS SINCE CHILDHOOD.**

Assessing adaptive behavior requires assembling information from people who had extended contact with Mr. Johnson during the developmental period. The obvious people

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<sup>7</sup> This Court's struggles with applying the DSM-5 further highlight the challenges posed to the jury in attempting to make a similar judgment based solely on the jury instructions provided. As this Court is aware, the jury instructions provided only the statutory elements of intellectual disability without providing without defining any of the terms relied on by clinicians. As a result, the jury was left to its own devices to define "subaverage", "deficits", "intellectual functioning", and "adaptive functioning". These issues are challenging even in a clinical setting, much less so than an emotionally charged jury room in the middle of a capital murder trial where unreliable outcomes result in the wrongful execution of an intellectually disabled man.

who have had this extended contact will be friends and family members. This Court erred in categorically excluding such people in its assessment.<sup>8</sup> The United States Supreme Court relied on family in *Moore I*, 137 S. Ct. at 1045 and *Moore II*, 139 S. Ct. at 667.

This Court unreasonably discounted the testimony of Mr. Johnson’s family members based upon the fact they “knew Johnson would not be sentenced to death if it was determined he was intellectually disabled.” Slip Op. 16-17. This is a determination of credibility that cannot be made on a paper record, it can only be made in a courtroom where the factfinder can assess the witnesses on Mr. Johnson’s behalf in person. *See Anderson v. State*, 564 S.W.3d 592, 600 (Mo. banc 2018) (noting that appellate court should defer to a lower court’s “superior opportunity” to make credibility determinations); *Barton v. State*, 432 S.W.3d 741, 760 (Mo. banc 2014) (quoting *State v. Twenter*, 818 S.W.2d 628, 635 (Mo. banc 1991)). This is why a remand to a Special Master is in order.

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<sup>8</sup> This Court also disparaged previous lawyers as universally biased and rejected any consideration of their interactions with Mr. Johnson. Each of these members of the bar signed the affidavits under penalty of perjury and there is nothing before this Court that would render their first-hand interactions with Mr. Johnson unreliable or untruthful. *See Moore I*, 137 S. Ct. at 1045 (discussing testimony of former counsel). This Court, as the purported factfinders, must at least meet the fair and impartial standards this Court demands of its citizens serving on a jury. *See State v. Brandolese*, 601 S.W.3d 519, 526–27 (Mo. banc 2020) (“To be sure, a juror who cannot be fair and impartial should be stricken for cause to ensure a fair and just trial.”) (citation omitted).

In addition, this Court completely ignored the testimony of Mr. Johnson's teachers during the developmental period that support the finding of intellectual disability. Robin Seabaugh taught Mr. Johnson in a developmental reading class in ninth grade. (Record on Appeal, Vol. II, p. 1219, *State v. Johnson*, SC87825 (Mo. 2008)). In ninth grade, Mr. Johnson was reading between a second and third grade level. (*Id.* at 1225). He failed ninth grade and Seabaugh characterized his intelligence as extremely low, which is also supported by his consistently low achievement scores during the developmental period. (*Id.* at 1226, Attachment M to Rule 91, p. 29).

Steve Mason taught Mr. Johnson in art after he had to repeat the ninth grade. (Record on Appeal, Vol. II, p. 1239). Mr. Johnson could not accomplish even basic tasks such as using a ruler to draw a straight line, he failed to complete any project, and received an F in art. (*Id.* at 1243-44). When Mr. Mason recommended that Mr. Johnson be placed in special education, he was told by school officials that this was not possible. (*Id.* at 1247). Mr. Johnson dropped out of school halfway through his second attempt at ninth grade. (*Id.* at 1257).

Having found every other person in Mr. Johnson's life to be incredible, this Court should not ignore testimony from historical reporters such as teachers who knew Mr. Johnson during the developmental period. This Court should remand this matter to a Special Master so that credibility can be judged in person by a trial court, after the opportunity for cross-examination.



**F. INTERPRETING MISSOURI STATUTE TO REQUIRE A DIAGNOSIS OF INTELLECTUAL DISABILITY PRIOR TO AGE 18 VIOLATES THE EIGHTH AMENDMENT.**

For various reasons, many of those who suffer from intellectual disability are not diagnosed as such during the developmental period. *See* Polloway, at 222 (noting that many *Atkins* petitioners have a clear history of school failure but were never labeled ID in school). In Mr. Johnson’s case, he was born into the poverty of the Missouri bootheel as a child of a sharecropper, at a time where people with his skin color were shipped to separate, but not equal, schools. When finally integrated, the unrefuted evidence is that requests for special education by concerned teachers were ignored. The reality is that the impoverished school districts Mr. Johnson attended simply did not provide the opportunity for diagnosis regardless of the apparent need.

This Court cited the Missouri statute for the proposition of requiring intellectual disability to be “manifested and documented before eighteen years of age.” Slip Op. 15. On this basis, this Court concluded that “[b]ecause Johnson is now over 60 years old, reports of Johnson’s alleged current mental ability are not given much weight.” *Id.* This Court also noted that Johnson did “not provide any evidence of a formal evaluation or diagnosis of intellectual disability during the developmental period.” Slip Op. 16.

To the extent this Court requires intellectual disability to be diagnosed during the developmental period, its opinion violates the Eighth Amendment. *See Oats v. State*, 181 So.3d 457, 469 (Fla. 2015) (reversing a lower court’s finding that the defendant was not intellectually disabled based upon a misperception that a lack of diagnosis prior to age 18

was fatal to the claim). In *Oats*, the Florida Supreme Court noted that it would be at odds with the Supreme Court's decision following *Atkins* to require diagnosis prior to age 18 before the protection of *Atkins* is given: "[t]hat inflexible view would not be supported by the United States Supreme Court's recent enunciations in *Hall* and *Brumfield*." *Id.* at 469; *see also United States v. Wilson*, 170 F.Supp.3d 347, 391 (E.D. N.Y. 2016) (noting that the age of onset requirement does not require diagnosis before the age of 18).

It is error to give Mr. Johnson's later IQ scores little weight in determining his intellectual disability when assessing functional academics. His IQ scores, from childhood to now, have been consistently within the range of intellectual disability, something even this Court acknowledged. *See* Slip Op. 11 (noting that adjusting for the margin of error and the Flynn effect, Mr. Johnson's test scores "are within the range that could be indicative of intellectual disability"). The fact that Mr. Johnson may not have been diagnosed as intellectually disabled during the developmental time frame is more a function of the paucity of services available to him during his childhood in rural Missouri.

As the Court notes, Mr. Johnson also suffered an abusive childhood. Rather than proving there is an alternate cause to his deficits, this fact further supports that the lack of diagnosis before a18 is more a function of the failure of Mr. Johnson's parental figures and school to identify and properly accommodate his disability. As Mr. Johnson's art teacher testified, when he recommended that Mr. Johnson be placed in special education, he was told that the school simply could not do anything about that. (Record on Appeal, Vol, II, p. 1247, *State v. Johnson*, SC 87825 (Mo. 2008)). Mr. Johnson had no other adults in his life to advocate for him.

Furthermore, IQ scores remain relatively consistent over a person's lifetime, as illustrated by Mr. Johnson's consistency in IQ scores over time. *See Muncy v. Apfel*, 247 F.3d 728, 734 (8th Cir. 2001) ("a person's IQ is presumed to remain stable over time in the absence of any evidence of a change in a claimant's intellectual functioning."). Mr. Johnson should not be exempted from the protection of *Atkins* simply because of the absence of diagnosis during the developmental time period.

**G. THE JURY DID NOT MAKE A FINDING REGARDING INTELLECTUAL DISABILITY.**

The jury in Ernest's Johnson's third sentencing hearing did not make a specific finding regarding Mr. Johnson's intellectual disability. Mr. Johnson's jury was instructed that before he could qualify for a life sentence under the protection of *Atkins*, they must "unanimously find" that he had proven that he was intellectually disabled by a preponderance of the evidence. (Attachment S to Rule 91, p. 6). This requirement of unanimity was again reiterated in Jury Instructions #7, 11, 12, 16, 17 and 21: "[i]f you did not unanimously find by a preponderance that the defendant is mentally retarded. . . ." (Attachment S to Rule 91, pp. 7, 12, 14, 19, 21, 25).

The verdict forms again reiterated that the jury must find unanimously that Mr. Johnson had proven intellectual disability. (Attachment S to Rule 91, pp. 31, 35, 39). The signed verdict forms reflecting the findings of the resentencing jury only lay out their findings in aggravation. (Attachment T to Rule 91, pp. 1-3). There is no signed verdict form directly addressing their finding on the intellectual disability question or on

mitigation. Instead, the only thing that may be said about the jury's decision is that at least one juror did not find Mr. Johnson to be intellectually disabled. No other findings were required or made by the jury with respect to this issue.

This Court seemingly adopts the State's version of a jury finding without evidence supporting this factual finding. The State argued in its response this Court should not undermine the jury's verdict by reweighing the evidence. (Resp. p. 15). The State also argued the jury "found he was not mentally retarded." (*Id*). Similarly, this Court stated, "the jury found Johnson is not intellectually disabled . . ." Slip Op. p. 5. As noted above, the jury never made these findings, but this Court's opinion perpetuates the State's unsupported arguments and provides greater weight and significance to the jury's consideration of the evidence of intellectual disability than is legally or factually warranted.

#### **H. A STAY WITH A SCHEDULE FOR A SPECIAL MASTER IS IN ORDER.**

"One of the crucial functions of the Court in deciding an *Atkins* claim is to determine the credibility of witnesses presented at the evidentiary hearing." *Wilson*, 170 F.Supp. 3d at 379. The evidence herein when properly assessed by applicable clinical standards establishes Mr. Johnson's intellectual disability.

This Court summarily denied a stay without analysis premised upon the Court's intellectual disability ruling. As noted above, Mr. Johnson respectfully suggests errors are manifest in this Court's ruling. This Court should reconsider, and appoint a Special Master and issue a stay similar to the stays granted by many other state courts in the recognition of the changes wrought by *Moore I* and *Moore II*, as cited in Johnson's stay motion. This

Court can provide guidance on the process to be implemented and set forth a finite timeframe for the consideration of the evidence. This is an issue that cannot be decided on the basis of a paper record . Witnesses need to be called to the stand and their credibility fairly assessed by a factfinder in person. Otherwise, the risk is too great that *Atkins* will be violated and an intellectually disabled person will be executed.

### **CONCLUSION**

This Court's opinion does not fairly account for the changes wrought by *Moore I* and *Moore II* in making reliable and constitutional determinations of intellectual disability. This case should be remanded to a Special Master so that proper clinical practice is applied and any State expert opinions can be subjected to cross-examination. Mr. Johnson's intellectual disability question remains unfairly determined by any factfinder guided by clinical standards.

Respectfully submitted,

/s/ Jeremy S. Weis

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 15th day of September, 2021, this writ petition and all attachments were filed via the Missouri e-filing system, and a true and correct copy was served on all parties of record.

/s/ Jeremy S. Weis

Attorney for Petitioner

# **Appendix O**

MISSOURI DIVISION OF CORRECTIONS  
CLASSIFICATION AND ASSIGNMENT UNIT  
Diagnostic Center Report

NAME: Earnest Lee JOHNSON

NUMBER: C-36747

DATE: 6-15-79

FELONY INCARCERATIONS: None.

CRIMINAL HISTORY: The PSI discusses several juvenile arrests which Johnson incurred, but he was never sent to a juvenile institution. He was jailed and placed on probation. He was arrested on a second degree burglary charge at the age of seventeen for breaking into a money changing machine in a laundromat. He was later fined and released. Also at seventeen he was arrested on the first of the two present offenses. He has never been treated for drug abuse or alcoholism. He has never been seen for psychiatric evaluation.

The PSI contained in the file discusses the circumstances of the present offenses at some length. In July of 1978 Johnson was involved in a burglary of a house and was placed on three years probation. He was transferred to Chicago to live with his brother and was employed there. He was apparently making an adequate adjustment until he returned to Charleston to visit his family at Christmas time, was unable to return due to bad weather and became involved in the second of the present offenses in February of 1979 when he stole an automobile. Johnson pled guilty to stealing a motor vehicle and burglary and stealing and has been sentenced to serve two years in MDC.

Accomplices: None.

Detainers: None.

OTHER SOCIAL INFORMATION: ( See the attached Pre-Sentence Investigation Report).

TEST DATA: Psychometric test data gathered at this center indicates that Johnson has average intellectual capabilities with a Revised Beta IQ of 95. His PTI Verbal Ability measured in the below average range. His Mechanical Comprehension measured in the average range. As Johnson was felt to have reading disabilities, he was not given further testing. He was barely able to read the SORP at the sixth grade level during the interview. It is noteworthy that the PSI indicates that Johnson attended special education classes in school and was measured to have an IQ of 70 which would place him in the borderline range of intellectual functioning. The discrepancy in these various scores may indicate that Johnson has learning disabilities.

EMPLOYMENT: Johnson has held two jobs, one for about a month doing farm labor and the other working parttime for a couple of months at a Walgreen Store in Chicago when he lived with his brother.

HEALTH: There is no current medical report in the file. Johnson denies having any chronic health problems. His duty status would appear likely to be regular.

SOCIAL ADJUSTMENT: The PSI is the only source of information on Johnson's background and discusses his past and social involvement at some length. He was raised as the youngest of three children in a rural environment by the paternal grandmother after the mother deserted the family when Johnson was three years old. Although his one brother has had adult probation, he is currently enrolled in college in Chicago and working regularly. The

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--continued

Earnest Lee JOHNSON

C-36747

sister also appears to have made a constructive social adjustment in life. The father has been employed as a farm laborer for the same family all of his life but it is evident that the family was poor. Johnson quit school after his freshman year where he made failing grades and became a discipline problem, being expelled for fighting on at least one occasion. He was a good basketball player. He denies ever using illegal drugs and only drinks alcohol on special occasions. His favorite pastimes are basketball and mechanical work. He has one particular girlfriend and a seven month old child. Johnson talked about his future in terms of wanting to return to Chicago to work in the Walgreen Store where his brother holds a management position. He said that he and his brother have plans to someday open a store or "disco place" of their own.

EVALUATION: Eighteen year old Earnest Lee Johnson has come to MDC on his first felony incarceration with one of the convictions resulting from the revocation of an adult probation. He has no history of substance abuse. He was raised in a rural environment in a disorganized family. Despite the poverty and other negative circumstances, he does have some meaningful family ties and relationships. He did poorly in school and has no vocational skills or substantial work experience. He has fathered one illegitimate child. Johnson's interview behavior represented him to be very childlike and unintelligent. He is apparently impulsive and has very little insight as regards his responsibility for his actions. Although he has serious feelings of regret about his present incarceration, it does not appear likely that he is capable of the judgment necessary to prevent him from engaging in criminal behaviors in the future. A successful social adjustment on Johnson's part could not be accomplished without the use of a controlled environment, strong guidance and community support following his release.

PERSONALIZED PLAN: Johnson expressed a willingness to get his GED and should definitely be encouraged to undergo remedial education to the utmost of his capability. He expressed interest in learning mechanical work or welding. It might prove constructive for his caseworker to communicate with his brother in Chicago and help to establish realistic post release plans for Johnson. He did receive a protective custody hearing during his stay in Housing Unit #1 and has been confined in protective custody as per the information contained in the report which identifies Evans #36408, MSP as an enemy.

SOURCES OF INFORMATION: Face sheet, Pre-Sentence Investigation Report, Psychometric Test Data, Protective Custody Hearing Report and related materials, Judgment papers and interview.

INSTITUTIONAL ASSIGNMENT: MIR

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