OCTOBER TERM 2021
No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHADRICK FULKS,
Petitioner,

v.

T.J. WATSON, Warden, USP-Terre Haute, and United States of America,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

--- CAPITAL CASE ---

Peter Williams
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
(215) 928-0520

Counsel of Record for Petitioner, and
Member of the Bar of the Supreme Court

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4 F.4th 586
United States Court of Appeals, Seventh Circuit.

Chadrick FULKS, Petitioner-Appellant,
v.
T.J. WATSON, Warden, Respondent-Appellee.

No. 20-1900
|
Argued June 7, 2021
|
Decided July 19, 2021

Synopsis

Background: After affirmance, 454 F.3d 410, of federal prisoner's death sentence for carjacking and kidnapping resulting in death, and affirmance, 683 F.3d 512, of denial of prisoner's motion to vacate sentence, prisoner petitioned for habeas corpus relief, asserting *Atkins* claim that prisoner's intellectual disability precluded imposition of death penalty. The United States District Court for the Southern District of Indiana, James R. Sweeney, J., 2019 WL 4600210, denied the petition as procedurally barred. Prisoner appealed.

Holdings: The Court of Appeals, Scudder, Circuit Judge, held that:

[1] lack of probability of success if *Atkins* claim had been asserted in motion to vacate sentence did not make such remedy inadequate or ineffective, as would authorize habeas petition under savings clause;

[2] updates to legal landscape did not warrant savings clause relief; and

[3] updates to clinical diagnostic standards did not warrant savings clause relief.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (4)

[1] **Habeas Corpus** Post-Conviction Motions or Proceedings

Taken in context, the words "inadequate" and "ineffective" in the savings clause of the statute governing motions to vacate sentence, which clause allows a federal prisoner to file a habeas petition if the remedy by motion to vacate sentence is inadequate or ineffective to test the legality of the prisoner's detention, means something more than "unsuccessful," and there must be a compelling showing that, as a practical matter, it would be impossible to use a motion to vacate sentence to cure a fundamental problem.

28 U.S.C.A. §§ 2241, 2255(e).

[2] **Habeas Corpus** Post-Conviction Motions or Proceedings

The probability that, based on legal landscape and clinical diagnostic standards in effect when federal death-row inmate had filed his motion to vacate sentence, inmate would not have prevailed on *Atkins* claim that his intellectual disability precluded imposition of death penalty, did not mean that the remedy by motion to vacate sentence was inadequate or ineffective, as would allow inmate to raise *Atkins* claim in habeas petition, pursuant to savings clause of statute governing motions to vacate sentence.

U.S. Const. Amend. 8; 28 U.S.C.A. §§ 2241, 2255(e).

[3] **Habeas Corpus** Post-Conviction Motions or Proceedings

Updates to legal landscape after federal death-row inmate had filed his motion to vacate sentence in 2008, which motion had not included *Atkins* claim that his intellectual disability precluded imposition of death penalty, did not expose a structural defect that made remedy by motion to vacate sentence inadequate

or ineffective, as would allow inmate to raise *Atkins* claim in habeas petition, pursuant to savings clause of statute governing motions to vacate sentence; trilogy of Supreme Court opinions that followed *Atkins* each represented course corrections to state-court applications of *Atkins* that further elaborated on measurements of intellectual function and evaluation of adaptive deficits, and even without those opinions, inmate could have raised same *Atkins* claim. U.S. Const. Amend. 8; 28 U.S.C.A. §§ 2241, 2255(e).

[4] **Habeas Corpus** Post-Conviction Motions or Proceedings

Updates to clinical diagnostic standards after federal death-row inmate had filed his motion to vacate sentence in 2008, which motion had not included *Atkins* claim that his intellectual disability precluded imposition of death penalty, did not expose a structural defect that made remedy by motion to vacate sentence inadequate or ineffective, as would allow inmate to raise *Atkins* claim in habeas petition, pursuant to savings clause of statute governing motions to vacate sentence; at sentencing, inmate had sought to avoid death penalty by relying on his cognitive impairments and fetal alcohol spectrum disorder, and he had every opportunity to take next step and argue that he was intellectually disabled, whether measured more functionally or under strict application of clinical standards, or both. U.S. Const. Amend. 8; 28 U.S.C.A. §§ 2241, 2255(e).

***587** Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division. No. 2:15-cv-00033 — **James R. Sweeney, II**, *Judge*.

Attorneys and Law Firms

Claudia Van Wyk, Attorney, Peter K. Williams, Attorney, Office of the Federal Community Defender, Eastern District of Pennsylvania - Capital Habeas Unit, Philadelphia, PA, for Petitioner-Appellant.

William A. Glaser, Attorney, Department of Justice, Criminal Division, Washington, DC, for Respondent-Appellee.

Before Rovner, Hamilton, and Scudder, Circuit Judges.

Opinion

Scudder, Circuit Judge.

Chadrick Fulks sits on federal death row for his role in the 2002 carjacking, kidnapping, and killing of Alice Donovan. He committed these crimes with Brandon Basham after they escaped together from a Kentucky jail. On two prior occasions—first, in his direct appeal and then, in a postconviction petition under 28 U.S.C. § 2255—Fulks challenged his capital sentence without success. Many years later, he returned to the district court with a new request for relief, this time invoking 28 U.S.C. § 2241 and the Supreme Court's decision in *Atkins v. Virginia*, and arguing that recent changes in clinical diagnostic standards show that he is (and since at least age 18 has been) intellectually disabled and ineligible for the death penalty. The district court concluded that Fulks cannot now pursue his *Atkins* claim under § 2241 and dismissed the petition. Guided in large measure by our recent decision in *Bourgeois v. Watson*, we agree and affirm.

I

A

In 2004 Chadrick Fulks pleaded guilty in the District of South Carolina to eight federal charges—including two death-eligible offenses—arising from the carjacking, kidnapping, and death of Alice Donovan. The district court then empaneled a jury to consider whether to impose the death penalty. See 18 U.S.C. § 3593(b)(2)(A).

Fulks advanced a mitigation defense grounded in his mental deficiencies and troubled childhood. His legal team, the district court later observed, "painted a compelling and empathetic picture of a young Chad Fulks growing up in poor, crowded, filthy, and deplorable living conditions, raised by violently abusive, sexually deviant, emotionally neglectful, and alcoholic parents who did not appear to care at ***588** all

about their children's well being." *Fulks v. United States*, 875 F. Supp. 2d 535, 568 (D.S.C. 2010). His defense counsel hired or consulted at least 11 experts, six of whom testified and explained, among other things, that Fulks suffered from borderline intelligence with IQ scores ranging from 75 to 79, along with moderate brain and cognitive impairments. See *id.* at 555–56, 558. But Fulks stopped short of arguing that he was intellectually disabled and thereby ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

The jury unanimously recommended, and the district court in turn imposed, two death sentences—one each for Fulks's convictions of carjacking and kidnapping that resulted in Donovan's death. The Fourth Circuit affirmed the death sentences on direct appeal and the Supreme Court declined review. See *United States v. Fulks*, 454 F.3d 410 (4th Cir. 2006), cert. denied, 551 U.S. 1147, 127 S.Ct. 3002, 168 L.Ed.2d 731 (2007) (mem.).

In 2008 Fulks returned to the district court in South Carolina and filed a motion to vacate his death sentences under 28 U.S.C. § 2255. He raised 33 claims, including allegations that trial counsel rendered ineffective assistance by failing to call additional mental health experts as part of his mitigation defense. But once again, Fulks did not raise an intellectual disability claim under *Atkins*, nor did he assert that his attorneys provided ineffective assistance by failing to raise such a claim. The district court held an evidentiary hearing and denied Fulks's petition but issued a certificate of appealability. The Fourth Circuit affirmed the denial of § 2255 relief, and the Supreme Court again denied a writ of certiorari. See *United States v. Fulks*, 683 F.3d 512 (4th Cir. 2012), cert. denied, 571 U.S. 941, 134 S.Ct. 52, 187 L.Ed.2d 257 (2013) (mem.).

B

This procedural history brings us to Fulks's most recent request for relief. In 2015 he filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2241 in the Southern District of Indiana, where he remains incarcerated at the U.S. Penitentiary in Terre Haute. After the district court appointed counsel to represent him, Fulks amended his habeas petition in 2019 advancing two claims. He claimed for the first time that he is intellectually disabled under current medical diagnostic and legal standards. He also contended that, even if he cannot meet the precise criteria for intellectual disability, he is functionally intellectually disabled and therefore ineligible for execution under the Supreme Court's decision and reasoning in *Madison v. Alabama*, —— U.S. ——, 139 S. Ct. 718, 203 L.Ed.2d 103 (2019). Fulks supported his petition with a report from a neuropsychologist, Barry Crown, who evaluated him in April 2018 and diagnosed him as intellectually disabled under current clinical standards.

Fulks asserted that the law allowed him to raise his intellectual disability claims in a § 2241 petition because § 2255 was "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). In Fulks's view, because his claims rested on new legal and factual bases unavailable to him at the time of his sentencing and § 2255 petition, he could seek relief under § 2241. More specifically, Fulks relied on the Supreme Court's decisions in *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), *Moore v. Texas* (*Moore I*), —— U.S. ——, 137 S. Ct. 1039, 197 L.Ed.2d 416 (2017), and *Madison*, —— U.S. ——, 139 S. Ct. 718 (2019)—all decided after the denial of his first § 2255 petition. Fulks also emphasized that his *Atkins* claim roots itself in the 2012 and 2013 updates to the User's Guide to Intellectual ***589** Disability: Definition, Classification, and Systems of Supports, 11th Edition (AAIDD–2012), a manual from the American Association on Intellectual and Developmental Disabilities, and the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM–5).

C

The district court denied Fulks's § 2241 petition as procedurally barred by 28 U.S.C. § 2255(e)—a provision prohibiting petitioners from seeking habeas relief under § 2241 unless it appears that § 2255 "is inadequate or ineffective to test the legality of [the] detention." The district court concluded that because Fulks failed to show a structural problem with § 2255, he could not use § 2241 to raise his *Atkins* claim. Relying on our decision in *Webster v. Daniels*, 784 F.3d 1123, 1136 (7th Cir. 2015) (en banc),

the district court explained that something more than an anticipated lack of success with a § 2255 motion is required to satisfy the savings clause. And as the district court emphasized, Fulks had a fair opportunity to raise an *Atkins* claim in his initial § 2255 proceeding but did not do so.

Fulks now appeals.

II

A

In most cases, 28 U.S.C. § 2255 supplies the exclusive postconviction means for federal prisoners to challenge their sentences. "Strict procedures govern" these motions. *Purkey v. United States*, 964 F.3d 603, 611 (7th Cir. 2020), cert. denied, —— U.S. ——, 141 S. Ct. 196, 207 L.Ed.2d 1128 (2020). Most relevant to this appeal, the statute limits a federal prisoner to a single attempt at filing a § 2255 motion unless the appropriate court of appeals grants permission to file a "second or successive motion." 28 U.S.C. § 2255(h). But that permission can come only if the motion contains "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reason-able factfinder would have found the movant guilty of the offense," or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* § 2255(h)(1)–(2).

Fulks concedes that his *Atkins* claim does not satisfy either of these exceptions. This acknowledgement explains why he filed his petition under 28 U.S.C. § 2241 and invoked the so-called savings clause in § 2255(e)—a narrow pathway of last resort for prisoners to seek postconviction relief through the general federal habeas corpus statute codified in § 2241.

The savings clause provides:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is *inadequate* or *ineffective* to test the legality of his detention.

28 U.S.C. § 2255(e) (emphasis added). The crucial point, clear from the text of the savings clause, is that Congress hinged access to § 2241 upon a showing that § 2255 is "inadequate" or "ineffective."

To date, we have identified three situations in which the remedy provided by § 2255 proved inadequate or ineffective. See *In re Davenport*, 147 F.3d 605 (7th Cir. 1998) (involving a claim alleging a miscarriage of justice and based upon a new rule of statutory interpretation made retroactive by the Supreme Court); ***590** *Garza v. Lappin*, 253 F.3d 918 (7th Cir. 2001) (involving a claim based on the ruling of an international tribunal issued after the prisoner's first round of § 2255 relief); *Webster*, 784 F.3d 1123 (involving a claim that relied on new evidence that existed but was allegedly unavailable at trial despite counsel's diligent efforts, and where that new evidence could show that the petitioner had long been intellectually disabled); see also *Purkey*, 964 F.3d at 611–14 (providing a fulsome explanation of these central cases).

[1] We explained in *Purkey* and reiterate today that our decisions in *Davenport*, *Garza*, and *Webster* do not "create rigid categories delineating when the [savings clause] is available." 964 F.3d at 614. But we also underscored that "the words 'inadequate' or 'ineffective,' taken in context, must mean something more than unsuccessful." *Id.* at 615. Rather, "there must be a compelling showing that, as a practical matter, it would be *impossible* to use section 2255 to cure a fundamental problem." *Id.* (emphasis added). In short, a petitioner must identify "some kind of structural problem with section 2255 before section 2241 becomes available." *Webster*, 784 F.3d at 1136.

B

Fulks posits that he can channel his *Atkins* claim through the savings clause because the recent adjustments to today's legal and clinical diagnostic standards came after his sentencing and § 2255 petition, meaning he could not have pursued or prevailed on his intellectual disability claim until now. Evaluating this contention requires consideration of how the law and clinical standards have evolved over the last 20 years.

We begin with *Atkins*, where the Supreme Court held that the Eighth Amendment prohibits the execution of intellectually disabled persons. See 536 U.S. at 321, 122 S.Ct. 2242. The Court's analysis drew upon clinical definitions of intellectual disability, which "require[d] 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." *Id.* at 318, 122 S.Ct. 2242.

The Supreme Court refined the *Atkins* analysis 12 years later in *Hall*, striking down a Florida law that prohibited a finding of intellectual disability if a person's IQ score exceeded 70. See 572 U.S. 701, 134 S.Ct. 1986. The Court concluded that such a rigid cutoff created an unacceptable risk that an intellectually disabled person would be executed. See *id.* at 704, 134 S.Ct. 1986. Along the way the Court reaffirmed *Atkins*'s teaching that courts are to be "informed by the work of medical experts in determining intellectual disability." *Id.* at 710, 134 S.Ct. 1986.

Taking into account the newly available DSM–5 and building on *Atkins*, the *Hall* Court reiterated that "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, 134 S.Ct. 1986. Because IQ tests entail certain imprecision, the Court further instructed that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 723, 134 S.Ct. 1986.

The Supreme Court returned to the *Atkins* standard three years later in *Moore I*, holding that the Texas Court of Criminal Appeals erred by disregarding the medical community's current definition of intellectual ***591** disability. See 137 S. Ct. 1039. The proper *Atkins* inquiry, the Court clarified, must follow the medical community's *current* diagnostic standards, not outdated frameworks, judicially crafted factors, or layman's stereotypes. See *id.* at 1051–53. Because the margin of error for Bobby Moore's IQ score of 74 yielded a range of 69 to 79—therefore allowing the possibility of a true IQ below 70—the Texas court, in evaluating whether Moore was intellectually disabled, "had to move on to consider Moore's adaptive functioning." *Id.* at 1049.

Moore's case returned to the Supreme Court in 2019 after the Texas court, on remand, once again rejected his claim of intellectual disability. See *Moore v. Texas* (*Moore II*), —— U.S. ——, 139 S. Ct. 666, 203 L.Ed.2d 1 (2019) (per curiam). The Supreme Court again reversed, concluding the Texas court repeated many of the same errors decried in *Moore I* and ultimately finding that Moore was indeed intellectually disabled. See *id.* at 670–72.

The Supreme Court's decisions in *Hall*, *Moore I*, and *Moore II* recognized that the medical diagnostic standards have not stood still since *Atkins*. And as the Court underscored in *Moore I*, intellectual disability determinations "must be 'informed by the medical community's diagnostic framework.' " 137 S. Ct. at 1048 (quoting *Hall*, 572 U.S. at 721, 134 S.Ct. 1986). Updated editions of the leading diagnostic manuals—the AAIDD–2012 and the DSM–5, issued in 2012 and 2013 respectively —superseded earlier versions governing at the time of Fulks's sentencing and initial § 2255 motion. Fulks's newly asserted claim that he is intellectually disabled anchors itself in the modifications to the diagnostic standards.

Compared to the prior edition, the DSM–5 places enhanced emphasis on the need to assess both cognitive capacity and adaptive functioning. The AAIDD–2012 and DSM–5 also now include express recommendations for

certain considerations when measuring intellectual disability: evaluators should base diagnoses on both a clinical assessment and standardized testing, should not rely on stereotypes about intellectually disabled people, and may adjust IQ scores for the so-called Flynn effect. See *McManus v. Neal*, 779 F.3d 634, 652–53, 653 n.6 (7th Cir. 2015) (citing James R. Flynn, *The Mean IQ of Americans: Massive Gains 1932 to 1978*, 95 PSYCH. BULL. 29, 32–34 (1984)) (explaining the Flynn effect as a testing phenomenon where IQ scores increase on average 0.3 points per year from the time the test was standardized, but reasoning that the *Atkins* standard does not *require* adjusting IQ scores for this effect).

III

A

All of this background brings us to Fulks's § 2241 petition. He opted for this procedural route to raise an *Atkins* claim because he did not meet the narrow requirements for filing a second or successive § 2255 petition. See 28 U.S.C. § 2255(h). But Fulks cannot satisfy the saving clause's requirements either, and this deficiency stops his § 2241 petition in its tracks. We reached the same conclusion on similar facts less than a year ago in the capital case of Alfred Bourgeois. See *Bourgeois v. Watson*, 977 F.3d 620 (7th Cir. 2020). We chart the same course today.

[2] To begin, "*Atkins* was the watershed case on intellectual disability" decided by the Supreme Court in 2004—years before Fulks filed his § 2255 motion in 2008. *Id.* at 636. Fulks could have raised substantially the same argument he brings now—that he is intellectually disabled—in his initial § 2255 petition. But he did not do so, ostensibly because he believed he would not have prevailed under the legal ***592** landscape and clinical diagnostic standards in effect at that time.

The probability that Fulks would not have prevailed on his *Atkins* claim in 2008 does not mean or show that § 2255 was inadequate or ineffective. We made this exact point in *Purkey*, reinforcing that "the words 'inadequate or ineffective' taken in context, must mean something more than unsuccessful." 964 F.3d at 615. Indeed, we have insisted, time and again, that satisfying the savings clause in § 2255(e) demands "a compelling showing that, as a practical matter, it would be impossible to use section 2255 to cure a fundamental problem." *Id.*; see, *e.g.*, *Higgs v. Watson*, 984 F.3d 1235 (7th Cir. 2021) (applying the savings clause analysis to a capital defendant's habeas petition and concluding he could not satisfy § 2255(e)'s demanding requirements); *Bourgeois*, 977 F.3d 620 (same); *Lee v. Watson*, 964 F.3d 663 (7th Cir. 2020) (same). Right to it, "[i]t is not enough that proper use of the statute results in denial of relief." *Purkey*, 964 F.3d at 615.

[3] Updates to the legal and diagnostic standards, which may now provide Fulks a stronger basis to prove an intellectual disability, do not expose any structural defect in § 2255. On the legal front, *Hall*, *Moore I*, and *Moore II* did not alter the law of intellectual disability to such a great extent that the remedy by a § 2255 motion was inadequate or ineffective to test the legality of Fulks's death sentence at the time he filed his petition in 2008. Although the Supreme Court in *Atkins* did not prescribe a specific test for determining when a person is intellectually disabled, it did rely on clinical definitions requiring both subaverage intellectual functioning and significant limitations in adaptive skills that manifest before age 18—the same three requirements governing the standard today. See *Atkins*, 536 U.S. at 318, 122 S.Ct. 2242. The trilogy of cases that followed—*Hall*, *Moore I*, and *Moore II*—each represent course corrections to state-court applications of *Atkins* that "further elaborated on the measurements of intellectual function and the evaluation of adaptive deficits." *Bourgeois*, 977 F.3d at 636. With or without that trio, Fulks could have raised the same *Atkins* claim in his initial § 2255 motion.

Nothing in the Supreme Court's jurisprudence prohibiting the execution of intellectually disabled persons, moreover, suggests that a capital prisoner seeking to raise an *Atkins* claim is exempt from the procedural limitations in § 2255. Nor do *Hall*, *Moore I*, or *Moore II* create "new rule[s] of constitutional law, made retroactive to cases on collateral review by the Supreme Court," that would permit a second or successive motion under § 2255(h)(2). The observation that *Hall*, *Moore I*, and *Moore II* refined the application

of *Atkins* is not enough to satisfy the savings clause in the circumstances before us here.

[4] So, too, on the clinical front. Updates to the clinical diagnostic standards for intellectual disability likewise do not convince us that the remedy available to Fulks in his original § 2255 motion was inadequate or ineffective. To be sure, Fulks may have a marginally stronger case of proving intellectual disability under today's standards. Under the DSM–5, for example, Fulks's Flynn-adjusted IQ scores of 75, 76, and 77 could satisfy the first prong of showing intellectual disability —subaverage intellectual functioning—because scores up to 75 fall within the range for an intellectual disability. And whereas no expert diagnosed Fulks as intellectually disabled at sentencing or in his initial § 2255 motion, neuropsychologist Barry Crown concluded in 2018 that Fulks is intellectually disabled under these updated standards—although he stopped short of ***593** saying that Fulks was *not* intellectually disabled under the older standards.

Regardless, these recent updates to the AAIDD–2012 and DSM–5 fail to reveal anything inadequate or ineffective about § 2255 that made it impossible for Fulks to pursue an *Atkins* claim in his initial postconviction motion. See *Bourgeois*, 977 F.3d at 636 (rejecting this same argument and explaining "the savings clause does not apply every time ... the medical community updates its diagnostic standards"). Fulks sought at sentencing to avoid the death penalty by relying on his cognitive impairments and fetal alcohol spectrum disorder—owing in no small part to his horrific upbringing—and he had every opportunity to take the next step and argue, whether measured more functionally or under a strict application of clinical standards (or both), that he was intellectually disabled.

Fulks begs to differ, insisting that any *Atkins* claim would have been futile when he filed his § 2255 petition in 2008, because the Fourth Circuit at that time employed standards for assessing intellectual disability that were later rejected in *Hall*, *Moore I*, and *Moore II*.

We disagree. Fulks's *Atkins* claim was not so squarely foreclosed by Fourth Circuit precedent that it would have been impossible or altogether futile for him to raise this claim during his first round of postconviction relief. To the contrary, the Fourth Circuit cases that Fulks identifies reflect specific applications of differing state-law intellectual disability standards to various capital defendants through the deferential lens of federal habeas review. See, *e.g.*, *Richardson v. Branker*, 668 F.3d 128 (4th Cir. 2012) (applying North Carolina's standard for intellectual disability to a § 2254 motion and concluding the state court's decision was not based on an unreasonable determination of the facts); *Walker v. Kelly*, 593 F.3d 319 (4th Cir. 2010) (applying Virginia's definition for intellectual disability to a § 2254 petition and holding the district court did not clearly err in finding the petitioner was not intellectually disabled); *Green v. Johnson*, 515 F.3d 290 (4th Cir. 2008) (applying Virginia law and concluding the Virginia Supreme Court did not apply *Atkins* in an objectively unreasonable manner).

By our reading, though, not one of these cases suggests that the legal and diagnostic standards recognized in *Atkins* were etched in stone or would render frivolous any arguments for adapting the legal framework to include updated clinical standards about intellectual disability. To the contrary, in a 2004 case, the Fourth Circuit did not question the district court's reliance on a clinical standard established by the American Association on Retardation that an IQ of 75 or below placed an individual in the intellectually disabled category—thereby showing amenability to an argument that Fulks, with an IQ score of 75, is likewise intellectually disabled. See *United States v. Roane*, 378 F.3d 382 (4th Cir. 2004) (affirming the district court's rejection of an *Atkins* claim in a § 2255 motion).

Our point with all of this is to say that we are aware of no Supreme Court or Fourth Circuit case on the books at the time of Fulks's § 2255 petition that would have foreclosed him from raising an arguable *Atkins* claim. In the end, then, we are unable to identify any structural defect in § 2255 that rendered it an inadequate or ineffective device to challenge his capital sentence. The consequence is that Fulks cannot use § 2241 to claim for the first time that he is ineligible for the death penalty under *Atkins*.

B

Fulks invokes a second ground for habeas relief by relying on the Supreme ***594** Court's 2019 decision in *Madison*

v. Alabama. See 139 S. Ct. 718. But *Madison* has no import to Fulks's intellectual disability claim.

Madison falls in the line of cases stemming from *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), and *Panetti v. Quarterman*, 551 U.S. 930, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007), in which the Court held that the Eighth Amendment prohibits executing an insane prisoner—meaning one who lacks a "rational understanding" of the reason for his execution. See *Panetti*, 551 U.S. at 958–60, 127 S.Ct. 2842; *Ford*, 477 U.S. at 409–10, 106 S.Ct. 2595. This prohibition on *carrying out* a death sentence is distinct from the holding in *Atkins*, which bars the *imposition* of a capital sentence in the first place. Compare *Ford*, 477 U.S. at 410, 106 S.Ct. 2595, with *Atkins*, 536 U.S. at 321, 122 S.Ct. 2242. Part of this distinction arises from the fact that a prisoner may become insane *after* being sentenced to death, whereas intellectual disability must manifest before age 18, such that the capital sentence cannot ever be imposed consistent with the Eighth Amendment. See *Davis v. Kelley*, 854 F.3d 967, 971 (8th Cir. 2017).

Although defendants in *Ford* and *Panetti* suffered from paranoid schizophrenia and extreme psychosis, the Court took the next step in *Madison* by clarifying that a delusional disorder is *not* a prerequisite to relief from execution. See *Madison*, 139 S. Ct. at 728. The Court instead emphasized that it is "not the diagnosis of [a particular mental] illness, but a consequence—to wit, the prisoner's inability to rationally understand his punishment" that governs the inquiry. *Id.*

Fulks sees *Madison* as a newly recognized functional application of the Eighth Amendment that should apply equally to his *Atkins* claim. Put another way, he believes *Madison* allows him to contend that his limitations are functionally equivalent to those of an intellectually disabled person, making him ineligible for the death penalty even if he does not meet the technical diagnostic criteria for an intellectual disability. Going further, Fulks adds that *Madison* provides him a new ground for relief that was previously unavailable when he filed his initial § 2255 petition, thereby entitling him to pursue his claim under § 2241.

Not so in our view. In all practical respects, Fulks's *Madison* claim is the same as his *Atkins* claim: the crux of his contention remains that he is intellectually disabled and thus ineligible for a capital sentence. No aspect of *Madison* changes the reality that he could have raised this *Atkins* claim during his first round of postconviction relief under § 2255.

Our conclusion finds reinforcement in Fulks's own insistence that his *Madison*-based claim is an *Atkins* claim, not a *Ford* claim. And for good reason, as *Ford* claims ripen only once a prisoner's execution is imminent, and so far, the Executive Branch has not scheduled Fulks's execution. See *Holmes v. Neal*, 816 F.3d 949, 954 (7th Cir. 2016); see also *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644–45, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998).

IV

Today's decision is surely not our last word on the savings clause. If our prior cases show anything, it is the immense complexity in identifying the contours of the savings clause and its proper scope, including in capital litigation. See, *e.g.*, *Higgs*, 984 F.3d 1235 (analyzing the savings clause in a capital case); *Bourgeois*, 977 F.3d 620 (same); *Lee*, 964 F.3d 663 (same); *Purkey*, 964 F.3d 603 (same); *Webster*, 784 F.3d 1123 (same).

Although Fulks has not prevailed today and cannot access § 2241 through the savings ***595** clause, he has identified —through the assistance of very able counsel—a potential structural limitation that may require additional assessment in a future case. The difficult question on the horizon is whether a capital prisoner can access § 2241 to vacate a death sentence in the face of a monumental change to the clinical definition of intellectual disability that occurs *after* the prisoner completed one round of § 2255 proceedings. Assuming a substantial change in the clinical standards allows a newfound diagnosis of intellectual disability, his execution

would offend the Eighth Amendment. But the prisoner would have no way to raise his *Atkins* claim as a second or successive motion under § 2255(h)'s two express exceptions.

Identifying this issue is much easier than resolving it. And Fulks's appeal does not require us to take that second step. It is enough for us to observe that there is a serious question whether § 2255 is inadequate or ineffective when a sea change in clinical standards would allow a prisoner to make a substantial showing of intellectual disability that, despite all diligence, he could not have raised previously. Nor must we decide today how much evidence a prisoner would need to present to receive an evidentiary hearing and relief under § 2241 for such an *Atkins* claim. Cf. *Herrera v. Collins*, 506 U.S. 390, 417, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (assuming in another context "that in a capital case a *truly persuasive demonstration* of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim" (emphasis added)).

Fulks and his counsel had the necessary facts and every opportunity to present an *Atkins* claim—but did not pursue it during sentencing, on direct appeal, or in his § 2255 petition. And the subsequent changes in the DSM–5 and the AAIDD–2012 do not amount to the kind of substantial change necessary to present a close question of whether the savings clause could potentially apply. So we can save for another day difficult questions that lurk in our savings clause jurisprudence.

For all of these reasons, we AFFIRM.

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United States District Court, S.D.
Indiana, Terre Haute Division.

Chadrick FULKS, Petitioner,
v.
J. E. KRUEGER, Respondent.

No. 2:15-cv-00033-JRS-MJD
|
Signed 09/20/2019

Attorneys and Law Firms

Claudia Van Wyk, Peter Konrad Williams, Federal Community Defender Office, Philadelphia, PA, for Petitioner.

Bob Daley, Kathleen Michelle Stoughton, Office of the United States Attorney, Columbia, SC, Joe Howard Vaughn, Winfield D. Ong, United States Attorney's Office, Indianapolis, IN, for Respondent.

Order Denying Petition for a Writ of Habeas Corpus

JAMES R. SWEENEY II, DISTRICT JUDGE

***1** Petitioner Chadrick Fulks is a federal prisoner incarcerated at the United States Penitentiary in Terre Haute, Indiana. He was convicted and sentenced to death in the United States District Court for the District of South Carolina. His convictions and sentence were affirmed on direct appeal, and his post-conviction motion under 28 U.S.C. § 2255 was denied.

Mr. Fulks now seeks a writ of habeas corpus from this Court pursuant to 28 U.S.C. § 2241. He presents two claims, both of which argue that he is categorically ineligible for the death penalty under the Eighth Amendment because he is intellectually disabled or functionally equivalent thereto. In support of his claims, Mr. Fulks presents extensive evidence that he has an intellectual disability,[1] has diminished cognitive functioning, and suffers from fetal alcohol spectrum disorder.

Ultimately, the Court cannot reach the merits of Mr. Fulks' claims because they are barred by 28 U.S.C. § 2255(e). Mr. Fulks cannot show that a structural problem with § 2255 prevented him from having a reasonable opportunity for a reliable judicial determination of these claims in his § 2255 proceedings. Accordingly, his claims must be dismissed with prejudice.

I.

Background

The facts underlying Mr. Fulks' criminal convictions are irrelevant to the legal issues presented in his habeas petition. They are set forth in detail in the opinion affirming Mr. Fulks' convictions and sentence on direct appeal. *See* *United States v. Fulks*, 454 F.3d 410 (4th Cir. 2006) ("*Fulks I*"). Relevant to Mr. Fulks' habeas petition is the procedural history of his other challenges to his convictions and sentence. This procedural history is set forth below.

Mr. Fulks and his co-defendant, Brandon Basham, were indicted in December 2002 in the United States District Court for the District of South Carolina. The Grand Jury returned a Superseding Indictment on April 23, 2003, charging Mr. Fulks and Mr. Basham with eight counts. In May 2004, Mr. Fulks pleaded guilty to all eight counts. Two of those charges —carjacking resulting in death, *see* 18 U.S.C. § 2119(3), and kidnapping resulting in death, *see* 18 U.S.C. § 1201— made Mr. Fulks eligible for the death penalty.

A jury unanimously recommended that Mr. Fulks be sentenced to death on both death-eligible counts. The sentencing court imposed the death sentence on both counts and sentenced Mr. Fulks to 744 months' imprisonment on the remaining six counts to run consecutively to the two death sentences. The United States Court of Appeals for the Fourth Circuit affirmed Mr. Fulks' convictions and sentence in *Fulks I*. The United States Supreme Court denied Mr. Fulks' petition for writ of certiorari on June 25, 2007. *See* *Fulks v. United States*, 551 U.S. 1147 (2007).

On June 23, 2008, Mr. Fulks filed a motion to vacate his convictions and sentence pursuant to 28 U.S.C. § 2255. Notably, Mr. Fulks did not raise a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), in his § 2255 motion. The District Court denied his motion, and, on June 26, 2012, the Fourth Circuit affirmed. *See* *United States v. Fulks*, 683 F.3d 512 (4th Cir. 2012) ("*Fulks II*"). The Supreme Court denied

Mr. Fulks' petition for writ of certiorari on October 7, 2013. *See* *Fulks v. United States*, 571 U.S. 941 (2013).

***2** On January 29, 2015, Mr. Fulks filed the instant habeas petition pro se. Approximately a year later, the Federal Community Defender Office from the Eastern District of Pennsylvania was appointed to represent Mr. Fulks in this action.[2] *See* Dkt. 22. After nearly three years of extending the deadline to file a reply brief, the Court granted Mr. Fulks' request to file an amended habeas petition. *See* Dkt. 54.

Mr. Fulks filed an amended habeas petition on March 8, 2019. Although it became fully briefed on July 12, 2019, the Court ordered supplemental briefing on Mr. Fulks' second claim, since the parties did not agree on the legal basis for the claim. That supplemental briefing was recently completed, and Mr. Fulks' habeas petition is now ripe for decision.

II.

Legal Standards

The primary legal issue the Court must resolve is whether Mr. Fulks meets the requirements of the "Savings Clause" found in 28 U.S.C. § 2255(e).[3] Prior to the enactment of 28 U.S.C. § 2255 in 1948, federal prisoners wishing to file a collateral attack on their convictions or sentences were required to petition for a writ of habeas corpus—codified in 28 U.S.C. § 2241—in the federal district court in which they were incarcerated. *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998). Congress passed § 2255 "to change the venue of postconviction proceedings brought by federal prisoners from the district of incarceration to the district in which the prisoner had been sentenced." *Id.* (citing *United States v. Hayman*, 342 U.S. 205, 212-19 (1952)). Unlike a § 2241 petition, § 2255 motions "must be filed in the district of conviction." *Webster v. Daniels*, 784 F.3d 1123, 1124 (7th Cir. 2015) (en banc). "As a rule, the remedy afforded by section 2255 functions as an effective substitute for the writ of habeas corpus[, 28 U.S.C. § 2241,] that it largely replaced." *Id.*; *see* *Chazen v. Marske*, —— F.3d ——, 2019 WL 4254295, *3 (7th Cir. Sept. 9, 2019) ("As a general rule, a federal prisoner wishing to collaterally attack his conviction or sentence must do so under § 2255 in the district of conviction.").

However, Congress created the Savings Clause to serve as a "safety hatch." *Davenport*, 147 F.3d at 609. It permits use of § 2241 if it "appears that that the remedy by motion [under § 2255] is inadequate or ineffective to test the legality of [ ] detention." 28 U.S.C. § 2255(e).

The Savings Clause was mostly inconsequential until Congress passed the Antiterrorism and Effective Death Penalty Act ("AEDPA") in 1996. Among other things, AEDPA limits federal prisoners to one § 2255 motion attacking their conviction or sentence. *See* 28 U.S.C. § 2244(b); *Tyler v. Cain*, 533 U.S. 656, 661-662 (2001). The appropriate court of appeals must authorize second or successive § 2255 motions before the district court has jurisdiction to entertain them. *See* 28 U.S.C. § 2244(b)(3)(A); 28 U.S.C. § 2255(h). In order to obtain authorization from the court of appeals, the petitioner must have

> ***3** (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). Many prisoners seek to raise claims that do not meet one of the two avenues for authorization. Thus, they file habeas petitions under § 2241 in the district of their incarceration. To proceed under § 2241, however, they must pass through the Savings Clause, which is the critical legal issue in this case—whether Mr. Fulks can pass through the Savings Clause and thus use § 2241 to raise his claims.

Federal courts across the country disagree regarding the circumstances under which the Savings Clause is met. *See, e.g.*, *Shepherd v. Krueger*, 911 F.3d 861, 862-63 (7th Cir. 2018) ("[T]he scope of [§ 2255(e)] is controversial both within this circuit and beyond."); *Camacho v. English*, 872 F.3d 811, 815 (7th Cir. 2017) (Easterbrook, J., concurring) (noting that Seventh Circuit decisions regarding the scope of § 2255(e) "have not persuaded other circuits" and urging

the Supreme Court "to decide whether § 2255(e) permits litigation of th[e] kind" authorized by the Seventh Circuit). Although Mr. Fulks was convicted and sentenced to death in the Fourth Circuit, this Court applies Seventh Circuit law to determine whether Mr. Fulks can proceed under § 2241. *See* *Webster*, 784 F.3d at 1135-39 (applying Seventh Circuit law to determine whether the Savings Clause is met).

The Seventh Circuit has found § 2255 inadequate or ineffective only in limited circumstances. The most significant cases in which this occurred, at least for Mr. Fulks' purposes, are set forth below.

The Seventh Circuit first found § 2255 inadequate or ineffective in *Davenport*. There, the Seventh Circuit addressed collateral attacks by two federal inmates—Davenport and Nichols. The Seventh Circuit framed the inquiry as follows: "To decide what 'adequacy' means ... [in § 2255(e)] requires determining what the essential function of habeas corpus is and whether it is impaired in the circumstances before us by the limitations on the use of the remedy provided in section 2255." *Davenport*, 147 F.3d at 609. It then explained that "[t]he essential function is to give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence." *Id.*

Davenport—who sought to challenge whether his 1981 burglary conviction qualified as a predicate crime under the Armed Career Criminal Act—could have raised that challenge during both his direct appeal and when he filed his first § 2255 motion but chose not to raise such a claim. Davenport thus could not meet the Savings Clause because "[n]othing in 2555 made the remedy provided by that section inadequate to enable Davenport to test the legality of his imprisonment. He had an unobstructed procedural shot at getting his sentence vacated." *Id.*

Nichols' case, the Seventh Circuit held, was different. Unlike Davenport, during Nichols direct appeal and § 2255 proceedings, the "law of the circuit was so firmly against him" for the claim he wished to raise that it would have been futile to raise it. *Id.* at 610. The Supreme Court, however, had since overruled the Seventh Circuit's interpretation of the relevant statute and made that ruling retroactive. Thus "Nichols could not [have] use[d] a first motion under [§ 2255] to obtain relief on a basis not yet established by law," nor could he have received authorization to file "a second or other successive motion ... because the basis on which he [sought] relief [was] neither newly discovered evidence nor a new rule of *constitutional* law." *Id.* (emphasis added).

***4** Given that the Supreme Court's decision of statutory interpretation applied retroactively, the Seventh Circuit explained: "A procedure for postconviction relief can fairly be termed inadequate when it is so configured as to deny a convicted defendant *any* opportunity for judicial rectification of so fundamental a defect in his conviction as having been imprisoned for a nonexistent offense." *Id.* at 611; *see id.* ("A federal prisoner should be permitted to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion.").

Ultimately, *Davenport* created a three-part test used to determine if a petitioner can invoke the Savings Clause and proceed under § 2241. To do so, a petitioner must establish:

> (1) that he relies on not a constitutional case, but a statutory-interpretation case, so [that he] could not have invoked it by means of a second or successive section 2255 motion, (2) that the new rule applies retroactively to cases on collateral review and could not have been invoked in his earlier proceeding, and (3) that the error is grave enough ... to be deemed a miscarriage of justice corrigible therefore in a habeas corpus proceeding, such as one resulting in a conviction for a crime of which he was innocent.

Montana v. Cross, 829 F.3d 775, 783 (7th Cir. 2016) (citation and quotation marks omitted); *see* *Beason v. Marske*, 926 F.3d 932, 935 (7th Cir. 2019).

After *Davenport*, the Seventh Circuit has infrequently found the Savings Clause satisfied in circumstances beyond those articulated in *Davenport*. One such instance was in *Garza v. Lappin*, 253 F.3d 918 (7th Cir. 2001). In *Garza*, after Garza's direct appeal and § 2255 proceedings were complete,

the Inter-American Commission on Human Rights (the "Commission") determined that Garza's rights were violated during the penalty phase of his proceedings. *Garza*, 253 F.3d at 919. Garza sought to use this favorable decision to argue that he was entitled to habeas relief. *Id.* Looking to *Davenport*, the Seventh Circuit reasoned that because Garza could not meet either avenue set forth in § 2255(h) to file a second or successive § 2255 motion, and because it was "literally impossible" for Garza to have raised the Commission's favorable decision in his first § 2255 proceeding because the Commission had not yet issued its decision, § 2255 did not then nor had it ever "provided an adequate avenue for testing Garza's present challenge to the legality of his sentence." *Id.* at 922-23.

Another instance was in the en banc Seventh Circuit's recent decision in *Webster*.[4] Webster was a federal prisoner who had been sentenced to death. He raised an *Atkins* claim in a § 2241 petition. Specifically, Webster wished to present "newly discovered evidence that would demonstrate that he [was] categorically and constitutionally ineligible for the death penalty under ... *Atkins*." *Webster*, 784 F.3d at 1125. The question was whether the Savings Clause permitted him to proceed via § 2241, and the Seventh Circuit held that it did.

***5** The Seventh Circuit began its analysis by reviewing *Davenport* and its progeny. Although noting some differences in its Savings Clause cases, the Seventh Circuit synthesized them as follows: "All of these decisions hold ... that there must be some kind of structural problem with section 2255 before section 2241 becomes available. In other words, something more than a lack of success with a section 2255 motion must exist before the savings clause is satisfied." *Webster*, 784 F.3d at 1136; *Poe v. LaRiva*, 834 F.3d 770, 773 (7th Cir. 2016) ("[Meeting the Savings Clause] generally requires a structural problem in § 2255 [that] forecloses even one round of effective collateral review, unrelated to the petitioner's own mistakes." (citation and quotation marks omitted)).

Ultimately, the Seventh Circuit held that "[s]everal considerations" showed that "in the circumstances presented ... the savings clause permits Webster to resort to a petition under section 2241." *Id.* at 1138. First, the Seventh Circuit reasoned that the language of subsections (a) and (e) of § 2255 suggests that the Savings Clause is met when § 2255 prevents a prisoner from challenging the " 'legality of [the prisoner's] *detention*.' " *Id.* (quoting 28 U.S.C. § 2255(e)). Second, the Seventh Circuit noted that the fact that "the Supreme Court had not yet decided *Atkins* ... at the time AEDPA was passed supports the conclusion that the narrow set of cases presenting issues of constitutional ineligibility for execution is another lacuna in the statute." *Id.* In other words, the problem with § 2255 for Webster was that, after his conviction and sentence, "the Supreme Court ha[d] now established that the Constitution itself forbids the execution of certain people." *Id.* at 1139.

Even if the language of the Savings Clause was not enough to show that it was met, the Seventh Circuit explained that "the next step would be to take into account the fact that a core purpose of habeas corpus is to prevent a custodian from inflicting an unconstitutional sentence." *Id.* "To hold otherwise," the Seventh Circuit continued, "would lead in some cases—perhaps Webster's—to the intolerable result of condoning an execution that violates the Eighth Amendment." *Id.* Thus, the Seventh Circuit held that "there is no categorical bar against resort to section 2241 in cases where new evidence would reveal that the Constitution categorically prohibits a certain penalty." *Id.*

After setting forth this broad holding, the Seventh Circuit applied the holding to the specific circumstances of Webster's *Atkins* claim. In doing so, it explicitly limited the availability of § 2241 in several important respects. These limitations, as discussed in detail below, ultimately prevent Mr. Fulks from relying on *Webster* to meet the Savings Clause.

III.

Discussion

Before resolving the primary issue presented by the parties —whether Mr. Fulks meets the Savings Clause—two preliminary issues must be resolved. First, the Court must resolve the parties' disagreement over the contours of Mr. Fulks' second claim. Second, the Court must address Mr. Fulks' argument that he is not required to meet the Savings Clause to proceed under § 2241. After addressing these issues, the Court turns to whether Mr. Fulks can meet the Savings Clause.

A. The Contours of Mr. Fulks' Claims

Mr. Fulks raises two claims in his habeas petition. The first is straightforward: he argues that he is intellectually disabled and thus ineligible for the death penalty pursuant to *Atkins* and its progeny. The contours of Mr. Fulks' second claim, however, are disputed. Mr. Fulks maintains that his claim is brought under *Atkins*, while Respondent contends it is necessarily brought under *Ford*. Resolving this dispute, and other issues discussed below, requires a basic understanding of Eighth Amendment claims under *Atkins* and *Ford v. Wainwright*, 477 U.S. 399 (1986).

***6** Before Mr. Fulks pleaded guilty and was sentenced to death, the Supreme Court held in *Atkins* that the Eighth Amendment forbids execution of an individual who has an intellectual disability. *Atkins*, 536 U.S. at 321; *see* *Hall v. Florida*, 572 U.S. 701, 704 (2014). "*Atkins* largely left to the [sovereign] the job of developing criteria to determine" which prisoners have an intellectual disability and thus cannot receive the death penalty. *McManus v. Neal*, 779 F.3d 634, 650 (7th Cir. 2015).

Twelve years after its decision in *Atkins*, the Supreme Court addressed "how intellectual disability must be defined in order to implement ... the holding of *Atkins*." *Hall*, 572 U.S. at 709. It ultimately deemed unconstitutional a Florida law that prohibited "all further exploration of intellectual disability" if a prisoner obtained a score of 70 or higher on an IQ test. *Id.* at 704. The Supreme Court noted that "[t]he legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework." *Id.* at 722. The medical community diagnoses intellectual disability by analyzing three criteria: (1) "significantly subaverage intellectual functioning"; (2) "deficits in adaptive functioning"; and (3) "onset of these deficits during the developmental period." *Id.* at 710; *see* *Moore v. Texas*, 137 S. Ct. 1039, 1045 (2017) (setting forth the same three criteria). These criteria "will 'inform[ ]' but not 'dictate' whether a person has an intellectual disability." *McManus*, 779 F.3d at 634 (quoting *Hall*, 572 U.S. at 721). Given this "conjunctive and interrelated assessment," the Supreme Court held that it was unconstitutional for a state to prevent evidence supporting a diagnosis of intellectual ability, at least when "a defendant's IQ test score falls within the test's acknowledged and inherent margin of error." *Hall*, 572 U.S. at 723; *see* *McManus*, 779 F.3d at 634 ("*Hall* also mandated that the legal standard for determining subaverage intellectual functioning must account for the margin of error in IQ testing.").

Most recently, in 2017, the Supreme Court in *Moore* held that the Texas Court of Criminal Appeals misapplied *Hall*. *Moore*, 137 S. Ct. at 1049 ("The [Texas court's] conclusion that Moore's IQ scores established that he is not intellectually disabled is irreconcilable with *Hall*."). Because the margin of error for Moore's IQ test yielded a range of 69 to 79—meaning Moore's intellectual functioning as measured by the IQ test could be below 70 such that he met the first factor—the Texas court "had to move on to consider Moore's adaptive functioning." *Id.* The Supreme Court cast its ultimate decision as an application of *Hall*: "in line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Id.* at 1050. Moreover, the Supreme Court made clear that, in making the intellectual-disability determination, courts had to use "[t]he medical community's current standards" rather than outdated standards, as the Texas court did. *Id.* at 1052-53. In both *Hall* and *Moore*, the Supreme Court looked to the most recent editions of the clinical manual of the American Association on Intellectual and Developmental Disabilities ("AAIDD") and the Diagnostic and Statistical Manual of Mental Disorders ("DSM") published by the American Psychiatric Association. *Id.* at 1048-53; *Hall*, 572 U.S. at 710-23.

***7** The claim first recognized in *Atkins* and at issue in *Hall* and *Moore* is distinct from the claim first recognized in *Ford*, even though both are rooted in the Eighth Amendment. In *Ford*, the Supreme Court held that "[t]he Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane," which was defined as a person whose mental condition "prevents him from comprehending the reasons for the penalty or its implications." 477 U.S. at 410, 417. Or, as further explained by the Supreme Court in *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Eighth Amendment prohibits the execution of a person whose "mental state is so distorted by a mental illness" that

he lacks a "rational understanding" of "the State's rationale for [his] execution." *Id.* at 958-59. The Supreme Court recently reiterated that the proper inquiry under *Ford* is "whether a mental disorder has had a particular *effect*"; the *Ford* standard "has no interest in establishing any precise *cause*." *Madison v. Alabama*, 139 S. Ct. 718 (2019).

In sum, although claims under *Atkins* and *Ford* are similar, they apply different standards and focus on different time periods. *Atkins* addresses the constitutionality of sentencing an individual to death, while *Ford* asks whether a prisoner subject to a death sentence can have that sentence carried out. Thus, for example, evidence of further intellectual tests conducted on a prisoner subject to a death sentence would have "no bearing on the *initial* conviction and sentence"—that is, the *Atkins* inquiry—"though they would be highly pertinent to the ultimate ability of the government to carry out the sentence" consistent with *Ford*. *Webster*, 784 F.3d at 1140. Because a *Ford* claim inquires into the prisoner's mental state near the time of execution, a *Ford* claim is typically not ripe until an execution date has been set. *See Holmes v. Neal*, 816 F.3d 949, 954 (7th Cir. 2016).

Again, Mr. Fulks' first claim is a straightforward *Atkins* claim; he argues that he is intellectually disabled and thus the Eighth Amendment prohibits his execution. The factual predicate for Mr. Fulks' second claim is that his cognitive functioning and fetal alcohol spectrum disorder make him functionally equivalent to one who is intellectually disabled. He argues that regardless of whether he meets the diagnostic criteria to be categorized as intellectually disabled, the same justifications forbidding the execution of intellectually disabled individuals apply to individuals with functionally similar limitations. Mr. Fulks' claim, then, amounts to a request to extend *Atkins*, as *Atkins* held only that those who are *intellectually disabled* cannot be executed. *Atkins*, 536 U.S. at 321; *see Hall*, 572 U.S. at 704.

Although Mr. Fulks does not point to any federal court that has accepted this argument, Mr. Fulks argues that this extension of *Atkins* is appropriate based on the Supreme Court's decision in *Madison*, which, as noted above, involved a claim under *Ford*. Yet Mr. Fulks disavows any claim under *Ford*. He explains: "Mr. Fulks does not claim that he is ineligible for death because he is 'insane' under *Ford*, or because he lacks a rational understanding of his situation. He argues that this Court must use *Madison*'s functional approach to determining whether he is ineligible for death under *Atkins*." Dkt. 67 at 14; *see id.* at 15 ("Mr. Fulks asks this Court to follow *Madison* by taking a functional approach to its application of the *Atkins* criteria. Mr. Fulks does not ask this Court to apply the *Ford* criteria.").

Respondent presents several bases to reject Mr. Fulks' second claim on the merits. For example, Respondent argues that there is no legal basis to extend the protections of *Atkins* to those who are only functionally intellectually disabled, especially not *Madison*, which dealt exclusively with a *Ford* claim. Respondent also argues that, despite Mr. Fulks' disavowal of a *Ford* claim, his claim necessarily is brought under *Ford* and should be dismissed as unripe.

***8** Ultimately, the Court construes Mr. Fulks' second claim as he describes it—namely, an *Atkins* claim rather than a *Ford* claim. However, this means that Mr. Fulks' two claims are essentially the same, at least for purposes of whether they can proceed under § 2241. The first is a traditional *Atkins* claim based on his contention that his is intellectually disabled, while the second is an *Atkins* claim based on the contention that he is functionally equivalent to one who is intellectually disabled and the corresponding argument that *Atkins* should be extended to cover such persons.

Because Mr. Fulks' two claims are both rooted in *Atkins*, the Court's analysis of whether his *Atkins* claims may be brought in a § 2241 petition is the same. In the end, the Court does not reach the merits of either claim, concluding that they cannot be brought via § 2241.

B. Whether the Savings Clause Must be Met to Proceed under § 2241

The second issue the Court must resolve is whether Mr. Fulks must meet the Savings Clause to proceed under § 2241. Mr. Fulks argues that he need not meet the Savings Clause because he is challenging the execution of his sentence rather than its imposition. *See* Dkt. 55 at 62-63.

Mr. Fulks is correct that "[a] motion seeking relief on grounds concerning the execution but not the validity of the conviction and sentence ... may not be brought under § 2255 and therefore falls into the domain of § 2241." *Valona v. United States*, 138 F.3d 693, 694 (7th Cir. 1998). This distinction is important because prisoners "attack[ing]

the imposition, not the execution, of [their] sentence ... must demonstrate that [they] fall within the 'savings clause' provided by § 2255." *McCall v. United States*, 304 Fed. Appx. 449, 450 (7th Cir. 2008).

The reason for this is apparent from the scope of § 2255. Section 2255 states, in relevant part, that prisoners "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States ... may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). Simply put, § 2255 allows prisoners to challenge the legality of their convictions or sentences. Habeas corpus claims falling outside this scope—such as those challenging how a sentence is executed—must be brought via the only remaining option, § 2241. *Valona*, 138 F.3d at 694; *see* *Walker v. O'Brien*, 216 F.3d 626, 629 (7th Cir. 2000) ("28 U.S.C. § 2255, the habeas corpus substitute for federal prisoners, is properly used only for challenges to convictions and sentences, while § 2241 is used for other challenges to the fact or duration of confinement.").

Claims challenging the execution of one's sentence, for example, include "a motion contending that the prison unlawfully deprived a prisoner of good time credits[;] [a claim] that parole officials unconstitutionally denied an application for release," *Valona*, 138 F.3d at 694; challenges to spending a portion of one's sentence on home confinement, *see* *Storm v. United States Parole Comm'n*, 667 Fed. Appx. 156, 157 (7th Cir. 2016); challenges to the implementation of the Inmate Financial Responsibility Program, which sets up a monthly payment plan for inmates' restitution, *see* *Ihmoud v. Jett*, 272 Fed. Appx. 525, 526 (7th Cir. 2008); and challenges to whether one's supervised release runs consecutively or concurrently to one's sentence, *see* *Figueroa v. Tarquino*, 737 Fed. Appx. 789, 790 (7th Cir. 2018). Notably, none of these examples are challenges to whether the petitioner's conviction or sentence is unlawful—that is, a challenge falling within the scope of § 2255(a).

***9** Unlike these examples of challenges to how a sentence is executed, Mr. Fulks' claims clearly fall within the ambit of § 2255(a). It is undisputed that *Atkins* claims generally are available in § 2255 proceedings. Mr. Fulks himself points to the fact that his co-defendant pursued an *Atkins* claim in his § 2255, and he does not dispute that he could have brought one. Most important, Mr. Fulks' request for relief makes clear that he is challenging the constitutionality of his sentence: he asks the Court to vacate his death sentence because it violates the Eighth Amendment. *See* dkt. 55 at 79 (requesting the Court to grant "habeas relief from Petitioner's death sentence"). Simply put, Mr. Fulks asks "the court to set aside his sentence" as violative of the Eighth Amendment, thus his claims fall within § 2255(a).[5] *Figueroa*, 737 Fed. Appx. at 790.

Accordingly, because Mr. Fulks' claim falls within § 2255(a), he must meet the requirements of the Savings Clause to proceed under § 2241. *See* *Walker*, 216 F.3d at 629.

C. Whether Mr. Fulks Meets the Savings Clause

Mr. Fulks argues that he meets the Savings Clause and can thus proceed under § 2241 for three different reasons. His first two arguments are that his claims rely on both new legal and new factual bases that were unavailable during his trial or initial § 2255 proceedings. *See* Dkt. 55 at 55-62. Mr. Fulks' new factual bases consist of the updated editions of the AAIDD (from 2012, the "AAIDD-2012") and DSM (from 2013, the "DSM-5"), which have superseded earlier versions that governed the medical community's diagnosis of intellectual disability at the time of his trial and § 2255 proceedings. Mr. Fulks' new legal bases consist of the Supreme Court's decisions in *Hall*, *Moore*, and *Madison*. His third argument is that this Court should recognize the availability of § 2241 beyond the narrow set of circumstances already recognized by the Seventh Circuit. The Court will address each argument in turn.

1. New Legal Developments

The Court turns next to Mr. Fulks' argument that he meets the Savings Clause because his claims rely on new legal developments that were previously unavailable. Specifically, Mr. Fulks maintains that the Supreme Court's decisions in *Hall* and *Moore* dramatically changed the "legal landscape governing *Atkins* claims." Dkt. 55 at 57. For example, Mr. Fulks contends that "*Hall* was the first decision of the Supreme Court holding that States did not have 'unfettered discretion to define the full scope of the constitutional protection' identified in *Atkins*." *Id.* (quoting *Hall*, 572 U.S. at 719). Similarly, as to Mr. Fulks' second *Atkins* claim, he argues that the Supreme Court's recent decision in *Madison*

is what allows him to argue that a functional approach should be taken to *Atkins* claims.

***10** The Seventh Circuit concluded that the Savings Clause was met when a prisoner's claim (1) relied on a new case of statutory interpretation that is retroactive (*Davenport*); (2) and when there was a subsequent decision about the case by an international tribunal (*Garza*). The new legal bases on which Mr. Fulks' claims rely—the Supreme Court's decisions in *Hall*, *Moore*, and *Madison*—are not analogous to those relied on in either *Davenport* or *Garza*; indeed, the reasoning of those cases suggests that Mr. Fulks cannot meet the Savings Clause based on new legal developments.

Looking first to *Davenport*, it created the three-part test set forth above. The first *Davenport* factor requires a prisoner to show "that he relies on not a constitutional case, but a statutory-interpretation case[.]" *Montana*, 829 F.3d at 783. Mr. Fulks cannot meet this factor, as he relies on *Hall* and *Moore* (which apply *Atkins*) and *Madison* (which applies *Ford*). All of these cases involve Eighth Amendment claims, not statutory ones. [6]

Although *Davenport* was decided some time ago, the Seventh Circuit has recently reiterated that *Davenport* does not apply to constitutional claims. *See* *Poe*, 834 F.3d at 773 (deeming "meritless" the argument that "*Davenport* does not actually preclude use of § 2241 for a constitutional case"). Constitutional claims, unlike statutory claims, do not reveal "some kind of structural problem with section 2255" that forecloses a single round of judicial review. *Webster*, 784 F.3d at 1136. "Where *Davenport* recognized a structural problem in § 2255(h) is in the fact that it did not permit a successive petition for new rules of *statutory* law made retroactive by the Supreme Court." *Poe*, 834 F.3d at 773. Section 2255(h), however, allows prisoners to pursue a successive § 2255 motion when there is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Thus, although there is no avenue but § 2241 for petitioners who rely on new statutory cases, the Seventh Circuit made clear in *Davenport*—and recently reiterated in *Poe*—that there is not a similar structural problem with § 2255 for prisoners such as Mr. Fulks who raise constitutional claims.

Garza is similarly unhelpful to Mr. Fulks. There, the Seventh Circuit found a structural problem with § 2255 similar to that in *Davenport*. As discussed above, Garza raised a claim predicated on a favorable decision by an international tribunal that was issued after his first § 2255 was complete. Like the petitioner in *Davenport* who wished to rely on a subsequent decision of statutory interpretation, § 2255(h) similarly did not provide Garza an avenue to file a successive § 2255 motion because his claim was not a constitutional claim. Because it was "literally impossible" for Garza to have raised the international tribunal's favorable decision in his first § 2255 proceeding, § 2255 did not then nor had it ever "provided an adequate avenue for testing Garza's present challenge to the legality of his sentence." [7] *Garza*, 253 F.3d at 922-23.

***11** Again, this is not the case for Mr. Fulks' constitutional claim. Section 2255(h) explicitly permits certain constitutional claims to be brought in successive § 2255 motions, and thus there is no "structural problem" with § 2255 that forecloses judicial review. *Webster*, 784 F.3d at 1136; *see* *Poe*, 834 F.3d at 773. In short, Mr. Fulks cannot meet the Savings Clause via the avenue opened in *Davenport* or *Garza*. [8]

One final note: Mr. Fulks' primarily relies on the Supreme Court's decision in *Hall* as the new legal basis for his first claim. But *Hall* was decided before the Seventh Circuit's decision in *Webster*. The Seventh Circuit repeatedly references whether Webster could meet the standards of *Atkins* and *Hall*. *See, e.g.*, *Webster*, 784 F.3d at 1125, 1143, 1146. If reliance on the Supreme Court's decision in *Hall* was all that was required to meet the Savings Clause and proceed under § 2241, the Seventh Circuit's decision is *Webster* would have been dramatically different. There would have been no need, for example, to even examine whether Webster's reliance on new evidence was sufficient, nor any need for the Seventh Circuit to limit its decision, and thus the availability of § 2241, to cases of newly discovered evidence that "existed *before* the time of trial" and that were "not available during the initial trial" through no fault of Webster's counsel. *Id.* at 1140. It cannot be, as Mr. Fulks contends, that one need only invoke *Hall* (or any other subsequent Supreme Court case, such as *Moore* or *Madison*) to proceed under § 2241.

2. New Factual Developments

Mr. Fulks' next argument is that his claims rest on new factual bases. Specifically, Mr. Fulks contends that he has an intellectual disability as defined by *Atkins* based on the most recent editions of the AAIDD and DSM, which the medical community uses to determine whether an individual has an intellectual disability. Mr. Fulks contends that these new editions "constitute new factual bases not available at the time of Mr. Fulks' 2004 trial or at the time he filed his § 2255 petition." Dkt. 55 at 56.

Mr. Fulks' argument that these new factual bases allow him to proceed under § 2241 relies primarily on *Webster*. This is understandable: as in *Webster*, Mr. Fulks is attempting to bring *Atkins* claims in a § 2241 proceeding. Moreover, certain language in *Webster*, read in isolation, supports Mr. Fulks' position. In the end, however, the Seventh Circuit's holding in *Webster* was explicitly narrow. It made clear that the availability of § 2241 for Webster was based on multiple case-specific factors that are not present here.

***12** The question presented in *Webster* was whether newly discovered evidence can ever "satisfy the demanding standard of [the Savings Clause]." *Webster*, 784 F.3d at 1125. To answer this question, the Seventh Circuit reviewed its precedents governing the Savings Clause. The Seventh Circuit synthesized its precedents as follows: "All of these decisions [*i.e.*, *Davenport*, *Garza*, *Brown*] hold ... that there must be some kind of structural problem with section 2255 before section 2241 becomes available." *Webster*, 784 F.3d at 1136. Unlike the structural problem in *Davenport* or *Garza*—namely, that section § 2255 prevented the petitioner from relying on new legal authority—the structural problem identified in *Webster* was that newly discovered evidence may show that Webster was subject to an unconstitutional punishment. Specifically, Webster found records from the Social Security Administration that supported his claim of intellectual disability that, through no fault of his own, were not previously disclosed during his trial.

The Seventh Circuit held that "there is no categorical bar against resort to section 2241 in cases where new evidence would reveal that the Constitution categorically prohibits a certain penalty." *Id.* at 1139. Mr. Fulks says his claims are no different; they are based on new evidence and preventing him from relying on this evidence in a § 2241 proceeding would lead to the "intolerable result of condoning an execution that violates the Eighth Amendment." *Id.* at 1139; *see id.* (noting that "a core purpose of habeas corpus is to prevent a custodian from inflicting an unconstitutional sentence").

However, after the Seventh Circuit concluded that there was no "categorical bar" to such claims, it went on to consider whether Webster had "presented a proper case for [§ 2241's] use." *Id.* at 1140. In concluding that Webster had presented such a case, the Seventh Circuit made clear that the circumstances under which use of § 2241 is appropriate are extremely limited:

> We have established thus far that a person who proposes to show that he is categorically ineligible for the death penalty, based on newly discovered evidence, may not be barred from doing so by section 2255. But this rule cannot apply to all newly discovered evidence, or else there would never be any finality to capital cases involving either the intellectually disabled or minors.[FN8]
>
> [FN8.] In fact, given the rule in *Ford v. Wainwright*, 477 U.S. 399 (1986), which holds that "[t]he Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane," *id.* at 410, there will always be some lack of finality for a person whose mental condition "prevents him from comprehending the reasons for the penalty or its implications." *Id.* at 417. Both parties have assumed, however, that the *Ford* standard is higher than the one imposed in *Atkins* and *Hall*. We assume for present purposes that this is correct.

Webster, 784 F.3d at 1140 & n.8. The Seventh Circuit went on to explain why its holding did not permit any case involving newly discovered evidence to meet the Savings Clause:

> Looking particularly at the intellectually disabled, it would always be possible to conduct more I.Q. and adaptive functioning tests in the prison. Those new scores would have no bearing on the initial conviction and sentence, though they would be highly pertinent to the ultimate ability of the government to carry out the sentence. But our concern is with the former, not the latter.

> What distinguishes Webster's case from the one we just hypothesized are two facts: first, the newly discovered evidence that current counsel have proffered existed before the time of the trial, and is relevant for precisely that reason; second, although the facts are disputed, there is evidence indicating that they were not available during the initial trial as a result of missteps by the Social Security Administration, not Webster's counsel..... It will be a rare case where records that predate the trial are found much later, despite diligence on the part of the defense, and where those records bear directly on the constitutionality of the death sentence.

***13** *Id.* at 1140.

The Seventh Circuit reiterated these limitations in a footnote, making clear that its ruling "depends" on an "array of limitations, both legal and factual." *Id.* at 1140 n.9. "[A]t least three principal reasons," it explained, ensure that its holding "will have a limited effect on future habeas corpus proceedings." *Id.* These specific limitations are as follows:

> First, the evidence sought to be presented must have existed at the time of the original proceedings. (A free-standing claim that an execution would violate *Ford v. Wainwright* might involve later-acquired evidence, but such a claim is quite different from the one now before us.) Second, the evidence must have been unavailable at the time of trial despite diligent efforts to obtain it. Third, and most importantly, the evidence must show that the petitioner is constitutionally ineligible for the penalty he received.... These three limitations are more than adequate to prevent the dissent's feared flood of section 2241 petitions[.]

Id.

In short, the Seventh Circuit made clear that simply arguing that new evidence shows one's sentence is unconstitutional is not enough to meet the Savings Clause. If it were, "there would never be any finality to capital cases involving ... the intellectually disabled." *Id.* at 1140. What made Webster's case unique—and § 2241 available to him—was the fact that there was newly discovered evidence that was (1) available at the time of trial (which is what made the evidence "relevant" to the *Atkins* claim), and (2) at least arguably unavailable through no fault of trial counsel. *Id.*

Against this background, Mr. Fulks' argument that his purportedly newly discovered evidence makes his case similar to *Webster* must fail. As an initial matter, it is at best a stretch to construe updated versions of the AAIDD and DSM as "newly discovered evidence" as *Webster* used the term. Rather than newly discovered evidence bearing on whether Mr. Fulks specifically was intellectually disabled at the time of trial (such as the Social Security Administration records discovered in *Webster*), Mr. Fulks relies on updated standards the medical community uses to evaluate whether anyone is intellectually disabled. These standards are not newly *discovered* evidence that Mr. Fulks specifically is intellectually disabled. They are instead newly *created* standards used to assess whether anyone is intellectually disabled. The latter is not "newly discovered evidence" as the term was used in *Webster*.

Nevertheless, the Court need not rely on this distinction to conclude that Mr. Fulks cannot proceed under § 2241. Even assuming the AAIDD-2012 and DSM-5 constitute newly discovered evidence, they do not meet the most critical requirements for newly discovered evidence set forth in *Webster*—namely, "newly discovered evidence that ... existed before the time of the trial." *Id.* at 1140; *see id.* at 1140 n.9 ("[T]he evidence sought to be presented must have existed at the time of the original proceedings."). The AAIDD-2012 and DSM-5 did not exist before Mr. Fulks' trial; they are only new evidence precisely because they were not created until *after* Mr. Fulks' trial.

***14** This limitation in *Webster* is important because *Atkins* focuses on the time of trial. *Webster* made clear that the evidence at issue must have existed at the time of trial to be "relevant" to an *Atkins* claim. *Id.* at 1140. Unlike a claim under *Ford*, which "might involve later-acquired evidence," such evidence is not relevant to an *Atkins* claim unless it existed at the time the *Atkins* determination was made. *Id.* at 1140 n.9.

Relatedly, the Seventh Circuit made clear that later developed evidence is insufficient because to hold otherwise would prevent there from being "any finality to capital cases

involving ... the intellectually disabled." *Id.* at 1140. Just as it "would always be possible to conduct more I.Q. and adaptive functioning tests" and file a new *Atkins* claim based on that new evidence, *id.*, if Mr. Fulks' theory is accepted, he could refile his claims with each revision of the medical standards governing the diagnosis of intellectual disability. This, like additional testing, would preclude any finality in capital cases involving the intellectually disabled. The Seventh Circuit rejected this notion in *Webster*, and this Court must therefore reject it here.

In sum, Mr. Fulks' alleged newly discovered evidence does not allow him to proceed on the course charted by *Webster*. *Webster* is the only occasion the Seventh Circuit has permitted a constitutional claim to proceed under § 2241 because a structural problem with § 2255 prevented the claim from having a reasonable opportunity for adjudication. And since *Webster*, the Seventh Circuit has reiterated that "the *Webster* court took great care to assure that its holding was narrow in scope" by limiting it to the "*rare* case where records that *predate* the trial are found much later[.]" *Poe*, 834 F.3d at 774. This is not such a case. Accordingly, *Webster* does not permit Mr. Fulks' claims to proceed under § 2241.

3. Availability of § 2241 Beyond *Davenport*, *Garza*, and *Webster*

Having determined that Mr. Fulks' claims do not fall within any of the Seventh Circuit's Savings Clause precedents, the Court turns to Mr. Fulks' final argument for why he meets the Savings Clause—namely, that "the Seventh Circuit has never held, or even suggested, that [*Davenport* and *Webster*] represent the only circumstances under which the savings clause is available." Dkt. 67 at 11. Instead, Mr. Fulks contends that "the only requirement for establishing § 2241 jurisdiction through the savings clause is that there be 'some kind of structural problem with section 2255.' " *Id.* (quoting *Webster*, 784 F.3d 1136).

As a general matter, the Court agrees. The Seventh Circuit has never held that the Savings Clause is only met in the specific circumstances in which it has so found. Indeed, *Webster* itself represents a recent example of a § 2241 claim being permitted to proceed in a new context. But Mr. Fulks must point to a new structural problem with § 2255 that prevented him from raising his claims during his § 2255 proceedings. He has failed to do so.

First, Mr. Fulks argues that the structural problem here is the same as the one identified in *Webster*—that "because § 2255(h) was enacted prior to *Atkins*, 'as a structural matter,' Mr. Fulks' challenge to his sentence 'cannot be entertained by use of the 2255 motion." *Id.* at 12 (quoting *Webster*, 784 F.3d at 1139). But for all the reasons discussed above, Mr. Fulks cannot rely on *Webster*. Contrary to Mr. Fulks' suggestion, *Webster* did not hold that any *Atkins* claim exposes a structural problem with § 2255 since *Atkins* was decided after § 2255(h) was enacted. Had *Webster* so held, the Seventh Circuit would not have gone to the lengths it did to limit *Webster*'s applicability to cases of "newly discovered evidence that ... existed before the time of the trial." *Webster*, 784 F.3d at 1140. It would have simply stated that *Atkins* claims can proceed under § 2241.

***15** Second, Mr. Fulks argues more generally that a structural problem with § 2255 exists because he "could not have raised his *Atkins* claim at trial or in his initial § 2255 motion." Dkt. 67 at 8. Specifically, he contends he could not have raised his *Atkins* claims because, until the Supreme Court's decisions in *Hall*, *Moore*, and *Madison* and the new diagnostic standards were released, he did not have a "viable *Atkins* claim." *Id.* at 10. According to Mr. Fulks, the non-viability of his claims is demonstrated by the fact that his co-defendant's *Atkins* claim was rejected by the district court based on factors the Supreme Court subsequently deemed impermissible in *Moore*. *See id.*; *see also* dkt. 55 at 59-61.

But the Savings Clause focuses on whether a prisoner had a reasonable opportunity to raise a claim, not whether that claim would have been successful. This is suggested by the language of the Savings Clause itself: § 2241 is available only when § 2255 "is inadequate or ineffective to *test* the legality of [ ] detention." 28 U.S.C. § 2255(e) (emphasis added). This is why whenever a prisoner is determined to have met the Savings Clause, it is because he never had a fair *opportunity* to raise the claim he now wishes to raise. *See, e.g.*, *Poe*, 834 F.3d at 772 (explaining that meeting the Savings Clause requires a structural problem with § 2255 that "forecloses even one round of effective collateral review, unrelated to the petitioner's own mistakes" (quotation marks omitted)); *Webster*, 784 F.3d at 1136 (noting that in *Davenport* the Seventh Circuit held "that whether section 2255 is inadequate or ineffective depends on whether it allows the petitioner a reasonable opportunity to obtain a

reliable judicial determination of the fundamental legality of his conviction and sentence" (citation and quotation marks omitted)); *Garza*, 253 F.3d at 922 (recognizing that § 2255 is inadequate or ineffective when "the operation of the successive petition rules absolutely prevented the petitioner from *ever having an opportunity* to raise a challenge to the legality of his sentence" (emphasis added)).

There is no dispute that Mr. Fulks could have raised both of his *Atkins* claims in his § 2255 proceedings. His argument is that this was nevertheless not a reasonable opportunity to obtain a reliable judicial determination because, as demonstrated by the rejection of his co-defendant's *Atkins* claim, the district court would have relied on criteria the Supreme Court has since held are inappropriate. This argument is not without force, at least on its surface. The Seventh Circuit concluded in *Davenport* that the Savings Clause was met even though Nichols could have technically raised the claim. The claim Nichols sought to raise did not have a reasonable opportunity for a reliable judicial determination, the Seventh Circuit reasoned, because even if he had raised it the "law of the circuit was so firmly against him" that it would have been futile to do so. *Davenport*, 147 F.3d at 610.

Mr. Fulks' situation, however, is different than the structural problem faced by Nichols in *Davenport*. First and foremost, *Davenport*'s reasoning is limited to statutory claims. *See* *Poe*, 834 F.3d at 773 (deeming "meritless" the argument that "*Davenport* does not actually preclude use of § 2241 for a constitutional case"). "Where *Davenport* recognized a structural problem in § 2255(h) is in the fact that it did not permit a successive petition for new rules of *statutory* law made retroactive by the Supreme Court." *Poe*, 834 F.3d at 773. But § 2255(h) permits successive constitutional claims in certain circumstances. Thus, Mr. Fulks' argument that the applicable law foreclosed his constitutional claim during his § 2255 proceeding finds no support in *Davenport* or any other case. The Seventh Circuit has made clear that—except in the limited circumstances presented in *Webster*—there is no structural problem with § 2255 for constitutional claims.

***16** Second, even if one applies *Davenport*'s reasoning to a constitutional claim, Nichols' argument in *Davenport* is meaningfully different than the one Mr. Fulks presents. Nichols' argument was obviously foreclosed as a legal matter based on the Seventh Circuit's interpretation of the statute at issue—an interpretation that the Supreme Court subsequently reversed. *See* *Davenport*, 147 F.3d at 610. Here, Mr. Fulks asks the Court to accept that an *Atkins* claim would have failed because the facts supporting it did not meet the then-current legal standard, as demonstrated by the reasoning used to reject his co-defendant's *Atkins* claim.

This asks too much of the Savings Clause, as Mr. Fulks seeks an expansion of access to § 2241 far beyond what any court has permitted. To accept Mr. Fulks' argument would require the Court to assess the evidence supporting Mr. Fulks' *Atkins* claim, then speculate how another federal court would have treated that evidence based on how it treated similar evidence in rejecting Mr. Fulks' co-defendant's *Atkins* claim.[9] Only then could the Court determine whether Mr. Fulks' first § 2255 presented "a reasonable opportunity to obtain a reliable judicial determination" of an *Atkins* claim. *Webster*, 784 F.3d at 1136 (citation and quotation marks omitted). But no two cases are the same, and thus there is no certainty that—even assuming the court relied on improper factors in rejecting Mr. Fulks' co-defendant's *Atkins* claim—that the court would have similarly done so for Mr. Fulks. Such a speculative analysis stands in stark contrast to the *Davenport* analysis, which only requires the Court to answer three relatively straightforward legal questions (one of which, again, limits *Davenport*'s reach to statutory claims).

In sum, Mr. Fulks had an opportunity to raise an *Atkins* claim, but he chose not to do so until now, when the law and relevant medical standards are more favorable to him. This is insufficient to meet the Savings Clause, as the Seventh Circuit has made clear that "something more than a lack of success"—or here, an anticipated lack of success—"with a section 2255 motion must exist before the savings clause is satisfied." *Webster*, 784 F.3d at 1136. Moreover, the Court must reject Mr. Fulks' invitation to find a structural problem with § 2255 based on a speculative analysis of how Mr. Fulks' claims would have been decided by another court had he raised them. Mr. Fulks does not point to any federal court that found the Savings Clause met in a remotely analogous case. And analysis of the most analogous case—*Webster*—suggests that it is unlikely the Seventh Circuit would support extending the availability of § 2241 in the manner Mr. Fulks urges.

Accordingly, Mr. Fulks' claims are barred by the Savings Clause, and the Court cannot reach the merits of them in this § 2241 proceeding.

IV.

Conclusion

For the reasons explained above, Mr. Fulks' petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 is **denied**. Mr. Fulks' claims are barred by § 2255(e) and therefore are dismissed with prejudice. [10] *See Prevatte v. Merlak*, 865 F.3d 894, 901 (7th Cir. 2017) (holding that failure to satisfy the Savings Clause is not a jurisdictional decision thus such claims should be dismissed with prejudice). Final judgment consistent with this Order shall issue.

***17 IT IS SO ORDERED.**

All Citations

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Footnotes

1 The Court follows the Supreme Court's lead in using the term "intellectual disability" rather than the previously used term, "mental retardation." *See* *Hall v. Florida*, 572 U.S. 701, 704 (2014).

2 On June 17, 2016, Mr. Fulks received authorization from the United States Court of Appeals for the Fourth Circuit to file a successive motion for relief under 28 U.S.C. § 2255. *See United States v. Fulks*, 4:02-cr-00992-JFA-1 (D.S.C.), dkt. 1617. Mr. Fulks' § 2255 action remains pending in the United States District Court for the District of South Carolina. In that action, Mr. Fulks is pursuing a different claim than those he pursues here. Specifically, he argues that he is entitled to a new penalty phase because his conviction under 18 U.S.C. § 924(c)(3) is unconstitutional following the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and its progeny. *See United States v. Fulks*, 4:02-cr-00992-JFA-1 (D.S.C.), dkt. 1618.

3 The Court will refer to § 2255(e) as the "Savings Clause," as is the practice among federal courts. *See* *Webster*, 784 F.3d at 1135.

4 Between *Garza* and *Webster*, the Seventh Circuit held that § 2241 is available not only to challenge convictions but also to challenge a prisoner's sentence, as long as the prisoner otherwise shows a structural problem with § 2255. *Brown v. Caraway*, 719 F.3d 583, 586-89 (7th Cir. 2013) ("[P]rovided that the other *Davenport* conditions are present, we conclude that a petitioner may utilize the savings clause to challenge the misapplication of the career offender Guideline, at least where, as here, the defendant was sentenced in the pre-*Booker* era.").

5 Mr. Fulks resists this conclusion by arguing that he "is not claiming that his sentence violated *Atkins* at the time it was imposed. Rather, ... he claims that his sentence is now unconstitutional under newly evolved diagnostic standards." Dkt. 55 at 62. But by his argument's own terms, he is challenging the constitutionality of his sentence and asking the Court "to set [it] aside," which falls squarely within § 2255(a)'s language permitting claims that a prisoner's sentence should be vacated because it violates federal law. *Figueroa*, 737 Fed. Appx. at 790.

6 Although the Court need not ultimately resolve whether *Atkins* claims should be governed by a functional approach, as Mr. Fulks suggests, it notes that *Madison* does not suggest that *Atkins* should be extended in the way Mr. Fulks urges. *Madison* applied the doctrine established in *Ford*; it did not involve an *Atkins* claim. *See* *Madison*, 139 S. Ct. at 722-23. And even in the *Ford* context, the Supreme Court did not suggest it was

adopting a *new* functional approach; it held that *Ford* and *Panetti* dictated a functional approach. *See* *id.* at 728 ("*Panetti* has already answered the question [presented in this case]."); *id.* ("[T]he key justifications *Ford* and *Panetti* offered for the Eighth Amendment's bar confirm our conclusion about its reach."). This shows that Mr. Fulks' argument that *Atkins* should be extended was available long before the Supreme Court decided *Madison*.

7 Following *Garza*, the Seventh Circuit has noted that the case involved " 'very unusual facts' ... [and thus] its applicability beyond those facts is limited." *Kramer v. Olson*, 347 F.3d 214, 218 n.1 (7th Cir. 2003) (quoting *Garza*, 253 F.3d at 921).

8 Mr. Fulks briefly argues that § 2241 is available for claims of actual innocence, citing to *Kramer v. Olson*, 347 F.3d 214, 217 (7th Cir. 2003). But *Kramer* essentially applied the three *Davenport* factors, focusing on the third, which requires "that the error is grave enough ... to be deemed a miscarriage of justice corrigible therefore in a habeas corpus proceeding, such as one resulting in a conviction for a crime of which he was innocent." *Cross*, 829 F.3d at 783. The Court need not reach this factor, as Mr. Fulks cannot meet the first *Davenport* factor. While Fulks is not arguing innocence of the crime to which he pleaded guilty, § 2241 is not available simply because one asserts he is actually innocent of a death sentence, which appears to be his argument. If it were, as discussed further below, the Seventh Circuit's decision in *Webster* would have been much different.

9 Notably, this speculative analysis would not be required had Mr. Fulks raised an *Atkins* claim in his § 2255 when he had the opportunity to do so. It would then be apparent whether the court applied factors that the Supreme Court subsequently deemed inappropriate in *Moore*, and this Court would not have to speculate how another court would have treated a wide-range of evidence regarding Mr. Fulks' alleged intellectual disability.

10 Mr. Fulks requests that if the Court rejects his claims, it make clear that any dismissal of a *Ford* claim is without prejudice. The Court accepted Mr. Fulks' construction of his second claim, which disavowed reliance on *Ford*; thus the Court did not adjudicate a *Ford* claim in this action. To the extent his second claim should have been construed as a *Ford* claim, it is dismissed without prejudice.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

CHADRICK FULKS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 2:15-cv-00033-JRS-MJD
	)	
J. E. KRUEGER,	)	
	)	
Respondent.	)	

Order Denying Motion to Amend or Alter Judgment

Petitioner Chadrick Fulks, a federal prisoner who has been sentenced to death, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, arguing that he is categorically ineligible for the death penalty because he is intellectually disabled (or the functional equivalent). On September 20, 2019, the Court denied Mr. Fulks' petition because his claims are barred by 28 U.S.C. § 2255(e). Dkts. 73 and 74. On October 17, 2019, Mr. Fulks filed a motion to alter or amend judgment.

To receive relief under Rule 59(e), the moving party "must clearly establish (1) that the court committed a manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment." *Edgewood Manor Apartment Homes, LLC v. RSUI Indem. Co.*, 733 F.3d 761, 770 (7th Cir. 2013) (cleaned up). Mr. Fulks seeks relief based on alleged errors by the Court, but he has failed to identify a manifest error of law or fact that warrants relief.

Mr. Fulks correctly asserts that *Atkins v. Virginia* prohibits the execution of intellectually disabled persons. 536 U.S. 304, 321 (2002); *see* dkt. 75, ¶¶ 6–21 (Mr. Fulks' motion, discussing *Atkins*). The Court's opinion denying Mr. Fulks' habeas petition recognized this holding. *See, e.g.*, dkt. 73 at 10 ("[T]he Supreme Court held in *Atkins* that the Eighth Amendment forbids execution of an individual who has an intellectual disability."). But some statements in the opinion suggested that

post-trial evidence is irrelevant to an *Atkins* claim. *See id.* at 12 (contrasting *Atkins* with *Ford v. Wainwright*, 477 U.S. 399 (1986)). As Mr. Fulks points out, post-trial evidence *is* relevant to an *Atkins* claim. The Court's statements suggesting otherwise were meant to acknowledge what the Seventh Circuit recognized in *Webster*—that there are evidentiary differences for *Atkins* and *Ford* claims and whether they meet the Savings Clause. *See Webster v. Daniels*, 784 F.3d 1123, 1140 (7th Cir. 2015). In any event, the background principle that post-trial evidence is relevant to an *Atkins* claim does not impact the Court's conclusion that Mr. Fulks' claims are barred by § 2255(e) and do not meet the statute's Savings Clause.[1] *See* dkt. 73 at 9−29.

Mr. Fulks argues that the Court's conclusion was wrong for two reasons. *First*, he argues that § 2255(e) does not apply to his claims at all because he is challenging "the *execution* of his death sentence rather than its *imposition*." Dkt. 75 at 13. The Court addressed and rejected this argument in its order denying relief. Dkt. 73 at 14-16. Section 2255(e) applies to any claim for which a petitioner is "authorized to apply for relief pursuant to [§ 2255]." And § 2255 authorizes prisoners convicted in federal court to move to vacate or set aside their sentences "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or *is otherwise subject to collateral attack*." 28 U.S.C. § 2255(a) (emphasis added). Mr. Fulks' § 2241 petition seeks to vacate or set aside his death sentence, and he has failed to show that his challenge is something other than a collateral attack on that sentence. Even if he concedes that the

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[1] An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255(e).

sentence was valid when it was imposed, he argues the sentence is unconstitutional now. He therefore has not shown that application of § 2255(e) is a manifest error of law.

Second, Mr. Fulks argues that if he is subject to § 2255(e), he has met the Savings Clause because § 2255 "is inadequate or ineffective to test the legality of his detention." Dkt. 75 at 15−25. This argument is merely a replay of Mr. Fulks' pre-judgment briefs. And for the reasons stated in the Court's order, Mr. Fulks has not met the Savings Clause. *Davenport* does not apply because Mr. Fulks raises constitutional claims, not statutory ones. *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998); *see Poe v. LaRiva*, 834 F.3d 770, 773 (7th Cir. 2016) (emphasizing that *Davenport* does not apply to constitutional claims). And *Webster* does not apply because Mr. Fulks' is not "the rare case where records that predate trial are found much later, despite diligence on the part of the defense, and where those records bear directly on the constitutionality of the death sentence." 784 F.3d at 1140 (distinguishing Webster's claims from the far-more-common *Atkins* claim, like Mr. Fulks', based on new evidence created after trial). Mr. Fulks' arguments for extending *Davenport* and *Webster* do not demonstrate that the Court committed a manifest error of law in declining to do so.

Accordingly, Mr. Fulks' motion to alter or amend judgment, dkt. [75], is **denied**.

IT IS SO ORDERED.

Date: 4/1/2020

JAMES R. SWEENEY II, JUDGE
United States District Court
Southern District of Indiana

Distribution:

Cindy Jane Cho
UNITED STATES ATTORNEY'S OFFICE (Indianapolis)
cindy.cho@usdoj.gov

Bob Daley
OFFICE OF THE UNITED STATES ATTORNEY
bob.daley@usdoj.gov

Brian L. Reitz
UNITED STATES ATTORNEY'S OFFICE (Indianapolis)
brian.reitz@usdoj.gov

Kathleen Michelle Stoughton
OFFICE OF THE UNITED STATES ATTORNEY
kathleen.stoughton@usdoj.gov

Claudia Van Wyk
FEDERAL COMMUNITY DEFENDER OFFICE
claudia_vanwyk@fd.org

Peter Konrad Williams
Federal Community Defender Office
pete_williams@fd.org

KeyCite Yellow Flag - Negative Treatment
Order Clarified by Fulks v. U.S., D.S.C., August 25, 2010

875 F.Supp.2d 535
United States District Court, D.
South Carolina, Florence Division.

Chadrick Evans FULKS, Petitioner,
v.
UNITED STATES of America, Respondent.

C/A No. 4:08–70072–JFA.
|
CR No. 4:02–992–JFA.
|
Aug. 20, 2010.

Synopsis

Background: Defendant was convicted in the United States District Court for the District of South Carolina, Joseph F. Anderson, Jr., Chief Judge, of carjacking and kidnapping resulting in the death of victim, and defendant appealed imposition of death sentence. The United States Court of Appeals for the Fourth Circuit, 454 F.3d 410, affirmed, and the United States Supreme Court, 551 U.S. 1147, 127 S.Ct. 3002, 168 L.Ed.2d 731, denied relief. Thereafter defendant returned to district court with a petition to vacate, set aside, or correct his federal death sentence.

Holdings: The District Court, Joseph F. Anderson, Jr., J., held that:

[1] it was not ineffective for counsel not to call additional experts to explain the possible connection between defendant's childhood, his drug abuse, the true effects of powerful stimulants, his alleged cognitive problems and the crimes he was charged with committing;

[2] counsel's investigation of mitigation evidence was not constitutionally inadequate;

[3] counsel were not ineffective in advising defendant to give a statement to the FBI when no proffer letter or plea agreement was in place;

[4] counsel was not ineffective for advising defendant to plead guilty to carjacking; and

[5] defendant's Fifth and Eighth Amendment rights were not violated by evidence of efforts to locate victim's body.

Petition denied.

West Headnotes (41)

[1] Criminal Law Constitutional or fundamental error

Criminal Law Denial of fair trial

As a general rule, relief on motion to vacate, set aside or correct sentence is limited to errors which were jurisdictional, rose to the level of a constitutional violation, resulted in a complete miscarriage of justice, or led to proceedings which were inconsistent with the rudimentary demands of fair procedure. 28 U.S.C.A. § 2255.

[2] Criminal Law Particular Cases and Issues

If the claim or claims that counsel failed to raise are devoid of legal merit, a defendant suffers no prejudice and cannot establish a claim of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

[3] Criminal Law Plea

In a case where a defendant enters a plea of guilty, the defendant, in order to obtain relief on motion to vacate, set aside or correct sentence, must show that (1) his or her counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases, and (2) there is a reasonable probability that, but for counsel's errors, he or she would have proceeded to trial instead of pleading guilty. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2255.

[4] **Criminal Law** Presumptions and burden of proof in general

A defendant bears the burden of proof as to both prongs of the *Strickland* ineffective assistance of counsel standard. U.S.C.A. Const.Amend. 6.

[5] **Criminal Law** Presumptions and burden of proof in general

Criminal Law Strategy and tactics in general

Courts should be deferential in inquiring into ineffectiveness of counsel claim, and have a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; defendant must overcome the presumption that the representation might be considered sound trial strategy. U.S.C.A. Const.Amend. 6.

[6] **Criminal Law** Prejudice in general

In demonstrating that counsel's inadequate performance prejudiced him, a defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; a reasonable probability, in turn, is defined as a probability sufficient to undermine confidence in the outcome. U.S.C.A. Const.Amend. 6.

[7] **Criminal Law** Determination

Courts may bypass the performance prong of ineffective assistance of counsel inquiry, and proceed directly to the prejudice prong when it is easier to dispose of the case for lack of prejudice. U.S.C.A. Const.Amend. 6.

[8] **Criminal Law** Presentation of evidence in sentencing phase

It was not ineffective for counsel in capital murder trial not to call additional experts to explain the possible connection between defendant's childhood, his drug abuse, the true effects of powerful stimulants such as methamphetamine, his alleged cognitive problems and the crimes he was charged with committing; additional mitigation evidence that defendant claimed should have been presented would have opened the door for the government to present very damaging evidence against defendant, as such evidence might have included evidence that defendant had physically abused his three-year-old step son and that defendant escaped from prison because he knew he was about to be arraigned on child abuse charges. U.S.C.A. Const.Amend. 6.

[9] **Criminal Law** Presentation of evidence in sentencing phase

Defendant failed to demonstrate prejudice under *Strickland* due to defense counsel's failure to present additional expert testimony on cumulative humanizing evidence in capital murder trial; counsel pursued a reasonable trial strategy that would have been undermined by the expert testimony that defendant had met the diagnostic measures of antisocial personality disorder and detract from defense's theory that defendant's associate was the instigator of the crimes. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[10] **Criminal Law** List or Disclosure of Prosecution Witnesses

Prosecution in a capital case is statutorily required to provide the defendant with a list of potential witnesses at least three days prior to trial; however, statute does not apply to witnesses called to rebut or disprove the defendant's defense. 18 U.S.C.A. § 3432.

[11] **Criminal Law** Witness lists

Even if defense counsel failed to anticipate testimony of certain prosecution witnesses during the government's case-in-chief even though they were not listed on the pretrial witness list, any failure to realize that those witnesses could have been called as a rebuttal

witnesses did not diminish or prejudice capital murder defendant's case so as to constitute ineffective assistance of counsel; trial counsel used the witnesses's testimony to support defense strategy that defendant's mental capabilities were so limited by his damaged brain that he was easily manipulated by his associate. U.S.C.A. Const.Amend. 6; 18 U.S.C.A. § 3432.

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

Counsel is only required under Sixth Amendment to make a reasonable investigation for possible mitigating evidence. U.S.C.A. Const.Amend. 6.

[13] **Criminal Law** Adequacy of investigation of mitigating circumstances

Trial counsel's investigation of mitigation evidence enabled them to make an adequate and meaningful presentation of mitigation evidence which painted an empathetic picture of capital murder defendant's life; trial counsel painted a compelling and empathetic picture of a young defendant growing up in poor, crowded, filthy, and deplorable living conditions, raised by violently abusive, sexually deviant, emotionally neglectful, and alcoholic parents who did not appear to care at all about their children's well being, and most of nine uncalled witnesses's testimony would have been cumulative to the testimony of other witnesses who gave compelling descriptions of the depravity of the conditions in the defendant's home. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[14] **Criminal Law** Presentation of evidence regarding sentencing

For purposes of ineffective assistance of counsel claim, a trial counsel's failure to present merely cumulative mitigating evidence does not prejudice a defendant's case. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[15] **Criminal Law** Preparation for trial

Trial counsel's use of law students to assist in the mitigation investigation in capital murder case did not constitute ineffective assistance of counsel; trial counsel hired trained investigators and mitigation specialists to conduct the bulk of the mitigation investigation, including a private investigator, and an investigator employed by an organization regularly retained by the federal public defender. U.S.C.A. Const.Amend. 6.

[16] **Criminal Law** Raising issues on appeal; briefs

Appellate counsel was not ineffective for failing to appeal the format employed by court in explaining the role of mitigating factors during deliberations in capital murder case; court listed on the verdict form virtually every mitigator suggested by the defendant, placed no restrictions on the amount of trial testimony received regarding mitigation, and instructed the jury there was "no limit" on the number of mitigators that it could consider. U.S.C.A. Const.Amend. 6.

[17] **Criminal Law** Objections to argument or conduct of counsel

Defendant's counsel was not ineffective for failing to object to the prosecutor's argument in capital murder trial; assuming that the law announced by *Tennard* was clear at the time the challenged summation was made, prosecutor's argument did not imply a strict causal nexus was required, and to the extent the prosecutor might have suggested that indirectly, court's omnibus jury charge clearly explained to the jury the proper role of mitigating factors in the case. U.S.C.A. Const.Amend. 6.

[18] **Criminal Law** Declarations, confessions, and admissions

Trial counsel were not ineffective in advising defendant to give a statement to the FBI when no proffer letter or plea agreement was in place in capital murder case; trial counsel's decision to have defendant give a statement was a reasonable trial strategy, especially in light of the multitude of witnesses and physical evidence of defendant's participation in seventeen-day crime spree, the decision to give the statement was part and parcel of the decision to plead guilty, to get defendant's version out without exposing him to the microscope of cross-examination given his lengthy criminal record, and it was reasonable for trial counsel to advise defendant to give the statement without a proffer or plea agreement for the strategic reason that it showed some level of acceptance of responsibility and remorse for accepting the role he had in the crimes, while most significantly, establishing his position that he was not the killer, and defendant failed to show that the outcome of his trial would have been different had he not given the statement to the FBI. U.S.C.A. Const.Amend. 6.

[19] **Criminal Law** Other particular issues in death penalty cases

Trial counsel were not ineffective for failing to insist that additional "catch-all" mitigation instruction and "minor participation" mitigation instruction be included on the verdict form in capital murder trial; court told the jury that there was, essentially, no limit on the number of factors or things that the jury could consider in mitigation, and trial counsel risked the possibility of a strong adverse reaction from the jury to suggest that defendant's participation in an extensive seventeen-day spree that spanned seven states and affected at least thirteen identifiable victims was "minor." U.S.C.A. Const.Amend. 6; 18 U.S.C.A. § 3592(a)(8).

[20] **Conspiracy** Liability for acts of coconspirators; Pinkerton doctrine

Generally, *Pinkerton* doctrine imposes vicarious liability on a co-conspirator for the substantive offenses committed by the members of the conspiracy when the offenses are committed during and in furtherance of the conspiracy.

[21] **Criminal Law** Post-conviction proceeding not a substitute for appeal

Claims challenging guilty plea which postconviction petitioner had opportunity to raise on direct appeal, but did not, were procedurally defaulted. 28 U.S.C.A. § 2255.

[22] **Criminal Law** Plea

Any incomplete or inaccurate assessment of *Pinkerton* with regard to counsel's advising defendant to plead guilty to capital offense, which was premised upon a *Pinkerton* theory, was cured when the jury returned a verdict of death on count charging kidnapping resulting in death to which the defendant pled guilty without reliance upon *Pinkerton*. U.S.C.A. Const.Amend. 6.

[23] **Criminal Law** Preparation for death penalty matters

Criminal Law Plea

Trial counsel was not ineffective for advising defendant to plead guilty to carjacking because it was done pursuant to a reasonable legal trial strategy; in light of the overwhelming evidence against defendant, trial counsel employed a valid and reasonable trial strategy in anticipatorily heeding the dictate in *Nixon* that, in a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed, and, in advising defendant to plead guilty and proceed directly to the sentencing phase in an effort to avoid a death sentence, trial counsel reasonably determined that it was in defendant's best interest to concede guilt as a way of showing remorse and accepting responsibility. U.S.C.A. Const.Amend. 6.

[24] **Criminal Law** Presentation of evidence in sentencing phase

Trial counsel was not ineffective in failing to present evidence of defendant's associate's manipulation and leadership such that it would have overcome the prosecution's compelling exegesis of defendant's own manipulation and leadership warranting the imposition of the death penalty; defendant's actions could not be described as lesser such that he could reasonably be considered to have been a minor participant in extensive seventeen-day spree that spanned seven states and affected at least thirteen identifiable victims. U.S.C.A. Const.Amend. 6; 18 U.S.C.A. § 3592(a)(3).

[25] **Sentencing and Punishment** Proportionality in general

A co-conspirator's state of mind is not relevant to the jury's determination of the proper punishment of another defendant because the Eighth Amendment requires an individualized determination of sentencing in death penalty cases. U.S.C.A. Const.Amend. 8.

[26] **Criminal Law** Presentation of evidence in sentencing phase

Trial counsel's decision to call only one of the three potential witnesses for testimony regarding future dangerousness was not constitutionally ineffective trial strategy in capital case; presentation of other two potential witnesses would render them subject to impeachment which could have seriously undermined the witnesses's credibility, if not the credibility of the entire defense case. U.S.C.A. Const.Amend. 6.

[27] **Criminal Law** Standard of Effective Assistance in General

Sixth Amendment guarantee of counsel does not guarantee an ideal or perfect representation. U.S.C.A. Const.Amend. 6.

[28] **Criminal Law** Jury selection and composition

Defendant failed to show that juror's participation in capital murder trial affected the fairness or the reliability of the trial, and that if trial counsel had asked juror about whether any close relatives had been a victim of a crime, the result would have been different. U.S.C.A. Const.Amend. 6.

[29] **Criminal Law** Jury selection and composition

Trial counsel's decision to seat certain venirepersons and not to request additional peremptory strikes was based on a reasonable strategy of preserving an issue for possible reversal. U.S.C.A. Const.Amend. 6.

[30] **Criminal Law** Raising issues on appeal; briefs

Appellate counsel were not ineffective for not appealing court's ruling sustaining a government objection to a statement by sheriff regarding a partial "admission" allegedly made by defendant's associate; appellate court would not have found an abuse of discretion by the court in denying the admission into evidence of the statement, which statement tended to show that associate was involved in charged murder, but did not absolve defendant of involvement in the murder. U.S.C.A. Const.Amend. 6.

[31] **Constitutional Law** Prosecutor

Mere inconsistency in the government's argument does not violate due process, it is the use of inherently factually contradictory theories that violates due process. U.S.C.A. Const.Amend. 5.

[32] **Criminal Law** Impeaching evidence

There was no plea agreement or other promise from the government outstanding at the time witness gave her testimony in defendant's trial, and thus no agreement that prosecution was obliged to disclose under *Brady*; any decision by police department to drop the relatively

minor misdemeanor charges against her occurred after the trial had concluded and was not made pursuant to the agreement with the prosecutors in defendant's case.

[33] **Criminal Law** Comments on Failure of Accused to Testify

Fifth Amendment precludes a prosecutor from commenting to a jury on the failure of an accused to testify in his own defense. U.S.C.A. Const.Amend. 5.

[34] **Sentencing and Punishment** Arguments and conduct of counsel

Failure to strike prosecutor's closing remark which told the jury that in sentencing defendant to death, they would be engaging in "an act of self defense" was not error; self-defense comment was brief and was part of a larger discussion of the issue of future dangerousness.

[35] **Criminal Law** Examination of witnesses

Trial counsel's strategic decision to not question defendant's brother on the stand about a .45 revolver given to him by defendant was a reasonable judgment and did not constitute ineffective assistance of counsel; trial team analyzed the issue, and ultimately decided that they "needed" brother's testimony, and did not want to alienate him because of the favorable testimony that he could provide about defendant's life and background. U.S.C.A. Const.Amend. 6.

[36] **Criminal Law** Presentation of evidence in sentencing phase

Capital murder defendant failed to demonstrate how lay mitigation witnesses' testimony would have been stronger with any additional preparation by trial counsel, and therefore lack of additional preparation of those witnesses did not constitute ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

[37] **Constitutional Law** Conduct and comments of counsel; argument

In analyzing the effects of improper prosecutorial sentencing phase arguments on due process, courts look to see whether the proceeding at issue was rendered fundamentally unfair by the improper argument; such a determination requires the court to consider the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated. U.S.C.A. Const.Amend. 5.

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

Trial counsel's failure to object to the government's alleged improper insertion of religion in its closing argument in capital murder trial was not constitutionally ineffective; government's two comments were fleeting and were, at most, veiled references to biblical language, and the defense itself suggested that the jury should use the Bible to influence its deliberations. U.S.C.A. Const.Amend. 6.

[39] **Criminal Law** Presentation of evidence in sentencing phase

Trial counsel were not constitutionally ineffective for not bringing capital defendant's artistic ability to the attention of the jury; evidence of defendant's artistic ability would have had little positive effect on the jury and most probably would have been counterproductive. U.S.C.A. Const.Amend. 6.

[40] **Sentencing and Punishment** Mode of execution

Use of lethal injection to carry out death sentence would not violate the Eighth Amendment. U.S.C.A. Const.Amend. 8.

[41] **Constitutional Law** Evidence and witnesses

Sentencing and Punishment Admissibility

Capital murder defendant's Fifth and Eighth Amendment rights were not violated by evidence of efforts to locate victim's body, which was discovered four-and-a-half years after the trial, and defendant's assistance in that regard; furthermore, defendant made no showing that sentencing jury's decision might have been different had two brief references to the search efforts been omitted from the trial. U.S.C.A. Const.Amends. 5, 8.

Attorneys and Law Firms

***540** Chadrick E. Fulks, Terre Haute, IN, pro se.

Kirsten Elena Small, Nexsen Pruet, Greenville, SC, Amy Gershenfeld Donnella, Billy Nolas, Federal Community Defender Office, Philadelphia, PA, for Petitioner.

Jimmie Ewing, Robert F. Daley, Jr., Jeffrey Mikell Johnson, Robert C. Jendron, Jr., William Kenneth Witherspoon, U.S. Attorneys Office, Columbia, SC, for Respondent.

***541** ORDER DENYING PETITION FOR RELIEF UNDER 28 U.S.C. § 2255

JOSEPH F. ANDERSON, JR., District Judge.

INTRODUCTION

Chadrick Evans Fulks was sentenced to death by a South Carolina federal jury for the 2002 carjacking and kidnapping resulting in the death of Alice Donovan. After an unsuccessful appeal to the United States Court of Appeals for the Fourth Circuit [1] and the United States Supreme Court, [2] Fulks returns to this court with a petition pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his federal death sentence.

Contending that his trial counsel were constitutionally ineffective in a variety of ways, and that other violations of his constitutional rights render his death sentence infirm, Fulks asserts thirty-three claims in his § 2255 petition, as amended. Because the court finds no merit to any of the grounds of error asserted, the petition is denied for the reasons that follow.

PROCEDURAL HISTORY OF THE UNDERLYING CRIMINAL CASE

Facts Relating to the Criminal Acts

The facts surrounding the abduction, rape, and murder of Alice Donovan were set out at length by the Fourth Circuit Court of Appeals in Fulks's direct appeal of this case. The undersigned hereby incorporates the following facts in this order:

> Fulks, who grew up in the tri-state area around Huntington, West Virginia, began dating an exotic dancer named Veronica Evans in April 2002. Shortly thereafter, Fulks, who was then twenty-five years old, began living with Evans and her three-year-old son Miles in the eastern Kentucky community of Lewisburg. On June 11, 2002, Fulks and Evans were married. Fulks supported his new family in the same way he had supported himself for years —by breaking into cars and stealing. And as he had with other women, Fulks often became violent with Evans, sometimes beating her severely and assaulting her sexually.
>
> On August 25, 2002, Fulks directed Evans to use a stolen credit card to buy a necklace at a Wal–Mart in Madisonville, Kentucky. Upon entering the store, Evans reported to police that Fulks was in the parking lot with a gun and that she was afraid he would kill her. The police responded and searched Evans's car, discovering, among other things, stolen credit cards and a pistol. The officers subsequently arrested Evans and Fulks and transported them to the Hopkins County Detention Center (the "HCDC"). Three-year-old Miles was placed in foster care. On August 27, 2002, Evans agreed to cooperate with the government and was released from the detention center. On the basis of evidence seized from their home, Fulks was ultimately charged with twelve counts of credit card fraud in Hopkins County, Kentucky.
>
> Brandon Basham had been housed at the HCDC on bad check charges for over a year when Fulks arrived in late August 2002. According to guards at the prison, Basham was disruptive and annoying, often pestering his fellow inmates. In order to protect him from other prisoners,

Basham was frequently ***542** reassigned cell mates, and, in mid-October 2002, he was placed in a cell with Fulks. On November 3, 2002, after about two months in custody, the Kentucky State Police served Fulks with an indictment charging him with first degree abuse of a child aged twelve years or younger (Miles).[3] The next evening, at approximately 6:30 p.m., a jailer released Fulks and Basham, at Basham's request, into an outdoor recreation area. The jailer became diverted administering medication to other inmates, and when she returned at about 8:00 p.m. to check on Fulks and Basham, they were gone. They had escaped from the HCDC through the ceiling of the recreation area by using a makeshift rope made of blankets and sheets.

By the following day, November 5, 2002, Fulks and Basham had made their way on foot to the residence of James Hawkins, about eight to twelve miles from the HCDC. Basham approached the residence and, after using the phone, persuaded Hawkins to drive him and Fulks to a nearby convenience store. Shortly after departing from the house, Hawkins agreed to drive Fulks and Basham to their car, which they claimed to be located about forty miles away in Robards, Kentucky. At some point, Basham pulled a knife on Hawkins, and Fulks ordered Hawkins to pull to the side of the highway so that Fulks could drive. Soon thereafter, Fulks stopped the truck on a remote state road, intending to abandon Hawkins. Basham started to tie Hawkins to a tree, but Fulks, dissatisfied with Basham's effort, soon took over the job. Once Fulks was convinced that Hawkins would be unable to escape, he and Basham departed in Hawkins's truck. Hawkins freed himself some fifteen hours later, hailed a passing motorist, and called the police. According to Hawkins's testimony at trial, although Basham held him at knifepoint throughout the carjacking incident, Fulks remained in charge, with Basham merely following Fulks's orders.

After leaving Hawkins, Fulks and Basham drove to Portage, Indiana, where, on November 6, 2002, they abandoned Hawkins's truck at a hotel and proceeded on foot to a trailer shared by Tina Severance and Andrea Roddy. Fulks had met Severance at the Westville (Indiana) Correctional Institute in 2001, while he was serving time there and she was working as a correctional officer. After a few hours in the trailer, Fulks and Basham became very nervous, and the four of them (Fulks, Basham, Severance, and Roddy) travelled in Severance's van to the Sands Motel in northern Indiana, where they spent the next two nights. At some point while at the Sands Motel, Fulks told Severance that he had escaped from prison because he feared a lengthy prison sentence on the pending child abuse charges. During their second night at the Sands Motel, Fulks asked Severance if she knew where they could obtain firearms. She replied that a friend, Robert Talsma, kept firearms at his home in nearby Michigan City, Indiana. On the morning of November 8, 2002, in accordance with a preconceived plan, Severance and Roddy lured Talsma away while Fulks and Basham broke into his home and stole several firearms, as well as a ring and some checks.

The four of them then drove Severance's van to Sturgis, Michigan, where ***543** they rented a motel room. Basham and Roddy spent the night of November 8, 2002, at the motel, while Fulks and Severance spent that night in Goshen, Indiana, smoking marijuana and methamphetamine with Fulks's brother, Ronnie Fulks. The next day, Fulks and Severance returned to the Sturgis motel to find Basham crouched on the floor holding a gun. Apparently convinced that the authorities had caught up with them, Basham was highly agitated, repeatedly asserting that he was going to shoot a police officer. He eventually calmed down, and the four then drove to the Indiana home of Ronnie Fulks, where they spent the night.

On November 10, 2002, Fulks, Basham, Severance, and Roddy, with Fulks driving Severance's van, travelled to Piketon, Ohio, where they checked into a Town and Country Motel. They then drove to a nearby Wal–Mart, where Basham wrote bad checks for items that Roddy later returned for cash. Also on November 10, 2002, at a K–Mart in Piketon, Ohio, Fulks met a young woman with a butterfly tattoo (later determined to be Heather Jacobi) with whom he used drugs. On that same date, Fulks stole a purse and cell phone belonging to nineteen-year-old Amy Ward from a vehicle parked at a Wal–Mart in Waverly, Ohio. On the following day, Fulks, Basham, Severance, and Roddy drove to Kenova, West Virginia, and rented a room at the Hollywood Motel. Fulks and Basham then left the motel, not to return until the early morning hours of November 12, 2002.

According to statements Fulks made to the FBI in 2003, after he and Basham left the Hollywood Motel on November 11, 2002, they smoked methamphetamine and then drove to the Barboursville Mall, near Huntington, West Virginia, intending to break into cars

and steal purses. When they arrived at the mall, they split up. The next time Fulks saw Basham, he was driving a car up and down the rows of the parking lot and yelling Fulks's name. In the passenger seat was the owner of the car, a nineteen-year-old Marshall University student named Samantha Burns. After spotting Basham, Fulks returned to Severance's van and followed Basham and Burns to a Foodland grocery store, where Fulks left the van and began driving Burns's car. They then visited several automatic teller machines and withdrew cash from Burns's account. They later returned to the Foodland to retrieve the van, at which point Basham announced that he wanted to find a place to rape Burns. Fulks then followed Basham in Severance's van to a secluded area by the Ohio River. Fulks parked some distance from Burns's car, and in such a way that his view of the passenger side of the car was obstructed. He observed Basham exit the driver's side of the car and walk around to the passenger's side. He saw nothing else until about twenty minutes later when Basham-alone-drove Burns's car to where Fulks was parked and informed Fulks that he wanted to burn the vehicle in order to remove any fingerprints. After buying gasoline, Basham set fire to Burns's car on a rural road near Lavalette, West Virginia, and he and Fulks returned to the Kenova motel. From that point forward, Basham wore, on a chain around his neck, a heart-shaped ring that was later determined to belong to Burns. Although both Fulks and Basham have admitted that Burns is dead, her body has never been recovered. [4]

***544** On November 12, 2002, Fulks, Basham, Severance, and Roddy drove the van to Little River, South Carolina, where Fulks had lived during the late 1990s. During their trip to Little River, Basham repeatedly taunted Severance by asking whether she wanted to go "swimming" in the Ohio River. Fulks eventually ordered Basham to stop teasing Severance, and Basham complied. When the four of them arrived at Little River, they checked in at the Lake Shore Motel. Fulks and Basham spent the following day, November 13, 2002, breaking into cars and stealing purses. On November 14, the four left Little River for the Beach Walk Hotel in Myrtle Beach, South Carolina. After checking in, Fulks and Basham left the hotel in Severance's van.

At around 2:00 p.m. on November 14, 2002, Carl Jordan stumbled upon Fulks and Basham burglarizing his son's residence outside Conway, South Carolina. According to Jordan, both Fulks and Basham fired gunshots at him, with Fulks shooting out the back window of Jordan's truck. [5] Jordan then attempted to retreat in his truck, with Fulks and Basham following in Severance's van. Fulks and Basham eventually gave up the chase, abandoned Severance's van, and stole a white pickup truck. They then made their way to a Wal–Mart store in Conway, South Carolina, where, according to Fulks's 2003 statements to the FBI, they planned to steal a car.

At 2:37 p.m. that same day, a Wal–Mart surveillance camera recorded a blue BMW driven by Alice Donovan enter the Wal–Mart parking lot, with Fulks and Basham following closely behind. As Donovan parked, Basham exited the truck and approached the BMW while Fulks circled the row of vehicles and parked opposite the BMW. Both vehicles then began moving again, travelling outside the range of the cameras. Fulks soon abandoned the pickup truck and began driving the BMW, with Basham and Donovan in the back seat. After leaving the Wal–Mart parking lot, Fulks and Basham made several (some successful) attempts to withdraw money from Donovan's account at various automatic teller machines. At some point, they crossed into North Carolina and stopped at a cemetery, where first Basham and then Fulks raped Donovan. According to Fulks's statements to the FBI, he did not want to rape Donovan but felt pressure from Basham to do so. They then reentered South Carolina and, according to Fulks, Basham ordered him to stop along a dirt road so that they could leave Donovan tied up, in order to prevent her from contacting the authorities. Fulks complied with this request and Basham, carrying a gun but no rope or tape that Fulks could see, began leading Donovan away from the car. Donovan implored Fulks to convince Basham to leave the gun in the car, but Basham refused to do so. Basham then led Donovan into the woods and out of Fulks's sight. He returned twenty minutes later, alone. As with Burns, both Fulks and Basham have admitted that Donovan was killed, but her body has never been found. [6]

***545** Fulks and Basham then returned to the Beach Walk Hotel in Myrtle Beach, where they informed Severance and Roddy that the police were in possession of the van, and that Fulks and Basham needed to return to West Virginia alone. According to Fulks, it was on their return journey to West Virginia that Basham first informed him that he had killed Burns and Donovan. On November 15, 2002, Fulks and Basham arrived in Huntington, West Virginia, and spent the next two nights smoking crack cocaine at the residence of Beth McGuffin, a friend of Fulks. McGuffin

testified that, during the time she spent with Fulks and Basham, Fulks controlled what he and Basham did.

> Two days after arriving at McGuffin's home, on November 17, 2002, Fulks and Basham drove to the Ashland Mall in nearby Ashland, Kentucky, where they planned to break into cars. At around 7:30 p.m., in the Ashland Mall parking lot, Basham attempted to carjack Deanna Francis and her fifteen-year-old daughter. After Francis reported the incident, a police officer spotted Basham and began to pursue him on foot. Basham initially eluded the officer by running behind some railcars, but he was apprehended at around 9:00 p.m. that evening, hiding across the railroad tracks in the Ohio River.
>
> Fulks returned to McGuffin's home late that same evening and was there when the television stations reported Basham's arrest. The following day, November 18, 2002, Fulks left Huntington in Donovan's BMW for his brother's home in Goshen, Indiana. That evening, an Ohio State Trooper, having observed the BMW and ascertained that it was stolen, attempted to apprehend Fulks at a rest area near Marion, Ohio. Following a highway chase reaching speeds of 130 miles per hour, Fulks narrowly escaped. He arrived at his brother's home in Indiana on the evening of November 19, 2002, and, on the morning of November 20, 2002, hid the BMW in a barn near Bristol, Indiana. Police officers had earlier set up a surveillance operation at Fulks's brother's home and, on the afternoon of November 20, 2002, after a brief foot chase, Fulks was finally apprehended.

Fulks, 454 F.3d at 413–17.

The Criminal Indictment and Notice to Seek the Death Penalty

Fulks and Basham were indicted in the District of South Carolina on December 17, 2002. The Grand Jury returned a Superseding Indictment on April 23, 2003, charging Fulks and Basham with eight separate offenses and setting forth special findings supporting the imposition of the Death Penalty on the first two Counts: (1) carjacking resulting in Alice Donovan's death (18 U.S.C. § 2119); and (2) kidnapping resulting in Alice Donovan's death (18 U.S.C. § 3571).

The notice of intent to seek the death penalty was filed on September 13, 2003, pursuant to 18 U.S.C.A. § 3593(a) and the Federal Death Penalty Act ("FDPA").

Appointment of Defense Counsel

Pursuant to the Federal Death Penalty Act,[7] this court initially appointed two attorneys to represent Fulks: John H. Blume and William F. Nettles IV. Attorney Sheri Lynn Johnson also began working on the case from the beginning (HT ***546** Vol. 4 at 11), and the court subsequently admitted her pro hac vice. These lawyers were joined by an array of pro bono lawyers and law students from Blume and Johnson's clinic at Cornell Law School to provide an experienced defense team to represent Fulks.

Counsel's Qualifications

Blume graduated from Yale Law School in 1984, and served as a law clerk to the Honorable Thomas A. Clark of the United States Court of Appeals for the Eleventh Circuit. After several years in private criminal defense practice, he became the Executive Director of the South Carolina Death Penalty Resource Center in 1988, where he remained until 1996. He joined Cornell Law School as a professor in 1993, and, in conjunction with Cornell professors Sheri Lynn Johnson and Stephen Garvey, formed the Cornell Death Penalty Project to "foster empirical scholarship on the death penalty, offer students an opportunity to work on death penalty cases, and provide information and assistance to death penalty lawyers."[8] Blume teaches courses on criminal procedure, evidence law, the Death Penalty in America, and also supervises several capital clinics at Cornell Law School. Additionally, since 1996 Blume has served on the Habeas Assistance and Training Project Counsel which consults with the Defender Services Committee of the Administrative Office of the United States Courts.

In addition to his noteworthy scholarly activity,[9] Blume has been an active presenter at related educational seminars.[10] In ***547** recent years, Blume has been involved as counsel of record in eighteen cases in which the federal death penalty was sought. He was successful in securing a verdict of life without parole, either by way of a jury verdict or a negotiated plea, in all eighteen cases. Further, he has been involved

in approximately twenty habeas actions brought pursuant to § 2254 challenging state death penalty convictions, and an additional twenty federal proceedings under § 2255.

Recently, Blume served as the featured speaker at a symposium in Columbia, South Carolina, sponsored by the South Carolina Law Review. The symposium focused on Fourth Circuit appellate procedures and jurisprudence. As an outgrowth of that project, Blume has authored an article published in the South Carolina Law Review dealing with the Fourth Circuit's death penalty jurisprudence. 61 S.C. L.Rev. 3 (2010). He is also the coauthor of an article that appeared in the March 2010 issue of the *South Carolina Lawyer* magazine, a publication of the South Carolina Bar. John H. Blume and Emily C. Paavola, *Is It Admissible? Tips for Criminal Defense Attorneys on Assessing the Admissibility of a Criminal Defendant's Statements, South Carolina Lawyer,* March 2010, at 28.

William F. Nettles IV has been an Assistant Public Defender with the Federal Public Defender's Office in Florence, South Carolina, for the past fifteen years. After graduating from the University of South Carolina School of Law in 1988, Nettles served as a law clerk to the Honorable John Hamilton Smith of the South Carolina Circuit Court before becoming an Assistant Solicitor. Thereafter, he worked for five years in private practice before joining the Federal Public Defender's Office.

Assisting Blume and Nettles on a pro bono basis was Sheri Lynn Johnson, also a Professor of Law at Cornell Law School, where she has served as the Assistant Director of the Cornell Death Penalty Project since 1996. Johnson graduated from Yale Law School in 1979, and worked for a year in the Criminal Appeals Bureau of the New York Legal Aid Society before joining the Cornell Law School faculty in 1981. She currently teaches constitutional and criminal law, and supervises the Post–Conviction Litigation and Capital Trial Clinics.

Like Blume, Johnson balances her academic work with courtroom participation in capital criminal cases. She has worked on two death penalty trials and has also been involved, directly or as second chair, with eight additional capital cases that were resolved short of a trial. Significantly, of the ten capital cases she was involved with prior to this case (two trials and eight pleas), all of the defendants received a life sentence rather than the death penalty. Johnson has also worked on approximately thirty capital post-conviction relief petitions over the last fifteen years.

***548** Blume and Johnson utilized the services of several Cornell law students primarily to perform basic legal research and locate witnesses. Additionally, the trial team included the assistance of Blume's associate in his South Carolina office, Keir Weyble. Further, pursuant to the provisions of the FDPA, this court authorized the defense team to enlist the assistance of various professionals including social workers, mitigation specialists, investigators, physicians, and mental health experts. Numerous submissions for compensation of these necessary adjuncts were submitted to the court and none was declined. It appeared to the court that because the crime spree involved in this case spanned seventeen days and covered seven states, with thirteen identifiable victims (including two women who were raped and killed, and several other individuals who narrowly escaped death), the defense team would need a full panoply of resources to mount a proper defense to what promised to be a vigorous prosecution by the United States government.

The Guilty Plea

In January 2004, the court determined that it would be necessary to sever Basham and Fulks for separate trials. On May 4, 2004, six days before the scheduled commencement of jury selection, Fulks decided to tender pleas of guilty to all eight counts of the superseding indictment and the court began the colloquy required by Rule 11 of the Federal Rules of Criminal Procedure. With regard to the carjacking and kidnapping counts on which the prosecution was seeking the death penalty, Fulks admitted to raping Donovan, but disclaimed any knowledge or participation in her murder.

Near the end of the Rule 11 colloquy, the court asked Fulks to detail his involvement in the crimes for which he was pleading guilty. Fulks responded, through Blume, his attorney, that he would rely on his Rule 302 Statement (the "302") given to the Federal Bureau of Investigation during the investigatory stage of the case. When the court expressed its concern about the propriety of accepting a guilty plea to an offense carrying a potential death sentence without a clear admission by the defendant that he participated in the conduct at issue, defense counsel suggested that, for Count One at least, a guilty plea could be tendered pursuant to the *Pinkerton* theory of liability. [11]

After the court expressed its continued concern regarding the validity of the tendered plea, the court adjourned the Rule 11 colloquy for four days and invited counsel for both the government and the defendant to research the issue and submit memoranda on the viability of a guilty plea to a capital case under *Pinkerton.*

Both the government and the defense responded with memoranda arguing that a plea pursuant to *Pinkerton* was appropriate under the circumstances presented in this case. The court thereupon accepted Fulks's guilty plea as to Count One, premised upon a *Pinkerton* theory of liability, and then accepted Fulks's plea to Counts Two through Eight as well, with no reliance on *Pinkerton.*

Upon Fulks's guilty plea, the court proceeded with the penalty phase to select jurors who would determine Fulks's sentence. Jury selection on the penalty phase ***549** of the case required two weeks beginning May 10, 2004. The five-week trial commenced on June 1, 2004, and on June 30, 2004, the jury deliberated and returned a verdict of death on Counts One and Two. The jury convicted Fulks on the remaining noncapital counts as well. [12]

Direct Appeal of Fulks's Conviction

Fulks thereafter appealed to the United States Court of Appeals for the Fourth Circuit, raising seven appellate issues. Fulks's trial counsel (Blume, Nettles, and Blume's law partner, Keir Weyble) were also appointed to represented Fulks on direct appeal.

The seven contentions of error raised by Fulks on direct appeal were that: (1) the district court erroneously permitted the prosecution to present testimony from two witnesses not included on its pretrial witness list; (2) the court abused its discretion in qualifying three jurors who were unconstitutionally prone to impose the death penalty; (3) the court abused its discretion in denying Fulks a new trial on the basis of a juror's failure to disclose during voir dire that her first husband had been murdered; (4) the court abused its discretion in qualifying two jurors whose life experiences rendered them incapable of impartially deciding Fulks's case; (5) the court abused its discretion in excluding testimony concerning three polygraph examinations of Fulks; (6) the court abused its discretion in permitting Donovan's sister to read the jury a 1990 letter that Donovan had written her; and (7) the court erred in concluding that the relaxed evidentiary standard applicable to capital sentencing proceedings is constitutional. *Fulks,* 454 F.3d at 410.

On July 27, 2006, the Fourth Circuit issued its decision rejecting all seven grounds for appeal and affirming the sentence of death on both Counts One and Two. *Fulks,* 454 F.3d at 410. Fulks then petitioned the United States Supreme Court for a writ of certiorari. The Supreme Court denied the petition on June 25, 2007. *Fulks v. United States,* 551 U.S. 1147, 127 S.Ct. 3002, 168 L.Ed.2d 731 (2007).

Appointment of Counsel for the § 2255 Petition

Following the refusal of the Supreme Court to hear the case, this court appointed counsel to represent Fulks in his yet-to-be-filed § 2255 petition. Rather than appoint one attorney as allowed by the Federal Death Penalty Act, this court appointed two attorneys to represent Fulks on his collateral review: Beattie B. Ashmore and William W. Watkins, Jr.

Ashmore graduated from the University of South Carolina School of Law and was admitted to the South Carolina Bar in 1987. He was admitted to the United States District Court for the District of South Carolina in 1990 and to the United States Court of Appeals for the Fourth Circuit in 1992. Ashmore worked as an Assistant United States Attorney for the District of South Carolina from 1990 until 1996. He was a partner in the law firm of Ashmore and Yarborough, P.A., in Greenville, South Carolina, from 1996 until 2000, and since 2000, he has been a partner with ***550** Price, Ashmore & Beasley, P.A. Ashmore was appointed by the South Carolina Supreme Court in 2005 to the Commission on Lawyer Conduct. He has had significant indigent criminal defense experience, including handling both appellate matters and general criminal defense in both state and federal court. His trial experience includes serving as lead counsel in numerous criminal trials. His appellate experience, covering more than a dozen appeals at the Fourth Circuit, includes several criminal appeals.

Watkins graduated from the University of South Carolina School of Law in 1999 and served as a law clerk for two years to the Honorable William B. Traxler, Jr., on the United States Court of Appeals for the Fourth Circuit. He was admitted to the United States District Court for the District of South Carolina and to the United States Court of Appeals for the Fourth Circuit in 2001. After his federal clerkship, Watkins

worked at the law firm of Womble Carlyle Sandridge & Rice, PLLC, in Greenville, South Carolina. He has substantial experience on issues of federal jurisdiction and appellate procedure, and as a member of his firm's appellate litigation team, he devoted a considerable amount of his time to appellate work in the state and federal systems. Watkins also serves as a pro bono Special Prosecutor for the South Carolina Attorney General's Office and is a Section Counsel Officer for the South Carolina Bar's Trial and Appellate Advocacy Committee.

As with trial counsel, this court was receptive to repeated requests by Fulks's new team of lawyers for compensation for expert and investigatory assistance. The court was informed that the new attorneys representing Fulks in his § 2255 petition would necessarily have to retrace the steps taken by trial counsel in an effort to ascertain if trial counsel had properly interviewed witnesses, pursued available defenses, and adequately researched Fulks's life story. This necessitated a renewed sweep by § 2255 counsel of the seven states involved in the seventeen-day crime spree, review of the voluminous record assembled thus far in this case, and interviews with Fulks's original trial lawyers.

In the Fall of 2008, one of Fulks's appointed § 2255 attorneys, Watkins, accepted an offer to become an Assistant United States Attorney for the District of South Carolina. When the court was informed of this development, it issued a stern warning to Watkins that a "Chinese wall" would have to be erected between him and any other employee of the United States Attorneys Office. Although the investigation had been completed and the initial briefs filed, out of an abundance of caution, the court appointed attorney Kirsten E. Small of Greenville, South Carolina, as substitute counsel to replace Watkins.

Small graduated from Georgetown University Law Center in 1994 and is admitted to the bars of Maryland, North Carolina, and South Carolina, and to the United States District Court for the District of South Carolina, the United States Court of Appeals for the Fourth Circuit, and the United States Supreme Court. She served as a law clerk to the Honorable William W. Wilkins of the United States Court of Appeals for the Fourth Circuit from 1994 until 2007, when she began working at Nexsen Pruet, LLC, in Greenville, South Carolina. She has been appointed to serve on the United States Court of Appeal's Criminal Justice Appellate Panel Committee for the Fourth Circuit and has substantial experience on issues of federal jurisdiction and appellate procedure. As a member of her firm's appellate litigation team, she devotes a considerable amount of her time to appellate work in the state and federal systems. ***551** The court found that Small was qualified to handle this matter in conjunction with Ashmore.

The court-appointed attorneys selected by this court were assisted on a pro bono basis by at least six lawyers from the San Francisco, California, firm of O'Melveny & Myers, LLP. That firm has been involved in this litigation from the outset of post-conviction proceedings, including attorneys David P. Dalke, Kymberleigh Damron–Hsiao, Amy J. Laurendeau, Stephanie L. Noble, Danielle N. Oakley, and Amy J. Longo. Dalke, Damron–Hsiao, Noble, and Oakley participated in the evidentiary hearing on the § 2255 petition. Suffice it to say that the pro bono lawyers from O'Melveny & Myers, each of whom demonstrated superior intellect and excellent writing and debating skills, contributed measurably to the efforts of the court-appointed counsel in this case.

Fulks's § 2255 Petition

Section 2255 provides federal prisoners with the statutory vehicle for collaterally challenging the lawfulness of their convictions. That section states in relevant part as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
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> * * *
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> If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

28 U.S.C. § 2255.

[1] As a general rule, relief under § 2255 is limited to errors which were jurisdictional, rose to the level of a constitutional violation, resulted in a "complete miscarriage of justice," or led to proceedings which were "inconsistent with the rudimentary demands of fair procedure." *United States v. Timmreck,* 441 U.S. 780, 783–84, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979) (citing *Hill v. United States,* 368 U.S. 424, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962)).

Fulks's initial § 2255 petition [13] (ECF No. 1090) was filed on June 23, 2008, just before the one-year statutory deadline established by the Anti–Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104–132, 110 Stat. 1214. Contemporaneously with the filing of the § 2255 petition, Fulks's counsel filed a motion requesting 120 days to file a memorandum of law in support of the § 2255 petition, which extension the court granted, rendering the memorandum due by October 21, 2008. Fulks timely filed an amended § 2255 petition and memorandum which supplemented the original petition, ***552** but did not add new grounds. [14]

The Interlocutory Appeal on Production of Attorney Records

The court originally scheduled an evidentiary hearing on the § 2255 petition for September 28, 2009. In the weeks leading up to the scheduled hearing, the government moved, successfully, for an order of this court requiring Fulks's original trial team to turn over its records pertaining to the case, contending that Fulks had waived the attorney-client privilege by asserting ineffective assistance of counsel. After the court entered its order requiring Blume, Nettles, and Johnson to turn over their files and records, Fulks took an interlocutory appeal on September 15, 2009, to the Fourth Circuit for a stay pending appeal and to place the case in abeyance, which motions the Fourth Circuit denied by order filed September 28, 2009. The court necessarily cancelled the evidentiary hearing on the § 2255 petition, and rescheduled the hearing for October 5, 2009.

Prior to the § 2255 evidentiary hearing, Fulks appealed to the United States Supreme Court on the question of whether trial counsel's records had to be produced. By order dated October 19, 2009, the Supreme Court stayed this court's orders compelling production to the government of materials pertaining to communications and advice between Fulks and his trial counsel pending further order. The court necessarily cancelled the evidentiary hearing on the § 2255 petition scheduled for October 5, 2009.

The Supreme Court subsequently issued a decision bearing on the issues in Fulks's appeal in an unrelated case, *Mohawk Indus., Inc. v. Carpenter,* 558 U.S. 100, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009). The Court in *Mohawk* held that disclosure orders adverse to the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine. *Id.* As a result of the *Mohawk* decision, the Supreme Court dissolved its stay on Fulks's appeal and the case was ultimately returned to this court for a hearing on the merits. After discussions with counsel, the court rescheduled the evidentiary hearing on the § 2255 petition for February 22, 2010. [15]

Discovery of Donovan's Remains and Amendment to § 2255 Petition

Approximately three months after Fulks's amended § 2255 petition was filed, bone fragments were found in the area of ***553** Horry County, South Carolina, near the intersection of Water Tower and Long Bay Roads. This was one of the three areas to which Fulks had directed authorities during the search for Donovan's body following Fulks's arrest and prior to his federal criminal trial. The other geographic area suggested by Fulks, an area known generally as Savannah Bluff, was some fifteen miles away from the Water Tower and Long Bay Roads area. The bone fragments were eventually identified by DNA testing as those of Alice Donovan.

The location of Alice Donovan's bone fragments prompted Fulks to file an additional ground to his § 2255 petition (referred to in this order as Claim 33). Therein Fulks contends that the prosecution used false information by suggesting to the jury that Fulks had misled law enforcement authorities who were searching for the Donovan remains in the months between Donovan's murder and Fulks's trial. The government did not object on timeliness grounds to the amended motion to vacate nor the addition of Claim 33 regarding the location of the Donovan remains. Accordingly, the court deemed all issues properly before the court and the matter ripe for the court's review.

Necessity for an Evidentiary Hearing

"If [a § 2255] motion is not dismissed, the judge must review the answer, any transcripts and records of prior proceedings, and any materials submitted ... to determine whether an evidentiary hearing is warranted." Rule 8, Rules Governing Section 2255 Proceedings for the United States District Courts.

"Section 2255 of Title 28 U.S.C. provides that unless the record conclusively shows that the prisoner is entitled to no relief, the district court should conduct an evidentiary hearing and state its findings and conclusions." *United States v. Young,* 644 F.2d 1008, 1013 (4th Cir.1981). "A hearing is required when a movant presents a colorable Sixth Amendment claim showing disputed material facts and a credibility determination is necessary to resolve the issue." *United States v. Coon,* 205 Fed.Appx. 972, 973 (4th Cir.2006) (citing *United States v. Witherspoon,* 231 F.3d 923, 925–27 (4th Cir.2000)). Finding that some issues presented in the § 2255 petition contained a few disputes of material facts, this court held an evidentiary hearing on the matters.

After the noted procedural delays, the court commenced the § 2255 evidentiary hearing on February 22, 2010. Arrangements were made to allow Fulks to participate in the hearing via satellite from his place of incarceration, the Federal Correctional Institution in Terra Haute, Indiana. Fulks was able to view the witnesses, the court, and the attorneys in real-time video conference, and was also provided a private telephone line through which he could conduct confidential communications with his counsel as the evidentiary hearing progressed.

Following the six-day evidentiary hearing, during which the court heard from a total of eight witnesses, the court took the matter under advisement. This order serves to announce the court's ruling on all thirty-three claims for relief.

As noted above, the court determined that an evidentiary hearing was necessary because factual disputes were present in at least some of the thirty-three claims for relief asserted by Fulks. At the evidentiary hearing, the court heard from a total of eight witnesses. Additionally, with the express consent of the parties,[16] the court ***554** received affidavits from several other witnesses.

Although the court heard from more than a dozen witnesses, either in person or by way of affidavit, the testimony of those witnesses, for the most part, did not involve disputed factual matters. In fact, there were few factual issues presented amongst the thirty-three claims raised by Fulks in § his 2255 petition. In large measure, the issues raised by Fulks's petition involve conclusions of law.

Because of the predominance of legal questions in this case, the court has determined that it would serve no useful purpose, and would more likely be counterproductive, for this court to set out its factual findings separate and apart from its conclusions of law. A more practical means for the court to comply with the mandates of 28 U.S.C. § 2255 is for the court to proceed through the claims asserted by Fulks in the order in which they are raised in the petition. Where a factual issue is squarely presented by one of Fulks's claims, the court will resolve that factual dispute with a factual finding imbedded within the discussion of the claim at issue. All other aspects of this court's order constitute this court's conclusions of law.[17] Because of the myriad claims asserted in this case, a separate recitation of findings of fact, followed by a recitation of the court's conclusions of law would, be more confusing than helpful to the reader.

§ 2255 CLAIMS

Standard of Review for Ineffective Assistance of Counsel Claims

[2] **[3]** The court will first address Fulks's claims of ineffective assistance of counsel. The Supreme Court has held that to establish a claim of ineffective assistance a petitioner must show that his attorneys' performance was objectively deficient and such deficient performance prejudiced his defense. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Specifically, the Supreme Court stated:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or ... sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the

> Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or ... sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. It is axiomatic that if the claim or claims that counsel failed to raise are devoid of legal merit, a defendant suffers no prejudice and cannot establish a claim of ineffective assistance of counsel. *Id.* In a case where a defendant enters a plea of guilty, the defendant in order to obtain § 2255 relief must show that (1) his or her counsel's representation fell below an objective standard of reasonableness demanded ***555** of attorneys in criminal cases; and (2) there is a reasonable probability that, but for counsel's errors, he or she would have proceeded to trial instead of pleading guilty. *See Hill v. Lockhart,* 474 U.S. 52, 56–59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

[4] **[5]** The defendant bears the burden of proof as to both prongs of the *Strickland* standard. First, the defendant must show that counsel's representation "fell below an objective standard of reasonableness" as measured by "prevailing professional norms." *Id.* at 688, 104 S.Ct. 2052. Courts should be deferential in this inquiry, and have "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. 2052. The defendant must therefore overcome the presumption that the representation "might be considered sound trial strategy." *Id.* (citation and internal quotation marks omitted).

[6] **[7]** Second, the defendant must demonstrate that counsel's inadequate performance prejudiced him. *Id.* at 687, 104 S.Ct. 2052. Thus, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. A reasonable probability, in turn, is defined as "a probability sufficient to undermine confidence in the outcome." *Id.* Additionally, courts may bypass the performance prong and proceed directly to the prejudice prong when it is easier to dispose of the case for lack of prejudice. *Strickland,* 466 U.S. at 697, 104 S.Ct. 2052.

CLAIM 1:

MENTAL HEALTH MITIGATION

[8] In Claim 1, Petitioner argues that trial counsel were ineffective for failing to present a meaningful mental health case in mitigation. Specifically, Petitioner claims that trial counsel should have presented the testimony of Drs. Seymour Halleck, Margaret Melikian, James Hilkey, and William Morton. These mental health experts had been retained by trial counsel and were prepared to testify at Fulks's trial, but trial counsel did not call them to testify.

A review of the trial record reveals that trial counsel presented a substantial mental health case. Trial counsel had to make difficult strategic decisions concerning the amount and type of mental health testimony to present—sufficient to convince the jury, but not of the type that would open the door to some type of counter-attack by the government. Mental health evidence is a "double-edged sword that might as easily condemn a defendant to death as excuse his actions." *Truesdale v. Moore,* 142 F.3d 749, 755 (4th Cir.1998); *Byram v. Ozmint,* 339 F.3d 203, 210 (4th Cir.2003) (counsel were not ineffective for failing to present testimony by a psychiatrist and a psychologist because the suggestions of antisocial behavior which the experts found could have been harmful to the defense).

In developing its mental health case in mitigation, Fulks's trial team hired or consulted with many experts, including the following individuals: Drs. Jonathan Venn, David Bachman, Ruben Gur, Christos Davatzikos, Fred Bookstein, James Evans, Margaret Melikian, Seymour Halleck, James Hilkey, Arlene Andrews, and Howard Becker.

Trial counsel initially retained Dr. Venn to complete a neuropsychological battery of evaluations on Fulks, including Halstead–Reitan testing. According to Dr. Venn's seventeen-page neuropsychological evaluation report dated March 30, 2004 (Gov't Ex. 10G), he examined Petitioner on ***556** at least eight occasions, and also interviewed several individuals

in preparing his report. Specifically, Dr. Venn interviewed Dr. Elin Berg, a psychiatrist who treated Fulks during his pretrial detention; Betty Burroughs, a mental health social worker who saw Fulks during his pretrial detention; Lieutenant Bob Garrison of the Lexington County Detention Center; and Dr. Oliver P. Harden, a physician who treated Fulks during his pretrial detention. Because Dr. Venn's neuropsychological battery indicated that Fulks was low functioning and that he had brain damage, trial counsel asked neurologist Dr. Bachman to also conduct a neurological evaluation of Fulks. Dr. Bachman believed based on his neurological exam, brain imaging tests, and patient history that Fulks most likely had a fetal alcohol spectrum disorder ("FASD").

Thereafter, the trial team retained Dr. Fred Bookstein, who conducted brain imaging studies to help confirm the FASD diagnosis. Dr. Bookstein prepared a report for trial counsel (Gov't Ex. 10A). Dr. Christos Davatzikos examined Fulks's quantitative brain imaging and prepared a report for trial counsel (Gov't Ex. 10B). The trial team also retained Dr. James R. Evans, a licensed clinical psychologist, to conduct a neurophysiological evaluation report (Gov't Ex. 10C), which indicated that Fulks had brain damage and neuropsychological impairment, and other mental illnesses.

In determining the range of potential mental health issues involved in Fulks's case, trial counsel consulted with psychologist Dr. James Hilkey (Gov't Ex. 16), and forensic psychiatrist Dr. Seymour Halleck (Gov't Ex. 15). Trial counsel also retained psychologist Dr. Ruben Gur, forensic psychiatrist Dr. Margaret Melikian, and Dr. Howard Becker, a teaching expert with academic expertise in FASD. Trial counsel conducted multiple focus groups and also retained attorney Jeff Bloom, a jury/litigation consultant, to conduct a mock trial and record the mock jury's deliberations and comments (Gov't Exs. 6–8). Bloom's efforts resulted in a recommendation that FASD evidence was the strongest mitigator for trial counsel to pursue.

After conducting a thorough mental health investigation, including input from at least ten mental health experts, trial counsel decided to call six experts to present Fulks's mental health case in mitigation. Contrary to Petitioner's contentions, trial counsel presented a substantial mental health case that did not rest singularly on a FASD diagnosis. Trial counsel presented testimony of the following experts in FASD, cognitive neuroscience, behavioral neuroscience, and neuropsychology: Dr. Ruben Gur testified as an expert in cognitive neuroscience; Dr. David Bachman testified as an expert in behavioral neurology; Dr. Howard Becker testified as an expert in FASD; Dr. James Evans testified to the battery of neuropsychological tests he administered to Fulks and to his review of tests administered by others; Dr. Fred Bookstein was qualified as an expert in biostatistics and morphometrics and testified regarding the anatomical abnormalities of Fulks's brain and their significance; and Dr. Arlene Andrews testified as an expert in child development and conducting family history assessments. Dr. Andrews presented her research regarding Fulks's childhood and explained the significance of Fulks's childhood experiences.

Before addressing the alleged deficiencies of trial counsel, the court notes for the record Petitioner's emphasis on the ABA Guidelines, rather than the prevailing professional practice, at the time of the trial. The Supreme Court has made clear that the ABA Guidelines do not set the standard for effective representation, and the ***557** court refuses to recognize them as the constitutional standard here. [18]

Petitioner claims trial counsel did not present the jury with evidence of his mental illness and his resulting diminished capacity to conform his conduct to the requirements of the law. Fulks claims that trial counsel should have presented evidence of a litany of Fulks's mental illnesses and psychological issues.

According to Dr. Halleck's diagnosis, Fulks has Cognitive Impairment, Polysubstance Dependence, Major Depressive Disorder, Dysthymic Disorder, and Antisocial Personality Disorder. According to Dr. Melikian's diagnosis, Fulks has Cognitive Disorder, Major Depressive Disorder, Adjustment Disorder with Anxiety, Amphetamine Dependence, Cannabis Dependence, Alcohol Dependence, and Antisocial Personality Disorder. According to Dr. Hilkey's diagnosis, Fulks has Polysubstance Dependence, Dysthymic Disorder, and Cognitive Disorder. According to Dr. Morton's diagnosis, Fulks has Methamphetamine Dependence.

Petitioner argues that Drs. Melikian, Hilkey, Halleck, and Morton could have explained the significance of the evidence presented at trial regarding his upbringing to allow the jury to gain insight into the psychological impairments and mental illness that elucidate Petitioner's behaviors. [19]

However, a review of the trial record reveals similar testimony on these matters by the experts who were, in fact, called. Specifically, Dr. Bachman explained that Fulks suffers from FASD, a condition exacerbated by Fulks's life of alcohol and

drug abuse starting from a young age, which, together with his multiple head injuries, significantly impacted his cognitive ability. (TT Vol. 18 at 31.) Dr. Gur testified that Fulks has "a highly abnormal brain," and that "the abnormality in the brain structure and function explain a lot of the behaviors, and the cognitive and emotional deficits that have been documented in his case," especially the frontal lobe portion which is the "executive that decides what to do with all that information that comes from the back of the brain .... [t]he one that tells you to stop, think about alternatives, particularly in relation to emotional situations." (TT Vol. 12 at 40, 47, and 79.) Dr. Gur testified that because of his abnormal brain, Fulks makes poor decisions. Dr. Bachman confirmed Dr. Gur's assessment that Fulks has an abnormal brain, and testified that Fulks consistently failed to perform the tasks on the inhibition testing and the tasks requiring frontal lobe involvement. (TT Vol. 18 at 47–48.) Dr. Evans testified that his psychological testing showed Fulks had a damaged frontal lobe, which causes him to act impulsively, learn slowly, fail to plan ahead, and puts him at higher risk for criminal behavior. (TT Vol. 17 at 14–15, 34.) He explained the reasons for Fulks's diminished capacity to properly interact with others, based on visual perception impairments. *Id.* at 22–23. Dr. Becker testified that persons with FASD have difficulty ***558** communicating with others and picking up on social cues, they do not learn from experience, they are impulsive, and they act before thinking. *Id.* at 142–145.

Petitioner next claims that trial counsel failed to call experts who could have better explained "the significance of the evidence presented regarding the beatings received by Petitioner, his chaotic family environment, drug and alcohol abuse, sexual abuse, deprivations, etcetera." A review of the trial record reveals compelling testimony by Dr. Gur about the effect of one's family background on behavior:

> But behavior is, to a large extent shaped by your upbringing. It is not all biology. You can take the same kid and use the environment in order to give him a better executive.... They like structure, and they realize there is something wrong in their own executive, so they are looking for guidance. If you guide them well, they can turn out being fine. If they are guided otherwise, they can turn out to be very difficult.

(TT Vol. 12 at 140.)

Additionally. Dr. Andrews testified at length to the negative influences and absent parenting in Fulks's childhood development. She testified that Fulks's father did not remember him at all before the age of twelve: "He doesn't remember when he was born. He doesn't remember he was in special classes at school. He doesn't remember that he tried to commit suicide." (TT Vol. 18 at 151–52.) Likewise, Dr. Andrews testified that Fulks's mother did not remember his birth or whether he went to kindergarten. (*Id.* at 151–152.) As explained in detail in Claim 3, Dr. Andrews explained Fulks's miserable childhood full of chaos. (*Id.* at 172.) Dr. Andrews testified that the lack of consistency in Fulks's life impeded his social development and made him insecure and confused. Although Petitioner claims his experts did not inform jurors about his emotional problems and substance abuse, Dr. Andrews described Fulks's substance abuse, depression, and suicide attempt, which Dr. Becker explained are secondary disabilities often arising as a result of the brain dysfunction caused by FASD. (*Id.* at 146–147.)

Petitioner also claims that trial counsel should have called Dr. Hilkey and Dr. Melikian to explain his borderline range of intelligence—a topic that the experts at trial fully explained. Dr. Evans testified that Fulks suffers from borderline intelligence, ranging from 75–79, moderate brain impairment, and cognitive impairment. (TT Vol. 17 at 10, 13.) Dr. Gur explained that Fulks "is clearly not a bright individual" and that his I.Q. test "comes up on the borderline, slightly above the cut of retardation. But a lot of the measures that go into that fruit salad [that make up I.Q.] are below that, well below that threshold." (TT Vol. 12 at 139.) Dr. Andrews testified that having an I.Q. above 70 actually makes people with brain damage from prenatal exposure more susceptible to breaking the law, being unemployable, being kicked out of school, and other problems. (TT Vol. 18 at 124.)

The court finds that it was not ineffective for counsel not to call additional experts to explain the possible connection between Fulks's childhood, his drug abuse, the true effects of powerful stimulants such as methamphetamine, his alleged cognitive problems and the crimes he was charged with committing. The court finds that the experts presented by trial counsel testified to such connection, as recited above.

Next, Petitioner claims that the jury was never told that his propensity for abusive conduct towards women was related to his psychological impairments and the alleged sexual abuse he experienced as a child and teen. ***559** Specifically, Petitioner claims that a teenage babysitter performed oral sex on him at age eight or nine, that around age thirteen he was molested by a friend's father, and that at age fifteen he moved in with a twenty-eight-year-old woman. However, the trial record is replete with witness testimony that Fulks's childhood environment was filled with inappropriate sexual activity including graphic pornography on the walls and ceilings; that Fulks was molested by an older man when he was a child; and that he had a sexual relationship with a "twenty-something" year old woman when he was fifteen.

As trial counsel testified during the § 2255 hearing, the trial team tried to obtain additional evidence of Fulks having been sexually abused as a child, but were unable to ferret out any. Trial counsel thought that it was very likely that Fulks had been sexually abused, but when multiple members of the trial team asked Fulks about it, he denied any sexual abuse at the hands of his family members.

The additional information which Petitioner now claims should have been presented includes Monica Wolowinski's report of Ronnie Fulks telling her the story of Chad Fulks allegedly sitting on his father's lap begging his father to stop rubbing his groin and thighs. Further, Petitioner complains that the jury did not hear of his teenage babysitter pulling down his pants when he was eight years old and performing fellatio, a story he apparently reported during his interview by Dr. Halleck. The court finds that this additional information was inherently unreliable because it came either by hearsay or by the Petitioner's self-serving statements.

Petitioner also claims that trial counsel should have called Dr. Morton to testify how heavy methamphetamine use, such as the kind Fulks participated in after escaping from jail in Hopkins County, Kentucky, can lead to confusion, paranoia, hallucinations, and homicidal thoughts. This, in turn, is said to explain the events leading to the death of Alice Donovan.

The court notes the inherent danger of the admission of the proposed testimony of the uncalled experts to explain that Fulks learned the behaviors that he later perpetrated. Testimony that Fulks was predisposed to "violent sexuality such as rape" would have tended to show Fulks had a motive to kidnap Samantha Burns and Alice Donovan, and would not have aligned with his claim that he did not want to rape Alice Donovan, but felt pressured to do so by Basham. *See* *St. Pierre v. Walls,* 297 F.3d 617, 633 (7th Cir.2002) (facts that show a defendant has a condition or proclivity toward violence are often aggravating, not redeeming or mitigating factors). Such expert testimony would have conflicted with the themes of Fulks's defense that he did not intend to kidnap and rape Samantha Burns and Alice Donovan. *See Satcher v. Pruett,* 126 F.3d 561, 572 (4th Cir.1997) (finding that trial counsel was not ineffective for not presenting testimony by a psychologist and a psychiatrist who examined the defendant for the purpose of developing mitigating evidence where the psychologist and the psychiatrist found no psychiatric or neurological disorders, but also finding that the defendant had an antisocial personality disorder that might make him a "future danger").

The additional mitigation evidence that Petitioner argues should have been presented would have also opened the door for the government to present very damaging evidence against Fulks. Such evidence might have included evidence that Fulks had physically abused his three-year-old step son and that Fulks escaped from prison because he knew he was about to be arraigned on child abuse charges. In light of the testimony by many witnesses ***560** concerning Fulks's childhood and background, any potential humanizing additional evidence would have offered an insignificant benefit compared to the potentially devastating evidence the prosecution would have offered in rebuttal. Detective Scott Smith testified that Fulks escaped from the Kentucky prison after being served with the indictment from criminal child abuse. (*See* TT Vol. 14 at 42–45, 52.)

[9] After reviewing the record, the court finds that Petitioner has failed to demonstrate prejudice under *Strickland* for failing to present additional expert testimony on cumulative humanizing evidence. *See* *Wong v. Belmontes,* 558 U.S. 15, 130 S.Ct. 383, 387–88, 175 L.Ed.2d 328 (2009) (when a substantial mitigation case was presented, evidence that is merely cumulative to the humanizing evidence actually presented fails to demonstrate the prejudice necessary to meet the prejudice prong of *Strickland*). In evaluating whether there is reasonable probability the additional mitigation evidence would have resulted in a different verdict, this court is charged with considering all of the relevant evidence that the jury would have had before it, not just the mitigation evidence. The court finds that trial counsel pursued a reasonable trial strategy that would have been undermined by

the expert testimony that Petitioner argues should have been presented. Trial counsel carefully investigated and considered all possible mitigation evidence before making a strategic decision not to present the testimony of Drs. Halleck, Morton, Melikian, and Hilkey.

The cases that Petitioner cites for support of his claim that trial counsel were ineffective for failing to present a meaningful mental health case in mitigation are inapposite. To describe Fulks's trial counsel's death penalty experience as significant is an understatement. *Cf.* *Gray v. Branker,* 529 F.3d 220 (4th Cir.2008) (counsel lacked any capital experience, discounted all mental condition information, never discussed nor presented any mental health evidence); *Belmontes v. Ayers,* 529 F.3d 834, 859 (9th Cir.2008), *overruled by* *Wong v. Belmontes,* 558 U.S. 15, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009) (trial counsel failed to consult with experts and investigate mitigating evidence for penalty phase); *Smith v. Mullin,* 379 F.3d 919 (10th Cir.2004) (trial counsel lacked any capital experience and was unaware defendant's mental state or mental illness could be introduced as mitigation in penalty stage).

Trial counsel were well-aware of the need for expert witnesses in mitigation in a capital case.[20] However, trial counsel did not want the jury to hear that Fulks had met the diagnostic measures of antisocial personality disorder, even if the experts did not believe that he was, in fact, antisocial. As attorney Johnson explained, if trial counsel had put up Dr. Hilkey, then that would also open the door to the government putting up experts who would have found that his own experts' testing showed him high on the antisocial personality disorder scale, a diagnosis that counsel did not want the jury to hear.[21] Also, trial counsel did not think it was beneficial ***561** to inject into trial a debate about whether Fulks did or did not have antisocial personality disorder, especially coming immediately after the jury heard testimony tending to show that Fulks planned and attempted to lure another victim, Ward, without Basham's help. Trial counsel was worried it would end up impeaching its own experts' theory, such that the jury would end up believing as true the government's antisocial personality disorder diagnosis and detracting from trial counsels' theory that Basham was the instigator of the crimes.

Instead of presenting additional mental health experts to discuss the hodgepodge mix of mental illnesses that Fulks may have had, trial counsel reasonably utilized suggestions from its jury consultant and mock jury deliberations to emphasize that the criminal acts related to Fulks's brain damage, as evidenced by hard evidence such as diagnostic tests including CAT scans, PET scans, and EEGs. The court finds that trial counsels' decision not to present the testimony of Drs. Halleck, Melikian, Morton, and Hilkey was a reasonable strategic decision made after a thorough mental health investigation and in light of the risks of opening doors to damaging evidence. Therefore, the court rejects Petitioner's claim that his trial counsel were ineffective in their presentation of the mental health case in mitigation.

CLAIM 2:

REBUTTAL WITNESSES

Petitioner's second claim alleges that trial counsel were ineffective for allegedly failing to recognize that Donna Ward and Jeff Bruning could have been called as rebuttal witnesses by the prosecution.

[10] Pursuant to 18 U.S.C.A. § 3432, the prosecution in a capital case must provide the defendant with a list of potential witnesses at least three days prior to trial.[22] The statute does not apply to witnesses called to rebut or disprove the defendant's defense. *See* *Goldsby v. United States,* 160 U.S. 70, 76, 16 S.Ct. 216, 40 L.Ed. 343 (1895); *United States v. Hessler,* 469 F.2d 1294 (7th Cir.1972). The facts on this issue were summarized by the Fourth Circuit as follows:

> On May 10, 2004, the prosecution, as required by 18 U.S.C. § 3432, provided Fulks with a list of the names and addresses of 181 potential trial witnesses. Among those potential witnesses was Amy Ward, whose purse and cell phone Fulks had stolen on November 10, 2002, in Waverly, Ohio. On May 21, 2004, defense investigator Pete Skidmore met with Amy Ward and her mother, Donna Ward, seeking to determine whether Amy was the young woman with the butterfly tattoo with whom Fulks had used drugs during the escapade. At this meeting, Donna advised Skidmore that she had received a phone call on November 17, 2002, from a man purportedly seeking to meet with Amy at a local hardware store that evening at 10:30 p.m. to discuss her recent job application with the store. Donna, knowing ***562** that Amy had submitted no such job application, became suspicious, but when she

> attempted to ascertain the caller's identity, he hung up. Donna also told Skidmore at the May 21, 2004 meeting that she believed the caller to be the same person who had stolen Amy's purse and cell phone. Although Skidmore claims he notified Fulks's lawyers of the November 17, 2002 phone call to Donna Ward, they have no such recollection.
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> * * *
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> Amy Ward, who was scheduled to testify on June 11, 2004, arrived in South Carolina on June 10, accompanied by her father Byron Ward. Just prior to Amy's testimony, Byron, while engaged in small talk with FBI Agent Jeff Bruning, mentioned the November 17, 2002 phone call his wife Donna had received regarding Amy's purported job application at the hardware store. Agent Bruning soon began investigating whether the call could be traced to Fulks, and, with the assistance of the Sprint telephone company, discovered that the phone call had been placed using a prepaid phone card found in Fulks's possession at his arrest. With further investigation, it was established that the call had been placed at 8:38 p.m. on November 17, 2002. Because Basham was hiding from the police in the Ohio River at that very moment, the timing of the call appeared to conclusively establish that Fulks, acting alone, had placed the call. On June 17, 2004, the court ruled that Donna Ward and Agent Bruning could testify regarding the call even though they had not been included on the prosecution's pre-trial witness list. The court then offered Fulks a three-day trial hiatus so that he could prepare to meet their testimony, but Fulks's counsel declined the offer, stating that a three-day recess would be useless at that point in the trial.

United States v. Fulks, 454 F.3d 410, 418–19 (4th Cir.2006).

Specifically, Petitioner claims that he was prejudiced because his trial counsel decided to present some, but not all, of the testimony by mental health experts, allegedly as a result of the unexpected testimony by Donna Ward and Agent Bruning.

At trial, Fulks's counsel argued that he was not the leader during the events of November 2002. Because the testimony of Donna Ward would rebut this argument, the prosecution could have called her as a rebuttal witness without violating § 3432. On appeal, the Fourth Circuit found no error in the court allowing Donna Ward and Agent Bruning to testify on behalf of the prosecution at trial, during the government's case-in-chief, even though they were not listed on the pretrial witness list.

Petitioner now argues that his trial counsel failed to familiarize themselves with the law of rebuttal, because had they done so, they would have realized that Ward and Bruning could have been called as a rebuttal witnesses whether they were on the prosecution's pretrial witness list or not. Petitioner claims that had his trial counsel recognized that Ward and Bruning could testify as rebuttal witness, they would have prepared their mental health experts in advance and not have pulled them from testifying.

[11] The government responds that Petitioner's trial counsel were not ineffective "for failing to anticipate the unexpected." *See* *Dutton v. Brown,* 812 F.2d 593, 598 (10th Cir.1987) (counsel who did not anticipate the trial court's sua sponte exclusion of an important defense witness was not ineffective). The government further contends that Fulks's trial counsel presented a logically cohesive case on ***563** Fulks's behalf in accordance with counsel's trial strategy and that counsel's failure to anticipate the testimony by Ward and Bruning did not prejudice Fulks's case.

During the § 2255 hearing, trial counsel would not admit that they would have pursued a different strategy had they been aware Ward and Bruning would be called as witnesses, but merely stated that "it had an effect on the ultimate decision, the final decision that was made." (HT Vol. 1 at 77.) In fact, when asked if he had known about the call to Donna Ward, defense counsel Blume candidly stated:

> I don't know what I would have done, I can't—it's unlikely that I would have pursued it to the extent of trying to get the card and have it analyzed to determine, you know, if it was in fact true. I mean, maybe some other lawyer would have, maybe some other lawyer should have. I can't imagine that I would have done that.

(*Id.* at 169.)

Further, as the Fourth Circuit noted on appeal, "[t]he testimony concerning the November 17, 2002 call to Donna

Ward was certainly damaging to Fulks's case, but viewed in the context of the trial evidence suggesting Fulks's leading role in the crime spree, it was hardly the silver bullet Fulks makes it out to be." *Fulks,* 454 F.3d at 426.

Petitioner's claim that Blume "has very limited trial experience" is simply false. Aside from representing Fulks, Blume has been involved in some fourteen state capital cases, all of which resulted in sentences less than death (i.e., life imprisonment or a term of years).[23] Additionally, Blume has handled approximately twenty state post-conviction relief (PCR) evidentiary hearings in death penalty cases, another twenty to thirty appeals of PCR hearing decisions, fifteen to twenty federal habeas cases filed pursuant to 28 U.S.C. § 2254 attacking state death penalty cases, and fifteen to twenty appeals of § 2254 petitions. (HT Vol. 1 at 125–132; Gov't Ex. 1.) Blume has argued eight cases before the United States Supreme Court and has been co-counsel in another ten to fifteen appeals. (HT Vol. 1 at 130.) He has had years of private criminal defense practice, served as the Executive Director of the South Carolina Death Penalty Resource Center for eight years, and for the past seventeen years he has worked with the Cornell Death Penalty Project advising criminal defense trial lawyers. In addition, Blume teaches criminal procedure, evidence, the Death Penalty in America, and also supervises several capital clinics at Cornell Law School. To label Blume's experience as "very limited" falls wide of the mark.

***564** Likewise, Petitioner's claim that trial counsel was somehow unfamiliar with the law of rebuttal, is not supported by the record. There is simply no evidence that supports the allegation. Aside from the fact that Blume teaches evidence law, Petitioner has submitted no affidavit by Blume, Johnson or Nettles that they did not know the law of rebuttal, and Petitioner elicited no testimony at the § 2255 hearing that trial counsel did not know the law of rebuttal. Furthermore, Petitioner's argument that trial counsel's alleged unfamiliarity with the law of rebuttal, even if true, does not constitute lack of knowledge about the "relevant law" about which courts have found counsel ineffective. *Cf. Saranchak v. Beard,* 538 F.Supp.2d 847, 881–84 (M.D.Pa.2008) (finding an attorney's performance to fall below the objective standard of reasonableness where the attorney had a "clear misunderstanding of the law regarding a general guilty plea" and failed to litigate a suppression issue once his client decided to plead guilty).

Rather, the court finds that trial counsel made a strategic decision not to call Drs. Hilkey, Halleck and Melikian. Their testimony was not consistent with the trial strategy first, that Basham, rather than Fulks killed both victims; and second, that Fulks's damaged brain, together with his warped childhood, mitigated his lesser role in those crimes. Trial counsel was on the fence about calling these mental health experts at any rate, "long before trial," (HT Vol. 4 at 36). As Blume stated in an email to the trial team on April 23, 2004: "I am still torn on whether to just go ahead and cut the shrinks loose and just go with bad brain/bad family leads to bad things." (Gov't Ex. 26) Ultimately, Blume made the decision to not call these experts at trial. The court finds that the strategic decision not to call the additional mental health experts at trial cannot be said to have been the result of trial counsel's unfamiliarity with the law of rebuttal.

Further, while trial counsel may not have anticipated the testimony of Ward and Bruning, counsel used the witnesses's testimony to support their strategy that Fulks's mental capabilities were so limited by his damaged brain that he was easily manipulated by Basham. At closing, trial counsel argued:

> "But, let's assume for the sake of argument, that Chad was trying to lure Amy Ward. Does it prove how limited and stupid he is? ... You tell them that they have applied for a job at a hardware store where they know they didn't apply, their child didn't apply, they want to meet you at 10:30 at night for a job interview? ... you have to be brain damaged to even say it."

(TT Vol. 21 at 153.) Fulks's trial counsel turned testimony by the government's witnesses into support for Fulks's case. Consequently, even if defense counsel may have failed to anticipate the testimony of Donna Ward and Agent Jeff Bruning, any failure did not diminish or prejudice Fulks's case.

CLAIM 3:

MITIGATION REGARDING
PETITIONER'S EARLY LIFE

Petitioner's third claim alleges that trial counsel were ineffective for allegedly failing to undertake an adequate and meaningful mitigation investigation that would have painted an empathetic and accurate picture of Petitioner's life. Petitioner claims that the primary mitigation witnesses called at trial did not "convey the true depth of the despair of Petitioner's life," and that trial counsel should have discovered and called other witnesses.

***565** **[12]** The court reviews trial counsel's mitigation investigation in light of the *Strickland* standard. Counsel has the responsibility to adequately investigate and present evidence in mitigation of guilt. *Byram v. Ozmint,* 339 F.3d 203, 209–210 (4th Cir.2003). However, counsel is only required to make a reasonable investigation for possible mitigating evidence. *Id.* (citing *Matthews v. Evatt,* 105 F.3d 907, 919 (4th Cir.1997)). This court is to review counsel's strategic decisions concerning the evidence to present at trial according to a "highly deferential" standard, with a presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* (citing *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052). That is to say, *Strickland* requires more than a mere possibility that the allegedly deficient performance may have prejudiced the defendant in some way. *Poyner v. Murray,* 964 F.2d 1404, 1420–1421 (4th Cir.1992).

Investigation Strategy

[13] In explaining trial counsel's strategy for conducting the mitigation investigation, Johnson explained that they attempted to "investigate everything," starting with the people closest to Fulks. (HT Vol. 4 at 16.) Because the trial team did not know precisely what to look for, the mitigation investigation started as very broad, with trial counsel asking a lot of questions. (*Id.* at 16–17.) The mitigation investigation primarily started with a series of meetings with Fulks about his life and background, family, school history, people with whom he had various relationships. It progressed to interviews of significant people in Fulks's life and in the neighborhood where he grew up, including exploration of his marital and romantic relationships, and interviews with his teachers and social workers. There were several reference points for the mitigation investigation: on the West Virginia/Ohio border, where Fulks spent most of his life; on the Indiana/Michigan border, where many of Fulks's family members lived; in the Kentucky/Indiana area where Basham grew up; and other areas where the seven-state crime spree occurred.

Trial counsel used two primary mitigation investigators: social worker Drucie Glass, and mitigation specialist Tracey Dean of the Center for Capital Litigation. Blume, Johnson, and Nettles, with the assistance of several law students, conducted some of the interviews, but Glass and Dean had the primary responsibility for interviewing witnesses. Trial counsel retained Dr. Arlene Andrews, Ph.D., MSW, to tell Fulks's life history. Dr. Andrews also interviewed some witnesses, as Blume testified "because of special training ... she is better at getting sometimes people to admit things they don't want to admit or talk about, not easy to talk about." (HT Vol. 2 at 3.) Collectively, the attorneys, paralegals, and mitigation investigators are referred to in this order as the "trial team" or the "team." The trial team, primarily through Blume's paralegal Jill Ryder, along with Glass and Dean, also obtained releases from Fulks and his family for school/education records, employment records, health records, information related to Fulks's prior criminal activity, and a great deal of information concerning Basham.

The investigation in Indiana/Michigan included members of the trial team visiting the Hopkins County Detention Center in Kentucky from which Fulks and Basham escaped and talking to the jail administrator and the correctional officer who was fired as a result of the escape. The team also talked with Fulks's drug counselor Mr. Taylor at Westville (Indiana) Correctional Institute where Fulks had been imprisoned ***566** in 2001, and Fulks's Probation Officer Mariann Pough.

The investigation in Kentucky and Indiana included going to the neighborhood where Basham grew up and talking with people who knew him then and those with whom that he had contact as he became older; DSS workers involved in the investigation into Fulks's alleged abuse of his son Miles; and James Hawkins, the man that Fulks and Basham kidnapped and tied naked to a tree.

The investigation in West Virginia/Ohio included attempts to discover favorable information from Heather Goodman; Beth McGuffin; Amber Fowler; Donnie Carroll; Amy Ward; former probation officers Sue Hatcher (who recommended

Fulks be taken from his childhood home), Jon Kincaid, and Trina Robinez, as well as former juvenile referee Tom Woelful; former teachers Kay McComus, Mike Sheets, Ray Sandridge; former neighbors Charles Vaughn, James and Linda Smith, and Sue Adkins; retired mailman Richard Beckner; former friend Brad Scarberry; Kimmie Royal of the group home in Iron, Ohio where Fulks lived for some time; former youth minister at Israel Tabernacle Church Chris Parsons; Callaher Elementary Principal Adams; Officer Alan Meek and social worker Denise Sayre of the West Virginia Division of Human Services, among others. The trial team also consulted with anthropologist Karen Lee Simpkins, an expert on Appalachian culture.

The investigation in South Carolina included attempts to discover favorable information from J.D. Brooks of Conway, witnesses to the shoot-out, and inmates in Columbia who may have heard information from Basham—Mike Sumpter, Melvin Gore, Travis Robinson, and Henry Hardy.

Investigation Charts

As a result of the wide-ranging mitigation investigation, the trial team developed numerous charts to consolidate, share, and track the collected information. The charts organized the information gathered, identified the areas of additional facts needed to be developed, identified themes for trial, and served as checklists at trial.

For example, the trial team created a comprehensive eighty-one page compendium, which included a genogram of Fulks's family members, including grandparents, parents, siblings, uncles and aunts on both maternal and paternal sides of his family. (Gov't Ex. 31.) The compendium described in extensive detail the family environment into which Fulks was born, created from records that the trial team obtained, together with information gathered from interviews with family members and people who knew Fulks, including the following: paternal grandmother Nancy Fulks, father Roger Fulks, mother Diana Thompson, sister Sherry Fulks, brothers Dewayne, Ronnie, and Shannon Fulks, maternal uncle Kevin Holbrook, maternal aunt Gail Beatty, paternal uncle Mark Fulks, neighbors Linda Adkins and Harriet and David Kiser, teacher Dottie Thompson, friend and neighbor Laurie Messinger, former girlfriend Heather Goodman, and Brian Messinger, who dated Fulks's sister Sherry and lived in the Fulks house for a year.

The trial team also created a seven-page chart of "Facts to Prove" that was a tool used "primarily to structure the examinations" of witnesses at trial, mainly including the issues to present to the jury as facts in mitigation. (HT Vol. 2 at 10; Gov't Ex. 32.) The chart served as a blueprint for the trial team's mitigation case, describing in detail Fulks's childhood environment; the relationships he had; his behavior while on the run; his post-arrest behavior showing honesty and remorse; his ability to adapt to prison life and lack ***567** of future dangerousness; and his mental impairments. As well, the chart included facts to prove at trial concerning Basham's mental instability, violence, leadership, lies, and evidence that Basham was the killer—facts to support Fulks's argument that he had a relatively less culpable role in the crimes. The trial team gathered information that went into the compendium from interviews with the following individuals: Beth McGuffin, Linda Adkins, Sue Hatcher, Larry Browning, Andrea Roddy, and Marianne Paugh, in addition to interviews with family members Ronnie, Dwayne (and his ex-wife Carla), Sherry and Mark Fulks, and Wilda Mae Holbrook.

The trial team also created a twelve-page "Time Line of Events" which described in detail the events beginning the day before Fulks's escape from the Kentucky jail until the day that prosecutors announced their intent to seek the death penalty. (Gov't Ex. 34.) The trial team also created a sixteen-page comprehensive "Chronology of Events" which described the events between Fulks's release from Westville Correctional Institution on March 23, 2002 and the day of Fulks's arrest in this case. (Gov't Ex. 35.) The trial team gathered this information from the following individuals: Tina Severance, Veronica Evans, James Hawkins, Hawkins' son, Andrea Roddy, Kandi Burns, Missy Jeffers, Sonya Johnson, Brandon Basham, Anna Puskas, and police/FBI records.

The trial team created a four-page chart of Fulks's "Mental Health History" (Gov't Ex. 36); a ten-page chart of Fulks's "Criminal History Chart" (Gov't Ex. 37); a 163–item chart of the favorable and unfavorable facts for Fulks and Basham (Gov't Ex. 39); and a comprehensive file on Basham, including charts on his criminal record, DSS reports, jail behavior, jail records, mental health records, and social services records (Gov't Ex. 49). Additionally, the team prepared charts of the historical arrests of all members of Fulks's family, Fulks's progress in school, his IQ scores, and a head injury chart. As Blume testified at the § 2255 hearing:

> I'm a list compiler by nature. I don't know if it's a positive trait or a negative trait, but you know, I do to—do lists like this so I can keep track of—it's a way of me sort of ordering my thoughts, laying out what I think need to be done and being able to hopefully try and manage the investigation and make sure that things get done that—hopefully things get done that need to be done.

(HT Vol. 1 at 171.)

As early as December 21, 2003, Blume had "two-week work plans" of tasks to be accomplished in preparation for trial. (*See* email, Gov't Ex. 23.) Aside from the mitigation investigation concerning Fulks's background, the crime spree, and his relative culpability vis-a-vis Basham, the team also conducted four large searches for Alice Donovan's body, in addition to investigator Skidmore's independent searches in his helicopter. The trial team thought that if Fulks's information could lead to the discovery of Alice Donovan's body, perhaps the government would withdraw the death penalty notice. Some of the trial team's searches utilized cadaver dogs, law students, and even an anthropologist to determine if any bones found were human remains rather than the more common find of deer bones.

Blume estimates that the trial team spoke with approximately 100 individuals during the mitigation investigation. While there were individuals that the trial team wanted to find, some individuals, such as former girlfriend Tracy Graybeal, could not be located, despite the trial team's ***568** efforts.[24] As Blume explained, many of the individuals were simply difficult to find:

> Some of them were homeless, some of them were prostitutes, some of them were drug addicts. So, there were some people that we did not, could not find. But, I mean, we attempted to find the people that we believed to be important and relevant and we found the ones we could.
> (HT Vol. 1 at 180–81.)

According to trial counsel, the team started its investigation without assuming a theory of the case, but after gathering information, theories eventually emerged. As a result of the foregoing thorough mitigation investigation of law and facts relevant to plausible options, *see* *Strickland* at 690, 104 S.Ct. 2052, trial counsel pursued a two-fold trial strategy: "to cast Basham as the instigator and sole murderer, and to present a strong case of mitigation based on Fulks's mental problems and troubled childhood." *Fulks,* 454 F.3d at 426. That trial strategy resulted in the presentation of the following synopsis of evidence to the jury.

Mitigation Testimony at Trial

The trial record reveals as complete and exhaustive a mitigation defense as one could reasonably expect in capital cases. Trial counsel painted a compelling and empathetic picture of a young Chad Fulks growing up in poor, crowded, filthy, and deplorable living conditions, raised by violently abusive, sexually deviant, emotionally neglectful, and alcoholic parents who did not appear to care at all about their children's well being.

The mitigation testimony spanned four days, including testimony by Fulks's friends and relatives who described his horrible childhood, as well as various mental health and other experts, including his private investigator and mitigation investigator. Trial counsel presented testimony from: (1) Kevin Holbrook, Fulks's maternal uncle; (2) Gayle Beatty, Fulks's maternal aunt; (3) Mark Fulks, Fulks's paternal uncle; (4) Kelly Fite, a firearms expert; (5) Brian Messinger, a friend of the Fulks family who lived with them for approximately six months when Fulks was about eleven years old; (6) Lorie Messinger, a friend of the Fulks family who dated Fulks's brother Dewayne; (7) Linda Atkins, a neighbor in Huntington, West Virginia; (8) Cindy Harper, Fulks's kindergarten teacher; (9) Gayle Wolfe, Fulks's fifth grade special education teacher; (10) Martha Floyd, Fulks's sixth grade teacher; (11) Sue Hatcher, a probation officer assigned to Fulks when he was nine years old because he committed battery on an elderly lady and pulled down the pants of a four or five-year-old girl on a playground; (12) Joseph Jones, a former boyfriend of Fulks's ex-wife Veronica Evans; (13) Dina Jones, the aunt of Fulks's ex-wife Veronica Evans; (14) Heather Jacobi, a young woman whom Fulks met in Portsmith, Ohio and used drugs with; (15) Heather Roche, a dog handler who conducted searches for the remains of Alice Donovan on February 13–14, 2004 and April 30–May 1, 2004; (16) Jeff O'Neill, a Cornell Law School student;

(17) Pete Skidmore, Fulks's private investigator; (18) Don Romine, a former warden at several federal correctional institutions, who testified as an expert in prison management and prison security. These witnesses testified in addition to the six aforementioned mental health experts, ***569** Drs. Evans, Gur, Becker, Bachman, Bookstein, and Andrews.

Fulks's uncle, Kevin Holbrook, testified that Fulks's mother drank a lot of whiskey while she was pregnant with Fulks and had been at the bars the night Fulks was born; that Fulks's parents would "bare-knuckle fist fight" which usually resulted in Fulks's mother having a black eye and busted lip; that Fulks's father abused him and his brothers by hitting them, beating them with a belt, and kicking them; that Fulks's parents would sell their food stamps to buy beer; and that the Fulks's house as always "nasty," with "rats, and mice, and roaches, and cats, and dogs, and everything." Holbrook testified to hearing Fulks's parents call their children "sons-of-bitches, fuckers, mother fuckers, ... cocksuckers," noting that "there isn't a name they haven't been called." He also said that while Fulks's parents regularly partied in their basement, he could not recall them having a birthday party for the kids. He testified that Fulks's father had all the children tattooed; that the parents showed no interest in the children's education; that Fulks's father liked to watch pornographic movies and thought it was funny to let the children watch too. (TT Vol. 16 at 129–42.)

Fulks's aunt, Gayle Beatty, testified about Fulks's alcoholic grandfather beating his mother in their poverty-stricken home, and described the poverty, hunger, and filth that she personally observed in the Fulks home, holes in the floor in front of the toilet looking down to the basement below, and Fulks's desperation to leave his parents and live with his aunt. (TT Vol. 16 at 149–59.) She told the story of arriving early one morning while Fulks's parents were still asleep, and going to the kitchen to feed the hungry Fulks children:

> I could only find one bowl.... I poured some cereal into the bowl and milk. There was a chip broke out of the top of the bowl ... Chad was having to tilt the bowl back a little bit so the milk wouldn't pour out. Ronnie Dale was telling him to hurry because he wanted some cereal."

(*Id.* at 154–155.) She told of Fulks's sweetness in purchasing earrings from the gas station for her instead of buying himself candy with the money she gave him. (*Id.* at 155.)

Fulks's Uncle Mark estimated that ninety percent of the time he saw Fulks's parents, they were drinking, and that they were alcoholics. (TT Vol. 16 at 161–62.) He testified to Fulks's mother passing out several times, sometimes partially clothed. (*Id.* at 162.) He said Fulks's parents would bare-knuckle fight, throw things at each other, and that Fulks's mother had once pulled out a shotgun and pointed it at Fulks's father's face. (*Id.* at 163.) He described the physical and verbal abuse of the Fulks children by their parents, the filthy, bug-infested house, and the lack of food in the house. (*Id.* at 167–170.)

Brian Messinger testified that the Fulks children were totally unsupervised; that the parents thought it was funny when the children stole or got into trouble with law enforcement; that the Fulks boys slept anywhere they could find; and that one of the boys, probably Chad Fulks, said he wanted to kill himself. (*Id.* at 211–17.)

Lorie Messinger testified that the Fulks boys fought with each other and anybody; that Fulks's father made her uncomfortable and made suggestive comments about the size of her breasts and attempted to touch them; and she described the sexually graphic pictures on the walls and ceilings in the basement of the Fulks's house. (*Id.* at 223–25.)

Linda Adkins testified that Fulks's mother asked her for money for food, but ***570** then would use it to buy beer, and when she started giving Fulks's mother food instead of money, she stopped asking for help; that many times when Fulks's parents fought, the children would come to her house, including one morning, about 3:00 o'clock, when the Fulks children came running to her house, telling her that their mother had a two by four and was threatening to hit their father's van with it. They said "if she hits the van, daddy will kill her." She testified that once when Fulks was three or four-years-old, no one could find him, and they eventually found him asleep on a pile of leaves in a corner of her garage. (*Id.* at 232–35.) Cindy Harper, Fulks's kindergarten teacher, testified to Fulks once having bad diarrhea that soiled his jeans and shoes, but she testified that no parent picked him up, and that he missed thirty-five days of school that year. (*Id.* at 74.)

Martha Floyd described Fulks as a follower, and recalled that he did not have a coat, even though the winters in West

Virginia were harsh. (TT Vol. 17 at 85.) She said she had seen bruises on him. (*Id.* at 91.)

Sue Hatcher, a probation officer, told the jury about the lack of responsiveness when she contacted Fulks's mother to discuss some of her concerns about Fulks, and that she recommended that Fulks be removed from his home, but her recommendation was not followed. (TT Vol. 17 at 95–103.)

Fulks's trial counsel also presented the testimony of Dr. Andrews as an expert in conducting a family history assessment. (TT Vol. 18 at 132.) Dr. Andrews found the major theme in Fulks's life to be chaos, with his parents constantly drinking and fighting and his lacking any proper supervision and care givers. Dr. Andrews based her findings on a family history that she prepared using records from Fulks's childhood, a genogram, and various interviews that she conducted. (*Id.* at 133–38.) She presented the jury with a comprehensive description of Fulks's history and child development (*id.* at 133, 152–71), describing his problems in school and subsequent mental health assessments. She described Fulks being placed in a behavioral disorder classroom because he was emotionally and behaviorally disturbed, bullying children, being disrespectful, and needing supervision. She testified that the school principal, a police officer, and a probation officer recommended Fulks be removed from his home because he was not receiving adequate adult supervision. (*Id.* at 160–61.)

Dr. Andrews testified that Fulks was beaten by his father, that his mother walked around the house, while neighbors were present, in see-through gowns, and, on one occasion, naked, and sometimes she completely passed out from drinking. (*Id.*) She presented the jury with testimony that Fulks's mother did not provide for him emotionally, even after she stopped drinking when she became "saved" when Fulks was twelve or thirteen years old, as she was away from home for long hours. (*Id.* at 163–64.) She also testified that this caused an escalation in the fighting between Fulks's parents, and Fulks's father left the home. (*Id.*) During this time, Fulks got into more trouble at school, both behaviorally and academically and that just before he turned fourteen, Fulks took a large quantity of acetaminophen in an apparent suicide attempt. (*Id.* at 166.) He lost consciousness and was taken to the hospital, and a subsequent psychiatric evaluation resulted in the hospital's offer to admit him to the adolescent treatment unit, which Fulks and his mother refused. (*Id.*) Subsequent to his parents' divorce, Fulks moved to Indiana to live with his father and his step-mother (*id.* at 167), at a ***571** time when Fulks was drinking alcohol, smoking marijuana, and huffing gas on "a very regular basis." (*Id.* at 168.) Fulks's school psychologist noted that he had been molested by an older man and that he had a sociopathic pattern. (*Id.*) After the school psychologist's referral for Fulks to see a psychiatrist, he was diagnosed with major depression and prescribed an antidepressant. (*Id.* at 169.) There is no record of any follow-up care, and Fulks's troubles continued. (*Id.* at 170.) Fulks was charged with arson for setting fire to a wooden plaque hanging on a school wall (*id.*), referred for alcohol and drug counseling, and sent to a group home around the age of fifteen. (*Id.*) Fulks began living with a woman in her late twenties, and never returned home to live. (*Id.* at 170–71.) He lived in group homes, was incarcerated, or stayed with different family members. (*Id.* at 171.)

Dr. Andrews explained the impact on Fulks of having two alcoholic parents, explaining that they do not learn about the things a responsible parent teaches children:

> They don't want responsibility, they don't want respect for [sic] others, they don't learn to solve problems well. They don't learn to effectively communicate their needs or feelings. They don't learn impulse control. They don't learn to have hopes and aspirations for the future. They live day-by-day, sometimes hour-by-hour. And they don't learn to cope with difficult situations with stress or trauma that may happen in their lives.

(TT Vol. 18 at 175.)

Dr. Andrews testified as to the "profound," "constant," and "extreme" exposure Fulks had to the violence between his parents. (*Id.* at 179.) Dr. Andrews testified that Fulks never learned to control his anger and developed low self-esteem and depression as a result of the exposure to domestic violence. Dr. Andrews surmised that Fulks was inflicted with multiple stressors and deprived of emotional attention, that he did not have the resiliency or intellect to handle them, so he turned to alcohol, drugs, and other negative behavior to cope with the anxiety. (*Id.* at 185–187.)

Witnesses Not Called to Testify

Petitioner complains that the trial team should have called the following nine witnesses to testify: (1) Monica Wolowinski, the mother of Fulks's best friend, who could have testified to having seen Fulks sleeping under trees; that his mother did not care that he was gone from his home for extended periods; that he was often hungry; that the residence was filthy; and that his mother cursed at and abused him; (2) Nathan Fulks, Petitioner's cousin, who could have testified as to the abuse and filth in the Fulks household; that Fulks's parents did not change the children's diapers; that the family was so poor that one of Fulks's brothers, with Diane's approval, stole from Nathan to buy food; that Fulks's father was a sexual deviant who "ran sex trains" on various women; "was a very violent man and would look for any excuse to fight;" would beat Diane and the children, including one beating that Fulks suffered where his back was so badly scourged that dried blood caused Fulks's shirt to stick to his back. Fulks also claims Nathan could have testified that his father's friends would congregate in their basement, where alcohol and drug consumption and fighting with firearms was the norm, and that Fulks's father Roger told him that something that led him to believe that Fulks had been sexually abused by one of Roger's contemporaries; (3) Tracy Graybeal, Petitioner's friend and sometimes girlfriend, who could have testified that Fulks used alcohol to cope with abuse by ***572** his parents and that his older sister had allegedly molested him when he was a small boy; (4) Christina Kirkman, who lived at the Fulks residence one summer and was allegedly raped by one of Fulks's uncles and assaulted by one of his brothers, could have testified to the abuse Fulks suffered, and that the Fulks children were used to seeing their parents passed out; (5) Beth McGuffin, who grew up with Fulks, who testified at trial, but whose testimony Petitioner now alleges trial counsel did not adequately develop. Allegedly, McGuffin could have testified about seeing Petitioner's mother with black eyes, about a man named Ed who used to pick up her and Petitioner off the street and take them to drink alcohol and smoke at the age of ten or eleven-years-old, that she and Petitioner used drugs when they were twelve-years-old, and that Fulks had sex with an older woman named Rhonda. Petitioner now claims that evidence of his sexual abuse would have mitigated his admission to raping Alice Donovan; (6) Harry Tyree, deacon at the Abundant Life Baptist Church in Proctorville, Ohio, could have testified that the Fulks's house was very dirty, with beer cans on the floor and the ashtrays overflowed with cigarette butts, and that Petitioner, his mother, and his brother attended the church for several years, where Petitioner behaved well; (7) Mark Thompson, a neighbor, could have testified that after Petitioner's mother stopped drinking, that she was consumed with church, but provided no better care for her children and let them roam the streets. He could have testified that Fulks would hang out around his house and eat because Fulks's mother did not cook meals for Fulks and that Fulks was a follower and not a leader; (8) Sharon Dotson, Petitioner's maternal aunt, could have testified about Fulks's mother's poor and abusive upbringing, that she often contemplated suicide, that the children were abused and subjected to a sexually inappropriate environment with "pictures up on the wall of naked women with their legs spread;" and (9) Elvin Taylor, counselor at the Westville Correctional Institution when Petitioner was an inmate, could have testified that Fulks completed a long-term substance abuse program; that Fulks would complain that he was susceptible to being influenced by others using drugs and was influenced by others engaging in criminal activity. He could have also testified that Fulks adapted well to a structured prison environment, was a model inmate, completed his seminar presentations, was eventually was put in charge of the dorm maintenance department, and was actively involved in resolving disputes between inmates through conflict resolution training.

[14] The court finds that most of these nine witnesses's testimony would have been cumulative to the testimony of other witnesses who gave compelling descriptions of the depravity of the conditions in the Fulks home, including the violence, verbal abuse, alcohol and drug abuse, and pornography that surrounded Fulks as a child. Trial counsel's failure to present merely cumulative mitigating evidence does not prejudice a defendant's case. *Buckner v. Polk,* 453 F.3d 195, 206 (4th Cir.2006). As the Supreme Court has observed, "there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distracts from more important duties." *Bobby v. Van Hook,* 558 U.S. 4, 130 S.Ct. 13, 19, 175 L.Ed.2d 255 (2009). Given the evidence trial counsel had already unearthed from those closest to Fulks's upbringing and the experts who reviewed his history, it was not unreasonable for his counsel not to identify and ***573** interview every other relative of a friend or friend of a relative. *See id.*

As to the non-cumulative evidence proffered by the uncalled witnesses, the evidence is either not relevant to Fulks's upbringing (e.g., sexual abuse of Kirkman) or has

questionable reliability, or the probative value of the evidence is far surpassed by the prejudicial impact of other evidence that would enter as a result of the doors that would open by presenting such evidence. *See Moody v. Polk,* 408 F.3d 141, 154 (4th Cir.2005) (to the extent affidavits presented new information, they were "double-edged").

As to Graybeal's information that Fulks revealed to her that his older sister had molested him when he was a small boy, the record reveals that Fulks did not make the revelation to Graybeal until 2007, three years after his trial. The court cannot deem trial counsel ineffective for failing to discover information from witnesses which Petitioner himself could have provided to his counsel, but chose not to, even assuming it was true.

The record reflects, and the jury found,[25] that trial counsel effectively presented evidence that Petitioner's childhood was one of physical abuse, emotional neglect, sexual abuse, and self-medication with drugs and alcohol. *See United States v. Roane,* 378 F.3d 382, 407 (4th Cir.2004) (in light of the compelling mitigation case presented by defendant's counsel during the penalty phase which resulted in the jury finding twelve mitigating factors, the court correctly concluded that their performance was not constitutionally deficient ***574** and that defendant was not prejudiced by the absence of additional witnesses).

The court rejects Petitioner's allegation that trial counsel's failure to present certain witnesses was not one of strategy, but of a failure to investigate adequately and to discover that these witnesses even existed. To the contrary, the foregoing recitation of trial counsel's mitigation efforts reveals that Fulks was the beneficiary of a dream team of attorneys who afforded him the constitutional guarantee of effective assistance of trial counsel. Petitioner's complaints about his trial counsel's mitigation efforts fall well short of demonstrating his "attorney's unprofessional errors were of such magnitude as to create a reasonable probability that the outcome of the proceeding in question would have been different." *Poyner v. Murray,* 964 F.2d, 1404, 1421 (4th Cir.1992).

The court finds significant the dictate in *Strickland* that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690–91, 104 S.Ct. 2052. In this case, trial counsel fulfilled its duty to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691, 104 S.Ct. 2052. Petitioner's claims to the contrary are without merit.

CLAIM 4:

ASSIGNMENT OF TASKS TO LAW CLERKS

[15] Petitioner's Claim 4 alleges that trial counsel was ineffective for allegedly assigning law students critical aspects of the mitigation investigation. Specifically, Petitioner alleges that the law students were not given proper training or guidance, and the mitigation investigation that resulted was inadequate because key testimony and witnesses were overlooked. Petitioner claims that trial counsel should have used trained investigators for all aspects of the mitigation investigation and that the failure to do so was unreasonable.

Because trial counsel assessed the investigation as "overwhelming, both because of the geographic spread of the crimes and the number of crimes" (HT Vol. 4 at 28), they reasoned that using law students would be helpful. The law students were primarily from the Cornell Law School Death Penalty Clinic where Blume and Johnson teach.

After Blume's appointment to the case, it was his initial impression that the government was not investigating, so Blume "wanted to try and get out in front of them with a lot of these different witnesses and different locations." (HT Vol. 1 at 117.) As Blume described it: "[t]here were a lot of different jurisdictions and lot of different incidents. [Fulks] and Mr. Basham escaped from an institution in Kentucky, went sort of north through the heartland and then back down to West Virginia, to South Carolina and then sort of back up where Mr. Fulks was apprehended." (*Id.* at 117.) By using mainly four or five law students to assist in the investigation in addition to two professional, retained investigators, trial counsel "covered more ground than any one investigator would cover." (HT Vol. 4 at 28.)

Blume, Johnson, and Glass took some students with them to conduct investigations in Indiana, West Virginia, Ohio, and South Carolina. (HT Vol. 1 at 117, 133.) Nettles traveled

to Kentucky with retained investigator Skidmore and law students Casey Hinkle and Mary Mulhern to "dig up dirt" on Basham to support their theory ***575** that "Basham was violent and unpredictable and that he was most likely the perpetrator." (*Id.* at 133, 179–80.)

Another reason trial counsel chose to use law students, according to Johnson, was "that students often are very good at being unintimidating and can sometimes get people to initially speak who might slam a door in an attorney's face." (HT Vol. 4 at 28.) Johnson stated that the law students primarily located individuals pursuant to trial counsel's instruction. (*Id.*) As to individuals who were not deemed "significant witnesses," such as people in the neighborhood, trial counsel had the law students speak to some of them initially and then trial counsel went back and re-interviewed them. (*Id.*) However, trial counsel did not send law students to interview powerful material witnesses or Fulks's relatives. (HT Vol. 1 at 183–84.) Trial counsel also used law students to collect school records and mental health records. (HT Vol. 4 at 29.)

Prior to using the law students, Johnson and Blume trained them on interviewing, complete with handouts (Gov't Ex. 44), with an eye towards the law students trying to find individuals who knew Fulks or had information to assist in the mitigation aspect of the case. (HT Vol. 4 at 39–40.) Blume had the law students do mock interviewing with role playing exercises before sending them out to conduct any interviews. (HT Vol. 1 at 182.)

The law students were instructed to write up everything that the witness told them, and trial counsel would review the memos and make a judgment about following up with an interview by one of the trial counsel. (HT Vol. 4 at 28–29.) Johnson stated that "if anyone had anything that looked like it was promising to say, virtually anyone, we—one of us would have gone to see that person afterwards." (*Id.* at 29.) Fulks's § 2255 counsel could not identify a single individual with whom the law students spoke with who had relevant information, but whom trial counsel did not follow up with themselves. (*Id.* at 40.) Trial counsel did not follow up on the individuals who responded to the law students' inquiries that they never knew the Fulks family. (*Id.* at 29.)

Significantly, Blume did not send any law students alone to interview anyone, with two exceptions. These two exceptions were due to the training and background of the two interviewers: (1) Tim Cane worked for several years as an investigator for a capital defense unit in San Francisco prior to attending Cornell Law School; and (2) Matthew Rawlings was an ordained minister from Huntington, West Virginia, whom Blume felt was mature and comfortable enough to talk to people on his own, and whom Johnson testified persuaded a witness to talk to trial counsel. (HT Vol. 1 at 182–83.) Among the other law students Petitioner complains were not trained or otherwise competent to aid in the mitigation investigation were Matthew Jury, a British lawyer on an internship at the Center For Capital Litigation, a non-profit corporation that represented death row inmates.

Although law students were not used to draft any of the pleadings, they did draft internal memos on legal issues which contained preliminary research. (HT Vol. 4 at 29–30.) Trial counsel would read the cases cited, and did not submit any memoranda to the court "without having done the research, rechecked the research." (*Id.* at 30.) Matthew Jury prepared a memo, (Pet. Ex. 45), and was present during jury selection. (HT Vol. 1 at 64.) Keith Palumbo, a Cornell law student prepared a memo on Fetal Alcohol Syndrome. (Pet. Ex. 47; HT Vol. 1 at 64.) Kerry Davenport, also a Cornell law student, prepared a separate memo on Fetal Alcohol ***576** Spectrum Disorders. (Pet. Ex. 46.) Another student, Casey Hinkle, prepared a memo regarding the admissibility of evidence to show consciousness of guilt in the penalty phase of Fulks's trial. (Pet. Ex. 43.)

The court finds that trial counsel's use of law students to assist in the mitigation investigation does not constitute ineffective assistance of counsel. As Petitioner concedes, trial counsel hired trained investigators and mitigation specialists to conduct the bulk of the mitigation investigation, including a private investigator, Pete Skidmore, and an investigator employed by Southeastern Professional Investigations, an organization regularly retained by the Federal Public Defender. Petitioner's allegation that many important investigation tasks were left to law students, without describing those tasks, is without support in the record.

As discussed *supra* in Claim 3, Fulks's mitigation team of experts included medical doctors, forensic psychologists, forensic psychiatrists, social workers, and other experts in mental health. The use of law students to assist initially in order to cover as broad an investigation as possible was a reasonable strategic decision. By his own testimony and as evidenced in the record, Blume and trial counsel trained the law students and conducted mock interviews before sending

them to knock on doors. The law students reported their findings in writing to trial counsel, and trial counsel followed up on every contact that appeared the least bit promising. The court finds that trial counsel provided the students with effective training, development, and education that allowed them to effectively use law students in their mitigation investigation. Trial counsel's use of the law students was limited, of a cumulative nature, and was highly supervised by Johnson, Blume, and Nettles. While this court does not recognize the ABA Guidelines as the constitutional standard for effective representation, Petitioner was the beneficiary of a comprehensive pretrial investigation, with a pretrial team that far surpassed the "minimum" assistance of a professional investigator and a mitigation specialist suggested by the 2003 ABA Guideline 4.1 that Petitioner cites. The court rejects Petitioner's claims that trial counsel was ineffective for assigning law students to some aspects of the mitigation investigation.

CLAIM 5:

COURT'S INSTRUCTIONS ON MITIGATING FACTORS

[16] In Claim 5, Petitioner contends that his appellate counsel was ineffective for failing to appeal the format employed by this court in explaining the role of mitigating factors during deliberations. The disputed instruction was as follows:

> As to the mitigating factors asserted by the defendant, Mr. Fulks, in this case, the law provides that there is, essentially, no limit on the number of factors or things that the jury may consider in mitigation. As to each of the factors submitted by the defendant, and which I am about to list, *you must, essentially, engage in a two-step process in determining whether any one or more of them have been proven.*
>
> Specifically, you must first determine if the evidence that you heard establishes the existence of the factor by a preponderance of the evidence.
>
> Secondly, if you determine that the factor has been proven, *you must determine whether the fact is mitigating, as I have defined that term for you. That is, it tends to suggest that life in prison* ***577** *without parole and not death is the appropriate punishment.*

(TT Vol. 21 at 274 (emphasis added).)

Petitioner argues that rather than advising the jury that it could give whatever weight it deemed appropriate to a particular mitigating factor, the court's instruction asked the jury, once it has already found that a particular fact exists, to further screen that factor to determine whether it is, in fact, mitigating. Fulks argues that this violates the Eighth Amendment because it created a substantial risk that the jury would screen out, and therefore fail to consider, facts that are unquestionably mitigating. (Pet. at 92.)

During the colloquy between the court and counsel regarding the content of the jury instructions at the end of the case, an issue arose regarding the relatively large number of allegedly mitigating factors the defendant proposed to be included in the jury charge and on the verdict form. The government was concerned that Fulks's trial counsel were attempting to "sand bag" the government's case by listing a large number of somewhat duplicative, and potentially irrelevant, factors for the jury to consider as mitigators. The court had earlier expressed its own concern that there appeared to be a degree of duplication in some of the mitigators proposed by the defendant. Shortly before the jury charge was finalized, the government attorneys suggested that the jury should be told that, with regard to mitigators, there were two issues: "(1) is it proved; and (2) is it mitigating?" (TT Vol. 20 at 217.)

The prosecutor continued:

> I want the jury to be instructed that if they find, as a fact, that Chad Fulks's mother ignored his stealing, for example, they can find that that was proved by the defendant. That is not the end of the jury assessment.... The jury must also find that ... it weighs in favor of imposition of a life without parole sentence.

(*Id.* at 217–18.)

After an extended colloquy, this court responded:

> That might eliminate my dilemma [regarding the need] to consolidate some of these [mitigators]. I can leave a fairly long number and tell them they

> don't have to take a vote and tally it on the vote sheet unless they determine that it has been proved and it is a mitigating factor.

(*Id.* at 218.)

Fulks's trial counsel objected to the court's reformulated instruction on mitigating factors, but did not appeal the adverse ruling. Fulks contends that the failure to appeal this issue was ineffective assistance of counsel because, he argues, *Eddings v. Oklahoma,* 455 U.S. 104, 114–15, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), requires that in a death penalty sentencing regime, sentencers "may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."

In *Eddings,* the trial court, acting as the sentencing judge, refused, as a matter of law, to consider in mitigation the circumstances of the defendant's unhappy upbringing and emotional disturbance. *Id.* at 109, 102 S.Ct. 869. Relying upon *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Court held that the sentencing judge had erred. In *Lockett,* the Ohio death penalty statute permitted consideration of only three mitigating circumstances. The Supreme Court had little trouble in finding that it was unconstitutional for a state to place limits on mitigating factors that a death penalty sentencer may consider. *Eddings* was an ***578** extension of *Lockett.* There, the state did not limit, by statute, the mitigators that a sentencer could consider, but the trial judge indicated at sentencing that he was precluded "as a matter of law" from considering the suggested mitigators.

It can easily be seen that both *Eddings* and *Lockett* dealt with situations where the state affirmatively placed limitations on the sentencing body even *considering* certain potentially mitigating factors. In Fulks's case, the court's instructions did nothing to preclude the jury from considering the array of mitigators suggested by Fulks in the proposed verdict form. Rather, the court instructed the jury to first determine if the mitigator was proved, and, secondly, if so, to determine whether it was in fact mitigating.

Courts of Appeals dealing with this question after *Eddings* have undercut Petitioner's contention that *Eddings* requires a reversal of the death sentence in this case. In *United States v. Jackson,* 549 F.3d 963 (5th Cir.2008), the defendant contended that the verdict form was inconsistent because the jury failed to find several mitigators that were essentially undisputed, including one (that a co-defendant did not receive the death penalty) that the prosecution stipulated. The Fifth Circuit logically concluded that by not checking the mitigator on the verdict form provided, the jury was merely signaling its decision that even if the factor existed, it was not mitigating. The court said:

> [T]he jury was not required to find that a factor was mitigating, even if it believed the factor's factual predicate to be true. All the law requires is that jurors be aware that they can consider a factor to be mitigating. For example, no juror found that Jackson, "experienced persistent falling when trying to walk until he was 5 years old and this factor is mitigating." In reaching that conclusion, the jurors could have believed Jackson experienced problems walking but that the factor did not weigh against a sentence of death.

Id. at 983.

The Fourth Circuit Court of Appeals was faced with an identical situation in *United States v. Higgs,* 353 F.3d 281 (4th Cir.2003). In *Higgs,* the defendant argued that his death sentence was flawed because the jurors failed to find as a mitigating factor that a co-defendant did not receive a death sentence. On appeal, Higgs argued that the jury's failure to find this undisputed factor "reflect[ed] an arbitrary and unreliable decision requiring [the court] to vacate the sentence." *Id.* at 327. Writing for the court, then-judge (now Chief Judge) Traxler observed that the appellant's argument failed, because:

> [T]he Constitution only requires that the jury be allowed to *consider* evidence that is proffered as mitigating. There is no constitutional requirement that the jury find a mitigating factor even when it is supported by uncontradicted evidence. In addition, the jury's failure to find that [the co-defendant's] life sentence was a mitigating factor for Higgs was supported by the evidence. Although it was undisputed that [the co-defendant]

> was the triggerman, a rational juror could well have found that Higgs had the dominant role in the murders and therefore that Higgs and [the co-defendant] were not equally culpable in the crime.

Id. at 327 (emphasis in original).

Viewed in the light of *Higgs* and *Jackson,* this court's jury instruction (and the accompanying verdict form), did no more than allow the jurors to do what the jury did in those cases, which is to determine whether a factor is not "mitigating" even though there may have been overwhelming evidence to support the existence of the ***579** particular factor. Moreover, the verdict indicates that the Fulks jury did not rubber stamp the government's case. Of the forty-three mitigators the court included on the verdict form at Fulks's urging, the jury unanimously found that over half (twenty-two) of the mitigators were proved. Nine or more jurors found that an additional four mitigators were proved.

At trial, the jury heard four days of testimony regarding Fulks's mitigators. This included testimony regarding his background of deprivation and abuse, his psychological condition, and his substance abuse. At the conclusion of the penalty phase trial, the court instructed the jury:

> A mitigating factor is simply information about a defendant's background, record, or character or about the circumstances surrounding the offense or any other information that you deem relevant that would suggest, in fairness and mercy, that a sentence of death is not the most appropriate punishment, or that a sentence of life in prison without any possibility of release is the more appropriate punishment.
>
> As to the mitigating factors asserted by the defendant, Mr. Fulks, in this case, the law provides that there is, essentially, no limit on the number of factors or things that the jury may consider in mitigation.

(TT Vol. 21 at 273–74.)

There then followed the court's disputed instruction on the two-step process the jury was to employ. The court continued:

> Unlike aggravating factors, which you must unanimously find proved beyond a reasonable doubt in order to consider them in your deliberations, the law does not require unanimous agreement with regard to mitigating factors. *Any juror persuaded that a mitigating factor exists, must consider it in this case.*
>
> Further, you may consider a mitigating factor found by another juror, even if you do not find that factor to be mitigating. *It is up to each individual juror to determine how much weight should be given to any particular mitigating circumstance.*

(*Id.* at 275 (emphasis added).)

In short, unlike the sentencing regimes that were involved in *Eddings* and *Lockett*—which forbade, as a matter of statutory or state common law, the consideration of certain mitigators—here the court listed on the verdict form virtually every mitigator suggested by the defendant, placed no restrictions on the amount of trial testimony received regarding mitigation, and instructed the jury there was "no limit" on the number of mitigators that it could consider.

Finally, the court told the jury that if any juror was persuaded that a mitigating factor existed, the juror "must consider it" in the deliberations. In sum, the court finds no constitutional error in Fulks's trial counsel's failure to appeal the jury charge on mitigation.

CLAIM 6:

CAUSAL NEXUS

[17] In this claim, Petitioner contends that the prosecutor, in his closing argument, encouraged the jury to think about mitigation in terms of a causal nexus between the mitigating evidence and the crimes committed. Such a nexus test had been rejected by the Supreme Court in *Tennard v. Dretke,* 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004), a case handed down while Fulks's trial was in progress and five days before the allegedly improper closing argument. Trial counsel did not object to the argument nor move for a mistrial based upon the prosecutor's comments which were as follows:

> ***580** Now the defendant's mitigation.... Two points I want to make, reminders, and, again, I will discuss with you in reply. One is this, this whole idea of cause-and-effect. You heard that phrase used in some of the questions. Every one of the defense experts admitted there is no cause-and-

> effect. That whatever issues that Chad Fulks has, there is no cause-and-effect. What does that mean? That means, despite the fact that Chad Fulks might have a cyst on his brain, might have an IQ of 79, or might have had a bad upbringing, the fact that those causes exist, does not make people commit violent crimes. There is no evidence of that. Anyone to come in the courtroom and claim that, that is junk science. Even their experts acknowledge that. There is no cause-and-effect.
>
> Ladies and gentlemen, think about, think about all of the millions of Americans that suffer, that have significant brain injuries, that have cysts and tumors on their brain, that have damaged brains from gunshot wounds, epilepsy, from all kinds of diseases and accidents. Think about the millions of Americans who have damaged brains but don't carjack women. And think about the millions of Americans with IQs of 79 or lower that don't rape women. And think of all the citizens in this country throughout the years from the—even before the Great Depression ... all the struggles that people have faced, all of the prejudice, all of the biases, all of the poverty, all of the horrible upbringings, but the overwhelming majority of people that grow up in crack-infested households, with alcoholic parents and abusive situations that have a terrible upbringing, the overwhelming majority of these people, they don't kill women. There is no cause-and-effect.

(TT Vol. 21 at 129–30.)

Relying upon *Tennard,* as well as *Eddings* (discussed earlier in regard to Claim 5), and *Smith v. Texas,* 543 U.S. 37, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004) (decided after Fulks's trial had concluded), Petitioner argues that the prosecutor set forth a "legally flawed argument that the jury must find some causal nexus between the evidence offered as mitigating and the crime committed before such evidence can be taken into account by the jury...." (Pet. at 98.)

The court is constrained to deny relief on this claim. As an initial proposition, close examination of the prosecutor's summation, in context, reveals that it did not suggest to the jury that a rigid nexus requirement had to be shown between a mitigator and the murder in question. Viewed as a whole, the prosecutor made the point that "every one of the defense experts admitted there was no cause-and-effect." In other words, none of the experts testified as to a direct correlation between the deficiencies they had identified regarding Fulks's background and physical and mental well-being and the murder of Alice Donovan. In this sense, the prosecutor was commenting on the evidence the jury had heard. He also told the jury that "millions of Americans" suffer from brain injuries, and other maladies, or suffer from a low I.Q., and do not rape and kill women.

In *Tennard,* the jury was instructed to determine the appropriate punishment by considering only two "special issues," which inquired into whether the crime was committed deliberately and whether the defendant posed a risk of future dangerousness. 542 U.S. at 277, 124 S.Ct. 2562. Earlier, in *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the Supreme Court held that a rigid application of three special issues did not allow the jury to give effect to Penry's ***581** mitigating mental retardation and childhood abuse evidence. Notwithstanding *Penry,* the Fifth Circuit had developed the concept of "constitutional relevance" and focused on whether the mitigating evidence was evidence of a "uniquely severe permanent handicap ... [ ]that the criminal act was attributable to this severe permanent condition." *Tennard,* 542 U.S. at 283, 124 S.Ct. 2562. The Supreme Court squarely rejected the Texas court's nexus test. *Id.* at 289, 124 S.Ct. 2562.

It can readily be seen that what was at issue in *Tennard* was the same sort of problem first addressed in *Eddings,* which is some type of statutory or common law bar to the jury giving full consideration to the mitigating factors produced at trial. Unlike the trial court in *Tennard,* this court instructed the jurors that they could consider any factors to be mitigating if the factor tended to suggest life in prison without parole, and not death, should be the appropriate sentence. (TT Vol. 21 at 274.)

The court's instruction, both before and after closing arguments, made no mention of a requirement that there be a causal connection between the mitigating factor and the death of Donovan. Further, the court instructed the jury that arguments of the attorneys were not evidence. (TT Vol. 22 at 250–51.) As the government observes in its brief, in order for the jurors not to have considered the numerous mitigating factors they found (the jury unanimously found twenty-two of the forty-three mitigators advanced by Fulks), they would have had to blatantly ignore this court's oral and written instructions.

In sum, Fulks's counsel was not ineffective for failing to object to the prosecutor's argument. Assuming, without

deciding, that the law announced by *Tennard* was clear at the time the challenged summation was made, the prosecutor's argument did not imply a strict causal nexus was required, and to the extent the prosecutor might have suggested this indirectly, the court's omnibus jury charge clearly explained to the jury the proper role of mitigating factors in this case. Hence, there was no error by the court or counsel.

CLAIM 7:

FBI 302 STATEMENT

[18] In Claim 7, Petitioner alleges that trial counsel were ineffective in advising him to give a statement to the FBI when no proffer letter or plea agreement was in place. Upon being arrested on November 20, 2002 and for the five months that followed, Petitioner gave no statement to the police. On April 28, 2003, pursuant to the advice of trial counsel, Fulks admitted to being involved in the abduction and rape of Alice Donovan. Petitioner argues that absent his voluntary statement, the government would have had difficulty proving either Petitioner's or Basham's guilt beyond a reasonable doubt. Thus, Petitioner argues, his willingness to provide a statement was of great value to the government, and counsel's advice that Petitioner take nothing in exchange for his statement was objectively unreasonable.

The government contends, however, that at the time that Fulks, through counsel, first approached the government about providing information regarding the whereabouts of Alice Donovan's remains, the government had no interest in receiving that information under conditions that would not allow the use of the information directly or derivatively. (*See* Gov't Ex. C, Decl. of AUSA Scott N. Schools at 4.) The government's insistence that information be provided without restriction was based on several realities. First, the evidence against Fulks at that time was already overwhelming. (*Id.*) Second, even though the government was interested in facilitating ***582** the location of Alice Donovan's remains to secure some closure for her family, whatever evidentiary value her remains may have had in November 2002, was likely lost or considerably dissipated by April 2003. (*Id.*) For both of these reasons, the government was willing to forego receipt of any information from Fulks unless the information could be used against him. (*Id.*) Third, the government had determined that Fulks and Basham were the only witnesses to the actual murders and expected that they would accuse each other of committing the murders. (*Id.*) Finally, the government had declined to execute a proffer letter with Basham (when he had sought to cooperate with the government in late-November 2002) when the information known to the government was less extensive. Therefore, the government saw no reason to treat Fulks more favorably in April 2003, after it had overwhelming evidence of Fulks's guilt. (*Id.* at 2, 5.) The government prosecutor stated that, for all of the reasons set forth above, "I can state with certainty that the government would have foregone any interview of Fulks rather than receive information from him that could not be used against him." (*Id.*)

Independently, trial counsel concluded on the basis of the strength of the government's case, that Fulks's guilt was not subject to any reasonable dispute.[26] Trial counsel was knowledgeable about proffers and had attempted to engage in plea negotiations to convince the government to drop the death penalty notice in exchange for Fulks's guilty pleas to all charges.[27] However, prosecutors systematically indicated their unwillingness to recommend a sentence other than death. (*See* Gov't Ex. C, *supra* at 4–6.) With the inevitability of trial on two capital charges, trial counsel focused on the penalty phase as the only way to save Fulks's life by presenting a well-thought-out case in mitigation during the sentencing phase.

Having substantial experience in capital defense as detailed in this court's findings, and in light of the government's unwillingness to withdraw the death penalty notice, Blume made the strategic decision to have Fulks make a 302 statement to the FBI.

According to Blume, Nettles, and Johnson, they reasoned that the only way to get into evidence Fulks's version of the crime spree without subjecting Fulks to cross-examination, was through a 302 statement. Fulks's version claimed that he had a less culpable role in the crimes, specifically pinning ***583** the murder of Alice Donovan on Basham. Because trial counsel wanted the government to admit the 302 statement in the trial, Blume believed a proffer would be self-defeating. Further, trial counsel determined that if Fulks gave a statement without a proffer or a plea agreement, that would demonstrate his acceptance of responsibility and remorse for acknowledging his role in the crimes, especially without asking for anything in exchange. *See* *Meyer v. Branker,* 506 F.3d 358, 369–70 (4th Cir.2007) ("A guilty plea demonstrates remorse, and, since the same jury sits during the guilt and penalty phases of a capital trial, ... it also lessens the exposure of jurors to the often dramatic evidence of

the crime."); *Simpson v. Polk,* 129 Fed.Appx. 782, 797 (4th Cir.2005) (defense strategy was that by entering the guilty plea "maybe the jury would have some mercy and sentence [defendant] to life in prison"); *Jones v. Page,* 76 F.3d 831, 844–45 (7th Cir.1996). As Blume testified:

> The purpose of giving the [302] statement was to not only get Chad's version out there, but to demonstrate some acceptance of responsibility and expression of remorse. And that those might be the factors which persuade the government to drop death or it could be used in mitigation of punishment at the sentencing phase of Mr. Fulks's trial.

(HT Vol. 1 at 45.) Blume also testified:

> Well, it was clear to us at the time the government wasn't going to enter into one. You know, part of the purpose of having him give the statement and then continue to take polygraphs, provide the information, hopefully find the body was not only to try and create —Chad wanted to help, that was one thing. So, we were trying to facilitate his desire to try to help find her remains. We were trying to see if this ongoing cooperation and maybe the assistance of this might create a situation in which a plea bargain might eventually happen. And three, if that didn't to try and create a situation where he could maybe take advantage of responsibility and remorse as mitigating factors.

(HT Vol. 2 at 15.)

Additionally, as the government points out, the 302 statement to the FBI buttressed Fulks's attempt to admit supportive private polygraph examinations. As noted by the government, "[i]n the best case, the polygraphs would support Fulks's assertion that Basham was the killer. In the worst case, the strategy preserved an issue for appeal for which there was some legal support while also assuring that the jury would at least be aware that Fulks had accused Basham of being the killer." (Gov't Mem. Opp'n at 80, citing Gov't Ex. 3, *supra,* at 5).

To the extent that Petitioner claims his 302 statement allowed the government "to fill in the gaps in its evidence," the court finds that any information he provided was cumulative or not critical to the case. That is to say, Petitioner has failed to show that the outcome of his trial would have been different had he not given a 302 statement to the FBI.

The fact that trial counsel advised Fulks to speak with the FBI, and Fulks told the FBI that Alice Donovan was killed in South Carolina and that he provided details of his involvement in the crimes with which he was charged cannot automatically be said to have been ineffective assistance of counsel. Independently of his statement, Fulks's guilt was not subject to any reasonable dispute. As the Fourth Circuit summarized:

> [B]oth Hawkins and McGuffin testified that Basham took orders from Fulks and that Fulks was continually in charge of what the two of them did. Furthermore, the prosecution presented evidence ***584** suggesting that Fulks instigated the Kentucky prison break because he was afraid of being sentenced to a lengthy term of imprisonment on child abuse charges that he learned of the day before the escape. And Tina Severance testified that Fulks, not Basham, approached her about obtaining firearms shortly after their escape. Although Basham also fired shots when Jordan discovered the two of them burglarizing his son's home, Jordan testified that Fulks fired at him as well. Finally, throughout the crime spree, Fulks and Basham only travelled to places with which Fulks

> was familiar, and they did so with Fulks behind the wheel.

Fulks, 454 F.3d at 426.

Petitioner next contests as speculative the suggestion that trial counsel advised him to cooperate with the government as part of an overall strategy to introduce evidence that he did not kill Alice Donovan and Samantha Burns. The evidence at the § 2255 hearing, however, repeatedly demonstrated that such was precisely the strategy:

> I felt like Mr. Fulks could probably tell the story to the police, he could get out his version of the events, which was that he was not the actual killer. And then the government would hopefully admit this at trial as Mr. Fulks's version of the offense. And then I also hoped through maybe if we could help use this to find the body, if we could find the body, with the combination of giving the statement and finding the body, with the polygraph that he was able to pass, the numerous polygraphs might result in the government withdrawing death. So, on balance, you know, although we talked about this a lot, and there was some trepidation, there's always, of course, a lot of trepidation about having your client go and talk to the police, that I felt like it was in Mr. Fulks's best interest to go and talk to the government. (HT Vol. 1 at 41–42.)

* * *

> [T]he purpose of having him give the statement, we wanted to do two things. Number one, is have him show some acceptance of responsibility by not asking for anything. By going to the government and giving a statement which effectively meant he was going to be convicted of these crimes. So, we wanted it to demonstrate, A, acceptance of responsibility, B, hopefully some true indicia of remorse.

(*Id.*) Blume also testified: "I thought that our main chance to save Chad's life was to convince the jury that he wasn't the killer." (HT Vol. 1 at 137.)

The court finds that trial counsel's decision to have Fulks give a 302 statement was a reasonable trial strategy, especially in light of the multitude of witnesses and physical evidence of Fulks's participation in the seventeen-day crime spree. The decision to give the 302 statement was part and parcel of the decision to plead guilty—to get Fulks's version out without exposing him to the microscope of cross-examination given his lengthy criminal record. It was reasonable for trial counsel to advise Fulks to give the statement without a proffer or plea agreement for the strategic reason that it showed some level of acceptance of responsibility and remorse for accepting the role he had in the crimes, while most significantly, establishing his position that he was not the killer. Trial counsel believed Fulks was not the killer, and reasonably believed that he could convey the same information to the government to convince the government to drop death against Fulks and pursue it against Basham as the actual killer. Although the government ultimately did not remove the death penalty notice, but the court finds ***585** that trial counsel's decision to allow Fulks to discuss the case with the FBI was a reasonable trial strategy, and, therefore, does not constitute ineffective assistance of trial counsel.

CLAIM 8:

CATCH–ALL MITIGATING FACTOR

[19] Petitioner alleges in Claim 8 that trial counsel were ineffective for failing to insist that additional, or more favorable, mitigating factors be included on the verdict form.

First, Petitioner argues that what is sometimes referred to as the "catch-all mitigation instruction" on the verdict form did not include the exact language found in 18 U.S.C. § 3592(a)(8), namely, "other factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against the imposition of the death sentence." Absent this language, Petitioner argues the sentencing process was "fatally flawed."

At Fulks's request, the court instructed the jury on a total of forty-three potentially mitigating factors. The verdict form on which the jury recorded its verdict listed these factors. Mitigator No. 41 read as follows: "Other factors in Chadrick Evan Fulks's childhood, background, or character weigh against imposition of the sentence of death." In Claim 8, Petitioner alleges that catch-all Mitigator No. 41 did not track exactly the language of § 3592(a)(8) and is therefore defective.

After the § 2255 petition was filed in this case, the United States Court of Appeals for the Fourth Circuit issued its opinion in the direct appeal of Fulks's co-defendant, Brandon

Basham. The verdict form in the Basham trial did not include even a "watered-down" catch-all mitigator, such as Mitigator No. 41 in the Fulks trial. Basham had objected, at trial, to this court's refusal to include a blank line on the verdict form on which a juror could record some type of catch-all mitigating factor. The Fourth Circuit Court of Appeals rejected Basham's claim. *United States v. Basham,* 561 F.3d 302, 337 (4th Cir.2009).

Basham argued that although this court's oral instructions followed the precise language of § 3592(a)(8), the absence of such a mitigating factor from the special verdict form created a reasonable likelihood that the jurors believed that they were precluded from considering "other factors" in mitigation. Relying upon *Jones v. United States,* 527 U.S. 373, 393, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999), the Fourth Circuit concluded that this court's "explicit instruction" could overcome any ambiguity or confusion caused by the verdict form in Basham's case.

In Fulks's case, as in *Basham,* this court explained to the jury the law regarding aggravating and mitigating factors. With regard to aggravating factors, the court instructed the jury that the statutory and non-statutory aggravating factors contained in the jury instructions and included on the verdict form were the "only ... aggravating factors that you may consider. You *may not* consider any other facts in aggravation which you may think of on your own." (TT Vol. 21 at 273 (emphasis added).)

As to mitigating factors, however, the court told the jury "the law provides that there is, essentially, *no limit* on the number of factors or things that the jury may consider in mitigation." (TT Vol. 21 at 274 (emphasis added).)

The court continued:

> Unlike aggravating factors, the law does not limit your consideration of mitigating factors to those that are listed for you. Therefore, if there are any mitigating ***586** factors not argued by the attorneys for the defendant, but which any juror finds to be established, by a preponderance of the evidence, that juror is free to consider them in his or her sentencing decision.

(TT Vol. 21 at 279.)

In Fulks's case, unlike in *Basham,* the court *did* include a modified catch-all mitigator in the form of Mitigation Factor No. 41. At Fulks's § 2255 hearing, Blume explained that in his view, Fulks would be best served by "as many [mitigators] as possible ... a lot of very short mitigators." (HT Vol. 2 at 185.) He wanted "short declarative sentences which no one can disagree with." (HT Vol. 1 at 174.) Mitigator 41 conveyed the essence of § 3592(a)(8) in the form desired by Blume: short, to-the-point, and unencumbered by compound phrases and repetition that quite possibly could have confused the jury.

Because the Fourth Circuit has already determined that the court's failure to include *any* catch-all mitigating factor on the verdict form was not error, or was, in any event, cured by the court's explicit instructions regarding § 3592(a)(8), and because in the present case, the court gave at least a watered-down version of this concept, the court finds no error in counsel's decision not to request the precise words of the statute be read to the jury.

The second portion of Claim 8 challenges trial counsel's failure to request the statutory mitigating factor provided in 18 U.S.C. § 3592(a)(3):

> [t]he finder of fact shall consider ... (3) Minor Participation. The defendant is punishable as a principal in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge."

In this court's view, for Fulks's trial team to have suggested to the jury that Fulks's participation in the crime was "relatively minor" might well have been counterproductive. As set forth earlier in this order detailing the chronology of events, Basham and Fulks were partners in crime in an extensive

seventeen-day spree that spanned seven states and affected at least thirteen identifiable victims. Fulks drove the automobile, as Basham could not drive. The Wal–Mart video clearly depicts both defendants participating in the abduction and carjacking of Alice Donovan. There was strong evidence that Fulks raped Alice Donovan as evidenced by his semen on the back seat of her automobile.

On this record, trial counsel risked the possibility of a strong adverse reaction from the jury to suggest that Fulks's participation was "minor." To be sure, counsel could, and did, argue that Fulks was "less culpable" than Basham, a strategy that strikes this court as reasonable under the circumstances. The court is not convinced, however, that trial counsel were ineffective for failing to insist on a Minor Participation mitigating factor in this case.

CLAIMS 9, 10, 11, 12 & 27:

GUILTY PLEA

Shortly before trial, the court was informed that Fulks had decided to plead guilty to all eight counts of the superseding indictment and proceed to trial on the penalty phase only. A guilty plea hearing was scheduled for May 4, 2004. At the hearing, the court followed its standard procedure for accepting a guilty plea in compliance with the requirements of Rule 11 of the Federal Rules of Criminal Procedure. Mindful of the serious consequences attendant to a guilty plea, and of the possibility of a later challenge to the validity of the plea, the court was especially careful to ***587** strictly comply with each and every aspect of Rule 11.

Near the end of the Rule 11 colloquy, the court attempted to determine if there was a factual basis for the guilty plea as required by Rule 11(b)(3). It is this court's standard practice with regard to Rule 11(b)(3) to first ask the defendant to advise the court, under oath, exactly what he or she did to become guilty of the crime. This is traditionally followed by a recitation by the prosecutor, or sometimes the investigating law enforcement officer, of the facts the government has developed as a result of its investigation and what evidence the government would be prepared to go forward on and prove if a trial were held. Following this, the court asks the defendant if he agrees with the government's recitation of his involvement in criminal activity.

When the court asked Fulks to explain exactly what he did to become guilty of the facts charged in all eight counts, Fulks responded, through trial counsel John Blume, that instead of making a statement in the courtroom he would rely upon the information contained in the statement he made to the investigating FBI agent as summarized in the agent's 302 report. The court immediately expressed its surprise and concern regarding this development. The court had not been apprised prior to the hearing that Fulks would not make a statement in court, but would instead rely upon the 302 statement to support his guilty plea. Defense counsel further informed the court that the government had agreed to accept the 302 in lieu of Fulks's oral confession at the Rule 11 hearing and that the government also believed the 302 formed a sufficient factual basis to support Fulks's plea on all counts.

The court took a recess to read the 302 to see, in particular, whether all of the elements of the two capital offenses were supported by the facts admitted. After reviewing the 302, the court was not convinced that the statement contained an admission of specific intent relating to the death of Alice Donovan. The court then expressed its concern to counsel that Fulks was attempting to plead guilty to capital crimes without admitting any direct or indirect participation in the death of the victim. Counsel for the defendant and the government all stated that Fulks could plead guilty to the capital offenses, without admitting any specific intent to cause death, under the doctrine set forth in *Pinkerton v. United States,* 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).

[20] Generally speaking, "[t]he *Pinkerton* doctrine imposes vicarious liability on a co-conspirator for the substantive offenses committed by the members of the conspiracy when the offenses are committed during and in furtherance of the conspiracy." *United States v. Carrington,* 301 F.3d 204, 211 (4th Cir.2002) (quoting *United States v. Aramony,* 88 F.3d 1369, 1379 (4th Cir.1996)). Because Fulks admitted in the 302 that he and co-defendant, Brandon Basham, conspired to kidnap and carjack Donovan, counsel argued that Fulks could be held liable for Donovan's death even if he had not intended it, under a *Pinkerton* theory of criminal responsibility.

As the hearing continued, the court expressed its concern about the propriety of accepting a guilty plea to carjacking resulting in death under a *Pinkerton* theory of liability:

> So, on the state of the record here, we have to look at either aiding and abetting liability or *Pinkerton* liability. Aiding and abetting requires some type of specific intent to help bring about the crime.
>
> ***588** I don't think [aiding and abetting] fits the facts set out in his 302 form, because, as I said, Mr. Fulks does not admit that he knew that she was going to be killed, and he does not admit that he wanted to help bring it about.
>
> Then we are left with so-called *Pinkerton* liability, which was established by the Supreme Court in the case of *Pinkerton versus United States* back in 1946. In that case the Supreme Court held that a conspirator may be convicted of substantive offenses committed by co-conspirators in the course of and in furtherance of the conspiracy.
>
> But what I have been agonizing over is, counts 1 and 2, two counts that carry the death penalty, do not charge a conspiracy....
>
> So, I'm not sure that we need to—I think the thing to do is to just stop right here and resume tomorrow and let me hit the books and y'all hit the books tonight to see if the law is that *Pinkerton* can apply to a murder case where a conspiracy is not charged.

(Plea HT, May 4, 2004 at 68–69.)

At the conclusion of that hearing, this court again reiterated its concerns:

> My concern is, I did not know when I walked out here that all I was going to have for a factual statement was his 302 that really admits kidnapping and admits car-jacking, but does not admit any complicity in death.
>
> And so the two options we have I think are looking at aiding and abetting, which I don't think fits....
>
> Then we have *Pinkerton* liability, the co-conspirator theory of imputing liability. But I'm just not sure of my authority to apply that doctrine to counts 1 and 2 which do not charge a conspiracy, and that's my precise question that I would like for y'all to take a look at.

(*Id.* at 72–73.)

The court then adjourned the hearing for three days to allow counsel to brief the question of whether a *Pinkerton* theory of liability could support a guilty plea for carjacking resulting in death. The briefs submitted by both the government and the defendant argued that a *Pinkerton* theory was viable under the circumstances presented in this case.

When the hearing resumed, the court reiterated its tentative concern regarding the *Pinkerton* theory, noted that both parties had urged upon the court that *Pinkerton* was viable, and agreed to accept the plea on this basis. In doing so, the court was trying to steer between the Scylla of accepting a potentially defective guilty plea and the Charybdis of forcing the defendant to go to trial, thereby denying his guilt in front of the jury and possibly compromising his case in mitigation during the penalty phase, if one ensued. Recognizing that the issue might arise again during the course of this litigation, the court entered a memorandum opinion reciting the events leading up to the guilty plea and the court's basis for accepting the plea. *United States v. Chadrick Evans Fulks,* CR No. 4:02–992 [D.S.C.] (order entered July 2, 2004). As the court noted in that order:

> The court ... must balance its own due process concerns about *Pinkerton* against Fulks's right to chose a strategy that he believes gives him the best chance that the jury will spare his life, pleading guilty, but not admitting intent.

Id.

The court noted in that same order that if it were later determined that the guilty plea was improvidently accepted, the error could well prove to be harmless. This was because Count Two, charging Kidnapping resulting in death, has no mens rea requirement ***589** as does Count One, and so if the jury found that the defendant should receive the death penalty on Count Two, any deficiency in the guilty plea to Count One would be harmless. As noted previously, the jury was required to render separate verdicts on both Count One and Count Two and imposed the death penalty on both counts.

As the court supposed at the time the guilty plea was accepted, Fulks has now returned to this court suggesting that notwithstanding his earlier position and the strong urging he made at the time to have the court accept his guilty plea by way of his admission to the 302 as part of a valid trial strategy, his plea should be set aside and a new trial ordered. With this

background, the court now turns to the issues raised in these five claims (9, 10, 11, 12, and 27).

Petitioner asserts the following five claims challenging his guilty plea: (a) Claim 9: that there was not a sufficient factual basis for the guilty plea to Count One because Fulks did not possess the requisite intent to plead guilty to the carjacking count; (b) Claim 10: that trial counsel was ineffective for advising him to plead guilty to the carjacking count; (c) Claim 11: that trial counsel was ineffective for allowing Fulks to plead guilty to the carjacking count because the distinction between the intent required under *Pinkerton* and the gateway intent factors of the Federal Death Penalty Act was too fine for a lay juror to appreciate; (d) Claim 12: that the Eighth Amendment precludes the application of *Pinkerton* in a capital case; and (e) Claim 27: that trial counsel was ineffective in advising Petitioner to plead guilty because this allowed the prosecution to introduce evidence of Petitioner's bad acts that would have been inadmissible in a guilt phase trial to which the Federal Rules of Evidence would apply.

Claims 9 & 12

[21] Because Fulks had the opportunity to raise Claims 9 and 12 on direct appeal and did not, *see* *United States v. Mastrapa,* 509 F.3d 652 (4th Cir.2007) (vacating plea on direct appeal for lack of sufficient factual basis), he has procedurally defaulted these claims. *See* *United States v. Mikalajunas,* 186 F.3d 490, 492–93 (4th Cir.1999). As a result, the court determines Claims 9 and 12 to be procedurally defaulted. Therefore, the only basis for Fulks to maintain any claims challenging his guilty plea is to argue that his trial counsel was ineffective for allowing him to plead guilty, as raised in Claims 10, 11, and 27.

Claim 10

[22] Claim 10 is an assertion that Fulks was denied the effective assistance of counsel when his trial counsel improperly advised him to plead guilty. In this argument, petitioner asserts that he was prejudiced by trial counsel's incomplete and inaccurate assessment of *Pinkerton* which formed the basis for his decision to accept counsel's advice to plead guilty. As a secondary proposition, Petitioner contends that he suffered prejudice by acting in reliance on his counsel's erroneous advice that he plead guilty when the plea lacked a legally sufficient factual basis. In essence, both of these arguments derive from the very same issue that concerned this court when the guilty plea was proffered. For the reasons that follow, the court concludes that counsel was not ineffective with regard to Fulks's plea and, perhaps more importantly, any error committed by trial counsel with regard to the guilty plea was unquestionably cured when the jury returned a verdict of death on Count Two (Kidnapping resulting in death) to which the defendant pled guilty without reliance upon *Pinkerton.*

***590** All of the arguments asserted in support of Claim 10 parrot the court's concern expressed on May 4 and May 7, 2004 when the court was urged by defense counsel and the government to accept the guilty plea. In essence, Petitioner's § 2255 attorneys contend that Fulks's statements contained in the 302 report were not sufficient to support a guilty plea to Count One, and the conviction and resulting death sentence on Count One must therefore be set aside.

The court's basic rationale for accepting the plea to Count One under *Pinkerton* is set out at length in the court's July 2, 2004 order. As the court noted in that order, there is sufficient evidence in the record from which the court could have concluded that Fulks intended serious harm or death, at the moment he took control of Donovan's automobile, to support his plea.

According to Fulks's own 302 statement, at the time Donovan was carjacked, Fulks and Basham were fleeing the scene of an attempted murder and first-degree burglary in a stolen white pickup truck; Fulks and Basham abandoned the pickup truck immediately after they carjacked Mrs. Donovan in her blue BMW from the Wal–Mart parking lot in Conway, South Carolina; and Donovan was subsequently raped and killed. Fulks further admits that he and Basham had previously carjacked and kidnapped Samantha Burns from a mall parking lot in Huntington, West Virginia, just a few days before Donovan's abduction. Burns was also raped and killed. Accordingly, the court could have logically inferred from the 302 that Fulks intended death or serious bodily harm at the moment he carjacked Donovan. [28]

Moreover, as pointed out by the government, the intent requirement for carjacking resulting in death is satisfied when the government proves that the defendant "was conditionally prepared to act if the person failed to relinquish the vehicle." *United States v. Foster,* 507 F.3d 233, 247 (4th Cir.2007). It is not necessary to prove, as the Petitioner apparently contends, that the defendant actually intended to cause the

harm. According to Fulks's 302 comment, Fulks saw that Basham was sitting on Donovan when Fulks first saw that Basham had entered the BMW. Basham, armed with a .22 revolver, forced Donovan into the back of the BMW so Fulks could drive. The physical sitting on Donovan, the ordering that she drive to the back of the parking lot, the ordering of Donovan into the back seat of the BMW, and the use of the .22 revolver were sufficient to infer that Basham, with Fulks's help, possessed the intent to seriously harm or kill Donovan if necessary to obtain control of her vehicle.

Because the record demonstrates that Fulks's trial counsel were correct in their assessment of *Pinkerton* liability, and because Petitioner's plea was supported by an adequate factual basis, the court concludes ***591** that there is no merit to Claim 10. [29]

Claim 11

In Claim 11, Petitioner contends that, assuming arguendo that the guilty plea pursuant to *Pinkerton* was valid, trial counsel was nevertheless ineffective in advising Petitioner to plead guilty because the distinction between intent under *Pinkerton* and the gateway intent factors under the Federal Death Penalty Act is "far too fine a line for a lay jury to appreciate." As the government observes in its response to the petition, no authority is offered for this proposition. Instead, Petitioner simply asserts that the distinction between the intent required for *Pinkerton* liability and the gateway intent factors of the Federal Death Penalty Act is a filament too fine to be disentangled by a jury composed of ordinary citizens.

Initially, it should be noted that such an assertion bespeaks a distrust of the common law jury trial. Frequently, jurors are required to compartmentalize their thinking, draw fine distinctions, and, in some cases, even ignore evidence that was produced in the courtroom. Jurors are sometimes instructed that an item of evidence is admitted against one defendant, but not against another, and jurors are occasionally instructed to consider certain evidence for one purpose (e.g., notice), but not another (e.g., liability). Moreover, it is sometimes necessary for the trial judge to instruct the jury to disregard testimony that it has already heard when a judge later determines it was improvidently admitted. Although this case was, and remains, a serious case to those involved, it was not an unusually complex or intellectually challenging one such as anti-trust cases, securities fraud cases, and a variety of other complex, highly technical disputes that are put before juries across the United States on a daily basis.

Petitioner contends that once a defendant has pled guilty to a crime that has "intent to cause death or serious bodily harm" as an element of the offense, a lay jury will view that as a concession that the defendant did act with the requisite gateway intent set forth in 18 U.S.C. § 3591(a)(2)(D) of "intentionally and specifically engag[ing] in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constitutes a reckless disregard for human life."

Importantly, Claim 11 suffers from a faulty premise, namely, the assertion that "the jury was instructed" that Petitioner had pled guilty to carjacking "with intent to cause death or serious bodily harm." (Pet. at 134.) Contrary to this assertion, when the court instructed the jury, there was no mention of the intent element required for Fulks to be guilty of carjacking. ***592** At the commencement of the trial, the court instructed the jury as follows:

* * *

> Let me stop here and clarify something you may wonder about. As I have said, Mr. Fulks has pled guilty to Kidnapping, resulting in death, and carjacking, resulting death. In pleading guilty to these two charges, Mr. Fulks has admitted that he participated in the Kidnapping of Ms. Alice Donovan and that he participated in the carjacking of Ms. Alice Donovan. He also admits that the Kidnapping and carjacking ultimately resulted in the death of Ms. Donovan. *He denies, however, any direct involvement in the actual death of Ms. Donovan; therefore, the question of whether Mr. Fulks was directly involved in the actual death of Ms. Donovan is a fact that you will have to consider in reaching your verdict in this case.* The statutory intent factors I have just outlined for you relate to the question of whether

> Mr. Fulks had any direct involvement in Ms. Donovan's death.

(TT Vol. 1 at 35–36 (emphasis added).)

Then, at the penalty phase trial's conclusion, the court instructed the jury:

> The defendant's guilty pleas before this trial began ensure that he will be punished with one of the two most severe punishments available under law.
>
> As you know, the defendant has pleaded guilty to two offenses: carjacking, resulting in death, and kidnapping, resulting in death.

(TT Vol. 21 at 249.)

* * *

> The law does not decide which is the appropriate sentence. The law does not assume that every defendant who is found guilty of committing a capital crime should be sentenced to death. Nor does the law presume that this defendant, in particular, should be sentenced to death.

(*Id.* at 249.)

* * *

> Let me now turn and discuss with you the deliberative steps that you should follow in considering as to both of the offenses for which death is a possible punishment. That is, carjacking, resulting in death, and Kidnapping, resulting in death. There are a total of six possible steps. I will first outline for you the steps you may be required to go through, and then I will address each of these steps in more detail later in these instructions.

(*Id.* at 255.)

* * *

> Second, you must consider whether the government has proven, beyond a reasonable doubt and to your unanimous agreement, one of four threshold intent factors.

(*Id.*)

* * *

> Next, before you may consider the imposition of the death penalty, you must also unanimously find, beyond a reasonable doubt, that the defendant acted with one of four potential mental states, called threshold intent factors, described below.

(*Id.* at 257–58.)

The court then gave detailed instructions on the four potential mental states that the jury would have to consider, and then concluded:

> You must find at least one of these threshold intent factors has been proven beyond a reasonable doubt, before you may continue your deliberations.

(*Id.* at 261.)

* * *

> ***593** If you do not find that the defendant acted with one of the described mental states, your deliberations end.

(*Id.*)

It can readily be seen, then, that the jury was merely instructed that Fulks had pled guilty to "carjacking resulting in death," with no reference whatsoever to the mental state that accompanied the guilty plea. The jury was then thoroughly and carefully instructed on the gateway intent factors the government was required to prove, beyond a reasonable doubt, in order to support a verdict of death.

Claim 11 essentially seeks to capitalize on this court's concern over the propriety of Fulks's guilty plea when the court expressed its reservations during the guilty plea phase about whether Fulks had acknowledged enough facts to support a guilty plea under *Pinkerton*. Here, the jury was not confronted with the dilemma that the trial court faced during the guilty plea phase. Accordingly, there is no merit to Claim 11.

Claim 27

[23] In Claim 27, Petitioner contends that had he not pled guilty and gone through a guilt phase trial, the Federal Rules of Evidence would have applied and would have prohibited the admission of Fulks's alleged other bad acts, such as violence towards his wives and former girlfriends. At the sentencing hearing in this case, the jury heard testimony about Fulks beating and raping Heather Goodman, hitting and dragging Amber Fowler, his wife, through the house by her hair, and punching, dragging by the hair, and raping his second wife, Veronica Evans. Evans even testified that on one occasion, Fulks poked an arrow into her, handcuffed her, punched her in the face, and raped her. (*See generally,* TT Vol. 14 at 37–185.)

The government responds that had Fulks opted to plead not guilty and demand a jury trial to determine his guilt, much of the testimony cited above would have come in as evidence of other bad acts offered to show motive or intent under Rule 404(b) of the Federal Rules of Evidence.

The court does not have to reach the argument made by the government because Claim 27 suffers from a fatal analytical flaw. Even assuming, had Fulks opted for a trial on guilt, that the court kept out evidence of violence towards other women, if Fulks had been convicted at the guilt phase trial, evidence of the violence towards other women would still have come in at the penalty phase, just as it did in the trial that was conducted. In other words, reasonable counsel would have concluded that evidence of violence towards women would be admissible in a penalty phase regardless of whether the penalty phase was occasioned by a guilty plea or a verdict of guilty by a jury following a trial. This fact has nothing to do with whether it was reasonable for Fulks to plead guilty based on the evidence the government had collected against him in this case.

At the § 2255 evidentiary hearing, Fulks advanced an argument not directly made in his petition, which is that *Pinkerton* and other considerations aside, it was bad trial strategy to plead guilty to the death-eligible counts. Rather, the argument goes, Fulks should have pleaded not guilty and required the government to prove guilt beyond a reasonable doubt. In support of this argument, Petitioner submitted the testimony of Andrea Lyon, a clinical professor of law at DePaul University College of Law in Chicago, and also an experienced capital litigator. Lyon has practiced since 1976 and specializes in criminal defense, almost exclusively homicides and capital offenses.

***594** Lyon testified to the remarkable proposition that there are *never* any circumstances imaginable under which it would be appropriate to plead guilty to a capital crime without the government's concession for a sentence of life. In fact, Lyon contended that such a position is the "standard practice in [the] industry." (HT Vol. 2 at 84 (emphasis added).) This court rejects Lyon's opinion on the categorical illegitimacy of pleading guilty when death remains on the line.

Some six months after Fulks's trial, the United States Supreme Court decided *Florida v. Nixon,* 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004), in which the Court determined that counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial does not automatically render counsel's performance deficient. In *Nixon,* the Court noted that a guilty plea "may be tactically advantageous for the defendant," citing to its ruling in *Boykin v. Alabama,* 395 U.S. 238, 240, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and also noted that where counsel is unable to negotiate a guilty plea for a

life sentence, defense counsel "must strive at the guilt phase to avoid a counterproductive course." 543 U.S. at 191, 125 S.Ct. 551 (citing Sundby, *The Capital Jury and Absolution:* The Intersection of Trial Strategy, Remorse, and the Death Penalty, 83 Cornell L.Rev. 1557, 1597 (1998) (explaining that "in capital cases, a 'run-of-the-mill strategy of challenging the prosecution's case for failing to prove guilt beyond a reasonable doubt' can have dire implications for the sentencing phase.")).

In fact, immediately after referencing one of Lyon's law review articles, the *Nixon* court stated, "[i]n this light, counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in a 'useless charade.' " 543 U.S. at 192, 125 S.Ct. 551 (quoting *United States v. Cronic,* 466 U.S. 648, 656–657 n. 19, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)).

In light of the overwhelming evidence against Fulks, the court finds that trial counsel employed a valid and reasonable trial strategy in anticipatorily heeding the dictate in *Nixon* that "in a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed." 543 U.S. at 192, 125 S.Ct. 551. In advising Fulks to plead guilty and proceed directly to the sentencing phase in an effort to avoid a death sentence, trial counsel reasonably determined that it was in Fulks's best interest to concede guilt as a way of showing remorse and accepting responsibility. Counsel's performance in allowing the guilty plea cannot be said to have fallen below an objective standard of reasonableness under *Strickland.*

In sum, trial counsel was not ineffective for advising Fulks to plead guilty to carjacking because it was done pursuant to a reasonable legal trial strategy.

CLAIM 13:

MINOR PARTICIPATION

[24] Among the mitigating factors that the jury is required to consider in determining whether a sentence of death is to be imposed on a defendant under the Federal Death Penalty Act is the defendant's role in the offense. Specifically, 18 U.S.C. § 3592(a)(3) provides: "Minor participation. The defendant is punishable as a principal in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge." "In other words, if a defendant is guilty of an offense, *but played a small part in it,* the ***595** jury (or, in a bench trial, the judge) could find that he was not sufficiently culpable to warrant the imposition of the death penalty." *United States v. Moussaoui,* 382 F.3d 453, 486 (4th Cir.2004) (Gregory, J., concurring in part, dissenting in part) (emphasis added).

As Blume testified, one of trial counsel's main goals at trial was to demonstrate that Fulks was not the person who actually killed Donovan or Burns. In that effort, the trial team assembled information about Basham to prove that he was more culpable for the crimes than Fulks. Blume stated, "we exhausted the sources that I was aware of at the time." (HT Vol. 2 at 19.)

Petitioner claims that trial counsel neglected to introduce evidence that Basham was a master manipulator and the leader for the purpose of a comparative analysis between Basham and Fulks to differentiate their degrees of culpability. Petitioner goes to great lengths to claim that the government portrayed Fulks as the leader during his sentencing trial. However, a review of the record shows that the government's argument was that Fulks and Basham were equally culpable:

> They were a two-man death squad. Two men, forming one team. They could not have done things that they did to Samantha, and they could not have done things they did to Alice without acting in unison, without acting as one.
>
> The government is not saying Chad Fulks is more culpable than Brandon Basham. And the government is not saying that Brandon Basham is more culpable than Chad Fulks. They are equally culpable.

(TT Vol. 21 at 24.)

Specifically, Petitioner claims trial counsel should have obtained testimony from staff of Columbia Care Center ("CCC") and from prison guards at the Alvin S. Glenn Detention Center ("AGDC"). As to the CCC staff, Petitioner argues that trial counsel should have called detention officer Jeremiah Bush to testify about Basham's construction of a rope made of bed sheets for a planned escape at the facility. Petitioner suggests that because a similar rope was constructed for the escape at the Hopkins County Detention Center ("HCDC") in Kentucky, the jury could have concluded

that Basham's role in constructing the rope was some evidence of his leadership in the HCDC escape and the later incidents of the crime spree.

However, this argument ignores the evidence pointing to Fulks's own attempt to escape from CCC while awaiting trial. That escape attempt involved Fulks having hoarded five bed sheets torn into a rope-like configuration, having removed the screen from his room window, having collected pepper packets to throw off police from his scent, and having attempted to persuade another inmate provide an alibi for him. (HT Vol. 2 at 21.)

Petitioner next argues that trial counsel should have called CCC nurse supervisor Celia Bowman to testify that Basham was a very manipulative inmate who skillfully manipulated the staff to obtain medication and other items. (Basham TT Vol. 10/12/2004 at 15–227.) Likewise, Petitioner argues that trial counsel should have called prison guard Robert McEachern to describe Basham as "very observant," "intelligent," and "crafty," (Basham TT Vol. 10/13/2004 at 16–102); and prison guard Francis Kirkland to describe Basham as "... very aggressive. Aggressive-type individual. He likes to have things his way or no way at all. He wants to take control." (Basham TT Vol. 10/13/2004 at 16–62). Petitioner complains that trial counsel should have called prison guard Lee James to describe Basham's leadership qualities: "He is a leader. He can lead. ***596** He can get the dorm in an uproar when he wants to," (Basham TT Vol. 10/14/2004 at 17–57); and prison guard Erick Dash to comment on Basham's volatility: "He is manipulative. He can go off at anytime. You never know. He can just go off." (Basham TT Vol. 10/14/2004 at 17–65).

Petitioner's claim that trial counsel was ineffective in failing to introduce testimony by CCC staff and AGDC prison guards on Basham's leadership and manipulation is unavailing. The reality is that trial counsel did present substantial evidence of Basham's leadership and manipulation, to consider in conjunction with Petitioner's self-serving statement to the FBI disclaiming any direct part in the death of Alice Donovan. It is not reasonable to suggest that evidence from the foregoing additional witnesses would have established evidence of Petitioner's role as a follower and not a leader such that Petitioner would have not been sentenced to death.

[25] Evidence that makes one defendant look more culpable does not necessarily help another defendant in the case. *See* *Howard v. Moore,* 131 F.3d 399, 420 (4th Cir.1997) (co-conspirator's intent to kill victim was not mitigating evidence in favor of defendant). Furthermore, a co-conspirator's state of mind is not relevant to the jury's determination of the proper punishment of another defendant because the Eighth Amendment requires an individualized determination of sentencing in death penalty cases. *Id.* (citing *Lockett v. Ohio,* 438 U.S. at 604, 98 S.Ct. 2954).

Contrary to Petitioner's argument, trial counsel effectively portrayed Basham as the leader and more aggressive than Fulks, including testimony from Tina Severance that Basham had a quick temper and was paranoid (TT Vol. 4 at 21); that Basham wore Samantha Burns's ring around his neck and that he threatened Severance (*id.* at 15–17); and that Basham was a time bomb ready to explode. (*Id.* at 22.) Through Andrea Roddy, trial counsel focused the jury on Basham's possessiveness of the stolen guns and his threats to kill police officers and a teenage boy. (*Id.* at 103–106.) However, the evidence of Fulks's own actions cut against Petitioner's argument that he had a minor participation in the crime spree.

Fulks's actions could not be described as lesser such that he could reasonably be considered to have been a minor participant in the crime spree. When asked by the government, "Did you see Mr. Fulks as a minor participant in this case?" Blume testified pithily, "No." (HT Vol. 2 at 184.) Moreover, the trial record reflected abundant evidence of Fulks's own aggressiveness, craftiness, and manipulation. More problematically, witnesses who had observed both Fulks and Basham provided devastating testimony of Fulks's leadership and ordering Basham around. The uncontradicted testimony was that Fulks, not Basham, drove the vehicles during the commission of all three kidnappings. James Hawkins testified that it was Fulks who ordered him to put his arms around a tree; who ordered Basham to tape Hawkins's hands; who cursed at Basham that he wasn't "doing it fucking right;" who taped Hawkins's hands more tightly; who tied his legs together; and who duct-taped his mouth shut. (TT Vol. 2 at 133–46.)

It was Fulks who chose to travel to Tina Severance's home; who convinced her to occupy her friend, Robert Talsma, while Fulks and Basham stole his guns (*id.* at 78–79); and who later pointed a gun at her head at the Lake Shore Hotel, which she testified was "the closest she came to dying." It was Fulks who drove to visit his family; who Carl Jordan testified shot at him, along with Basham. (TT Vol. 5 at 49–61.) Fulks stole and drove Olieta Hyman's pickup truck into the Wal–Mart parking

***597** lot. Fulks chose to leave the pickup truck and get into the driver's seat of Alice Donovan's car, while Basham sat on top of her with a gun in his lap. Fulks drove himself, Basham, and Donovan away from the Wal–Mart parking lot. (*Id.* at 123–155.) It was Fulks who purchased electrical tape from the gas station (TT Vol. 6 at 16), who then drove to an isolated area where he and Basham raped Alice Donovan. (TT Vol. 6 at 29–32, 43–45, 56.)

Fulks's trial counsel attempted to portray Basham as the more aggressive and the leader of the two. It is speculative to suggest that any additional evidence in the form of testimony from the CCC staff and prison guards would have convinced the jury that Basham was more of a "master manipulator" than was Fulks. It was Fulks who, after stealing a shirt emblazoned with the FBI emblem, impersonated an FBI agent to rob two young men, and afterwards laughed at his cunning play. (TT Vol. 14 at 72, 97.) It was Fulks who convinced CCC staff of his terrible pain, but who was able to attempt an escape, fight five guards, and badly wound one. Perhaps most notable was Fulks's pretending, in the presence of a jailhouse prayer group, to receive a telephone call informing him that his wife, mother-in-law, and newborn baby girl had been hit by an eighteen-wheeler, and none of them was expected to survive. He cried in his cell for a day and a half (TT Vol. 14 at 259), so much so that his bed linens were wet with tears. (*Id.* at 260.) So convincing was his pretense that the nurses gave Fulks Tylenol PM to help sedate him (*id.* at 260).

While at another place of incarceration, Fulks persuaded his fellow jail inmate's mother, Nell Lee, to bond him out. After he told Nell Lee that his mother-in-law had died, his wife was injured, and that his little girl was in critical condition (*id.* at 282), Nell Lee spent about two hours on the telephone in an attempt to help him find the hospital where his alleged daughter was located. (*Id.* at 281.) The next day, Fulks had Nell Lee take him to the airport to rent a car to go take care of his child. (*Id.* at 280.) When Fulks was unable to rent a car, Nell Lee loaned him a car, gave him money for gas (*id.* at 281), and gave him a note indicating her permission for Fulks to use the car for five days. (*Id.* at 283.) Each day for five days, Fulks called Nell Lee to report his baby girl's condition. (*Id.* at 284.) On the fifth day, Fulks told Nell Lee that he would be back with her car in about two hours. (*Id.* at 285.) Nell Lee did not hear from Fulks again, but later discovered the truth: that there had been no accident, and in fact, that Fulks had no wife, mother-in-law, or baby.

In sum, the court finds that Petitioner has failed to show any evidence that trial counsel failed to present evidence of Basham's manipulation and leadership that would have overcome the prosecution's compelling exegesis of Fulks's own manipulation and leadership.

CLAIM 14:

FUTURE DANGEROUSNESS

[26] In an effort to persuade the jury that Fulks would not pose any future problems to staff or other inmates if allowed to serve a life sentence in prison, Fulks's trial team retained, interviewed, and had on standby three potential witnesses to testify on the issue of future dangerousness. These witnesses were: Don Romine, Dr. Mark Cunningham, and James Aiken. Ultimately, only one of the three, Romine, was called to testify at trial. Romine was a former Marine with thirty-one years of experience working for the Federal Bureau of Prisons. (TT Vol. 19 at 63–64.) He began his career as a correctional officer and worked his way up to a senior ***598** executive level position, ultimately serving as warden at two federal prisons, including a high-security facility. (*Id.* at 65, 72.) Romine had also helped draft security policies for federal prisons. (*Id.* at 66–67.) He received an award for heroism while working at the federal facility at Marion, Illinois. (*Id.* at 69–70.)

Romine was called as a witness to testify to the simple proposition that no one escapes from federal maximum security institutions. To this end, Romine described the elaborate security apparatus and procedures in place at the institution at which Fulks would be housed if given a life sentence. In this court's view, Romine was perhaps one of the strongest witnesses the defense team presented in terms of attempting to spare Fulks's life.

As for the two witnesses who were not called, if they had testified in accordance with their declarations attached to the petition, they would have said that Fulks was a gentle person who would not constitute an escape risk or threat to prison safety. Among other things, Cunningham would have testified that, in his opinion, an offender's alleged acts of violence in the community have little value in predicting violent behavior in a prison context. (Pet. Ex. 77 at ¶ 8.) Aiken would have gone further, testifying that rather than Fulks being a threat to other inmates, Fulks himself would have been a potential victim: "In fact, the major concern I have of Mr. Fulks is the need to protect him from the predator, more dangerous,

violent and disruptive prison population, especially as he grows older." (Pet. Ex. 76 at ¶ 12.) Aiken would have also testified to the somewhat remarkable proposition that Fulks's "criminal history and confinement record do not reflect a pattern of a prison predator nor is there evidence of his continual, methodical use of violence to gain control over inmates, staff or the operation of the prison." (*Id.* at ¶ 8.)

In discussing the tendency of some attorneys to "overtry" a case, the late Francis Murnaghan of the United States Court of Appeals for the Fourth Circuit once observed,

> Resourceful lawyers ... often desire to be thorough and to overlook nothing in the commendable zeal to afford first-class representation. Consequently in many cases they tend to excess as they inundate us with a plethora of arguments, some good and some not so good. Sometimes one wonders whether such lack of selectivity is not counterproductive, for a party raising a point of little merit exposes himself to the risk of excessive discount for a better point because of the company it keeps. [30]

What Judge Murnaghan said regarding cumulative and sometimes counterproductive arguments can also be said about trial witnesses. To have added the testimony of Cunningham and Aiken to that of Romine, perhaps the defense's strongest witness in the entire trial, could well have been counterproductive because it would have arguably weakened Romine's testimony.

The choice of what type of expert to use is one of trial strategy and deserves "a heavy measure of deference." *Turner v. Calderon,* 281 F.3d 851, 875–76 (9th Cir.2002). On the record in this case, the court is unable to conclude that the decision to call only one of the three potential witnesses for testimony regarding future dangerousness was constitutionally ineffective trial strategy.

***599** As the government observes in its memorandum in opposition to the § 2255 petition, Cunningham would have actually given testimony damaging to the Petitioner. In his declaration, Cunningham conceded that there is a 20 to 30 percent likelihood of a capital offender committing an act of violence at some time during his prison term, and an 8 to 10 percent likelihood that a capital offender will present a chronic violence problem. (Pet. Ex. 77 at ¶ 11.) Moreover, Cunningham estimated that there is between 26.2 and 31.5 percent probability that Fulks would commit a "serious assault" during his incarceration. (*Id.*)

Nevertheless, Cunningham was apparently prepared to testify that Fulks's "prior prison incarceration and incarceration pretrial records reveals [sic] that he has no serious violence in his past prison confinement, and has exhibited no serious violence in past extended jail incarcerations." (*Id.* at ¶ 9.)

Cunningham and Aiken would have no doubt been extensively cross-examined about Fulks's behavior while incarcerated. To begin, Fulks successfully escaped from jail in Kentucky, and attempted on two occasions to escape while being held pending trial in this case. One of these attempts included collecting bed sheets to make into a rope, and accumulating small quantities of pepper that could be used to throw off tracking dogs. (TT Vol. 15 at 117–40.)

The record in this case contains several episodes of what could be termed major scuffles with prison guards while Fulks was being held awaiting trial in this case. These included an April 2003 incident where Fulks became angry because he was not allowed to carry personal photographs with him during a prison move. In the ensuing scuffle, Fulks kicked the officers, attempted to bite them, and spit on them. (TT Vol. 15 at 81–108.)

The following month, while at the inmate medical facility CCC, Fulks became agitated and refused to put on a paper gown. Again, a scuffle ensued and Fulks kicked one officer and bit another sufficient to cause blood to ooze through the officer's shirt. (*Id.* at 195–99.) That same day, when a nurse attempted to administer a sedative to Fulks, which had been ordered by a doctor, Fulks again began swinging, kicking, yelling, and biting. It took five correctional officers to restrain Fulks long enough for the nurse to administer the sedative. (*Id.* at 185.)

There was ample evidence of an abdominal wound that Fulks administered to himself, and thereafter manipulated by removing the dressing and inserting toilet paper and removing it from the wound. (TT Vol. 20 at 59.) All of

these transgressions would have been a fertile field for cross-examination by the government and would have seriously undermined the witnesses's credibility, if not the credibility of the entire defense case.

When questioned at the hearing why Cunningham and Aiken were not called, Blume admitted that although Cunningham had testified at a number of federal capital cases, he had always testified as a defense witness. Blume was therefore concerned that he would be viewed as nothing more than a "hired gun" for the defense. (HT Vol. 1 at 167.) As to Aiken, Blume testified that he believed that he got the same testimony that Aiken would have given from Romine, and he was concerned about having "two people up there that might contradict each other on the small points. I felt we got what we needed out of Mr. Romine." (HT Vol. 2 at 22.) Finally, Aiken's experience was more related to the state prison system, whereas ***600** Romine dealt exclusively with the federal correctional facilities.

On this record, the court concludes that Blume's decision not to call Cunningham and Aiken to testify as to Fulks's future dangerousness was part of a reasonable trial strategy.

CLAIM 15:

VOIR DIRE

In Claim 15, Petitioner claims that during voir dire, his trial counsel failed to gather useful information, educate the prospective jurors, or establish a rapport with them. He also contends that counsel was ineffective by failing to ask open-ended questions, to listen to the answers, and to show the jurors respect and honesty. As a result, Petitioner argues that the was denied a fair trial.

Blume was well-familiar with conducting an effective voir dire. In addition to having participated in fifteen to twenty mock death penalty voir dires, and three actual courtroom voir dire proceedings, Blume has written on voir dire in capital cases, including an article entitled "*Probing Life Qualification Through Expanded Voir Dire,*" 29 Hofstra L.Rev. 1209, 1220 (2001). Blume has also lectured on conducting voir dire in capital cases. In the instant case, trial counsel retained jury consultant Jeff Bloom to conduct a mock voir dire session for the trial team, during which the trial team members critiqued one another and discussed what to try and accomplish during voir dire. (HT Vol. 2 at 23–24.)

Blume testified that the team's approach to voir dire was to "try and identify jurors who are likely to give the death penalty, to do what you can to get them excused for cause, to —and then to try and identify jurors who might be receptive to your case in mitigation or your case for life and to try and give them the tools to get out of the jury room with a life verdict if they want to vote for life." (HT Vol. 2 at 33.) To that end, trial counsel developed a detailed voir dire outline (Gov't Ex. 51), along with a more condensed version (Gov't Ex. 49) to be used at the podium during voir dire.

Prior to jury selection, the trial team compiled a notebook of the juror questionnaires, with each team member tasked to go through the questionnaires and to rate them pre-voir dire as to their "pro deathness or lack thereof" basis (Gov't Ex. 56–14); (HT Vol. 2 at 27). Specifically, the trial team adopted the "Colorado Method of Jury Selection." (Gov't Ex. 52.) Such a method was developed for use capital cases to rate potential jurors on a scale of 1 through 7 based on their views on the death penalty, with 1 being a juror who would never under any circumstances give death, and 7 being a juror who would always give death.

The trial team's pre-voir dire assessments were consolidated together on a single sheet for use during voir dire. During voir dire, trial counsel had four or five members of the team fill out a "Juror Rating Form" on each juror. Trial counsel prepared a chart of the jurors deemed qualified by the court for use in determining its strikes. (Gov't Ex. 53.) The chart contained a composite of information on each juror, including their name, their race, the status of whether they were qualified over an objection or not, and the trial team's rating assessment.

In preparing to select the jury, the trial court, upon defense counsel's motion, summoned a state-wide venire of 800 jurors. Each juror was mailed a standard questionnaire containing a total of fifty-eight questions to be returned to the court in advance of jury selection. These questionnaires were formulated after receiving suggestions from the government and the ***601** defendant. Each venireperson was also given a supplemental questionnaire upon arrival at the courthouse to test his death penalty views on paper before one-on-one questioning by the court and counsel. Defense counsel received most of the standard questionnaires several weeks in advance of voir dire. [31]

The court conducted jury selection from May 10 to May 21, 2004. At least one assisting defense lawyer (if

not two) was present at counsel table at all times to assist the lawyer questioning prospective jurors. Voir dire was conducted by Blume, Johnson, and Nettles.[32] The assisting lawyer routinely pointed out to counsel engaged in questioning additional information (either from the standard questionnaire, the supplemental questionnaire, or just general followup) he or she thought important to ensure that all defense questions had been answered before a juror was excused.

The voir dire of each venireperson commenced with the court explaining that an individual at the extremes, that is, one who would either always or never impose the death penalty, is ineligible to serve on the jury. The court advised each venireperson that the court needed jurors "in the middle" who could base their decision on the law and the facts. The court explained to each juror that he or she must listen to the evidence carefully, then listen to the law as it is explained by the trial judge, and apply the law, whether he or she agrees with the law or not. The court asked each juror if he or she understood this requirement and asked if the juror could comply with those instructions and be fair and impartial. (TT Vol. 1 at 64–65, 183–84; Vol. 2 at 6–8, 277–79; Vol. 4 at 25–27; Vol. 5 at 114–15, 260–62, 291–92; Vol. 6 at 234–35; Vol. 8 at 104–106, 173–75, 229–32.) Each prospective juror was also individually subjected to voir dire by the government and Fulks's trial counsel.

Additionally, each venireperson was asked if he or she would automatically impose the death penalty for capital murder, how each juror would vote when faced with evidence of a double murder, and permitted Fulks to extensively question the prospective jurors concerning their views on the death penalty. The Fourth Circuit found such an examination plainly sufficient to satisfy *Morgan v. Illinois,* 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992); *Fulks,* 454 F.3d at 430 n. 7.

Petitioner complains that trial counsel's questions were rambling, confusing, intimidating, too long, and did not engage the prospective juror in a dialog. He also contends that trial counsel failed to ask open-ended questions, to listen to the answers, and to show the jurors respect and honesty. Petitioner complains that the manner of trial counsel's voir dire denied him a fair trial.

[27] The Sixth Amendment guarantee of counsel does not guarantee an ideal or perfect representation. *Mickens v. Taylor,* ***602** 240 F.3d 348, 363 (4th Cir.2001). Instead, it "guarantees a defendant on trial for his life the right to an impartial jury." *Morgan,* 504 U.S. at 728, 112 S.Ct. 2222.

This court presided over Blume's voir dire of all the venirepersons, and has reviewed the transcript of the jury selection process. After this review, the court is constrained to disagree with Petitioner's contention that Blume's questions to prospective jurors were rambling, confusing, intimidating, or otherwise ineffective. As the court has noted previously, Blume brought with him to the trial a wealth of experience in the well of the courtroom. Petitioner's bald allegations that the questions posed by Blume were improper, ineffective, or offensive to jurors is unavailing. The court finds no error in trial counsel's conduct of voir dire.

CLAIM 16:

JUROR QUESTIONNAIRES

[28] Petitioner claims that trial counsel were ineffective in their review of juror questionnaires. Prior to jury selection, all prospective jurors were required to complete a written juror questionnaire. Question 42 of the juror questionnaire inquired into whether the juror or any close relatives had been a victim of a crime. Juror Sylvia Allison left blank question 42. Petitioner now alleges that his trial counsel were ineffective in not asking Allison why she left question 42 blank—the answer to which would have revealed that her husband had been murdered in 1971. (*Id.* at 158–159.) The court qualified Allison over Fulks's objection on other grounds.

Fulks appealed the trial court's rulings concerning Allison, and the Fourth Circuit affirmed, finding no error. *Fulks,* 454 F.3d at 410. Because Fulks raised this issue on direct appeal, the government argues that Petitioner is foreclosed from asserting it in this § 2255 matter. *See Withrow v. Williams,* 507 U.S. 680, 715, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (Scalia, J., concurring) (listing cases holding that a federal prisoner generally cannot raise on collateral review a claim that was previously decided on direct review).

Out of an abundance of caution, however, the court has considered the merits of Petitioner's argument, and finds the ineffective assistance claim to be without support. The *Strickland* test requires that Petitioner show a reasonable

probability that "the result of the proceeding would have been different." *See* *Strickland v. Washington,* 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Luchenburg v. Smith,* 79 F.3d 388, 393 (4th Cir.1996) (requiring the petitioner to show a reasonable probability of prejudice). Because Petitioner cannot demonstrate a reasonable probability of prejudice if trial counsel had questioned Allison on question 42 (which she left blank), his ineffective assistance of counsel claim fails.

At a post-trial hearing to ascertain whether Allison had been actually biased against Fulks or whether the circumstances surrounding her husband's murder and her failure to disclose it warranted a finding of implied bias, Allison testified that her failure to answer Question 42 was inadvertent. When asked by the court whether there was "even any remote possibility" that her husband's murder "had some influence in [her] deliberations," Allison responded: "None at all." *Fulks,* 454 F.3d at 431.

This court denied Fulks's motion for a new trial and discussed at length its reasoning in an order dated December 23, 2004, 2004 WL 5042206. Specifically, the court applied the test established by the Supreme Court in *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984), and ***603** found that had Allison actually answered question 42, she would not have been excluded for cause. Further, the court found that Allison honestly believed she had disclosed her husband's murder and that Fulks had failed to show that Allison was actually biased. Finally, the court found the circumstances of Allison's husband's murder and her failure to disclose it did not warrant a finding of implied bias. The Fourth Circuit affirmed this court's ruling on appeal. *Fulks,* 454 F.3d at 432–33.

Petitioner has failed to show that juror Allison's participation affected the fairness or the reliability of the trial, and that if trial counsel had asked Allison about question 42, the result would have been different. To the extent that Petitioner contends that he was denied the opportunity to exercise a peremptory challenge on Allison, the Fourth Circuit has explicitly rejected this analysis post-*McDonough.* [33] Therefore, his ineffective assistance of counsel claim fails.

CLAIM 17:

ADDITIONAL PEREMPTORY STRIKES

[29] In Claim 17, Petitioner alleges that trial counsel were ineffective for choosing to seat automatic death venirepersons, instead of moving for additional peremptory strikes. After the court refused to excuse jurors Goehring, Harvey, Allison, Novinger, and Plyler for cause, trial counsel elected to seat them, hoping for reversal on appeal. Fulks challenged the seating of these five jurors on direct appeal, and the Fourth Circuit rejected Fulks's challenges. [34] *See* *Fulks,* 454 F.3d at 410, 427–35.

Trial counsel lodged objections to those jurors they believed were erroneously qualified, struck some jurors, and seated three jurors based on trial counsel's understanding that to preserve the issue for appeal, he needed to seat the jurors. Petitioner asserts that lead counsel was unfamiliar with federal jury selection procedures. The evidence in the records proves otherwise. Aside from Blume's extensive familiarity and experience with capital voir dire, Nettles had at least fifteen years of experience in federal jury selection procedures from working in the Federal Public Defender's Office. Furthermore, the records of trial counsel reveal that Blume considered filing a motion for additional strikes, but chose not to based on a reasonable strategy of preserving what he perceived as a strong appealable error.

While Petitioner characterizes the foregoing jurors as "automatic death venirepersons," such was not the court's assessment of the jurors, otherwise the court would have dismissed them for cause. The ***604** court's own voir dire of the venirepersons eliminated the individuals "at the extremes"—who would either always or never impose the death penalty—as ineligible to serve on the jury. Therefore, the remaining venirepersons were those "in the middle" who informed the court, either orally or in their written questionnaires, that they could base their decision on the law and the facts.

The court disagrees with Petitioner's claim that trial counsel's decision not to move for additional strikes fell below an objective standard of reasonableness. The court's evaluation of counsel's performance "must be highly deferential," judged "on the facts of the particular case," and considered "from counsel's perspective at the time." *Strickland,* 466 U.S. 668, 689–690, 104 S.Ct. 2052. The court finds trial counsel's decision to seat the foregoing venirepersons and not to request

additional peremptory strikes was based on a reasonable strategy of preserving an issue for possible reversal. In light of the *Strickland* standard, counsel's decision was reasonable and entitled to deference.

CLAIM 18:

THE "DEER" STATEMENT

[30] Petitioner's Claim 18 alleges that appellate counsel were ineffective for not appealing this court's ruling sustaining a government objection to a statement by Sheriff Ronald Hewett regarding a partial "admission" allegedly made by Basham. Petitioner claims that the partial statement "was a key piece of evidence showing that Fulks did not strike the fatal blow that killed Alice Donovan," and "would likely have led the jury to a different conclusion about Petitioner's moral responsibility for Donovan's death." The court disagrees and finds that appellate counsel was not ineffective because the Fourth Circuit would not have found an abuse of discretion by the court in denying the admission into evidence of Basham's statement to Sheriff Hewett.

By way of background, Basham met with law enforcement representatives in Brunswick County, North Carolina, on November 28, 2002, to help search for the remains of Alice Donovan. Accompanying Basham were Sheriff Hewett, FBI Agent Jeff Long, an unidentified police officer, and two of Basham's attorneys. According to Hewett, at some point during their ride, a deer jumped in front of their vehicle and Basham volunteered: "You know, I could never kill a deer and here I have...." Hewett stated that Basham stopped before finishing the sentence. (Pet. Ex. 30).

During Fulks's trial, his counsel sought to introduce Basham's so-called "deer statement" as a declaration against penal interest or an excited utterance, [35] as evidence that Basham, and not Fulks, killed Donovan. The government argued against ***605** admission of the statement as being taken out of context and as ambiguous. The court agreed with the government and ruled that Basham's deer statement was inadmissible.

Petitioner argues that during the Basham trial a few months later, the government took an inconsistent position when it introduced Basham's deer statement through Sheriff Hewett. He thus contends that his attorney should have raised the issue on appeal. [36]

The court finds that appellate counsel's decision not to appeal the court's exclusion of the Basham's deer statement in Fulks's trial was not ineffective. As Blume testified, "[i]f there was an argument which I thought was potentially meritorious, I would have raised it." (HT Vol. 2 at 37.) Given the broad discretion afforded to trial courts in evidentiary rulings, appellate counsel would have had to demonstrate that the court abused its discretion in excluding Basham's deer statement. *United States v. Hedgepeth,* 418 F.3d 411, 419 (4th Cir.2005).

Petitioner fails to show an abuse of discretion. As the court analyzed in detail during argument outside the jury's presence, while Basham's deer statement tends to show that Basham was involved in Donovan's murder, it does not absolve Fulks of involvement in the murder. In discussing the issue at trial, the court noted that second half of Basham's deer statement could have included any number of things such as "here I have helped my co-defendant kill one, I helped bury a dead body, I held the woman down while she was killed. He could have said a number of things that still inculpated [himself]." (TT Vol. 21 at 251.)

Moreover, the court was concerned that if it admitted Basham's partial deer statement, it would have to admit the rest of Basham's statements to authorities—made on multiple occasions—that it was Fulks who actually killed Donovan. For example, during the same day spent searching with Sheriff Hewett, Basham said that Fulks slit Donovan's throat and stuffed her in the trunk of her car.

Ultimately, the court applied the balancing test required by the Federal Death Penalty Act, 18 U.S.C. § 3593(c), and denied the admission of Basham's deer statement because the danger of confusing the issues and misleading the jury substantially outweighed its probative value. To admit the deer statement, which is ambiguous and only partially implicated Basham in the murder of Donovan, while at the same time disallowing the remainder of Basham's recitations of what happened—all of which pinned the blame for the death squarely on Fulks—would have unquestionably mislead the jury as to the import of Basham's deer statement.

Finally, in light of the fact that the trials of Fulks and Basham were severed on the defendants' motion, the court found

that allowing testimony about all of Basham's statements regarding Fulks's culpability would defeat the purpose of having severed the trials.

Petitioner has failed to show that the court abused its discretion in making this evidentiary ruling. Therefore, his Claim 18 that appellate counsel were ineffective ***606** for failing to raise this issue on appeal is without merit.

CLAIM 19:

INCONSISTENT THEORIES

In Claim 19, Petitioner alleges that his due process rights were violated by the government's presentation of allegedly inconsistent theories in his trial and his co-defendant Basham's trial concerning the relationship between the co-defendants. Specifically, Petitioner alleges that, depending on the trial, the government averred that either Basham or Fulks acted as mastermind of the crime spree; that either Basham or Fulks was solely responsible for allegedly strangling Alice Donovan; and that either Basham or Fulks deferred decisions of life and death to the other. Neither defendant took the stand in his respective trial, but counsel for each defendant blamed the other defendant for Donovan's murder.

A review of the record does not sustain Petitioner's position that the government presented inconsistent theories going to the core of its case. "[T]he Due Process Clause prohibits the government from presenting mutually inconsistent theories of the same case against different defendants." *United States v. Higgs,* 353 F.3d 281, 326 (4th Cir.2003). However, the law permits the government to focus on the particular role of the defendant on trial. *Higgs,* 353 F.3d at 326–27.

Petitioner contends that the government took an inconsistent position in the trials regarding Basham's "deer statement" and Basham's demonstration, in the presence of Sheriff Hewett, of how Alice Donovan was allegedly strangled with a purse strap.

As noted in Claim 18, in the Fulks trial, the government argued to the court that Basham's deer statement was ambiguous and the court kept it out of evidence. In Basham's own trial, however, the court admitted his deer statement. In closing argument of the Basham trial, the government stated:

> Do you remember what Brandon Basham's comments were? He sees that doe and he says to himself, spontaneously, 'here I couldn't even kill a deer, and I have,' and his lawyer, Mr. Littlejohn stops him. 'Here, I couldn't even kill a deer, and here I have'—what do you think he is thinking about? Here I have smoked a joint? Here I have stolen a car?

(Basham TT Vol. 12 at 79.) Petitioner now contends that the government's argument to the jury in Basham's trial about the deer statement was inconsistent with its argument to the court in Fulks's trial that the deer statement was without meaning.

Next, Petitioner contends that in Fulks's trial, the government argued that Basham's purse strap demonstration was explaining how "Chad Fulks took the purse strap and strangled" Alice Donovan. (TT Vol. 16 at 255.) Petitioner argues that in Basham's trial, the government took the position that it was Basham demonstrating how he, and not Fulks, used the purse strap to strangle Alice Donovan and that in closing argument the government characterized Basham's demonstrations an admission that Basham killed Alice Donovan with her own purse strap. Petitioner's contortion of the record cannot go uncorrected.

A review of the record Basham's trial transcript reveals that Sheriff Hewett testified as to how Basham demonstrated the purse strap was used to strangle Alice Donovan. On cross-examination, Sheriff Hewett testified:

> A. The only thing that I can state, honestly, that I remember Brandon ***607** Basham telling me was that Chadrick Fulks was driving and we did what Chadrick Fulks wanted to do. He was the leader.
>
> * * *
>
> Q. There is nothing in your notes, nor is there anything in Lieutenant Crocker's notes that indicate that Brandon Basham told you that he used the strap, is there?
>
> A. No, sir. He did not tell me he used the strap. He demonstrated, though.
>
> Q. He demonstrated?
>
> A. Yes, sir.
>
> Q. Your notes, nor Lieutenant Crocker's notes say that he did that; isn't that true?

A. That is true because he didn't say. He showed.

(Basham TT Vol. 10 at 53–54.)

In its closing argument in Basham's trial, the prosecutor did not argue that Basham confessed. Rather the prosecutor told the jury:

> What does Brandon Basham say in the presence of Sheriff Hewitt? It is not really what he says, it is what he does. He is shackled. He describes a purse strap, and he demonstrates, he demonstrates to Sheriff Hewitt how Alice Donovan was strangled. And then he tells Sheriff Hewitt, "I threw the purse strap into the woods." He has demonstrated. He even has his arms down. You saw Sheriff Hewitt stand up there and show.

(Basham TT Vol. 29 at 57.)

It is a stretch for Petitioner to argue that "[i]ndeed, Basham actually confessed, without prompting, to strangling Alice Donovan through his demonstration to Sheriff Hewett," and that "[t]his can only be deemed to be government misconduct for failure to reveal this to Mr. Fulks's trial team."

A review of Basham's trial record demonstrates that Basham did not confess, Sheriff Hewett did not testify Basham confessed, and the government did not argue Basham confessed to strangling Donovan. As Nettles testified, he understood Hewett's testimony to mean that Fulks strangled Donovan. (HT Vol. 2 at 140.) Hewett's use of the passive tense in describing Basham's strap demonstration leaves to speculation who actually used the strap to strangle Donovan, if that is what happened. [37]

Petitioner argues alternatively that it was ineffective assistance of counsel to fail to uncover what Hewett actually saw and what he would say under oath. In light of the motion for a hearing pursuant to *Jackson v. Denno* and the evidentiary hearing held prior to trial, Petitioner's claim that his trial counsel failed to investigate Hewett's testimony is without merit. 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

Throughout Fulks's trial, the government maintained a theory that Chad Fulks and Brandon Basham were equally culpable for the crimes committed. The theory was repeated in the government's closing argument to the jury:

> It required the actions and the conduct of both Chad Fulks and Brandon Basham. The two of these men acted together as one in concert with one another. ***608** They were a two-man death squad. Two men, forming one team. They could not have done things that they did to Samantha, and they could not have done the things they did to Alice without acting in unison, without acting as one. The government is not saying Chad Fulks is more culpable than Brandon Basham. And the government is not saying that Brandon Basham is more culpable than Chad Fulks. They are equally culpable. Any objective view of the evidence and testimony that you saw, any reasonable juror looking at this objectively, not looking at it from the point of view of Chad Fulks, not looking at it from the point of view of Brandon Basham, if you look at it objectively, there is but one conclusion: these two were acting together as one. But for the conduct of Chad Fulks and but for the conduct of Brandon Basham, Alice Donovan and Samantha Burns would be alive today.

(TT Vol. 21 at 24–25.)

During Basham's trial, the government maintained the same theory that Chad Fulks and Brandon Basham were equally culpable for the crimes committed. In the government's closing argument to the jury in Basham's trial, the same theory was propounded:

> Remember, the evidence and the testimony that you saw during the guilt phase of this case, this was a two-man team. This was Brandon Basham and Chad Fulks acting together as a team. Their actions, their conduct, their choices were made as a team.

> Brandon Basham could not have carjacked and kidnapped Samantha Burns or Alice Donovan without Chad Fulks. And Chad Fulks could not have carjacked and kidnapped Samantha Burns and Alice Donovan without Brandon Basham. They are equally culpable. But for the actions of Brandon Basham, and but for the actions of Chad Fulks, Samantha Burns would be alive today and Alice Donovan would be alive today.... But for Brandon Basham and Chad Fulks, not only would Samantha Burns be alive today, not only would Alice Donovan be alive today, but none of us, no one in this courtroom would be here today.

(Basham TT Vol. 29 at 43–44.)

While Petitioner claims that the government argued to the Basham jury that Fulks made all the life and death decisions, the record reveals otherwise:

> No question, Chad Fulks was the leader in many aspects of this seventeen-day spree. Where they were going, there is no question about that, ladies and gentlemen. But there is also no question, the government submits, that Brandon Basham was a willing, eager, and reliable foot soldier. He was eager to please his friend. And he was willing to participate and make choices. You know who summed it up? When Tina Severance was on that witness stand, I think it was in redirect, some innocuous question about how they were getting along. Do you remember what Tina Severance said spontaneously? Like two peas in a pod. They were always together having a good time. That is Brandon Basham and Chad Fulks in November 2002. Like two peas in a pod. Brandon Basham could not have carjacked, kidnapped, and killed Alice Donovan without Chad Fulks; Chad Fulks could not have carjacked, kidnapped, and killed Alice Donovan without Brandon Basham.

(Basham TT Vol. 12 at 82.)

The government did not present mutually inconsistent theories in Fulks's trial and Basham's trial. As the court in *McNeill v. Branker* explained:

> ***609** The law does not provide that every inconsistency amounts to a due process violation requiring reversal. A due process violation only occurs when the inconsistency exists in the core theory of the prosecutor's case.... In *Bradshaw v. Stumpf,* 545 U.S. 175, 184–87, 125 S.Ct. 2398, 162 L.Ed.2d 143 (2005), the Supreme Court considered a petitioner's challenge to his guilty plea of aggravated murder and attempted aggravated murder. The Court rejected Stumpf's argument that inconsistent arguments about the identity of the triggerman at his trial and the trial of his co-perpetrator required reversal of the convictions. It reasoned that the identity of the triggerman was immaterial because the intent element of the offense did not require the defendant to pull the trigger.

601 F.Supp.2d 694, 706–707 (E.D.N.C.2009) (internal citation omitted).

[31] Petitioner has failed to demonstrate that the government adopted an inconsistent position rising to the level of a due process violation. Mere inconsistency in the government's argument does not violate due process, it is "[t]he use of inherently factually contradictory theories" that violates due process. *Smith v. Groose,* 205 F.3d 1045, 1052 (8th

Cir.2000). Viewing the Petitioner's argument in a generous light shows, at best, an inconsistent argument concerning the vagueness of Basham's statements, but fails to demonstrate that the government relied upon factual theories that were inconsistent at the core of its case. Accordingly, Petitioner's Claim 19 alleging a due process violation fails.

CLAIMS 20 & 21:

WITNESS INTIMIDATION
AND *BRADY* REQUIREMENTS

Petitioner contends that the prosecution inappropriately influenced witness testimony and failed to disclose a deal made with one of the witnesses in violation of the government's obligations under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Claim 20

Two of the principal witnesses called by the government were Andrea Roddey and Tina Severance. Roddey was one of the four people who traveled with Fulks from Indiana to Conway, South Carolina, where Donovan was abducted. She participated in the burglary of Robert Talsma's house, witnessed several events where Basham threatened to kill police and other persons, and generally assisted the group in using fraudulent checks and the like. After the trial, Roddey submitted a one-page affidavit which indicates that during her questioning by the FBI agents, the agents "focused on Chad Fulks and asked me very few questions about Brandon Basham." (Pet. App. Ex. 12 at ¶ 3.) When she asked the agents why they were not interested in Basham, the agents responded that she "need not worry about the target of their question." (*Id.*)

Secondly, Roddey averred that the agents "put pressure on her to testify that during the events of November 2002, Chad Fulks threatened my life and the life of Tina Severance." (*Id.* at ¶ 5.) Fulks says that she told the agents that this was not true and that she would not lie, but despite her protestations, the agents "continued to push me on these issues." Significantly, the Roddey affidavit does not indicate that she gave in to the pressure by the FBI or that she gave testimony that was in any way untrue at trial.

At trial, Roddey did not testify that Fulks threatened her, and, in some respects, her testimony was adverse to the government. For example, she testified that there was no mud on the driver's side ***610** of Severance's van the morning Fulks and Basham returned to the motel after abducting Burns. This was helpful to the Fulks defense because the undisputed testimony was that Fulks did all of the driving. [38]

At most, the Roddey affidavit, if believed, indicates that FBI agents made a thinly-veiled and entirely unsuccessful effort to have her change her testimony so as to harm Fulks more than it did. The court finds that Roddey's post-trial, one-page affidavit indicating that inappropriate pressure was placed upon her to testify against Fulks is not credible. More importantly, even if the court were to find that law enforcement authorities put inappropriate pressure on Roddey to testify in a certain way, the effort was not successful in that Roddey gave testimony that was, in certain respects, helpful to the Petitioner.

As noted previously, Tina Severance also had extensive knowledge of the misdeeds of Basham and Fulks during their crime spree. Like Roddey, Severance was in the van for many of the events of November 2002. She offered damaging testimony that Fulks put a gun to her head in a Myrtle Beach hotel room. (TT Vol. 3 at 173–74.) She also testified that neither federal or state prosecutors or officials had offered her any "promises or rewards" in exchange for her testimony. (*Id.* at 184.) [39] At the same time, Severance acknowledged the pendency of the Myrtle Beach misdemeanor warrant against her.

Fulks's § 2255 counsel have now produced for the court a letter from the Myrtle Beach Police Department, dated January 24, 2008 (nearly four years after the trial of this case), which reads in its entirety as follows:

> To Whom It May Concern:
>
> In regards to *State v. Tina Severance* all charges against her were dismissed. There are currently no active warrants against her. This is pursuant to her cooperation in a case in 2002 in which she was a witness.
>
> If you would like to discuss this any further please contact me.

(Pet. App. Ex. 31.)

[32] The court finds no conflict between the testimony given by Severance at trial that no deals were made with her in return for her testimony and the fact that at some point subsequent to the trial, the Myrtle Beach Police Department dropped relatively minor misdemeanor charges against Severance. Although the letter states that the dismissal of the charges were "pursuant to her cooperation" in the Fulks trial, there is no assertion that federal prosecutors had anything to do with the decision to drop the charges or that the agreement to drop the charges was made by Myrtle Beach Police Department prior to Severance's testimony. The letter from the Myrtle Beach Police Department could be read broadly to indicate that there was some type of pre-testimony agreement with Tina Severance to have her charges dismissed. To reach this conclusion, however, the court will have to determine that this sole, unsworn letter carries more probative value than: (1) Tina Severance's sworn testimony at trial that no deals had been made in return for her testimony; and (2) the statement made during trial by the Assistant United States ***611** Attorney handling this case, as an officer of the court, that no deals of any kind had been made with any of the prosecution's witnesses. A more likely reading of the Myrtle Beach Police Department's letter is that the relatively minor charges were dismissed after the Department learned that Ms. Severance had testified for the government in an unrelated case.

After a careful review of all of the evidence relating to Tina Severance's testimony, the court finds that there was no plea agreement or other promise from the government outstanding at the time Severance gave her testimony in the Fulks trial. Any decision by the Myrtle Beach Police Department to drop the charges against her occurred after the trial had concluded and was not made pursuant to the agreement with the prosecutors in this case.

Finally, and most importantly, it should be noted that like Roddey, Severance gave testimony that was, in part, harmful to the government. She testified that Fulks did not carry a gun and she claimed that there was only a little mud on the driver's side of the floorboard when Fulks and Basham returned to the motel after kidnapping Samantha Burns.

Claim 21

Claim 21 is a reassertion of those claims asserted in Claim 20 in the context of a *Brady* violation. Specifically, Petitioner contends that the government was under an obligation to disclose, pursuant to the dictates of *Brady v. Maryland,* favorable evidence that was material to either guilt or sentencing. 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Petitioner argues that the failure to disclose the pressure put upon Roddey by the FBI and the favorable deal made with Severance were matters that should have been disclosed. Because the court finds no support for the proposition that agents pressured Roddey or that there was a pre-testimony deal with Severance, both the prosecutorial misconduct and the *Brady* violation claims must fail.

CLAIMS 22 & 23:

PROSECUTORIAL COMMENTS
DURING SUMMATION

In Claims 22 and 23, Petitioner asserts that, during his summation, the prosecutor made a total of five statements that were improper and prejudicial. As to some of the statements, Petitioner's counsel objected, and as to one, the court sustained the objection. The defense counsel did not, however, move for a mistrial, nor did they appeal any of these issues. Petitioner argues that, where appropriate, the failure to object, the failure to move for a mistrial, and the failure to appeal the forensic misconduct that he contends occurred during the trial were error.

As noted previously, prior to his escape from the Kentucky prison, Fulks was incarcerated on state child abuse charges that could have subjected him to a life sentence. There was trial testimony that Fulks related to Tina Severance that he "probably would never get out [of jail]." (TT Vol. 3 at 224.) During summation, Assistant U.S. Attorney Jonathan Gasser reminded the jury of these developments and then said: "Those aren't Detective Smith's words. Those are Chad Fulks's words. 'I probably will never get out.' " (TT Vol. 21 at 30–31.)

The prosecutor then noted that Fulks thought he might end up serving a life sentence in Kentucky and "ma[de] a choice, and he escapes, and he participates in the kidnapping, and the rape, and the murder of two women, and he is caught. And you know what he is asking you jurors to do? To give him a pass." (*Id.* at 30–31.)

***612** Finally, the prosecutor concluded by saying:

> So, what is he asking you to do, facing all of that time, commits all of these horrible crimes, kills two women, and he is asking you for a life sentence. It is the government's contention, in essence, that that 2–week crime spree, he is not held accountable for. He was looking at serious and significant time before, and now he is looking at life without parole. So, where is the punishment? Where is the accountability for what he did to these two women?

(*Id.* at 31–32.)

Fulks's trial counsel objected to this comment in what is generally termed a "speaking objection," stating in the presence of the jury: "Objection ... He [Fulks] was not facing life without parole before. Life without parole is not a pass. It is the second most severe and substantial punishment." (TT Vol. 21 at 31.) Although the court overruled the objection, the court indicated that "the defense will be allowed free reign to make whatever argument is appropriate on this point."

While it is true that Fulks was not under an existing life sentence at the time he committed the acts for which he was convicted in this case, he was, as revealed by his own words to Tina Severance, potentially subject to a life sentence for the crimes he was being held for in the Kentucky prison. Because of this, the prosecutor's comment was reasonable in light of the record in this case, and this court properly determined that it was a matter for argument going both ways.

Fulks next contends that the prosecutor improperly claimed that Fulks raped Samantha Burns. The objectionable comment was as follows:

> What are Brandon Basham and Chad Fulks doing dressed out in camouflage that night? No other night. No evidence or testimony they wore camouflage any other night. They were hunting, the government submits to you. They were hunting down somebody. They were hunting, and they located, and they isolated, and they abducted, and they raped, and they robbed, and they killed their prey. She just happened to be a nineteen-year-old college co-ed named Samantha Burns.

(TT Vol. 21 at 41.)

Contending that the statement that Fulks raped Samantha Burns is "an outright lie" (Pet. at 182), Petitioner contends that the government conveyed false information to the jury. In response, the government points out that the repeated use of the pronoun "they" in the disputed passage clearly suggests that the prosecutor was implying that Fulks and Basham worked as a team throughout their seventeen-day crime spree including the rape of Burns. The government points out that immediately following the sentences quoted above, the prosecutor noted:

> They [Fulks and Basham] did everything together. That night [November 11] before they left, they got camouflage clothing ... Chad Fulks was stealing money from the ATM machine, and they returned together. Everything they did that night, they did together. The two of them acting as one ... when they arrived back at the motel room. Not one, both of them were covered in mud.

(TT Vol. 21 at 41).

Viewed in context, the prosecutor's comment about the rape of Samantha Burns was not improper.

The third comment at issue relates to Fulks's demeanor in the courtroom as the trial progressed. During closing argument, the prosecutor argued to the jury that the Fulks they saw at trial was not ***613** the same Fulks who committed the alleged crimes. The prosecutor said:

> The Chad Fulks you see sitting in this courtroom here today is not the Chad Fulks Samantha Burns confronted. It is not the Chad Fulks that Alice Donovan saw face-to-face lying on top of her. You know, I refer to this as a caged lion analysis. You take your kids to the zoo. The lions are lethargic. We know zoo animals have to be doped up, drugged up. Lethargic.

(TT Vol. 21 at 76–77.)

Petitioner contends that this comment labels him a "zoo animal" and is a "dehumanizing" comment that violated his rights under the Fifth, Sixth, and Eighth Amendments to the United States Constitution. The government responds that the reference to zoo animals quoted above is taken out of context and the court agrees.

The prosecutor was making the point that Fulks looked different at trial than when he was committing the significant crimes at issue in this case because he had been medicated in the same way animals are sometimes medicated at zoos. Defense counsel objected and the court held a bench conference. At the conference, defense counsel reiterated his objection to the prosecutor comparing Fulks the defendant to a "wild animal" and the prosecutor responded that all of the experts who testified had confirmed that Fulks was medicated during trial. The court ruled: "The analysis will stop with the fact that wild animals are drugged or sedated. I will overrule the objection as long as that's as far as you are going." (*Id.* at 77.) After this colloquy, the prosecutor finished the analogy as follows:

> The point is this. That is why I asked all those doctors if they are aware of the medication that Chad Fulks is on, the sedatives, tranquilizers, all the drugs he is on. The point I am trying to make ... is the picture you see of Chad Fulks, the chalky, pasty skin Chad Fulks, the Chad Fulks that you have seen in this court room looking straight ahead, all benign, all shy, all quiet, that is not the Chad Fulks. That is not the crack-smoking rapist that roamed the streets of Kentucky and West Virginia and South Carolina in November of 2002. And you have to understand that. You have to grasp that. In order for the government to have a fair trial, in order for you to make an informed decision on what the appropriate punishment should be ... you have to have the ability to close your eyes and attempt to picture, in your mind, the testimony and evidence that you have heard. And picture in your mind what truly happened. What was the true representation of what happened in November of 2002? And the Chad Fulks that these women saw. The Chad Fulks that these women confronted, is that Chad Fulks. That is the Chad. That is a picture of Chad Fulks taken outside the Florence County Courthouse. That muscular Chad Fulks. Not the one you see here in this courtroom.

(TT Vol. 21 at 77–78.)

It is thus apparent that the prosecutor was not using a metaphor to describe Fulks as a wild animal. Rather, he was pointing out that just as animals are sedated in zoos and appear to be lethargic and benign, Fulks was sedated during the trial and was not the same person who engaged in the seventeen-day crime spree. This court concludes that its ruling on the objection correctly cabined the prosecutor's summation. There was no error in the argument that was given by the prosecutor.

Fulks next contends that the prosecutor violated the Constitution when he made an indirect reference to the defendant's refusal ***614** to take the stand and testify. In closing argument, the prosecutor noted that Fulks never told his brother or anyone else that the seventeen-day crime spree was all caused by Basham. The pertinent language is as follows:

> Sometimes, Ladies and Gentlemen, it is not only what people say that matters, it is what people don't say that is every bit as important. [Fulks] had an opportunity to spill his guts to his brother, and he says nothing. And, I submit to you, because he is in it up to his neck. That is the truth.

(TT Vol. 21 at 91.)

[33] The Fifth Amendment precludes a prosecutor from commenting to a jury on the "failure of an accused to testify in his own defense." *United States v. Ollivierre,* 378 F.3d 412, 419 (4th Cir.2004). This principle has been extended to statements that the jury would "naturally and necessarily take ... to be a comment on the failure of the accused to testify." *United States v. Francis,* 82 F.3d 77, 78 (4th Cir.1996). In making this determination, the court must examine the statement in context. *United States v. Percy,* 765 F.2d 1199, 1204 (4th Cir.1985). Here, viewing the statement in context, it is clear that the statement refers to Fulks's interactions with his family, not his failure to testify at trial.

[34] Finally, Petitioner contends that the prosecutor erred when he told the jury that in sentencing Chad Fulks to death, they would be engaging in "an act of self defense." He argues that this statement carries with it the insinuation that Petitioner was in a position to harm the jury and that the jury needed to protect themselves from Petitioner. (Pet. at 183.)

The full argument, in context, was as follows:

> [O]ne last point on future dangerousness. Ladies and Gentlemen, you can decide for whatever reason, obviously, the 12 of you can decide that the death penalty is the appropriate punishment. But the facts of this case ... are so egregious, are so horrific, that Chad Fulks deserves to die. It will, obviously, be your decision. That retribution is appropriate in this case. The government submits to you, when it comes to future dangerousness, when it comes to all of these factors, when it comes to all of the evidence that I have just discussed with you, the government submits to you, Ladies and Gentlemen, that, in essence, in essence, it will be an act of self-defense.

(TT Vol. 21 at 114.)

Trial counsel objected and the court conducted a sidebar conference. At the conference, the Assistant United States Attorney, an experienced prosecutor, stated that he had heard similar comments in closing arguments "a hundred times." (*Id.* at 115.) The court disagreed, indicating that the argument was "going too far." Although the court did not grant the defense counsel's request that the jury be instructed to disregard the comment, the court made it clear that no further argument along this line would be allowed. (*Id.*)

Other courts, facing similar statements by prosecutors during summation, have found the "self-defense" analogy to be proper argument. *See, e.g., United States v. Chandler,* 996 F.2d 1073, 1095 (11th Cir.1993) (finding that prosecutor's comment that "recommending the death penalty is a form of self defense for society" was not improper); *Ingram v. State,* 779 So.2d 1225, 1267 (Ala.Crim.App.1999) (prosecutor's argument that capital punishment "was a form of 'self defense' and was imposed for the sake of society" was not error).

***615** Moreover, the self-defense comment was brief and was part of a larger discussion of the issue of future dangerousness. The court finds no error in the failure to strike the self-defense remark.

CLAIMS 24 & 25:

HANDGUN ISSUES

[35] In Claim 24, Petitioner claims that the government engaged in prosecutorial misconduct by asserting that Fulks had been armed with a .45 caliber revolver. In Claim 25,

Petitioner claims that his trial counsel were ineffective for failing to question Ronnie Fulks about the revolver when he took the stand.

At trial, Robert Talsma and Tina Severance testified that Fulks and Basham stole Talsma's .45 caliber revolvers on November 8, 2002. (TT Vol. 3 at 84–87; Vol. 2 at 217–19.) Dewayne Fulks admitted he told FBI agents who came to his father's house the day before Fulks was arrested that he saw Fulks with two revolvers. (TT Vol. 4 at 124–25.) After apprehending Fulks in Indiana, the government did not recover one of the .45 caliber revolvers, and believed that Fulks must have disposed of the gun while he was running from them in the woods. Fulks told his trial counsel that he had given the gun to his brother Ronnie Fulks when he had been in Indiana. Because Ronnie was a felon, if he acknowledged having received the gun, he would have exposed himself to criminal liability for felon in possession of a weapon. Trial counsel attempted to obtain the gun from Ronnie or at least have him agree that he had the gun, which trial counsel claims Ronnie refused to do. Ultimately, trial counsel "decided not to push it" because Ronnie had helpful things to testify about his life and background when he was going to be called by the government and trial counsel did not want to alienate him.

During closing, the government argued that Fulks was armed with two .45 caliber revolvers the day he and Severance went to Goshen, Indiana, to see Fulks's brothers. (TT Vol. 21 at 38.) The government also asserted that Fulks shot at Carl Jordan, although the prosecutor told the jury that it did not know with certainty whether the gun Fulks used to shoot at Carl Jordan was a .45 caliber revolver or a .22 caliber revolver because it did not have the gun, but that it did not matter. (TT Vol. 21 at 57–58.) This argument was not improper, as Jordan testified that Fulks shot at him. (TT Vol. 5 at 49.)

Petitioner claims that the government should have accepted Fulks's claim that he gave a .45 revolver to his brother Ronnie Fulks and provided Ronnie with immunity for testifying about it. Further, Petitioner asserts that his claim about having given the .45 caliber revolver to Ronnie should have precluded the government from arguing that Fulks was armed with a .45 revolver during the remainder of the crime spree. Petitioner claims that the significance of Ronnie Fulks's proposed testimony is that it would have established Basham as the only individual with an operational handgun during all relevant times. [40]

The prosecution had no obligation to accept Fulks's claims that Ronnie had one of the .45 caliber revolvers, especially when Ronnie did not mention it to the government. In light of the testimony gathered at trial, the government had good ***616** reason to believe Fulks was in possession of a gun or guns during the crime spree. Tina Severance testified that when they were staying at the Lake Shore Motel, Fulks became "frantic" because he could not find a revolver, and thought that Severance or Basham had taken it. (TT Vol. 3 at 138.) Another time at the motel, Fulks became angry at Severance and pointed a gun at her head. (*Id.* at 177–178.) Beth McGuffin testified that she noticed a gun in the glove box, and that Fulks said the gun belonged to him. (TT Vol. 6 at 113–14.) Che McCoy testified that Fulks wanted to sell a .22 caliber revolver to McCoy or to trade it for McCoy's gun. (TT Vol. 7 at 214.) Because there was reliable evidence that Fulks had a gun during the crime spree, it was not improper for the government to so argue during the trial.

Petitioner claims that his trial counsel were ineffective for failing to question Ronnie about the .45 revolver when he took the stand. Petitioner argues that if trial counsel had asked questions about the .45 revolver, Ronnie could have asserted his Fifth Amendment right, and trial counsel could have argued effectively to the jury at closing that Fulks gave Ronnie the only operational .45 revolver. The trial team analyzed this issue in an email (Gov't Ex. 56), and ultimately decided, as Blume testified, that they "needed Ronnie," and did not want to alienate him because of the favorable testimony that he could provide about Fulks's life and background. The court finds that trial counsel's strategic decision to not question Ronnie on the stand about the .45 revolver was a reasonable judgment and does not constitute ineffective assistance of counsel. *Meyer v. Branker,* 506 F.3d 358, 371 (4th Cir.2007) ("It is a cardinal tenet of the Supreme Court's ineffective assistance jurisprudence that strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."). This standard is "necessary to avoid second-guessing of 'perfectly reasonable judgments,' and to 'eliminate the distorting effects of hindsight' after an adverse decision." *Id.* (citing *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052).

CLAIM 26:

PREPARATION OF MITIGATION WITNESSES

[36] Petitioner's Claim 26 alleges that trial counsel were ineffective for allegedly failing to adequately prepare three lay mitigation witnesses for their testimony. Specifically, Petitioner complains that his trial counsel did not adequately prepare his uncle Mark Fulks and his sixth grade teacher Martha Floyd for their direct testimony and failed to meet with his brother Ronnie Fulks prior to his testimony. Petitioner claims that "had counsel prepared these witnesses, their testimony would have been much more compelling and could have changed the outcome of the proceeding."

As detailed in Claim 3, trial counsel's mitigation testimony spanned four days and included some twenty-four witnesses, many of whom testified as to Fulks's deplorable living conditions as a child, surrounded by constant violence, alcohol and drug abuse, and many instances of sexual depravity. As to the three witnesses that Petitioner claims trial counsel did not prepare for trial, the record reveals that trial counsel spoke to each mitigation witness before he or she testified. A review of Mark Fulks's and Martha Floyd's declarations themselves reveals that trial counsel did meet with them prior to their testimony. As to Ronnie Fulks, he was called by the government, and no requirement exists for an attorney to prepare a witness that ***617** he will cross-examine, although both Johnson and Blume interviewed Ronnie Fulks in advance of the trial. (HT Vol. 2 at 45.)

Blume testified that Martha Floyd was prepared by mitigation specialist Tracy Dean before being interviewed by Blume himself in West Virginia. During his interview of Martha Floyd, he took five pages of handwritten notes. (Gov't Ex. 58.) Blume also testified that he did not perceive that the government would contest the facts that she was going to relay. (HT Vol. 2 at 41–43.)

Blume testified that Mark Fulks was interviewed by mitigation specialist Tracy Dean in April of 2003 (Gov't Ex. 61) before being interviewed by Blume himself in Indiana on August 21, 2003. During his interview of Mark Fulks, Drucy Glass took notes. (Gov't Ex. 60.) In preparation for trial, the trial team prepared a direct examination outline for Mark Fulks. (Gov't Ex. 59.)

As recited in Claim 3, Mark Fulks estimated that 90 percent of the time he saw Fulks's parents, that they were drinking; that they were alcoholics; that Fulks's mother regularly passed out, sometimes partially clothed; that Fulks's parents would bare-knuckle fight, throw things at each other, with Fulks's mother pulling out a shotgun and pointed it at Fulks's father's face; that Fulks's parents would physically and verbally abuse him and his siblings; that their house was filthy, bug-infested, and lacked food. (TT Vol. 16 at 159–81.)

Martha Floyd testified that she taught Fulks sixth grade in a self-contained behavioral disorder learning disability class. She testified to Fulks's poor upbringing; that she saw bruises on him; that he lacked school supplies and money for book rentals, special treats or snacks; that he did not have a coat in the tough West Virginia winters; that a teacher purchased shoes for him; that he was a follower; that he was a slow learner who tried really hard in school, and would sit in a rocking chair by himself. She testified that his parents were inaccessible, never came to school or responded to notices of meetings, and did not respond to phone calls or notes sent home. (TT Vol. 17 at 85–93.)

Ronnie Fulks testified that he and his brother Chad grew up in the same exact environment and household, one in which their parents drank "every day, all day," until they got staggering drunk and passed out. He testified that his parents grew and used marijuana, that they would fight every day, that his mother broke a ketchup bottle over his fathers head, used coffee pots and ashtrays and whatever was handy to beat his father, that his father beat his mother, that they both beat the children, and that his parents would curse at them. He testified that people were frequently in his parents' basement partying and fighting every night, and that if the police were called, the partygoers would "hear it go over the police scanner. Everybody would break up and go home, and come and do it the next night." Ronnie testified that as a six-year-old child, he would use alcohol and drugs along with the partygoers in the basement, that his brothers Chad and Dewayne would also drink and use drugs as children, that he would get high huffing gasoline and paint, that he would get in a lot of trouble as a kid stealing and beating and cutting people with a knife. He testified that his parents let him and his brothers do anything they wanted, that their parents never helped with their homework and did not care about their schooling. Ronnie told a story of his father smashing the windows of a car and tearing "the whole inside of the car up," and then asking Ronnie, who was then a teenager, to take the blame for it. Ronnie took the blame and left the state. He also testified that he stopped speaking to his mother ***618** after she refused to let him be paroled to her house, causing him to serve an additional fourteen months in an Ohio jail. He

testified that his best memory of his childhood was leaving home at fourteen. (TT Vol. 8 at 10–23.)

In sum, Petitioner argues that three of 156 total witnesses at trial would have been "more compelling" if they had been better prepared by trial counsel. Petitioner has failed to demonstrate how the witnesses' testimony would have been stronger with any additional preparation by trial counsel. Petitioner argues only that if trial counsel had properly prepared these three witnesses (Mark Fulks, Martha Floyd, and Ronnie Fulks), they "would have been able to testify competently about strong mitigating factors, including Mr. Fulks's tragic upbringing, the child abuse Mr. Fulks suffered, Mr. Fulks's parents' alcoholism, and other unfortunate circumstances." As the record reveals, these three witnesses did testify, compellingly, about these matters.

Petitioner has failed to show that his trial counsel's performance fell outside the wide range of reasonable professional assistance. The allegations contained in Claim 26 do not come close to supporting the contention that but for counsel's errors, the result would have been different. Having failed to do so, Petitioner has failed to show prejudice.

Hedrick v. True, 443 F.3d 342, 353–55 (4th Cir.2006).

CLAIM 28:

THE GUILTY PLEA AND
ACCEPTANCE OF RESPONSIBILITY

Petitioner's Claim 28 alleges that trial counsel were ineffective in allegedly failing to explain to the jury the concept of acceptance of responsibility. Petitioner claims he "received no benefit from the entry of his guilty plea," and that trial counsel "never made the point" that a defendant who enters a plea of guilty should receive a lesser sentence.

Fulks's argument is not supported by the record. All twelve jurors unanimously found as a mitigating factor that "Chadrick Evan Fulks pleaded guilty to kidnapping and car jacking resulting in death." (Special Verdict Form, ECF No. 649; TT Vol. 22 at 25.)

In his opening statement, trial counsel explained that Fulks had accepted responsibility for his actions by pleading guilty:

> Chad Fulks has pled guilty to kidnapping and carjacking Alice Donovan. By doing that, he has accepted responsibility for his role in the deaths of these two women. And has insured that he will never be released from prison and that he will die there. As the prosecutors told you during voir dire, as the judge told you all individually and collectively, life without parole means just that. It means life without parole. It means the person will die in prison. And that-there is nothing gentle about that. That is not gently confessing. That is stepping up and saying there are only one of two things that could happen: I am going to plead guilty, my life will either be taken by lethal injection, or I will spend the rest of my life in a federal prison.

(TT Vol. 1 at 129.)

Trial counsel continued this theme in his closing argument:

> Chad pled guilty to these offenses, ensuring he will never be released. He will spend the rest of his life in a maximum security prison. Sending him to prison for the rest of his life is not excusing what he did. It is not giving him a pass. Life without parole is not only severe punishment, it is a just punishment. ***619** And it is the appropriate punishment for Chad Fulks. Choose life.

(TT Vol. 21 at 173.)

Contrary to Petitioner's claim, trial counsel capitalized on Fulks's guilty plea and used it to argue for a life sentence instead of death.

Petitioner's argument that he "received no benefit from the entry of his guilty plea" is a simplistic and incorrect view of the criminal justice system. Petitioner essentially and incorrectly argues that regardless of what crimes a defendant is found to be guilty of, the law requires that the death penalty be removed as an option from the jury's deliberation upon a plea of guilty. Such is clearly not the law.

Petitioner claims that he would not have pled guilty if he had known that counsel would not have introduced evidence of acceptance of responsibility. Instead, Petitioner claims he "would have put the government's evidence to the test and the outcome of the proceeding most likely would have been different." The court finds such a statement to be wholly speculative, and cannot agree with Petitioner's assessment that if he had pled not guilty that it "is very likely that the jury would have recommended life rather than death."

CLAIM 29:

REFERENCES TO RELIGION
IN CLOSING ARGUMENT

Petitioner's Claim 29 alleges that trial counsel were ineffective in failing to object to the government's alleged insertion of religion in the trial. Petitioner specifically complains about two comments by the government during its closing argument: first, the government's use of the term "born-again" as "an improper powerful religious reference that painted Petitioner as a Godless killer;" and second, the government's reference to Petitioner's habit of taking multiple showers during the day, stating that "There are no amount of showers that Chad Fulks could take that could wash his sins away. None." (TT Vol. 21 at 232.)

[37] In analyzing the effects of improper prosecutorial sentencing phase arguments on due process, courts look to see "whether the proceeding at issue was rendered fundamentally unfair by the improper argument." *Bennett v. Angelone*, 92 F.3d 1336, 1345 (4th Cir.1996) (internal citations omitted). Such a determination requires the court to consider "the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated." *Id.*

The first comment originated out of the examination of Fulks's uncle Mark. During his direct examination, Fulks's trial counsel asked Mark if he remembered when Fulks was in prison in Indiana, to which Mark responded affirmatively. During cross-examination, the prosecutor asked about a letter Mark had written on January 31, 2000 to Judge Brown, the Indiana state court judge who was to sentence Fulks after his guilty plea to burglary. In his letter, which was published to the jury (Gov't Trial Ex. 410), Mark asked for leniency on Fulks and stated his belief that Fulks had "turned his life around." (TT Vol. 16 at 177–78.) Mark's letter included the statement that "I watch him start walking on the path to the Lord. I know you hear that a lot, but I see it in him because I gave my life to the Lord a couple of years ago. I know what it takes to change." (*Id.*) The prosecutor then engaged in the following colloquy:

> Q. Now, Mr. Fulks, I guess, prior to January of 2000, you became a born-again Christian?
>
> ***620** A. Yes.
>
> Q. And would you, at times, talk to Chad about that?
>
> A. Yes, I have. I would over the telephone.
>
> Q. And with your conversations that you had with your nephew Chad, based on what he was telling you, you believed that Chad Fulks had turned his life over to God, as well?
>
> A. I had no reason not to believe it.

(TT Vol. 16 at 178–79.)

The government's cross examination was appropriate to support its attempt to show that Fulks feigned a religious conversion to manipulate his uncle to write a letter requesting that Fulks receive a more lenient sentence for a burglary conviction in Indiana prior to his later crime spree with Basham. It was relevant to counter trial counsel's repeated claim that Fulks had limited mental capacity. (*See* TT Vol. 21 at 143 (noting Fulks's "clear limitations"); *id.* at 144 ("It is a manifestation of his limitations, not of his cunning"); *id.* at 153 ("You have to be brain damaged to even say it. To even think about it.... It is stupid."); *id.* at 160 ("another example of his mental limitations").)

[38] In his closing argument, the prosecutor made the following statement:

> In 2000, in front of the Judge in Indiana, he gets his Uncle Mark, a good and solid man, Mark Fulks. A man that truly has found God. A born-again Christian. Took that witness stand, told you how Chad, Chad comes to him and says Uncle Mark, I am following the path of the Lord. Please write this letter. Please write this letter to the Judge so my sentence is not so bad. Uncle Mark believes him. Uncle Mark writes that letter, and the Judge accepts that letter that Chad Fulks, this man that would go on to rape, and to carjack, and to kill, was a man of God.

(TT Vol. 21 at 122.)

Petitioner claims that trial counsel were ineffective for not objecting and requesting a curative instruction to the prosecutor's "born-again" reference as the government seeking to gain an improper advantage by "invoking Christian doctrine to a Bible-belt jury." The second statement about which Petitioner complains is the prosecutor's comment in his closing argument, referencing Fulks's habit of taking multiple showers each day, stating, "There are no amount of showers that Chad Fulks could take that could wash his sins away. None." (TT Vol. 21 at 232.)

When compared to the defense's extensive use of many direct Bible quotations during its closing arguments earlier, the government's isolated comment during reply closing argument concerning Fulks's repeated washing cannot be considered as the government seeking to gain an improper advantage by "invoking Christian doctrine to a Bible-belt jury." (*See,* e.g., TT Vol. 21 at 163 (noting that there is no "eye for an eye" under the law)); *id.* at 173 (noting that the prophet Micah "encouraged us to love, to do justice, to love mercy, and to walk humbly" and that "life without parole is both merciful and just"); *id.* at 201 ("The Bible says a parent should train a child up in the way he should go."); id. at 210 (claims to not be invoking Bible by quoting Bible, including "Let he who is without sin throw the first stone."); *id.* at 210 ("even if they have sinned themselves, which, of course, we all have."); *id.* at 210–12 (over the prosecution's objection, defense was allowed to give a long analysis of the life of the Apostle Paul and quoted him as saying, "Not that I have already obtained this, or am already made perfect.").

The defense itself suggested that the jury should use the Bible to influence its ***621** jury deliberations. After a long explanation of the Apostle Paul's ministry and his desire to make up for his past sins and seek righteousness (*id.* at 212–14), defense counsel stated:

> And there is a second way that what Paul says in Philippians is instructive, and that is as a guide for jury deliberations, the process of deliberation. It may be that the juror sitting right next to you does not have the same understanding you have. It may be that he or she can only see the crime and not the brain damage and the avalanche of horrible experiences that shape the person who committed it.

(TT Vol. 21 at 215.)

The court finds trial counsel's failure to object to the government's alleged improper insertion of religion in its closing argument was not ineffective. The government's two comments were fleeting and were, at most, veiled references to biblical language. In light of the isolated and brief nature of the comments, made in the course of the government's 147–page closing argument, and considering the religious-laden arguments of opposing counsel, and the court's instruction to the jury that the arguments of the attorneys is not evidence, [41] the court finds Petitioner's claim of a due process violation on this issue is without merit.

CLAIM 30:

PETITIONER'S ARTISTIC ABILITY

Petitioner's habeas counsel have attached copies of Petitioner's artwork to his petition (Pet. App. Ex. 38), and suggest that these drawings reveal that Petitioner has great artistic talent. Moreover, the artwork is said to show that Petitioner "has the ability to transcend human suffering and bring joy and enlightenment both to himself and those

viewing his work." (Pet. at 138.) Petitioner thus argues that Blume and his trial team were constitutionally ineffective for not bringing Petitioner's artistic ability to the attention of the jury. At the evidentiary hearing, Blume testified that he recalled seeing Fulks's artwork, but does not remember "considering presenting it as mitigation."

[39] On the record assembled in this case, the court is constrained to conclude that evidence of Petitioner's artistic ability would have had little positive effect on the jury and most probably would have been counterproductive. The jury heard evidence that Fulks and Basham escaped from jail, engaged in a seventeen-day crime spree that spanned seven states with thirteen identifiable victims, including two whose lives were taken after they were raped. The remains of one of the victims have yet to be found and the remains of the other have only recently been found. With this background, it is difficult for the court to conclude that the jury would have given any weight to the suggestion that Fulks possesses artistic ability. Moreover, to suggest to the jury that this ability enabled him to "transcend human suffering" and "bring joy and enlightenment to both himself and those viewing his work," would quite possibly have angered the jurors. The trial testimony revealed that Blume did not ignore this factor; rather, he concluded that it would not be of help in attempting to spare Fulks's life. This court is not prepared to say that Blume's conclusion was constitutionally unreasonable under the circumstances.

***622** CLAIM 31:

CUMULATIVE EFFECT ALLEGED ERRORS

In Claim 31, Petitioner argues that the alleged errors made by his counsel and this court rise to the level of cumulative error and mandate a setting aside of his sentence. As the government observes in its memorandum in opposition to the § 2255 petition, the cases Petitioner relies upon for this proposition involve matters actually determined to be constitutional error. In those cases, each error, standing alone, was not grounds for relief, but cumulatively the errors compelled the court to order a new trial.

As the Fourth Circuit said in the appeal of Fulks's co-defendant, Basham:

> Generally, ... if a court determines that none of a defendant's claims warrant reversal individually, it will decline to employ the unusual remedy of reversing for cumulative error. To satisfy this requirement, such errors must so fatally infect the trial that they violated the trial's fundamental fairness. When none of the individual rulings work any cognizable harm it necessarily follows that the cumulative error doctrine finds no foothold.

Basham, 561 F.3d at 330. (internal punctuation and citations omitted).

In this court's view, this case is not one where there were a number of constitutional errors or numerous instances of ineffective assistance of counsel. Accordingly, the cumulative error doctrine does not afford any relief in this case.

CLAIM 32:

EXECUTION BY LETHAL INJECTION

[40] In Claim 32, Petitioner asserts that the manner of carrying out his execution would violate the Eighth Amendment to the United States Constitution which prohibits "cruel and unusual" punishment. (Pet. at 145.) Without citing any authority, Petitioner contends that the combination of drugs used, the protocol governing the execution, the use of untrained non-medical and unqualified personnel, and the physical space in which the execution would be carried out, all combine to result in the infliction of unnecessary pain and suffering in violation of the Eighth Amendment. (*Id.*) The record is devoid of any facts to support these assertions, and death by lethal injection has been upheld by a variety of courts in recent years. *See, e.g., Baze v. Rees,* 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) ("this Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment."); *Evans v. Saar,* 412 F.Supp.2d 519, 522 (D.Md.2006) ("Circuit after circuit (including the Fourth)

has ruled that the [3–drug] protocol does not run afoul of the Eighth Amendment.").

The government has responded to Claim 32 by also asserting, in its brief, facts that are not in the record. The government suggests that the Bureau of Prisons has a multi-step procedure designed to protect the health and safety of all involved. It is suggested that the federal protocol compares favorably with other execution protocols that have recently passed Eighth Amendment scrutiny.

The court is thus faced with deciding this issue on a sparse record, but with ample precedent upholding the use of lethal injection in the United States. Petitioner has failed to carry his burden of showing that the Eighth Amendment would be violated by using the legal injection method to perform his execution. *See* *Baze,* 553 U.S. at 47, 128 S.Ct. 1520 ("[C]apital punishment is constitutional. ***623** It necessarily follows that there must be a means of carrying it out;" there is broad consensus that lethal injection is the most humane method of execution available).

CLAIM 33:

LOCATION OF DONOVAN'S REMAINS

[41] On January 18, 2009, six years after the death of Alice Donovan, a search team located seven pieces of bone that appeared to be part of a human skull in a rural area of northeast Horry County, South Carolina. The search team subsequently found several additional bone fragments, including one that appeared to be a forearm bone. DNA testing confirmed that these partial remains were Alice Donovan's.

This discovery prompted Petitioner to file a motion to add an additional claim (this Claim 33) to his petition for relief, and to expand the record to include facts relating to this claim. The government opposed the motion, not on the grounds of timeliness, [42] but on the grounds of futility. The court grants Petitioner's motion to add Claim 33, expands the record to include all evidence relating to that claim, and addresses the claim on the merits.

Distilled to its essence, Claim 33 is an assertion that Fulks "consistently" directed authorities to the area where Donovan's remains were located, and that the jury that sentenced him to death was incorrectly given the impression that he had misled authorities as to the whereabouts of Donovan's remains. After a careful review of the developments following the death sentence in this case, the record produced at trial regarding efforts to locate the body, and the prosecutor's comment regarding "concealment" of Donovan's body, the court concludes that Petitioner's Fifth and Eighth Amendment rights were not violated.

To place Claim 33 in context, it is necessary to recite, in some detail, the testimony that was, and was not, allowed regarding the unsuccessful efforts to locate Donovan's body. After the jury was excused for the day on June 10, 2004, Fulks's trial counsel asked for a ruling on the evidence that he anticipated the government would offer the following day. The evidence included testimony concerning events that occurred shortly after Fulks was taken into custody in Indiana and while authorities in North Carolina and South Carolina were frantically attempting to locate Alice Donovan in the days following her disappearance. Basham, who was then being held in custody separate from Fulks, gave authorities a map depicting what is known as the Savannah Bluff area of Horry County, and indicated that authorities should search in that area. A search of the Savannah Bluff area was begun, and the Basham map was sent to Indiana for review by Robert Truitt, [43] the lawyer who had been appointed to represent Fulks in Indiana during the early stages of the criminal proceeding.

***624** Apparently Truitt took the map, conferred with Fulks, and responded to an FBI agent in South Bend, Indiana, that Fulks agreed with Basham that the search should be focused on the Savannah Bluff area. [44] Truitt said, however, "I want to be clear that this will not be attributed to my client in any way." (TT Vol. 8 at 188.) As a result of Fulks's confirmation of the Basham map, law enforcement authorities intensified their search of the Savannah Bluff area, and searched for two additional days. The authorities found nothing.

In the discussions following the close of the testimony on June 10, 2004, Fulks's trial counsel made it clear that he wished to enforce the non-attribution condition imposed by Truitt and bar any reference to the fact that Fulks directly or through his lawyer suggested that authorities look in the Savannah Bluff area. (*Id.* at 189.) The government argued that the jury should be made aware that Fulks's lawyer (as opposed to Fulks himself) confirmed that authorities should look in the Savannah Bluff area.

During the colloquy as to whether and to what extent the court should admit testimony regarding the Savannah Bluff directions, the court learned that the government intended to introduce evidence, without objection, that on April 21, 2003 (some five months after Donovan was abducted), Fulks had directed authorities to a different area—the Water Tower and Long Bay Roads area, some fifteen miles away from the Savannah Bluff area—and was taken to that section of Horry County to assist with the search. As the government explained, Fulks's instructions to look in the Water Tower and Long Bay Roads area actually consisted of two separate locations: one near Long Bay Road (the April 21, 2003 statement) and a second (given on March 23, 2004, the day Fulks was taken to the scene) near Water Tower Road which intersects with Long Bay Road. (TT Vol. 8 at 195.) The court then summarized the state of the record, which was that Fulks had, at one time or another, given authorities directions to three different locations, the latter two being reasonably close to each other, but it was only the first of the three that trial counsel sought to keep from the jury pursuant to the non-attribution agreement insisted upon by Truitt. All parties agreed that this was an accurate assessment of the situation before the court. (*Id.* at 195.) The court then took the matter under advisement.

The colloquy resumed the following day. After another extended discussion, the court announced that it would side with the defendant and would enforce the non-attribution agreement in all respects. As a result, the jury did not hear that Fulks had initially joined in Basham's suggestion that the remains would be found near the Savannah Bluff area. Instead, the jury heard only that Fulks gave directions to two different locations in the vicinity of Water Tower and Long Bay Roads. This testimony included significant details about the number of searches, the number of man-hours involved, the fact that helicopters and cadaver dogs were used, and the fact that Fulks himself was taken to the area to see if he could assist with the search. The jury also learned that the search efforts were to no avail, and that at the time Fulks's case went to trial, Donovan's remains had not been located.

***625** It is undisputed that in January 2009, more than six years after Donovan's death and four-and-a-half years after the trial, Fulks was put in touch with Monica Caison, a specialist with The Community United Effort Center for Missing Persons of Wilmington, North Carolina. Fulks provided Caison with a package containing detailed instructions and a map of the location indicating where Donovan's remains were said to be located. Acting upon this information, Caison performed a systematic grid search and recovered the remains that ultimately proved to be Donovan's. That location was reasonably near the area that Fulks had suggested in his third direction to the location of the body (given on March 23, 2004).

In Claim 33, Fulks contends that he was convicted based on materially false information, specifically that the jury was left with the impression that he had misled authorities about the location of the body. As an initial matter, it should be noted that the idea that Fulks was less-than-truthful regarding the location of the body and that he led authorities on a "wild goose chase" was not one of the "central arguments" (Supp. Pet. at 1) of the case.[45] To begin, it is simply not accurate to state that Fulks "consistently" directed authorities to the location of Donovan's remains. Fulks confirmed Basham's suggestion that authorities should search for Donovan in the Savannah Bluff area, some fifteen miles away from where the remains were ultimately found. Fulks did this shortly after he was taken into custody, possibly while Alice Donovan was still alive, and certainly while her remains were still fresh enough to allow a forensic examination to determine the cause of death, and quite possibly the identity of the defendant who "struck the fatal blow." It was not until more than four months later, when Donovan was obviously deceased, and when it was more likely that her remains, if found, would be helpful to investigators, that Fulks began directing authorities to the Water Tower and Long Bay Road areas. In fact, Fulks initially provided information that caused investigators to look on the Long Bay Road side of the area, and only later, when Fulks was brought to the site, did he direct the searchers to the Water Tower Road area. Thus, the assertion that Fulks "consistently" led law enforcement to the correct location is incorrect.[46]

If Donovan's remains had been found before the trial at the location indicated by Fulks in his second or third set of instructions to authorities, the court would have faced a dilemma regarding Fulks's earlier confirmation, via his Indiana lawyer, that the body would be found near Savannah Bluff. To have kept out the Savannah Bluff statement, yet allow testimony regarding ***626** Water Tower and Long Bay areas where the body was actually located, would be to give the court's blessings to manipulation of authorities: While the evidence is fresh, provide information (indirectly through an attorney and carefully worded so as to not be attributed to the defendant) that sends authorities to an area where the perpetrator knows the remains will not be found; then, after passage of sufficient time to render a forensic examination largely irrelevant, direct the authorities to the

proper location and receive credit for helping the victim's family find their loved one so that a suitable funeral could be arranged. In this case, the court did not have to face this dilemma because, as noted, the remains were not found until some four-and-one-half years after the trial. Suffice it to say, however, that to the extent Petitioner claims that his conviction was based upon "false evidence" in violation of the United States Constitution, the argument that he has, from day one, sincerely attempted to direct authorities to the proper location, rings hollow.

Secondly, the notion that Petitioner misdirected authorities did not "permeate" the trial. Although the notion that Fulks attempted to mislead authorities was initially included as part of the non-statutory aggravating factor of victim impact, the government decided that the better course of action was to abandon any evidence or argument that Fulks had lied to authorities regarding the location of the body. This became clear during the colloquy leading up to the court's ruling excluding Truitt's statement. During that colloquy, the court asked the government whether it sought to introduce evidence regarding Fulks's suggestion to Truitt that authorities look in the Savannah Bluff area, only to later direct authorities to the Water Tower and Long Bay Roads area "to show that the defendant was sending you in two different directions, or jerking you around so to speak?" (TT Vol. 8 at 6.) The prosecutor responded:

> In fact, I actually disclaimed that, because of the non-attribution statement made by the lawyer in Indiana. Said we don't intend to argue. I think the jury, they may make that inference. I don't know that. But we don't intend to say Chad Fulks sent us in the wrong direction in Indiana. One of the tricky arguments is defendant's right to silence.

(*Id.*)

The trial resumed and the jury heard evidence that the authorities searched in the Bee Tree Farms area of North Carolina, the Savannah Bluff area of Horry County, and the Water Tower and Long Bay Roads area of Horry County.[47] The only testimony the jury heard regarding directions provided by Fulks related to the two locations near Water Tower and Long Bay Roads. Evidence regarding the government's extensive search efforts was a component of the government's case-in-chief because without having Alice Donovan's body upon which to perform tests and present evidence, the government needed to make a strong showing that every effort possible had been made to locate the body. To that end, the government offered, and the court allowed, extensive testimony regarding the search efforts.

***627** *The Court's Introductory Remarks*

The only *direct* reference in the entire trial to Fulks misleading authorities regarding the search for Donovan's remains came on the first day of trial, as the court introduced the jury to the case and explained the statutory and non-statutory aggravating and mitigating factors that had been alleged. Among the non-statutory aggravating factors was victim-impact evidence. The court, in its preliminary remarks to the jury, stated:

> The final non-statutory aggravating factor alleged by the government is victim impact evidence. Under this factor, the government contends that defendant Fulks caused injury, harm, and loss to Alice Donovan, Alice Donovan's family, and Alice Donovan's friends and coworkers as demonstrated by Alice Donovan's personal characteristics as an individual human being and the impact of the death upon Ms. Donovan's family. The government alleges that the family of Alice Donovan has suffered injury, harm, and loss as a result of Ms. Donovan's death, including, but not limited to, one or more of the following:
>
> *First, defendant Fulks engaged in a series of lies and deceit during law enforcement's initial efforts to locate Alice Donovan's body which resulted in obstructing search efforts and gave Alice Donovan's family a false sense of hope during a period of intense despair.*
>
> Second, defendant Fulks engaged in a premeditated plan to dispose of Alice Donovan's body in such a manner that recovery of the remains has not been achieved. The government alleges that this action by the defendant has caused significant emotional and psychological pain to Alice Donovan's family, beyond the expected grief associated in homicide cases.

(TT Vol. 1 at 40 (emphasis added).)

Petitioner does not challenge these remarks to the jury, but given that they constitute the only direct reference to an allegation that Fulks engaged in "lies and deceit" regarding the efforts to locate the body, the court's introductory remarks merit discussion here. First, the court was merely repeating the language of the indictment, and there was no pretrial effort to remove this language from the indictment or from the court's introductory remarks to the jury.

Second, in opening statements, Assistant U.S. Attorney Scott Schools did not suggest that Fulks had lied as to the location of the remains. Rather, he suggested to the jury that the authorities had conducted an extensive search at the location suggested by Fulks and found nothing. The prosecutor concluded that Basham and Fulks had "successfully concealed [Donovan's] remains." (TT Vol. 1 at 57.)

Third, as indicated above, the government rather quickly abandoned this line of attack, and the idea that Fulks engaged in "lies and deceit" to hinder the location of Donovan's body did not arise, directly or indirectly, for the duration of the trial. [48]

***628** Fourth, the court's final instructions contained no mention of the issue in light of the government's abandonment of it early in the case. The court told the jury:

> It again becomes by duty, therefore, to instruct you on the rules of law that you must follow in arriving at your decision as to whether the defendant, Chadrick Evan Fulks, should be sentenced to death or to life in prison without the possibility of release.
>
> * * *
>
> It would be a violation of your oaths, as jurors, to base your verdict upon any other view of the law that what I give you in *these* instructions.

(TT Vol. 21 at 248–49 (emphasis added).)

In addition to the fact that the jury was told to follow the final instructions only, the "lies and deceit" comment made in the introductory remarks occurred on the first day of a four-and-a-half week trial and comprised five lines out of a transcript that totaled 5,048 pages.

The Trial Evidence

Moreover, no false evidence was put before the jury regarding the efforts to locate Donovan's remains. Fulks's directions to Water Tower and Long Bay Roads were admitted without objection, as was testimony regarding the extensive efforts made by law enforcement officers to locate the body, efforts that involved repeated searches, numerous individuals, and even a search effort that was financed, personally, by Fulks's trial counsel. As the court observed during the colloquy on the Savannah Bluff statement, the government had a legitimate need to tell the jury about the extensive and heroic efforts made to locate Donovan's remains prior to trial. As the court analogized at trial, in a typical case, jurors want to see fingerprints or at least hear an explanation of why the fingerprints were not obtained. Here, with no body and no forensics examination associated with the body to produce to the jury, the government quite naturally realized that it needed to make a strong showing for the jury that all reasonable efforts were made to locate the body prior to trial. (TT Vol. 9 at 14.)

The only testimony Petitioner points to with specificity regarding the search for Alice Donovan is the following testimony of FBI Agent Jeff Long:

> AUSA Gasser: Despite these thorough and exhaustive efforts by law enforcement, as you sit there in this witness box today, can you tell this jury how Alice Donovan died?
>
> Agent Long: No, I can't.
>
> AUSA Gasser: Can you tell this jury where the remains of Alice Donovan are?
>
> Agent Long: No, I can't.

(TT Vol. 11 at 86.)

Fulks argues that Long's testimony "[d]rove home the point to the jury that ***629** Mr. Fulks must have purposefully obstructed the search efforts." (Supp. Pet. at 11). The court is not persuaded that Long's testimony presented false or misleading information regarding Fulks's efforts to locate the body.

The Prosecutor's Argument

Rather than focus on whether Fulks misled authorities, the government focused on the concept that Fulks had helped conceal the remains. It is undisputed that Donovan's remains were deposited in a secluded, rural, heavily overgrown, and somewhat swampy area. As the government correctly observes, that when Donovan was abducted, it was Fulks who was driving and who had lived in this area of South Carolina in the past and who most probably determined the location for disposal of the body. To conceal a body by placing it in a remote, hard-to-find location is one thing; to lie to authorities who are later searching for the body by directing them to the wrong location, or conflicting locations, is something else. It was the concealment argument, not the misdirection argument, that the government relied upon.

The passages from the government's closing argument related to concealment are as follows:

> On November 14th, 2002, Brandon Basham and Chad Fulks had a plan. Their plan involved Kidnapping and carjacking a woman in order to get her car, at that point. That is what their plan was. And that plan evolved. That plan then included rape and murder. Chad Fulks and Brandon Basham knew there would be no eyewitnesses. They knew they would take Alice Donovan to an isolated spot. Take that body where nobody would know how to find it. They accomplished that very same plan before, 72 hours before, with a 19–year–old girl in Huntington, West Virginia.
>
> And the defense lawyers want you to believe, and Chad Fulks wants you to believe that, for the first time in his entire life, for the first time, that he is telling you the truth. I didn't rape Samantha Burns. I didn't kill Samantha Burns. I didn't kill Alice Donovan. And I had nothing to do with getting rid of their bodies. Do you believe that? Are you going to accept that?

(TT Vol. 21 at 119.)

Fulks characterizes the prosecutor's closing argument as suggesting that Fulks obstructed the search for Alice Donovan and sent the law enforcement officers on a "wild goose chase."[49] In the court's view, the closing argument quoted above did nothing more than describe exactly what the evidence at trial demonstrated: Fulks and Basham disposed of Alice Donovan's body in a remote area where it would be extremely difficult for searchers to find her. The fact that it took over six years to discover a few remains of Alice Donovan's body demonstrates this fact. Additionally, the prosecution appropriately noted that Fulks waited more than five months after the kidnapping to provide accurate information about the possible location of Donovan's body. (TT Vol. 21 at 126.)

After the prosecutor concluded his initial closing argument, defense counsel addressed the jury and suggested that several of the government witnesses "said they had absolutely no idea how Alice Donovan died." (TT Vol. 21 at 154–55.) In reply, the prosecutor argued the following:

> Before I even get to some of the defense experts, a couple of points I need to ***630** address that [were] brought up by Mr. Blume in his closing argument. Mr. Blume made the statement that one of the reasons why he argues to you jurors to vote for life without parole is that he states that the government has no body. He said that the government has no idea how Alice Donovan died. That the government cannot tell you how Alice Donovan died. And because of that, he asks you and he argues to you that life without parole is the most appropriate punishment. I want you to think about that for a moment, ladies and gentlemen. Why is it that the government has no body? Whose fault—at whose conduct is it that the government has no body? The reason the government doesn't have Alice Donovan's body, the reason why we can't put her and take her to a morgue and have a pathologist autopsy her and come in and take that witness stand and tell you jurors that she was raped, that her throat was cut, or that she was shot, is because of the actions, of Chad Fulks and Brandon Basham. Don't you think it is a little bit unfair? Don't you think it is unfair that somehow the government—it should be held against the government for not producing a body because the actions and the conduct of Chad Fulks and Brandon Basham have been successful? Under that theory, ladies and gentlemen, you could never seek the death penalty in a case in which somebody successfully hid or destroyed the body. Think of the logic there. So much of what we do in life, so much of the law is based on logic, simple logic. Should Chad Fulks and Brandon Basham be rewarded because they successfully were able to conceal the body of Alice Donovan? Should, somehow, you sentencing jurors and Brandon Basham's sentencing jurors go back there and hold that against the government because of the actions and conduct of Brandon Basham and Chad Fulks? Is that fair? Is that just?

> I submit to you, that that is what makes this crime more aggravating. More aggravating. The fact that they successfully disposed of her body so that the victims will not be able to bury her and so that the government is barred from providing you, jurors, a total picture. The government should not be held accountable for that.

(TT Vol. 21 at 219–21.)

The court finds nothing in this closing argument to be false or misleading. The prosecutor focused on the defendants' actions in "hid[ing] and destroy [ing]" the body, not on misleading authorities after-the-fact. Indeed, the *only* reference that the prosecution made to the unsuccessful search was that Fulks knew that the officials had been searching in the Savannah Bluff area in November 2004. In order to put the statement in context, it should be noted that the government, midway through its closing argument, began to recite a series of demonstrably false statements and actions taken by Fulks during his lifetime. The prosecutor began: "I am going to end up on two subject matters ... one is the defendant's credibility." (TT Vol. 21 at 119.) The prosecutor then rhetorically asked:

> Why is Chad Fulks's credibility important? Why is that important to you jurors who will be making that decision? Chad Fulks says he didn't rape Samantha Burns. Chad Fulks says he didn't kill Samantha Burns. Chad Fulks says he didn't kill Alice Donovan. Chad Fulks says he had nothing to do with disposing of their bodies. One of the questions you will have to decide is, do you believe Chad Fulks ... this man who has spun a web of deceit his entire life. He has lied, he has deceived, he ***631** has manipulated people, particularly the women, his entire life.
>
> Do you think, with all of those lies I have just gone over from the incident with Nell lee and Robert Lee about his little girl, and all of those lies, in the whole, grand scheme of things, ladies and gentlemen, all of those matters are really not that serious. Lying about your identity, lying about whether you possess a firearm, lying to get out of jail, in the whole, grand scheme of things for which you are getting ready to do, really are not that serious. And the defense lawyers want you to believe, and Chad Fulks wants you to believe that, for the first time in his entire life, for the first time, that he is telling you the truth. I didn't rape Samantha Burns. I didn't kill Samantha Burns. I didn't kill Alice Donovan. And I had nothing to do with getting rid of their bodies. Do you believe that? Are you going to accept that?
>
> What else about his credibility, ladies and gentlemen? What did he tell the police in this case? Well, Ladies and Gentlemen, I submit to you, not much. You can put it in proper context. In April of 2003, five months after Alice Donovan is abducted, he sits down with the police and his Lawyers, and he says where Alice Donovan's body may be, and he talks about the things I have already discussed regarding Alice Donovan, basically, putting it on Brandon Basham.
>
> *Let's talk about the searches. First, with regard to the searches, Chad Fulks knew in April of 2003, he knew they had been searching the Savannah Bluff area, didn't find the body in November. Knew they had been searching Bee Tree farm area up in North Carolina, no body found. So he sends them to another location. Does that make it true? No.*

(*Id.* at 119–20.) The prosecutor then followed with a carefully constructed chronology of episodes in which Fulks had lied to or deceived other people.

Following this detailed summary, the prosecutor concluded:

(*Id.* at 125–26 (emphasis added).)

The italicized language in the passage quoted above did not contain any untrue statements, nor was it in violation of the court's ruling regarding the search directions given by the Indiana lawyer. Further, when viewed in the light of the prosecutor's entire two-hour summary, it was a relatively insignificant reference to the general proposition that just because Fulks said something, it was not necessarily true. The statement was certainly not a "central argument" (Supp. Pet. at 1) or "theme" (*id.* at 11) that "permeated the proceedings" (*id.* at 10) or served as "one of the primary justifications for sentencing [Fulks] to death." (*Id.* at 26.)

Finally, the cases relied upon by Fulks for the proposition that a sentence of death based in part upon false information

violates a "heightened reliability" requirement of the Eighth Amendment (Supp. Pet. at 21) are unavailing. In both *United States v. Tucker,* 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972), and *Johnson v. Mississippi,* 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), the defendants had been sentenced to death based, in part, upon prior convictions that were invalidated, rendering the government's previous presentation of evidence regarding the convictions to be false. In the case at hand, however, the location of the remains of one of Fulks's victims does nothing to change, invalidate, or falsify the arguments made by the government at trial.

Petitioner also relies upon *United States v. Tucker,* 404 U.S. 443, 448, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972), which holds that ***632** due process is implicated if a sentencer's decision "might have been different" if it had not considered the false information. But here, no false information was presented to the jury. To the extent that the brief mention of the search efforts in the court's introductory remarks or the prosecutor's reference during the his two-hour summary were considered by the jury in this case, the court is in no way persuaded that the result "might have been different" had these two statements been omitted.

During the four-and-a-half week trial of this case, the jury heard about Fulks and Basham escaping from a new detention facility in Kentucky (where Fulks was being held on charges that might have exposed him to a life sentence) and then engaging in a seventeen-day crime spree that spanned seven states. During this crime spree, two women were abducted, raped, and murdered, and their remains were left in remote areas to be consumed by the elements or wild animals. Four other victims of the crime spree could have been murder victims as well. James Hawkins was duct-taped to a tree and left in the woods during temperatures in the low thirties and escaped with his life only when he was able to free himself fifteen hours later. Ohio State Highway Patrol Trooper Nicholas Malo dove onto a berm to avoid being struck by the BMW Fulks was driving at speeds of up to 130 miles per hour, and Fulks then drove the BMW onto the berm in an effort to strike him. (TT Vol. 7 at 166–98.) Carl Jordan confronted Fulks when he and Basham were burglarizing Jordan's son's house. Jordan found himself in a high-speed chase with Fulks driving a van directly at him and Basham shooting out the back window of his vehicle. (TT Vol. 5 at 46–58.) Although Fulks offered an explanation for it, Fulks's late night call to young Amy Ward could have been determined by the jury to be an attempt to have a third kidnapping victim. In addition to these victims, or potential victims, of personal violence, the crime spree included numerous people whose homes were burglarized, whose vehicles were stolen, or whose identities, pocket books, or license plates were stolen.

In light of this extensive record of criminal activity, this court cannot conclude that the sentencing jury's decision "might have been different" had the two brief references to the search efforts been omitted from the trial.

CONCLUSION

Chadrick Evan Fulks received world-class representation from a highly skilled, motivated team of four lawyers with death penalty experience, together with innumerable investigators and experts, law students, and others who contributed to mounting a vigorous defense marshaling all the evidence available in the best light to the defendant. Counsels' notes and other documents produced in discovery reveal an exhaustive effort to interview potential witnesses, locate and interview experts (some on multiple occasions), evaluate their potential testimony, and use those that would assist the defense team in its efforts to spare Fulks's life. In his petition before this court, Fulks has failed to show that his trial counsel were ineffective under *Strickland* or that any other errors of constitutional magnitude occurred. The petition is therefore denied.

Certificate of Appealability

On December 1, 2009, the Rules governing Section 2254 and 2255 cases in the United States District Courts were amended to require that the district court issue or deny a certificate of appealability when a final ruling on a post-conviction petition is issued. *See* Rule 11(a) of the Rules governing 28 U.S.C. § 2254 and 2255. The court has reviewed its order and pursuant ***633** to Rule 11(a) of the Rules Governing Section 2254 and Section 2255 cases, issues a certificate of appealability as to Claims 1 through 28, and 32. As to Claims 29, 30, and 31, the Petitioner has not made a substantial showing of a denial of a constitutional right, and therefore, a certificate of appealability is denied as to these Claims. 28 U.S.C. § 2253(c)(2); *Miller–El v. Cockrell,* 537 U.S. 322, 336–38, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (in

order to satisfy § 2253(c), a petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong) (citing *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)).

IT IS SO ORDERED.

All Citations

875 F.Supp.2d 535

Footnotes

1 *United States v. Fulks,* 454 F.3d 410 (4th Cir.2006)

2 *Fulks v. United States,* 551 U.S. 1147, 127 S.Ct. 3002, 168 L.Ed.2d 731 (2007)

3 The government had photographs of the child to support its allegation that Fulks abused the child by striking his testicles, burning his genital area, bruising his back, and leaving a choke mark on his neck. (Presentence Investigation Report "PSR" at 29.)

4 In connection with Burns's death, Basham and Fulks each received sentences of life imprisonment in the Southern District of West Virginia, after pleading guilty to the federal offense of carjacking resulting in death, in violation of 18 U.S.C. § 2119.

5 A defense expert testified at trial that the trajectory of the bullet that shattered the window of Jordan's truck belied Jordan's belief that Fulks had fired the shot.

6 As noted in this order, Donovan's remains were found subsequent to the Fourth Circuit's decision on the direct appeal of Fulks's conviction.

7 The Federal Death Penalty Act of 1994 was enacted as Title VI of the Violent Crime Control and Law Enforcement Act of 1994 and became effective on September 13, 1994. *See* Pub.L. No. 103–322, Title VI, §§ 60001–26, Sept. 13, 1994, 108 Stat.1959 (codified at 18 U.S.C. § 3591–3598).

8 *See* http://www.lawschool.cornell.edu/faculty/bio.cfm?id=5; last checked July 29, 2010.

9 According to Blume's CV, which is available on the Cornell Law School website, Blume has recently authored the following publications: *In Defense of Non–Capital Habeas: A Reply to Hoffman and King,* with Sheri Johnson, and Keir Weyble, Cornell L.Rev. (forthcoming, Fall 2010); *When Lightning Strikes Back: South Carolina's Return to the Unconstitutional, Standardless, Capital Sentencing Regime of the Pre–Furman Era,* Charleston L.Rev., (forthcoming, Fall 2010); *The Dance of Death or (Almost) "No One Gets Out of Here Alive": The Fourth Circuit's Capital Punishment Jurisprudence,* with Sheri Johnson, Emily Paavola, and Keir Weyble, 61 S.C. L.Rev. 465 (2010); FEDERAL HABEAS CORPUS UPDATE, with Mark Olive, Denise Young & Keir Weyble (Administrative Office of the U.S. Courts, 20th Ed., August 2009); *Unstacking the Deck: A Handbook for Capital Defense Attorneys Challenging the State's Case in Aggravation,* with Emily Paavola (Death Penalty Defense and Resource Center, December 2009); *Statement Handbook: Questions to Ask About the Admissibility of a Criminal Defendant's Statements,* with Emily Paavola (Death Penalty Defense and Resource Center, August 2009); *Gilmore v. Utah: The Persistent Problem of Volunteers,* in Blume & Steiker, DEATH PENALTY STORIES (Foundation Press 2009); *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases,* with Sheri Johnson and Christopher Seeds, 18

Cornell J.L. & Pub. Pol'y 689 (2009); *An Empirical Look at Atkins v. Virginia and its Application in Capital Cases,* with Sheri Johnson and Christoper Seeds, 76 Tenn. L.Rev. 625 (2009); *Back to the Future: Reversing Keith Simpson's Death Sentence and Making Peace with the Victim's Family Through Post–Conviction Investigation,* 77 UMKC L.Rev. 963 (2009); *Mental Retardation and the Death Penalty Five Years After Atkins,* with Sheri Johnson and Christopher Seeds, in THE FUTURE OF AMERICA'S DEATH PENALTY (Carolina Academic Press 2009); *Crime Labs and Prison Guards: A Comment on Melendez–Diaz and its Potential Impact on Capital Sentencing,* with Emily Paavola, 3 Charleston L.Rev. 205 (2009).

10 In 2009 alone, Blume made the following presentations: " *'Volunteers:' The Relationship between Suicide and Death Row Inmates who Waive their Appeals,*" American Academy of Psychiatry and the Law Annual Meeting, November 2009, Baltimore, MD;. "*New Hope for an Old Punishment? What will the Future Bring: The Death Penalty in Thailand and China,*" Clarke East Asia Speaker Series, Cornell Law School, October, 2009, Ithaca, NY; "*The Fourth Circuit's Capital Punishment Jurisprudence,*" Fourth Circuit Symposium, University of South Carolina School of Law, October 2009, Columbia, SC; "*Criminal Cases Pending before the Supreme Court,*" *Supreme Court Preview,* William & Mary School of Law, October 2009, Williamsburg, VA; "*Supreme Court Update,*" National Habeas Corpus Seminar, August 2009, Pittsburgh, PA; "*Protecting Relief: Strategies for Getting Certiorari Denied,*" Supreme Court Advocacy Institute, New York University School of Law, June 2009, New York, NY; "*An Empirical Analysis of Post–Atkins Mental Retardation Claims in Capital Litigation,*" National Seminar on the Development and Presentation of Mitigating Evidence in Capital Cases, April 2009, Philadelphia, PA; "*The Death Penalty: What Will the Future Bring?* " Charleston Law School, March 2009, Charleston, SC. From 2001 to 2008, Blume made at least twenty-one other presentations.

11 Under the *Pinkerton* doctrine, a conspirator may be held liable for an act committed by a fellow conspirator when the act is committed in furtherance of the conspiracy, falls within the scope of the conspiracy, or is reasonably foreseeable as a natural consequence of the conspiracy. *Pinkerton v. United States,* 328 U.S. 640, 647–48, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).

12 The remaining noncapital counts to which Fulks pled guilty, in addition to the carjacking and kidnapping offenses, were: (1) interstate transportation of a stolen motor vehicle (18 U.S.C. § 2312); (2) conspiracy to commit numerous offenses, including carjacking and kidnapping (18 U.S.C. § 371); (3) conspiracy to use firearms in furtherance of a crime of violence (18 U.S.C. § 924(*o*)); (4) use of a firearm during and in relation to a crime of violence (18 U.S.C. § 924(c)(1)(A)); (5) being felons in possession of firearms (18 U.S.C. § 922(g)(1)); and (6) possession of stolen firearms (18 U.S.C. § 922(j)). *Fulks,* 454 F.3d at 415 n. 3.

13 The matter before the court is, technically speaking, a motion under 28 U.S.C. § 2255. All parties have, however, referred to the motion as a "petition," and Fulks as the "Petitioner." For consistency, the court will adopt this nomenclature.

14 For ease of reference, citations to the Amended Petition in the order that follows will be "Pet. at ____," it being understood that it is the Amended Petition from which the court is working. Additionally, because it will be necessary for the court to cite from Fulks's trial, Basham's trial, and several pre and post trial hearings in both cases, the court will adopt the following abbreviations for references to testimony and exhibits in this case: TT = trial transcript of Fulks's Penalty Phase Trial in June 2004; HT = transcript of evidentiary hearing on Fulks's § 2255 petition in February 2010; Basham TT = trial transcript of co-defendant Brandon Basham's trial in November 2004; Govt. Ex. ____ = Government's Exhibits introduced at the § 2255 evidentiary hearing; Pet. Ex. ____ = Petitioner's Exhibits introduced at the § 2255 evidentiary hearing; and Pet. App. Ex. ____ = Exhibits from Petitioner's Appendix attached to his § 2255 petition, as amended. In addition, Claim 33 is the subject of a separate document and referred to herein as Supp. Pet. at ____.

15 During the pendency of this § 2255 proceeding, Fulks filed several motions to dismiss his appeal and expedite his execution, and subsequently withdrew them. *See* ECF No. 1009 filed Dec. 14, 2006 (withdrawn by ECF No. 1015 filed Apr. 5, 2007); ECF No. 1114 filed Sept. 9, 2008 (supplemented by ECF No. 1119 filed Sept. 26, 2008); and ECF No. 1126 filed Oct. 27, 2008—all motions to dismiss were withdrawn by ECF No. 1151 filed Feb. 25, 2009.

16 The parties agreed to waive their hearsay objections to the affidavits and allow the court to consider the information contained therein as if the witness had testified from the witness stand.

17 Although the Fourth Circuit has never squarely addressed the issue, several other circuits have concluded that a separate listing of findings of facts followed by a separate listing of conclusions of law is not required. *See, e.g., Perera v. United States,* 932 F.2d 973, 1991 WL 73709 (9th Cir.1991) (unpublished).

18 As Justice Alito noted in his concurring opinion, the ABA is a private organization with limited membership, and that "[i]t is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination." *Bobby v. Van Hook,* 558 U.S. 4, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009) (Alito, J. concurring).

19 Petitioner claims that the failure to present the available mental health evidence was due to trial counsel's alleged apoplexy over the Ward/Bruning testimony, which is a separate ineffective assistance of counsel claim addressed in Claim 2.

20 *See* John H. Blume, Sheri Lynn Johnson & Scott E. Sunby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation,* 36 Hofstra L.Rev. 1035, 1041 (2008) ("First, the defense team must secure appropriate expert assistance, primarily from mental health experts.").

21 Blume has written several articles discussing that antisocial personality disorder is a diagnosis to be avoided. *See* John H. Blume & David P. Voisin, *Avoiding or Challenging a Diagnosis of Antisocial Personality Disorder,* 24 Champion 69 (Apr.2000) (antisocial personality disorder diagnosis "can be the kiss of death, because to many people, and most judges, this means that the defendant is little more than a remorseless sociopath.").

22 "A person charged with treason or other capital offense shall at least three entire days before commencement of trial [ ] be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireperson and witness, except that such list of the venirepersons and witnesses need not be furnished if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person." 18 U.S.C. § 3432.

23 At the § 2255 hearing, Blume briefly related his capital trial experience in the following South Carolina cases: *State v. Telus Edwards* (1986) (pled to manslaughter); *State v. William Looper Hunter, Jr.* (1988) (received life verdict in jury trial); *State v. Leonard Gardner* (1980s) (pled to life with a thirty-year parole eligibility); *State v. Ronnie Skipper* (late 1980s) (received a life sentence before Judge Baggett in a resentencing case); *State v. Limmie Arthur* (pled to life sentence after death sentence was reversed on appeal); *State v. Michael Preston* (late 1980s or early 1990s) (pled to life); *State v. James Russell Cain* (pled to life); *State v. Shannon Ardis* (pled guilty and received a life sentence after a bench trial); *State v. Sterling Spann* (pled to life after resentencing and served 14 years); *State v. Lino Delacruz* (2001) (conceded guilt and received a life sentence from a jury); *State v. Danny Han* (pled to life); *State v. Chavis Miller* (pled to life); *State v. Terrion Warren* (2006) (pled guilty and was then sentenced to life in front of a judge); *State v. Ringo Pearson* (found to have

mentally retardation and subsequently sentenced to a term of years). (HT Vol. 1 at 125–132). Blume's trial experience is also listed in Government's Exhibit 1.

24 Blume talked to Tracy's parents several times, but they would not disclose her whereabouts.

25 Twelve jurors found: Mitigating Factor Number 1, Chadrick Evan Fulks's mother abused alcohol while she was pregnant with him. Number 9, Chadrick Evan Fulks suffered from learning disabilities as a child. Number 12, Chadrick Evan Fulks was neglected by both of his parents. Number 13, Chadrick Evan Fulks lived in a house that was often filthy and infested with roaches and ants. Number 14, Chadrick Evan Fulks's parents did not provide him with adequate clothing or school supplies. Number 16, Chadrick Evan Fulks's parents sold food stamps to get money for beer. Number 18, Chadrick Evan Fulks was often left without supervision. Number 19, Chadrick Evan Fulks was permitted to roam the streets as a young child. Number 20, A principal, a police officer, and a probation officer all recommended Chadrick Evan Fulks be removed from the home at the age of nine, but he was not removed. Number 21, Chadrick Evan Fulks's parents gave him little attention or affection. Number 22, Chadrick Fulks was subjected to emotional abuse as a child. Number 23, Chadrick Evan Fulks was subjected to physical abuse as a child. Number 24, Chadrick Evan Fulks grew up seeing his parents frequently fighting each other. Number 25, Chadrick Evan Fulks grew up seeing heavy drinking and frequent fighting by other adults in his own house. Number 27, Chadrick Evan Fulks grew up seeing graphic photographs of naked women papering the walls and ceiling of his basement. Number 28, Chadrick Evan Fulks's father showed him pornographic movies as a young child. Number 31, Chadrick Evan Fulks started drinking at the age of 9 and using marijuana at 11 or 12, and his parents made no effort to stop him. Number 32, Chadrick Evan Fulks's brother taught him to inhale gasoline and paint as a young teenager. Number 34, Chadrick Evan Fulks's mother ignored his stealing. Number 35, Chadrick Evan Fulks's brother taught him to steal, fight, and break into cars. Number 36, Chadrick Evan Fulks attempted suicide at age 13. (TT Vol. 22 at 20–25.) Eleven jurors found Mitigating Factor Number 15, that Fulks frequently went hungry or was uncertain whether he would get food as a child. (*Id.* at 21.) Ten jurors found: Number 11, Chadrick Evan Fulks's parents cared so little for his education that they never helped him with homework and even left him at school with soiled pants. Number 37, Chadrick Evan Fulks was diagnosed with depression, substance abuse, and possible sociopathic tendencies at age 14. (*Id.* at 21, 24.) Nine jurors found Mitigating Factor 2, Chadrick Fulks's brain was permanently damaged by his mother's drinking during her pregnancy. (*Id.* at 20.)

26 At the § 2255 hearing, Blume said, “I believed that he would be found guilty, I didn't see any credible defense or issue which he would be found not guilty of the offenses. And so given that, I felt like that it was in Mr. Fulks's best interest to plead guilty.” (HT Vol. 1 at 45.) Every court to consider this cases agreed with trial counsel's assessment of the evidence. For example, according to the Fourth Circuit, “Fulks chose to pursue his trial strategy in the face of an abundance of evidence casting Fulks as an equal, if not leading, partner in the crime spree.” *Fulks,* 454 F.3d at 410, 426. In fact, after the verdict was returned, all four alternate jurors requested an audience with the undersigned so that they could inform the court that they, too, would have unanimously voted in favor of the death penalty.

27 “Because I believe [sic] then and I believe now he was remorseful for his responsibility in this. And so a proffer in my mind would have been self-defeating. I wanted the statement to come in. I mean, my main concern wasn't that the statement would come in, but the government might not use it on the basis of they thought it might be self-serving, and then I didn't know. You know, I did know about a proffer, but I didn't—you know, right or wrong, it's not my decision to say whether this is the right decision or the wrong decision, but my decision was that I didn't want a proffer and I didn't think it was in Mr. Fulks's interest to ask for one.” (HT Vol. 1 at 43.)

28 As the government observes in its brief, the court is authorized to determine if a guilty plea is supported by “anything that appears in the record.” *United States v. Mastrapa,* 509 F.3d at 660. In this case, the

government orally supplemented Fulks's 302 statement at the guilty plea hearing with an extensive rendition of Basham and Fulks acting as partners during their seventeen-day crime spree, a period that included the abduction, rape, and murder of two women, the abduction and leaving for dead a third individual (Hawkins), and the potential abduction of yet two other women. Fulks's trial counsel protested the rendition of matters outside the 302, and indicated that the only concessions Fulks would make were those contained in the 302. This court is reluctant, therefore, to rely upon the government's rendition at the guilty plea hearing, for, although it "appears in the record," it was disputed by Fulks.

29 In *Holloway v. United States,* 526 U.S. 1, 119 S.Ct. 966, 143 L.Ed.2d 1 (1999), the Court required an assessment of the mens rea requirement at the inception of the carjacking. In this case, the government asserts that because Fulks and Basham kidnapped Donovan, the crime of carjacking occurred over an extended period of time. Accordingly, the argument goes, the court is authorized to determine Fulks's mens rea at any point during the commission of the *actus rea.* Because Fulks and Basham, among other things, both raped Donovan while the carjacking was in progress, the government contends that the concurring opinion in *United States v. Lebron–Cepeda,* 324 F.3d 52, 63 (1st Cir.2003) leads to the conclusion that even if the requisite mental state was not demonstrated at the precise moment the carjacking began, it was unquestionably shown while the carjacking was in progress. Because the court did not rely on this theory in accepting Fulks's plea, and because counsel for the government offered only a lukewarm argument at the hearing, the court declines to rely upon this theory.

30 *United States v. Computer Sciences Corp.,* 689 F.2d 1181, 1183 (4th Cir.1982), *overruled in part by* *Busby v. Crown Supply, Inc.,* 896 F.2d 833 (4th Cir.1990).

31 The standard questionnaires that had been returned to the court were released to defense counsel as follows: On March 31, 2004, 299 questionnaires were released; on April 1, 2004, 224 questionnaires were released; on April 15, 2004, thirty questionnaires were released; on April 27, 2004, twenty questionnaires were released; and on May 6, 2004, eleven questionnaires were released. That means defense counsel had access to 523 of 584 total questionnaires by April 1, 2004.

32 Of those jurors seated, Blume conducted the voir dire of Sylvia Allison, Agnes Bryan, Richard Goehring, Lisa Harvey, Mary Ellen Huggins, Timothy Kurzwell, Anne Lee, and Karl Nations; Sheri Johnson conducted the voir dire of Pearl Gordon, Elizabeth Plyler, and Cynthia Steele; and Bill Nettles conducted the voir dire of Joni Novinger.

33 In *Jones v. Cooper,* the Fourth Circuit stated that, to the extent *United States v. Bynum,* 634 F.2d 768 (4th Cir.1980), stood for the proposition that a defendant denied the right to exercise intelligently a peremptory challenge is entitled to a new trial, "this reasoning was subsequently rejected by the Supreme Court in *McDonough,* 464 U.S. at 555, 104 S.Ct. 845; it is no longer good law." *Jones,* 311 F.3d 306, 314 n. 3 (4th Cir.2002).

34 Fulks challenged for cause the following venirepersons: Richard Goehring, Lisa Harvey, and Sylvia Allison on the ground that the strength of their beliefs in favor of the death penalty rendered each of them unwilling to consider any mitigating evidence that he would offer; and Joni Novinger and Elizabeth Plyler on the ground that their personal experiences rendered them incapable of impartially serving on his jury because Novinger's sister had been the victim of a sexual assault, and because Plyler and her daughter were roughly the same ages that Donovan and Burns had been when they were killed. The court rejected the challenges, qualified

the five venirepersons over Fulks's objections, and the Fourth Circuit found no error. *Fulks,* 454 F.3d at 427–34.

35 During the trial, the court was mindful of the fact that the Federal Rules of Evidence do not technically apply in a capital sentencing trial. *Fulks,* 454 F.3d at 437. Instead, the Federal Death Penalty Act provides that the court may exclude evidence "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. § 3593(c). In spite of this, throughout the trial, the parties made objections and referred to specific evidentiary rules as did the court in ruling on the objections. References to these rules were by analogy only, and the court was aware of the somewhat more flexible standard for admissibility established by § 3593(c). Moreover, the Petitioner has no standing to object to this court's reference to the Rules of Evidence because he contended on appeal that the Federal Death Penalty Act was unconstitutional because the FRE do not apply to the sentencing phase of a FDPA trial. *Fulks,* 454 F.3d at 437.

36 In closing argument of the Basham trial, the government stated: "Do you remember what Brandon Basham's comments were? He sees that doe and he says to himself, spontaneously, "here I couldn't even kill a deer, and I have," and his lawyer, Mr. Littlejohn stops him. "Here, I couldn't even kill a deer, and here I have"—what do you think he is thinking about? Here I have smoked a joint? Here I have stolen a car?" (Basham TT Vol. 12 at 79.)

37 It should be noted that Basham's version of when and how Donovan died changed several times as the investigation progressed. At one time, Basham indicated that Fulks, acting alone, had taken Donovan to an undisclosed location and left her there without any involvement by Basham at all. Later, the story changed to indicate that Fulks had taken Donovan to a location with Basham's involvement. Still later, Basham said that Fulks had slit Donovan's throat and put her in the back of the car.

38 It should be noted that the Roddey testimony regarding mud on the driver's side of the vehicle was contrary to a photograph introduced in evidence which showed mud on both sides of the front of the vehicle.

39 In fact, the government attorney stated during the trial that no deals, promises, or special provisions were made for *any* of the more than 100 witnesses called by the government.

40 Assuming Fulks's story was true, that Ronnie had one of the .45 revolvers, the other .45 revolver had inoperable ammunition and the .45 automatic had no ammunition clip, thus leaving one operational firearm, the .22 caliber revolver, which witnesses testified Basham always carried.

41 The court instructed the jury that "what the lawyers say is not evidence" (TT Vol. 21 at 17), and that "the arguments of the attorneys and the comments and rulings of the court are not evidence." *Id.*

42 Collateral attacks on a sentence must be filed within one year from the latest of the date of the final judgment of conviction or "the date on which the facts supporting the claim ... could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(f)(4). The government concedes that Claim 33 was asserted within one year from the date the remains were discovered.

43 The exact name of the Indiana lawyer does not appear in the record. According to a 302 form attached to the government's memorandum in opposition to Claim 33, however, his name is Robert Truitt.

44 Exactly what Truitt said to authorities is not clear. According to Fulks's trial counsel, “the lawyer came out and said, ‘Well, okay, yeah, he looked at this, and that looks right’ or something to that effect.” (TT Vol. 8 at 188.) According to the government, Truitt said, “Basically, you are warm.” (*Id.* at 191.)

45 Claim 33 is contained in a separate filing with its own numbering system. To avoid confusion with the Amended Petition (“Pet.”) that is the subject of most of this order, references to the new Claim 33 will be as follows: Supp. Pet. at ____.

46 In addition to acquiescing in Basham's suggestion that authorities needed to look in the Savannah Bluff area, Fulks learned that at Basham's direction, law enforcement authorities were also searching the Bee Tree Farms area of North Carolina, some 52 miles distance from where the body was located. Nothing in the record indicates that Fulks did anything to stop authorities from searching this area. There was also evidence accumulated by the government (but note put before the jury) that Fulks actually told authorities that a “live woman [was] taped to a tree” in the woods on “Wonderland Road” near Conway, South Carolina. See FBI 302, date of transcription Nov. 25, 2002 (Fulks, through attorney, said that “live woman taped to a tree” in woods on “Wonderland Road” near Conway, SC) (attached as Ex. 3 to Government's Memorandum in Opposition to Supplement the Pleadings).

47 It should be noted that the jury heard evidence regarding the search at Bee Tree Farms and Savannah Bluff not because of information Fulks provided, but rather because of information provided by his co-defendant, Basham. In producing this evidence, the government was not attempting to lay fault at Basham's feet for giving them bad information; rather, it was merely an effort to convince the jury that all reasonable efforts had been made to locate the body.

48 The issue of searching the Savannah Bluff area came up four days later when Fulks's trial counsel sought to introduce testimony that Fulks was present at a hearing where the government prosecutors indicated to the judge that one of the reasons that the government sought the death penalty for Basham was that Basham had purposefully given authorities bad information regarding the location of Donovan's remains. (TT Vol. 11 at 113–30.) After a somewhat confusing colloquy, it became clear that the reason Fulks's counsel wanted that information admitted was to raise the inference that Fulks, having heard that misleading authorities as to the location of Donovan's remains was one of the reasons the government sought the death penalty for Basham, would be less likely to produce bad directions himself; hence, Fulks had a motivation to be truthful, and was truthful, when he directed authorities to Water Tower and Long Bay Roads. The government protested that the court had previously sustained an objection to the fact that Fulks himself had directed authorities to the Savannah Bluff area, and suggested that it would not be fair to the government to allow in evidence of Basham's misdirection, and at the same time keep out evidence of Fulks's misdirection. (*Id.* at 123.) Ultimately, the government sided with Fulks and allowed the testimony that Basham had misled authorities as to the location of the body.

In the somewhat confusing colloquy that led up to this ruling, the government lawyers did seem to indicate, contrary to their earlier assertions, that they would make a “wild goose chase” argument as to Fulks. (*Id.* at 122–23.) The entire colloquy occurred while the jury was out of the courtroom, and, contrary to the government's statement during this hearing, the government did not, in fact, reverse course and seek to put before the jury the idea that Fulks had lied about the location of the body.

49 The term “wild goose chase” was actually used by Fulks's trial counsel and later by the court during a colloquy while the jury was not in the courtroom. (TT Vol. 11 at 114–30.) The term was never used in front of the jury.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 11, 2022

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 20-1900

CHADRICK FULKS
Petitioner-Appellant,

v.

T.J. WATSON, Warden
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.

No. 2:15-cv-00033

James R. Sweeney II, *Judge*.

O R D E R

Petitioner-appellant filed a petition for rehearing and rehearing *en banc* on September 2, 2021. No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing and rehearing *en banc* is therefore DENIED.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

NOTICE OF ISSUANCE OF MANDATE

March 21, 2022

To: Roger A. G. Sharpe
UNITED STATES DISTRICT COURT
Southern District of Indiana
104 U.S. Courthouse
Terre Haute, IN 47807

No. 20-1900	CHADRICK FULKS, Petitioner - Appellant v. T. J. WATSON, Warden, Respondent - Appellee
Originating Case Information:	
District Court No: 2:15-cv-00033-JRS-MJD Southern District of Indiana, Terre Haute Division District Judge James R. Sweeney	

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

RECORD ON APPEAL STATUS: No record to be returned

form name: **c7_Mandate** (form ID: **135**)

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

July 19, 2021

Before
ILANA DIAMOND ROVNER, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*
MICHAEL Y. SCUDDER, *Circuit Judge*

No. 20-1900	CHADRICK FULKS, Petitioner - Appellant v. T. J. WATSON, Warden, Respondent - Appellee
Originating Case Information:	
District Court No: 2:15-cv-00033-JRS-MJD Southern District of Indiana, Terre Haute Division District Judge James R. Sweeney	

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

form name: **c7_FinalJudgment** (form ID: **132**)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

CHADRICK FULKS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 2:15-cv-00033-JRS-MJD
	)	
J. E. KRUEGER,	)	
	)	
Respondent.	)	

FINAL JUDGMENT

The Court now enters final judgment. Petitioner Chadrick Fulks' petition for a writ of habeas corpus is denied and the action is dismissed with prejudice.

Date: 9/20/2019

JAMES R. SWEENEY II, JUDGE
United States District Court
Southern District of Indiana

Laura A. Briggs, Clerk

BY: _____
Deputy Clerk, U.S. District Court

Distribution:

Bob Daley
OFFICE OF THE UNITED STATES ATTORNEY
bob.daley@usdoj.gov

Kathleen Michelle Stoughton
OFFICE OF THE UNITED STATES ATTORNEY
kathleen.stoughton@usdoj.gov

Claudia Van Wyk
FEDERAL COMMUNITY DEFENDER OFFICE
claudia_vanwyk@fd.org

Joe Howard Vaughn
UNITED STATES ATTORNEY'S OFFICE (Indianapolis)
joe.vaughn@usdoj.gov

Peter Konrad Williams
Federal Community Defender Office
pete_williams@fd.org

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

CHADRICK EVAN FULKS, Petitioner, v. T.J. WATSON, Warden, USP Terre Haute, UNITED STATES OF AMERICA Respondents.	CIVIL ACTION (Capital Habeas Corpus) No. 2:15–cv–00033–WTL–MJD **Hon. William T. Lawrence** **United States District Judge**

AMENDED PETITION FOR WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2241

PETER WILLIAMS
CLAUDIA VAN WYK
Assistant Federal Defenders
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
Tel: 215.928.0520
Fax: 215.928.0826
pete_williams@fd.org
claudia_vanwyk@fd.org

Counsel for Petitioner

Dated: March 8, 2019

PRELIMINARY STATEMENT

Petitioner Chadrick Evan Fulks shall be referred to as Petitioner, Mr. Fulks, or, when discussed as a child or in conjunction with other members of the Fulks family, Chad. Respondent shall be referred to as the Government. Citations to witness declarations and affidavits shall be referred to as "Dec." and "Aff.," respectively, followed by the name of the relevant witness. Citations to expert reports shall be referred to as "Report," followed by the name of the expert, the date, and the page number. All declarations, reports, affidavits, and other relevant records cited herein are provided in the Appendix filed with this Petition. Cites to pages in the Appendix shall be referred to as "App." followed by the relevant page number.

The transcript from Petitioner's trial and § 2255 level proceedings shall be cited as "Tr.," followed by the relevant date and page number.

All other citations are either self–explanatory or will be explained.

All emphasis in this Petition is supplied unless otherwise indicated.

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Pursuant to 28 U.S.C. § 2241 and this Court's order of December 6, 2018, *see* Dkt. 54, Petitioner Chadrick Evan Fulks, through undersigned counsel, hereby submits this Amended Petition for Writ of Habeas Corpus Pursuant ("Amended Petition").

THE PARTIES

1. Petitioner, CHADRICK EVAN FULKS, is a federal prisoner at the United States Penitentiary at Terre Haute (USP–Terre Haute) under a sentence of death (Reg. No. 16617–074).

2. Respondent, T.J. WATSON, is Warden of the USP Terre Haute and currently maintains custody of Mr. Fulks.

PROCEDURAL HISTORY

3. In May 2004, Mr. Fulks pleaded guilty to eight charges, including two death–eligible offenses, arising from the November 2002 abduction and death of Alice Donovan and related events. On June 30, 2004, a jury sentenced Mr. Fulks to death. His convictions and sentence were affirmed by the United States Court of Appeals for the Fourth Circuit. *See United States v. Fulks*, 454 F.3d 410 (4th Cir. 2006). The Supreme Court denied Mr. Fulks's petition for writ of certiorari on June 25, 2007. *See Fulks v. United States*, 551 U.S. 1147 (2007).

4. On June 23, 2008, Mr. Fulks filed a motion to vacate the convictions and sentence and for a new trial pursuant to 28 U.S.C. § 2255, which was amended on October 21, 2008. The motion was denied and the denial was affirmed on appeal. *United States v. Fulks*, 683 F.3d 512 (4th Cir. 2012). The Supreme Court denied Mr. Fulks's petition for writ of certiorari on October 7, 2013. *See Fulks v. United States*, 571 U.S. 941 (2013).

5. On January 29, 2015, Mr. Fulks filed a pro se Petition for Writ of Habeas Corpus in this Court pursuant to 28 U.S.C. § 2241. Dkt 1. Upon order of the Court, Mr. Fulks filed a pro se Response to the Court's Entry Directing Further Proceedings on April 7, 2015. Dkt. No. 6. Both of these pleadings were prepared by another death row inmate. Dkt. 6 at 7. On May 11,

2015, this Court issued an Order to Show Cause directing Respondent to answer the allegations of the habeas petition and show cause why the relief requested by Mr. Fulks should not be granted. Dkt. 7. Respondent requested and this Court granted two extensions of time to file the response to the Petition. Dkt. 8–11. On August 18, 2015, Respondent filed a Return to Order to Show Cause. Dkt. 12. This Court ordered Respondent, on September 4, 2015, to supplement the Return. Dkt. 14. Following a request for and grant of another extension of time, Dkt. 15, 17, Respondent filed a Supplemental Response to Order to Show Cause on November 18, 2015, Dkt. 18.

6. On January 13, 2016, at Mr. Fulks's request and after complying with administrative protocol for requesting an out–of–district appointment, counsel from the Federal Community Defender Office for the Eastern District of Pennsylvania ("FCDO") moved for appointment in Mr. Fulks's habeas corpus proceedings. Dkt. 20. This Court appointed the FCDO to represent Mr. Fulks on February 1, 2016. Dkt. 22. Through the FCDO, Petitioner requested, and this Court granted, a series of extensions to allow counsel, inter alia, to investigate the possibility of filing an amended habeas petition.

7. On December 6, 2018, the Court granted Petitioner leave to file, by March 8, 2019, an amended habeas petition to supersede the previously filed petition. Dkt. 54.

CLAIMS FOR RELIEF

I. MR. FULKS IS INTELLECTUALLY DISABLED AND IS INELIGIBLE FOR THE DEATH PENALTY UNDER *ATKINS V. VIRGINIA* AND ITS PROGENY.

A. Introduction

8. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court ruled that the Eighth Amendment categorically bars the execution of intellectually disabled individuals. As the Court put it, "[t]hose mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id*. at 306.[1]

9. The United States Supreme Court has ruled that the current, prevailing clinical definitions are binding in the task of determining whether an individual should be exempted from the death penalty. *Moore v. Texas*, 137 S. Ct. 1039, 1049, 1052–53 (2016) ("*Moore–I*"). The Supreme Court cited the two main diagnostic authorities in the field of intellectual disability as embodiments of the prevailing medical standards: the American Association on Intellectual and Developmental Disabilities ("AAIDD"), and the American Psychiatric Association ("APA"), which has most recently set forth its definition of intellectual disability in the Diagnostic and Statistical Manual of Mental Disorders – 5th Edition ("DSM–5"). These current standards, and

[1] *Atkins* referred to this diagnosis as mental retardation, which was the name used in the field at the time. Since *Atkins* was decided, the diagnosis of mental retardation has been renamed as intellectual disability. In *Hall v. Florida*, the Supreme Court acknowledged this change in nomenclature and adopted the term intellectual disability instead of mental retardation. *Hall v. Florida*, 572 U.S. 701 (2014). Accordingly, this petition uses the term intellectual disability or the abbreviation "ID." However, the terms "mental retardation" or "mentally retarded" are also used in their historic context relevant to this case.

not outdated standards employed in the past, govern the disposition of *Atkins* claims. *Moore–I*, 137 S. Ct. at 1053.

10. Pursuant to the definitions set forth by the APA and the AAIDD and endorsed by the Supreme Court, there are three prongs to a finding of intellectual disability: (1) deficits in intellectual functioning/subaverage intellectual functioning ("prong one"), (2) deficits in adaptive functioning ("prong two"), and (3) onset before age eighteen ("prong three"). *See* DSM–5 at 33; *Intellectual Disability: Definition, Classification, and Systems of Supports – 11th Edition*, American Association on Intellectual and Developmental Disabilities (2010) ("AAIDD–2010") at 5. As the voluminous evidence summarized below shows, Petitioner Chadrick Fulks satisfies these criteria. He has significantly subaverage intellectual functioning, as measured by individually administered tests of comprehensive intelligence; and significant adaptive deficits, reflected in extensive testing, the vivid accounts of people who have known him, and extensive records documenting his impairments. Both his intellectual and adaptive deficits are further confirmed by the presence of structural defects in his brain, which have been present since his birth. These deficits are also corroborated by the presence of several significant risk factors including a Fetal Alcohol Spectrum Disorder ("FASD"), which has caused Petitioner to suffer from brain damage since before his birth. Mr. Fulks has been intellectually disabled all of his life and is ineligible for the death penalty.

11. Mr. Fulks is entitled to pursue his *Atkins* claim under 28 U.S.C. § 2241. A federal habeas petitioner is entitled to review under § 2241 when review under 28 U.S.C. § 2255 is "inadequate or ineffective to test the legality of his detention" or sentence. 28 U.S.C. § 2255(e); *see also Brown v. Carraway*, 719 F.3d 583 (7th Cir. 2015) (§ 2241 can be used to challenge a defendant's *sentence* in addition to his or her conviction). This includes a number of

circumstances including, inter alia, where the defendant challenges the execution, rather than the imposition of his sentence. Here, Mr. Fulks presents a claim that, if successful, would render him ineligible for the death penalty and ineligible to be executed. Consistent with the Supreme Court's directives, he also makes this claim under current, prevailing clinical standards. However, neither the current standards nor the Supreme Court rulings applying those standards to an *Atkins* case were present at the time of his trial or § 2255 proceedings. Because § 2255 proceedings are both inadequate and ineffective to test the legality of Mr. Fulks's death sentence and because Mr. Fulks challenges the execution of his sentence in addition to its imposition, Mr. Fulks's *Atkins* claim should be heard and his death sentence should be vacated.

B. Deficits in Intellectual Functioning

1. The Diagnostic Criteria

12. Under the classification schemes outlined by the APA and the AAIDD, deficient intellectual functioning is defined as an intelligence quotient ("IQ") of approximately 70 with a confidence interval derived from the standard error of measurement ("SEM") taken into consideration. Because a margin for measurement error or "confidence interval" on IQ tests generally involves a measurement error of five points, at a minimum, scores up to 75 also fall within the presumptive range for intellectual disability. DSM–5 at 37. *See also* AAIDD–2010 at 36 (finding the consideration of the standard error of measurement or "SEM" and reporting an IQ score with a confidence interval deriving from the SEM to be critical considerations in the appropriate use of IQ tests).

13. Consistent with the AAIDD's and APA's diagnostic criteria, the Supreme Court held in *Hall* that because the SEM is "a statistical fact, a reflection of the inherent imprecision of the test itself," at a minimum, full–scale IQ scores of 75 or below will establish the diagnosis of intellectual disability if the other two prongs are met. *Hall*, 572 U.S. at 712, 723. *See also*

Brumfield v. Cain, 135 S. Ct. 2269, 2278 (2015) (IQ score of 75 was "squarely in the range of potential intellectual disability").

14. In addition, both the AAIDD and the APA have rejected fixed cutoff points for IQ in the diagnosis of intellectual disability and mandated that any test score must be considered in the context of clinical judgment and adaptive functioning. In its 2010 Guidelines, the AAIDD specified:

> It is clear from th[e] significant limitations criterion used in this Manual that AAIDD . . . *does not* intend for a fixed cutoff point to be established for making the diagnosis of ID. Both systems (AAIDD and APA) require clinical judgment regarding how to interpret possible measurement error. Although a fixed cutoff for diagnosing an individual as having ID is not intended, and cannot be justified psychometrically, it has become operational in some states [citation omitted]. It must be stressed that the diagnosis of ID is intended to reflect a clinical judgment rather than an actuarial determination. A fixed point cutoff score for ID is not psychometrically justifiable.

AAIDD–2010 at 40 (emphasis in original).

15. Similarly, the DSM–5 makes clear that "[c]linical training and judgment are required to interpret [IQ] test results and assess intellectual performance" and "clinical judgment is needed in interpreting the results of IQ tests." DSM–5 at 37. The DSM–5 also recognizes that a single IQ score is an imperfect predictor of functioning and must be considered in context with adaptive functioning when assessing an individual for ID. *Id.* For this reason, intellectual functioning is assessed through clinical assessment in addition to standardized testing. *Id.*

16. The Supreme Court has also recognized that the assessment of intellectual functioning is not the rote imposition of hard cutoffs or actuarial determinations, but a conjunctive, clinical determination that is interrelated with the other prongs of the diagnosis, stating that: "Intellectual disability is a condition, not a number." *Hall*, 572 U.S. at 723; *see also id.* at 722 ("This awareness of the IQ test's limits is of particular importance when conducting the conjunctive assessment necessary to assess an individual's intellectual ability."); *id.* at 722–

23 ("It must be stressed that the diagnosis of [intellectual disability] is intended to reflect a clinical judgment rather than an actuarial determination." (quoting AAIDD–2010 with approval)); *id.* at 723 ("It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment." (citing DSM–5 with approval)).

17. IQ scores must also be corrected for the Flynn Effect. The Flynn Effect reflects a well–established finding that the average IQ score of the population increases at a rate of 0.3 points per year or 3 points per decade. Accordingly, the AAIDD requires that any IQ score be corrected downwards at a rate of 0.3 points per year since the test was normed. *See User's Guide: Mental Retardation, Definition, Classification and Systems of Supports*, 10th Ed., AAIDD (2007) ("AAIDD–2007"), at 20–21; AAIDD–2010 at 37 (same); *User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports*, AAIDD (2012) ("AAIDD–2012") at 23 (same); McGrew, K., Norm Obsolescence: The Flynn Effect, *The Death Penalty and Intellectual Disability*, AAIDD (2015) at 160-66 (same); Watson, Dale G. Intelligence Testing, *The Death Penalty and Intellectual Disability*, AAIDD (2015)) at 118–19 (same).

18. The APA also recognizes that "[f]actors that may affect test scores include . . . the 'Flynn effect' (i.e. overly high scores due to out–of–date test norms)" and mandates that IQ scores be interpreted using clinical judgment and training. DSM–5 at 37. Test score interpretation using clinical judgment includes correction for the Flynn Effect.

19. *The Death Penalty and Intellectual Disability*, published in 2015 by the AAIDD, stated the following regarding the Flynn Effect:

> Not only is there a scientific consensus that the Flynn [E]ffect is a valid and real phenomenon, there is also a consensus that individually obtained IQ test scores derived from tests with outdated norms must be adjusted to account for the Flynn [E]ffect, particularly in *Atkins* cases.

McGrew, K., Norm Obsolescence: The Flynn Effect, *The Death Penalty and Intellectual Disability* (AAIDD 2015) at 162. Furthermore, "in cases where current or historical IQ test scores are impacted by norm obsolescence (i.e., Flynn [E]ffect), and the scores are to be used as part of the diagnosis of ID in *Atkins* or other high stakes decisions, the global scores impacted by outdated norms should be adjusted downward by 3 points per decade (0.3 points per year) of norm obsolescence." *Id.* at 165.

20. The AAIDD and APA also mandate that the spurious inflation of IQ scores arising from prior administrations of intelligence tests—the "practice effect"—be taken into consideration when interpreting IQ testing. *See, e.g.,* AAIDD–2010 at 38; DSM–5 at 37.

2. Mr. Fulks Has Deficits in Intellectual Functioning.

21. Petitioner has been given three individually administered, comprehensive tests of intellectual functioning as an adult. In April 2003, neuropsychologist Jonathan Venn, Ph.D., administered a Wechsler Adult Intelligence Scale, Third Edition ("WAIS–III") to Petitioner. He received a full–scale IQ score of 77. Report, Jonathan Venn, Ph.D., at 10 (App. 0286). Correcting for the Flynn Effect, the full–scale IQ score from this test is 75 (74.6), which is squarely within the range for intellectual disability. *See Brumfield*, *supra*.

22. Petitioner's scores on the subsequent two tests are strikingly consistent with the first one. Less than four months after Mr. Fulks had taken the first WAIS–III in August 2003, psychologist James Hilkey, Ph.D., administered a second WAIS–III. On that test, Mr. Fulks received a full–scale IQ score of 78, which Flynn–corrects to a 76 (75.6). Report, James Hilkey, Ph.D., at 4 (App. 0274). In February 2004, neuropsychologist Eugene Gourley, Ph.D., administered the Woodcock Johnson Test of Cognitive Abilities, Third Edition ("WJ–III"). Mr. Fulks received a full–scale IQ score of 79, which Flynn–corrects to a 77 (77.2). Report, Butner

Medical Center, 3/25/04, at 11 (App. 0304). During this time, Petitioner was also administered four full batteries of either neuropsychological or psychological testing. The one– and two–point increase in scores on the subsequent two tests are consistent with the initial score of 75 and easily explained with the practice effect.

23. During his childhood, Mr. Fulks was administered a comprehensive IQ test (the Wechsler Intelligence Scales for Children – Revised ("WISC–R")) three times: at the ages of nine, twelve, and fourteen. At the age of nine, he received a score of 90, which Flynn–corrects down to an 86 (85.5). At twelve, he received a score of 96, which Flynn–corrects to 91 (90.6). At fourteen, he received a score of 93, which Flynn–corrects to an 87 (87.3). *See* Report, Natalie Novick–Brown, Ph.D., at 121 (App. 0171).

24. That Mr. Fulks's testing history began with higher scores and regressed to scores in the intellectual disability range as he grew older does not undermine his *Atkins* claim, but provides further support for it. "[I]individuals with mild mental retardation 'often are not distinguishable from children without Mental Retardation until a later age.'" *Sasser v. Hobbs*, 735 F.3d 833, 848 (8th Cir. 2013).

25. Mr. Fulks's medical and social history makes such a regression particularly likely. As set forth, *infra*, Petitioner suffers from brain damage stemming from a Fetal Alcohol Spectrum Disorder ("FASD"). Individuals such as Mr. Fulks who were born with cognitive impairments frequently experience declines in IQ as they age. Because of these cognitive deficits, their intellectual capacity develops more slowly than their age–mates. As time goes on, they fall increasingly behind their peers. In Mr. Fulks's case, this dynamic is further exacerbated by other risk factors in his history which correlate both with intellectual disability and drops in

IQ. Accordingly, Petitioner was primed for such a decline in IQ to occur. *See* Report, Barry M. Crown, Ph.D., at 7 (App. 0007), discussed *infra*; Section F, *infra* (describing risk factors for ID).

26. That Mr. Fulks had ID–level intellectual deficits before the age of eighteen is further confirmed by Petitioner's history of impaired adaptive behavior. These adaptive deficits emerged at a very young age, cut across all domains of functioning, and stem from brain abnormalities that have been present since before his birth. *See* Sections C and D, *infra*. Petitioner's brain abnormalities and adaptive functioning correspond to the ID level scores obtained in adulthood. They do not correspond to higher scores during childhood. Indeed, school personnel—without the benefit of the breadth and depth of evidence offered in support of Petitioner's *Atkins* claim—noted that Petitioner's overall functioning did not match his IQ scores and that he was functionally intellectually disabled. *See* Section C, *infra*; Report, Barry M. Crown, Ph.D., at 7 (App. 0007); Report, Natalie Novick–Brown, Ph.D., at 24–27 (App. 0074–77) (describing interviews with Joy Krug and Marilyn Lauver).

C. Deficits in Adaptive Functioning

27. The AAIDD has defined adaptive behavior as "the collection of conceptual, social, and practical skills that have been learned and performed by people in their everyday lives." AAIDD–2010 at 43. The DSM–5 describes adaptive deficits as "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. The focus in an adaptive behavior analysis is on *typical* performance, not *maximal* performance. AAIDD–2010 at 47.

28. The adaptive deficits prong is satisfied if there is a significant limitation in any one of the three types of adaptive behavior: conceptual, social, or practical. AAIDD–2010 at 43; DSM–5 at 37. Skills included in the conceptual domain are: executive functioning (judgment, planning, impulse control, abstract thinking, and problem solving), memory, language, reading,

writing, mathematics, and acquisition of practical knowledge. The social domain encompasses skills and characteristics such as: social judgment and competence; interpersonal communication skills; awareness of others' thoughts, feelings, and experiences; gullibility; empathy; and friendship abilities. The practical domain involves learning and self-management across life settings, including personal care; job responsibilities; money management; recreation; self-management of behavior; and school and work-task organization. DSM–5 at 37; AAIDD–2010 at 44.

29. As it is expected that strengths co–exist with weaknesses, analysis of adaptive behavior is based on the presence of weaknesses, not the absence of strengths. "[S]ignificant limitations in conceptual, social or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills." AAIDD–2010 at 47. The Supreme Court has recognized that "intellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.'" *Brumfield*, 135 S. Ct. at 2281 (quoting AAIDD–2002). In *Moore–I*, the Supreme Court found unconstitutional the Texas Court of Criminal Appeal's attempt to overcome deficits with perceived adaptive strengths because "the medical community focuses the adaptive functioning inquiry on adaptive *deficits*." *Moore–I*, 137 S. Ct. at 1050 (citing AAIDD–2010, DSM–5, and AAIDD–2002 with approval). Subsequently, in *Moore v. Texas*, 2019 LEXIS 821, ___ S. Ct. ___ (Feb. 19, 2019) ("*Moore–II*"), the Supreme Court reversed the Texas Court of Criminal Appeals for again relying on strengths in its determination of Mr. Moore's *Atkins* claim. *Id.* at *9.

30. Additionally adaptive functioning is not based on criminal behavior, "street smarts or behavior in jail or prison." AAIDD–2012 at 20; DSM–5 at 38 (adaptive behavior may

be difficult to assess in controlled settings such as prison). Consistent with this diagnostic standard, the Supreme Court has rejected adaptive behavior analyses that rely on improved functioning in prison. *Moore–I*, 137 S. Ct. at 1050; *Moore–II*, 2019 U.S. LEXIS 821 at *10–11.

31. Assessments of adaptive functioning should be broad–based, comprehensive, and grounded in extensive data. They can include formal testing of adaptive functioning, as well as a multi–method and comprehensive evaluation. This multimethod assessment can include interviews with third–party reporters, records review, consideration of other testing, and review and synthesis of past evaluations. AAIDD–2012 at 16–20; AAIDD–2010 at 47; DSM–5 at 37–38. Here, all of these methods demonstrated that Petitioner has had significant adaptive deficits in all three domains of functioning both before and after the age of eighteen. Report, Natalie Novick–Brown, Ph.D., at 37 (App. 0087); DSM–5 at 37–38.

32. Natalie Novick–Brown, Ph.D., a clinical and forensic psychologist, has conducted an assessment of Mr. Fulks's adaptive functioning. Dr. Brown has twenty-three years of clinical and forensic experience in FASD and other medical conditions involving developmental disabilities. She has also researched extensively in this field. After conducting formal testing of adaptive behavior as well as a comprehensive, multimethod evaluation, Dr. Novick–Brown has concluded that Petitioner has significant deficits in all three domains of adaptive functioning, and that these deficits were present before the age of eighteen. Report, Natalie Novick–Brown, Ph.D., at 2, 53–54 (App. 0052, 0103–04).

1. Formal Testing of Adaptive Behavior

33. The AAIDD has indicated that scores of approximately two standard deviations or more below the mean on a valid adaptive behavior instrument fall within the presumptive range for intellectual disability. The AAIDD also mandates that the instrument's standard error of measurement must be taken into consideration, which effectively expands the presumptive range

to the top of a 95% confidence interval bracketing 70 (typically scores of 75 and below). However, the AAIDD makes clear that there is no fixed cutoff point for an adaptive behavior score: "A fixed point cutoff for ID is not psychometrically justifiable. The diagnosis of ID is intended to reflect a clinical judgment rather than an actuarial determination." AAIDD–2012 at 23. The DSM–5 recommends the use of formal adaptive behavior testing, but sets no presumptive range for intellectual disability on a formal test of adaptive functioning. DSM–5 at 37–38.

34. Dr. Novick–Brown administered the Vineland Adaptive Behavior Scales – 3rd Edition ("Vineland–3") to two reporters regarding Mr. Fulks's adaptive functioning: Gayle Wolfe, his fifth grade special education teacher, and Linda Adkins, his childhood neighbor. Due to the retrospective nature of this assessment, Ms. Wolfe and Ms. Adkins were asked to describe Petitioner's functioning at the times they had regular contact with him within the developmental period, at ages ten and thirteen, respectively.

35. The Vineland–3 includes a composite score which encompasses the individual's global functioning, and three domain scores: communication, social, and daily living skills, which correspond to the conceptual, social, and practical domains of functioning.

36. Ms. Wolfe and Ms. Adkins reported the following scores.

VINELAND–3 SCORES
(SS = Standard Score, Mean = 100, 1 Standard Deviation = 15)

Rater	Composite	Communication (Conceptual)	Socialization (Social)	Daily Living Skills (Practical)
Gayle Wolfe (5th Grade Teacher)	SS 48 < 1st Percentile	SS 38 < 1st Percentile	SS 38 < 1st Percentile	SS 63 1st Percentile
Linda Adkins (Neighbor)	SS 60 < 1st Percentile	SS 50 < 1st Percentile	SS 63 1st Percentile	SS 63 1st Percentile

37. All of these scores are two standard deviations or more below the mean. All of them fall within the presumptive range for intellectual disability.

2. Multimethod Assessment: Conceptual Domain

a. Academic functioning, learning, and memory

38. Petitioner's academic performance was abysmal. He repeated the first grade, and began receiving special education for speech and language issues during his second time through the first grade. In the third grade, his teacher Dottie Thompson referred him for a multidisciplinary assessment because he had weaknesses in most academic subjects, had deficits in self–direction, was easily distractible, and needed "guidance at all times." Report, Natalie Novick–Brown, Ph.D., at 90 (App. 0140). Ms. Thompson completed a Devereux Elementary School Behavior Rating Scale, which indicated, inter alia, that Petitioner had a low rating for comprehension. Petitioner was placed in the behavioral disorder ("BD") classroom, and was "to be mainstreamed as behavior and academics permit." He received special education supports for the rest of his academic history, in the context of either the BD or SLD (specific learning disability) programs for the various schools he attended. For much of his academic career, those

supports encompassed all academic subjects and included individualized or small group attention within a self–contained classroom. After he was placed in special education, school records describe him as "low functioning," "not keeping up," and someone with learning needs that were "very concrete." *Id.* at 96–97 (App. 0146–47). By the time he reached the eighth grade, Petitioner was receiving special education in all academic subjects: Math, English, Science, and Social Studies. Despite receiving this level of support, Petitioner fell increasingly behind his peers. He failed to successfully complete the seventh, eighth, or ninth grades and eventually dropped out of school in the ninth grade. *See id.* at 39 (App. 0089); Individualized Education Program, Cabell County School District, 5/12/87 (App. 1077); Review, Cabell County School District, 3/1/89 (App. 1078); Individual Educational Program, Cabell County School District, 5/15/89 (App. 1079); Dec. Joy Krug (App. 0336–38).

39. Consistent with school records, third–party reporters repeatedly described Petitioner as slow, having an impaired ability to learn, and being consistently behind age–related expectations.

40. Gayle Wolfe taught Petitioner in the BD class when he was in the fifth grade. The BD classroom was a self–contained special education class with a significantly smaller class size (e.g., seven children in the fifth grade). These students received small-group and individualized attention from the special education teacher, and were mainstreamed with monitoring from a BD teacher whenever the school deemed it possible. This was the maximum level of support that the Cabell County School District was able to provide short of a separate, specialized school. As Ms. Wolfe indicated: "This [separate school] option was very expensive for the county, so the school sought to avoid it. In general, a separate placement would only get financed if there was a lawsuit. There was otherwise not much lower you could go than a self–contained class." Dec.

Gayle Wolfe at ¶ 13 (App. 1086). If a student had both intellectual and behavior problems, as Chad did, then the "BD" label took precedence because the school viewed behavior problems as the primary issue interfering with the student's education. Students with intellectual issues frequently had behavioral problems as they were frustrated with their academic difficulties. When Ms. Wolfe taught Chad in the fifth grade, five of the seven children in the BD class had intellectual problems and were "slow" like Chad. Report, Natalie Novick–Brown, Ph.D., at 20–21 (App. 0070–71) (describing interview with Gayle Wolfe); Dec. Laura Cooper at ¶ 7 (App. 0324).

41. Even in the context of a special education class, Ms. Wolfe described Petitioner as slow and noted that he was far behind his age–mates. His reading skills were at the first grade level, and he could not understand phonetics. In math, she worked with him to learn addition and subtraction—second grade skills. Tellingly, it was easier to teach Petitioner math because it was more "hands on" and involved less abstract thought. Petitioner's writing skills were particularly impaired. Report, Natalie Novick–Brown, Ph.D., at 21 (App. 0071) (Interview of Gayle Wolfe). Although Ms. Wolfe worked intensively with Petitioner on writing, he still did not learn to write a sentence. *Id.* at 43–44 (App. 0093–94).

42. Laura Cooper, who was Chad's sixth grade special education math teacher, reported that Petitioner was far behind his classmates. He had difficulties learning, and had to be taught slowly and repetitively. Ms. Cooper worked with Chad on basic practical skills, rather than sixth–grade math. Martha Floyd, who was also Chad's special education teacher in the sixth grade, reported that he was a slow learner. Cindy Harper, who taught Chad in kindergarten, reported that he had difficulty with learning even then. Dec. Laura Cooper (App. 0323–24); Tr.

6/23/04 at 85 (App. 0696) (Testimony of Martha Floyd); Tr. 6/23/04 at 74 (App. 1004) (Testimony of Cindy Harper); Dec. Joy Krug (App. 0336–38).

43. After his seventh grade year and the summer school that followed, Chad moved to Indiana to live with his father and attended Westview Jr. High School. He enrolled in the eighth grade on August 21, 1991, and was quickly referred for a special education assessment. He was placed in a remedial reading program by September 10, 1991, and was evaluated by September 30, 1991. Marilyn Lauver, Chad's counselor there, reported that the school authorities quickly provided special education services and bypassed the normal procedures for assessment. The school acted so quickly with him because he had received special education services in the past and because of his obvious intellectual and emotional deficits. Ms. Lauver further noted that his communication, practical, and social skills were at an intellectually disabled level. *See* Report, Natalie Novick–Brown, Ph.D., at 25–27 (App. 0075–77) (interview with Marilyn Lauver).

44. School Psychologist Joy Krug, who assessed Chad in September 1991, found him to be functionally intellectually disabled. She further concluded that he needed a great deal of help to survive in school, that his verbal impairments prevented him from reasoning, and that his ability to think abstractly and learn from experience was very limited. She also found that he was "impulsive and tended to act before thinking." *Id.* at 24 (App. 0074) (describing interview with Joy Krug). Based on Ms. Krug's assessment and his history, Chad received special education supports in all academic subjects: Reading, Mathematics, Social Studies, and Science. *Id.* at 23–25 (App. 0073–75); Dec. Joy Krug (App. 0336–38).

45. After Westview, Chad returned to Ohio, transferred to an alternative school, and was eventually sentenced to the Davis Center, a juvenile detention facility. There, he received his GED and a certificate in welding. He received a second GED later while in prison in Indiana.

This is not evidence of adaptive behavior. Adaptive functioning is defined by an individual's typical functioning at home, at work, in school, or in the community, and focuses on the individual's need for supports in any one of these settings in order to function independently. DSM–5 at 38. By definition, highly structured environments such as prisons or juvenile placements provide a significant level of supports and do not allow individuals the freedom to function independently. Accordingly, inmates and residents in these institutions do not have to rely on their own adaptive resources in order to function and advance. For this reason, adaptive behavior assessments are not made based on functioning in prison or other highly structured environments. AAIDD–2012 at 20 (ID determinations are not based on prison functioning); DSM–5 at 38 (adaptive behavior may be difficult to assess in controlled settings such as prison). Consistent with this diagnostic standard, the Supreme Court has rejected adaptive behavior analyses that rely on improved functioning in prison. *Moore–I*, 137 S. Ct. at 1050; *Moore–II*, 2019 U.S. LEXIS 821 at *10–11. Accordingly, functioning in these settings is not probative of adaptive behavior.

46. *To be clear, Petitioner is not proffering his juvenile detention and prison functioning as evidence of adaptive behavior*. Nevertheless, as a matter of thoroughness, Petitioner notes that even in the restrictive setting of the Davis Center and prison, Chad's performance was deficient. In juvenile detention, Chad required close supervision, had to retake one of the GED modules, and barely achieved the minimum average score needed to pass the exam (he received an average score of 45.6, with a score of 45 required). Similarly, even after receiving intensive, individualized instruction from the welding instructor, Chad still failed the welding test and had to retake it in order to receive his certificate. Finally, while in the restrictive environment of Indiana prison, having had additional years of cognitive development, and

having been carefully tutored on the GED while in juvenile before taking the GED a second time, Mr. Fulks still barely squeaked by with an average score of 48. *See* Report, Natalie Novick–Brown, Ph.D., at 53, 107.

47. Chad's impairments were apparent outside of the formal school setting as well. Linda Adkins, Chad's neighbor, indicated that he had early childhood delay in speech and language, motor, reading, and self–care skills. When he did learn to speak, he had a limited vocabulary, would frequently mispronounce words, and was very hard to understand. He also had difficulty understanding what he was being told and required frequent repetition before he could follow Ms. Adkins's instructions. Report, Natalie Novick–Brown, Ph.D., at 17 (App. 0067).

48. Christina Kirkman (Holbrook), Chad's cousin, indicated that he had difficulty understanding basic schoolwork as a child. When he was in the second grade, she would help him with his homework. She found that he could not add or subtract, and had difficulties reading. Even with individualized instruction, Chad would have difficulty learning and become frustrated by his inability to grasp the material. He had deficits in attention and focus, and frequently could not repeat back what Ms. Kirkman was saying to him. At times, he would also perseverate on a phrase, repeating it over–and–over again. Report, Natalie Novick–Brown, Ph.D., at 18–20 (App. 68–70) (describing interview with Christina Kirkman); Dec. Christina Kirkman at ¶¶ 3, 7 (App. 0334).

49. Dr. Novick–Brown administered the Fetal Alcohol Behavior Scale ("FABS") to Ms. Wolfe, Ms. Adkins, Ms. Lauver, and Ms. Kirkman. The FABS is a standardized assessment of behavior to determine whether an individual has the behavioral profile typical of someone with an FASD. Dr. Novick–Brown asked Ms. Wolfe, Ms. Adkins, Ms. Lauver, and Ms. Kirkman

to rate Petitioner's functioning on this scale at the target ages of ten, thirteen, fourteen, and twenty–one, respectively. All reporters returned scores in the range indicative of an FASD and found concordance on the following behaviors: "difficulty learning" and "performing precise tasks."[2] Report, Natalie Novick–Brown, Ph.D., at 34–36, 42 (App. 0084–86, 0092).

50. Dr. Novick–Brown also administered a behavioral screening, inquiring into the presence of behaviors found to correlate with the presence of FASDs, to Gayle Wolfe, Linda Adkins, Christina Kirkman, and Marilyn Lauver. This screening focused on the presence of these characteristics at the ages of ten, thirteen, fourteen, and twenty–one, respectively. The results indicated concordance on the fact that Petitioner had difficulties learning from experience. Report, Natalie Novick–Brown, Ph.D., at 34–36, 42 (App. 0084–86, 0092).

51. Achievement testing also reflected that Chad was consistently behind in his academic development. He first received individually administered achievement testing in the third grade, when he took the Wide Range Achievement Test ("WRAT") on November 1986 (nine years, six months). It reflected early evidence of impairments.[3] He scored in the bottom 9th percentile for word–reading, the bottom 12th percentile for mathematics, and the bottom 23rd percentile for spelling. The Kaufman Test of Educational Achievement, which was administered later that same school year, also reflected impaired scores: 18th percentile (math calculations); 14th percentile (spelling); 27th percentile (word–reading); and 37th percentile (reading comprehension). As time passed, he failed to develop intellectually and academically, his

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[2] Ms. Kirkman responded "don't know" to many items, which rendered her overall score invalid. However, it did not render the individual responses invalid—which reflected concordance on "difficulty learning," "performing precise tasks," and other FABS data cited throughout this Petition.

[3] Although less reliable than individually administered testing and frequently inflated, group administered testing during early childhood also reflected impairments as early as kindergarten. *See* Report, Natalie Novick–Brown, Ph.D., at 41 (App. 0091).

classmates left him behind, and achievement test scores fell further and further below age–related expectations. *See* Report, Natalie Novick–Brown, Ph.D., at 40–42 (App. 0090–92).

52. Chad took his last round of school–age individually administered achievement testing in September 1991 (fourteen years, four months). Despite having failed the first grade and having an additional year of cognitive development, Chad consistently received scores reflecting third to fifth–grade functioning on nine of the ten subtests that list grade equivalency. He also fell in the bottom 10th percentile or lower on fourteen of the sixteen reading, writing, and math subtests over four separate tests of achievement. (One of the tests does not list grade equivalencies.) *See* Dec. Joy Krug (attached records) (App. 0339–41).

53. Chad's eighth grade achievement test scores were as follows.

INDIVIDUALLY ADMINISTERED
ACHIEVEMENT TEST SCORES – 8TH GRADE[4]
(14 years, 4 months – Age–Mates in the 9th Grade)

Test	**Word–Reading**	**Reading Comp.**	**Spelling**	**Writing**	**Mathematics Calculation**	**Knowledge**
KBFAT	SS 68 2nd %ile GE 3.5		SS 75 5th %ile GE 4.6		SS 73 4th %ile GE 4.5	
WJTA		SS 95 37th %ile GE 8.0		SS 80 9th %ile GE 4.4	SS 81 10th %ile GE 4.6	SS 79 8th %ile GE 4.4
WRAT	SS 74 4th %ile GE 4E		SS 81 10th %ile GE 5B		SS 66 1st % GE 4E	
TOWL	2nd %ile		16th %ile	2–5 %ile (4 subtests)		

[4] The abbreviations for this table are as follows. KFBAT: Kaufman Brief Form Achievement Test. WJTA: Woodcock Johnson Test of Achievement. WRAT: Wide Range Achievement Test. TOWL: Test of Written Language. SS: Standard Score. GE: Grade Equivalency.

54. Mr. Fulks's adult–level achievement testing reflected similar impairments. As a twenty–five– and twenty–six–year–old, after years of special education supports and 2 rounds of GED courses, he tested predominantly at the fifth and sixth grade level across achievement testing administered by four separate psychologists and neuropsychologists. This testing reflected scores as low as the second grade level (writing). Even his most advanced scores were at the seventh and eighth grade levels, significantly below age–related expectations and showing significant impairments for a twenty–six–year–old adult. Report, Natalie Novick–Brown, Ph.D., at 41–42 (App. 0091–92).

b. Executive functioning, memory, learning, and cognitive flexibility

55. Mr. Fulks received neuropsychological testing from four separate neuropsychologists over the course of 2003 and 2004. This testing reflected cognitive impairments in, inter alia, his executive functioning, attention, processing speed, memory, and visuospatial processing. These constitute conceptual impairments themselves. They are also consistent with the behavioral descriptions of adaptive impairments described below.

56. In addition, a global analysis of Mr. Fulks's neuropsychological testing reflects a generalized processing and integration deficit that further impairs his executive functioning. Mr. Fulks has impairments in nine domains of neuropsychological functioning: intellectual functioning, academics, memory, visuospatial processing, attention, processing speed, motor skills, executive functioning, and communication. He is in the bottom 2nd percentile in at least 30 percent of the neuropsychological and achievement testing administered forensically. Dr. Novick–Brown explains that "executive functioning skills are responsible for making decisions about how to act," explaining that such skills are "[r]eferred to as 'higher order' cognitive processing because the executive center of the brain receives and then integrates, analyzes, and

makes decisions based on neural input from other brain regions." *Id.* at 64 (App. 0114). Good executive functioning relies both on the cognitive capacity of the brain's decision–making centers as well as good input from the other regions of the brain. The testing demonstrates that Mr. Fulks has a widespread impairment both in his executive functioning and in the other areas of the brain that provide input to the executive functioning centers. Dr. Novick–Brown explains that "[t]est results in Mr. Fulks'[s] situation indicate marked executive dysfunction in conjunction with pervasive deficits in neural input, which largely explains why his adaptive functioning is so impaired when he had to make decisions on his own in complex situations." *Id.* at 65 (App. 0115). Accordingly, Mr. Fulks's executive functioning impairments become more severe as the environment or the tasks required of him become more complex. *Id.* at 64–65 (App. 0114–15).

57. While they were assessed in adulthood, these impairments have been present since the developmental period. As detailed, *infra*, fetal alcohol diagnostician Julian K. Davies, M.D., has evaluated Petitioner and diagnosed him with an FASD. He has concluded that Petitioner's fetal alcohol exposure is a primary cause of his intellectual and cognitive impairments—including the impairments discussed above. Although Dr. Davies has noted the presence of other contributing factors to Petitioner's brain impairment, those factors all occurred during the developmental period and are additional risk factors for intellectual disability. *See* Section F, *infra*.

58. Consistent with Mr. Fulks's neuropsychological impairments, the FASD behavioral screening administered by Dr. Novick–Brown to Ms. Adkins, Ms. Wolfe, Ms. Lauver, and Ms. Kirkman indicated agreement that Petitioner: was disorganized, was unaware of consequences, had difficulty following directions, was inattentive and had trouble concentrating,

had transition problems, had a tendency to overreact, had poor impulse control, gave up easily, had poor judgment, could not take a hint, and was easily confused. Report, Natalie Novick–Brown, Ph.D., at 46 (App. 0096).

59. The FABS results similarly showed that Petitioner had the following behavioral characteristics: unaware of the consequences of his behavior, had trouble completing tasks, poor judgment, poor attention control, and poor organizational skills. *Id.* at 46.

60. Consistent with these behavioral ratings on instruments administered retrospectively, the Devereux Elementary School Behavior Rating Scale, completed by third grade teacher Dottie Thompson, returned significantly high scores in "Classroom Disturbance" and "Inattentive–Withdrawn," all of which indicates a lack of self–regulation. *See* Report, Rodney Pardue, 3/4/87 (App. 1075); Report, Natalie Novick–Brown, Ph.D., at 45 (App. 0095).

61. Third–party reporters also described deficits in executive functioning. As discussed above, Dottie Thompson described Chad as distractible, having no self–direction or self–discipline, and needing constant supervision. Ms. Lauver described him as impulsive and unable to control his behavior. Ms. Krug found that Chad had impairments in reasoning, abstract thinking, impulse control, and the ability to learn from experience. *See* Report, Natalie Novick–Brown, Ph.D., at 46–47 (App. 0095–96) (describing interviews of Joy Krug, Marilyn Lauver); Referral for Multidisciplinary Assessment, Cabell County School District, 1/6/87 (App. 1065); Report, Rodney Pardue, 3/4/87 (App. 1073); Dec. Joy Krug (App. 0338).

62. Chad's functioning outside of school reflected problems with executive functioning, memory, and cognitive flexibility as well. Ms. Adkins, Ms. Holbrook, and Kelly Perry (Ms. Adkins's daughter and Petitioner's childhood neighbor) described him as slow. Ms. Perry even noted that he was less developed cognitively than his younger brother Shannon. Mrs.

Perry also described Chad as emotionally unstable, indicating that he threw dramatic temper tantrums. *See* Report, Natalie Novick–Brown, Ph.D., at 46 (App. 0096) (describing interviews of Kirkman and Adkins); Dec. Kelly Perry (App. 0362).

c. Communication

63. The neuropsychological testing conducted on Mr. Fulks over the course of 2003 and 2004 reflected impairments in both expressive and receptive communication. As discussed, *supra*, these deficits have been present since the developmental period and largely present since birth. Report, Natalie Novick-Brown, Ph.D., at 63 (App. 0113).

64. Consistent with the testing administered during adulthood and his diagnosis of FASD, Chad showed communication impairments from early on in the developmental period. He received speech and language therapy from his second year of the first grade until the end of his school career. At age eight, the Arizona Proficiency Scale showed age–inappropriate errors in pronunciation. As noted *supra*, Chad's third grade teacher Dottie Thompson reported comprehension as a deficit when she completed the Devereux Elementary School Behavior Scale. That same year, his scores on the Peabody Picture Vocabulary Test ("PPVT")—a test of vocabulary and language—reflected a two–year delay in language development (bottom 12th percentile).[5] At the age of nine years, ten months, he tested at the three year, five month level. Finally, and consistent with other areas of functioning and his cognitive impairments, as Chad grew older, he fell further and further behind his age–mates. At fourteen years, four months, he was administered the PPVT again and his scores showed a five–year delay (age–equivalent of nine years, eight months, bottom 5th percentile). *See* Results of Selective Screening, 11/25/96

[5] School records reflect that Petitioner was administered the PPVT twice during the third grade, and that he received the same score (SS 81, bottom 12th percentile, Age Equivalent 7 y 9 m) both times.

(App. 1064); Academic Evaluation Report, Peggy Blatt, 2/24/87 (App. 1069); Dec. Joy Krug (attached records) (App. 0341); Report, Julian K. Davies, M.D., at 19–20 (App. 0030–31).

65. Chad's writing skills were similarly delayed. As discussed above, he was administered the Test of Written Language ("TOWL") in the third grade (nine years old) and was unable to complete it due to the length of the story. He was administered the TOWL again at age fourteen. At that point, he was able to complete the test but received scores in the bottom 2nd percentile on four of six subtests, the bottom 5th percentile on one of the six subtests, and the bottom 16th percentile on the last subtest. Consistent with these impairments, when Mr. Fulks's writing abilities were assessed at age twenty–six, he tested in the bottom 3rd percentile (at the second grade level). *See* Report, Natalie Novick–Brown, Ph.D., at 122–23 (App. 0172–73).

66. Third–party reporters also described language impairments. Linda Adkins indicated that Chad's speech development was delayed. Ms. Adkins reported that he did not begin speaking until three years old, and when he did it was difficult to understand him because he would lisp and mispronounce words. (Ms. Perry also reported that he was difficult to understand as a child.) Ms. Kirkman confirmed Chad's delay in speech development and that he was difficult to understand even after he learned to speak. He also had difficulties with pronunciation, and sounded "like a baby." *Id.* at 48 (App. 0098). Other children teased him because of his speech issues. Ms. Kirkman indicated that he sounded more like a three–year–old when he was seven. Even Mr. Fulks's father, whose memory of Chad's childhood was largely nonexistent, indicated that Petitioner did not "say stuff real plain" as a child. *Id.* at 48 (App. 0098) (describing interviews with Linda Adkins, Christine Kirkman, and Roger Fulks); *see also* Dec. Kelly Perry (App. 0362) (confirming that Petitioner was difficult to understand as a child).

67. Chad also had deficits in receptive communication. Ms. Adkins and Ms. Perry reported that Ms. Adkins had to give him repeated instructions when asking him to do something, and even then he had difficulty understanding what Ms. Adkins wanted. Report, Natalie Novick–Brown, Ph.D., at 48–49 (App. 0098–99) (describing interviews with Linda Adkins and Christina Kirkman); Dec. Kelly Perry (App. 0362).

68. Chad showed the same impairments in school. Ms. Wolfe reported that he was teased because of his speech impediment, was insecure about his speech, and frequently remained silent as a result. She also noted difficulties with receptive communication skills, indicating that she had to speak with him on a very basic level. Report, Natalie Novick–Brown, Ph.D., at 48–49 (App. 0098–99).

69. The behavioral screening and FABS confirmed the presence of these impairments. All four reporters endorsed "indistinct speech" on the behavioral screening. On the FABS, the four reporters reflected concordance on: "communicates with poor timing/interrupts and communicates about unusual/unrealistic conversation topics." *Id.* at 47 (App. 0097).

3. Multimethod Assessment: Social Domain

a. Coping skills

70. Chad was consistently described as having deficient coping skills in social settings. Gayle Wolfe described him as a follower and easily victimized socially. He was frequently in trouble, but never caused problems on his own. He was a "copycat" who was drawn into trouble by other, more sophisticated, children and could never explain what started the problems, why he got involved, or why he misbehaved. *Id.* at 49–50 (App. 0099–0100).

71. Similarly, Ms. Lauver indicated that Chad was emotionally and socially immature. He seemed much younger than his age (fourteen), did not know how to solve problems with his peers, and did not know how to avoid social victimization in an age–

appropriate way. Ms. Lauver described his coping capacity as "almost non–existent." *Id.* at 50 (App. 0100).

72. All four reporters on the behavioral screening "found concordance with respect to the following observed behaviors: immature, inflexible and stubborn, and moody/emotional outbursts." The standardized rating on the FABS reflected similar results. The reporters found concordance "on the following relevant behaviors: deficient mood control—rapid mood swings with changes triggered by seemingly small things and tendency to overreact." *Id.* at 49 (App. 0099).

b. Interpersonal relationships

73. Mr. Fulks showed deficits in interpersonal relationships in multiple settings. Ms. Adkins reported that Chad was a follower and a "pleaser" as a child. He did not initiate activities. He was easily led by other children, and was frequently "picked on" and manipulated by his peers. He followed his older brother Dewayne around and "did whatever Dewayne told him to do. Dewayne tended to tell him do things that would get him into trouble." *Id.* at 50 (App. 0100) (describing interview with Linda Adkins). He seemed much younger than his actual age, and had no friends among his age–mates. Similarly, Ms. Kirkman could not recall Chad ever having a close friend in school, indicated that he did not know how to connect socially with people, and—as noted above—that he seemed more like a three–year–old when he was seven. *Id.* at 50–51 (App. 0100–01) (describing interviews of Christina Kirkman and Linda Adkins).

74. Chad had similar impairments in the school setting. As detailed above, Ms. Wolfe noted that he was a follower, easily led by others, often lured into misconduct by more sophisticated children, and had little understanding as to why and how he got involved in misbehavior. Ms. Wolfe also indicated that that he was quiet, socially withdrawn, and immature.

He acted like a five– or six–year–old, even though he was eleven at the time he was taught by Ms. Wolfe. He had weak social reciprocity skills, was "very backward socially," had no friends in school, and did not have the social skills to initiate friendships with peers. *Id.* at 51 (App. 0101). Additionally, he had little sense of risk, and consequently was caught up in serious fights on the playground. *Id.*

75. Similarly, Ms. Lauver described Chad as unable to fit in despite initially trying to reach out to peers, lacking in social skills, and having no friends as a result. He came across as anxious, depressed, fearful, and suspicious. He showed no social judgment, and lacked basic social graces such as greeting people politely. He also had difficulty understanding jokes, and "[i]t was important to be very concrete and literal with" him. *Id.* at 26 (App. 0076). Ms. Lauver noted a marked delay in interpersonal skills: Petitioner acted like a seven–year–old, even though he was fourteen when she knew him. *Id.* at 52 (App. 0102).

76. Regarding leisure activities, as detailed in Section 4, *infra*, in the discussion of the Practical Domain, Petitioner was teased and ostracized, and had difficulty fitting in, because he had trouble understanding the rules of games. *Id.* at 52 (App. 0102) (describing interviews with Linda Adkins and Christina Kirkman).

77. The behavioral screening and FABS results all confirmed these behavioral reports. All four respondents on the behavioral screening agreed that Chad's behavior had the following characteristics: "superficial friendships, socially inept/problems with peers, follower/easily led by others, oppositional/disobedient, aggressive behavior with peers, difficulty with teamwork, and developmentally delayed." *Id.* at 50 (App. 0100). The FABS also returned concordance on the following characteristics: "had trouble playing on a team, established

superficial friendships easily but had no close friends, and seemed unaware of 'good manners.'" *Id.*

4. Multimethod Assessment: Practical Domain

a. Recreation

78. Kelly Perry, Linda Adkins, and Christina Kirkman reported that Chad had impairments in recreational skills during childhood, which stemmed from his trouble understanding the rules of games and impaired coordination. Ms. Perry stated that it was difficult to play with him because he was "slow in his thinking." *Id.* Ms. Adkins confirmed this account, indicating that Petitioner did not seem to understand games when he was a child, would get confused when he played volleyball, and did not understand the game. He had similar difficulties understanding kickball and would kick the ball at the wrong time. Ms. Kirkman also confirmed that Chad had difficulties understanding sports. All three reporters described problems with coordination. *Id.* at 52 (App. 0102) (describing interviews of Linda Adkins and Christina Kirkman); Dec. Kelly Perry (App. 0362).

79. Visuomotor testing conducted in the developmental period confirmed Chad's brain–based problems with coordination. At age nine, he showed a two–year developmental delay. He showed visuomotor and perceptual problems again at age twelve. At age fourteen, he received test scores in the bottom 12th percentile (no age equivalency listed). Report, Natalie Novick–Brown, Ph.D., at 51–52 (App. 0101–02). Consistent with this childhood testing, Mr. Fulks's motor skills and visuospatial reasoning were shown to be impaired on neuropsychological testing administered when he was an adult. *Id.* at 56 (App. 0106).

80. Finally, as an adolescent and an adult, Mr. Fulks had few normal recreational activities: his leisure activities largely consisted of drug and alcohol abuse. *Id.* at 52 (App. 0102).

b. Self–management across life settings

81. Mr. Fulks showed a consistent failure to manage his functioning and behavior across multiple life settings. As discussed *supra*, he could not keep pace with his peers academically, despite years of special education supports; he was unable to sustain productive work during his adult years; and, he never lived independently for any length of time as an adult. *Id.* at 52–53 (App. 0102–03).

82. Furthermore, he only accomplished something positive in his life—e.g., a GED, drug treatment, and a welding certificate—when in highly structured and controlled settings such as prison, juvenile facilities, or mental health placements. *Id*. To be clear, Petitioner is not proffering his prison functioning as evidence of adaptive behavior. *See* Section 2, *supra*. However, that he was unable to achieve anything of substance outside of these highly structured settings—when he had to rely on his own cognitive functioning to "organize and structure his behavior"—demonstrates the deficits in his ability to engage in adaptive reasoning and self–regulation across life–settings as well as deficits in the cognitive abilities related to self–sufficiency.[6] Report, Natalie Novick–Brown, Ph.D., at 52–53 (App. 0102–03).

D. Structural Evidence of Brain Impairments

83. Evidence of Mr. Fulks's intellectual and adaptive deficits receives further support from structural evidence of brain damage. Prior to his trial, Mr. Fulks received an MRI, a PET scan, an EEG, and a Quantitative EEG ("QEEG"), all of which showed brain abnormalities. The MRI showed that there was a subarachnoid cyst in the right temporal lobe of Petitioner's brain, which had filled in an area where his brain had failed to develop. The PET scan and EEG revealed diffuse abnormality throughout his brain. The QEEG revealed evidence of brain

[6] As discussed above, although not reflective of his adaptive functioning, Mr. Fulks's functioning inside of juvenile detention and prison was also deficient. *See* Section C.2, *supra.*

damage in the frontal and occipital lobes. These structural abnormalities are consistent with brain damage from an FASD. Indeed, the nature and structure of these abnormalities, as shown on the PET scan and the MRI, demonstrated that both of these issues were congenital, and not formed through any post–natal trauma to the brain. Tr. 6/24/04 at 1–32 (Testimony of David Bachman, M.D.) (App. 0485–0513); Tr. 6/23/04 at 26 (App. 0648) (Testimony of James Evans, Ph.D.).

84. Prior to Mr. Fulks's 2004 trial, cognitive neuroscientist Ruben Gur, Ph.D., conducted a review of all of Mr. Fulks's imaging scans and a quantitative analysis of his PET scans, which revealed that he had a "highly abnormal brain." Tr. 6/28/04 at 24 (App. 0615). Dr. Gur noted the subarachnoid cyst, but also indicated that the cyst was "the least of [his] problems" because his "whole brain [was] misshapen." Tr. 6/16/04 at 78 (App. 0872). The structure of Mr. Fulks's brain abnormalities indicated that his brain never developed properly in the first place (as opposed to developing properly and then acquiring an injury). The quantitative analysis of the PET scan reflected abnormalities in the basal ganglia, thalamus, the cerebellum, and the frontal and temporal lobes. Consistent with Dr. Davies's diagnosis of FASD, these abnormalities were primarily congenital with fetal alcohol exposure as the most likely cause. *Id.* at 77–93 (App. 0871–87).

85. Christos Davatzikos, Ph.D., an Associate Professor of Radiology and Bioengineering at the University of Pennsylvania, subjected Mr. Fulks's MRI to a quantitative analysis. This quantitative analysis showed that Petitioner had a "highly abnormal profile" that could not have come from a normal brain. Tr. 6/26/04 at 19 (App. 0610). In addition to the cyst discussed above, quantitative MRI analysis reflected widespread abnormalities in the frontal and temporal lobes of the brain. This included, inter alia, abnormalities with the right frontal lobe, the

left temporal lobe, and the inferior frontal gyrus. Dr. Davitzikos also concluded that these abnormalities were likely congenital. *Id.* at 15–34 (App. 0606–25).

86. Biostatistics and morphometrics expert Fred Bookstein, Ph.D., examined the MRI and noted that it showed an abnormal corpus callosum, which is highly correlated with FASDs. Dr. Bookstein concluded it was fifteen times more likely that Mr. Fulks brain was affected prenatally by alcohol than a brain in the general population and that the chance he suffered from an FASD was six hundred to one. Tr. 6/24/04 at 93–112 (App. 0574–93).

87. Finally, as discussed above, Dr. Davies conducted a medical evaluation of Mr. Fulks and diagnosed him with an FASD. Dr. Davies is a Clinical Professor of Pediatrics at the University of Washington, School of Medicine. He is also a staff physician at the Fetal Alcohol Syndrome Clinic located in the University of Washington School of Medicine, which is both the longest–running FASD clinic in the country and one of the foremost Fetal Alcohol Spectrum Disorder diagnostic clinics in the United States. Dr. Davies has conducted research, authored articles, co–authored books, and conducted trainings related to FASDs. Curriculum Vitae, Julian K. Davies, M.D. (App. 0045–50); *See* Section F, *infra* (discussing Dr. Davies' analysis).

88. FASD is an umbrella term used to describe the spectrum of birth defects and neurologic impacts caused by maternal alcohol consumption during pregnancy. Brain damage that results from FASD often includes lower IQ; attention and hyperactivity issues; difficulties with judgment and impulse control; language and social difficulties; learning problems; deficits in memory; and impairments in executive functioning skills such as flexibility; planning, organization; inhibition; and novel problem solving. *See* Report, Julian K. Davies, M.D., at 1 (App. 0012).

89. Dr. Davies has reviewed the foregoing analyses and concluded that the nature of the structural brain damage documented above correlates with fetal alcohol exposure. Dr. Davies identified FASD as a primary cause of Mr. Fulks's brain damage. There are other potential risk factors for cognitive dysfunction in Mr. Fulks's history, such as pre–eighteen head injuries, early onset substance abuse, and complex trauma from an abusive and dysfunctional environment. However, Dr. Davies has identified these other factors as contributory factors to Mr. Fulks's brain damage that aggravated his FASD–related deficits. Additionally, these risk factors were all present before the age of eighteen. *Id.* at 26–27, 31–33 (App. 0037–38, 0042–44).

90. The structural brain damage documented above confirms Mr. Fulks's intellectual and adaptive impairments. Most fundamentally, it identifies the source of his intellectual and adaptive deficits and verifies that these deficits were present before the age of eighteen as his brain damage has been there since birth.

91. Additionally, this brain damage lines up directly with the neuropsychological impairments described *supra*. The frontal and temporal lobes are associated with, inter alia, executive functioning (frontal), memory (temporal), and auditory language (temporal). Mr. Fulks's damaged frontal and temporal lobes explain the impairments in memory, attention, language, and executive functioning that are set forth through the neuropsychological testing. Furthermore, the thalamus functions as the "switchboard" of the brain and relays information from other parts of the brain to the executive centers for the purposes of making decisions. Tr. 6/16/04 at 49–50 (App. 0843–44) (Testimony of Ruben Gur, Ph.D.). The corpus callosum serves a similar function, relaying information back and forth between the two sides of the brain. These additional abnormalities show that Mr. Fulks's frontal and temporal lobe's ability to receive information from the rest of the brain is also impaired. This is consistent with the generalized

processing deficit reflected in the neuropsychological testing. Accordingly, Petitioner's structural brain damage, which has been present since before the age of eighteen, corresponds directly to his cognitive impairments. *Id.* at 47–48, 133–37 (App. 0841–42, 0927–31).

E. Age of Onset

92. The age of onset for Mr. Fulks's intellectual and adaptive deficits was well before the age of eighteen. As set forth *supra*, Mr. Fulks had ID–level functioning from birth through adulthood. These deficits have been shown through: third–party reporters; records review; testing administered during the developmental period; achievement and neuropsychological testing administered forensically during adulthood; formal, retrospectively administered measures of adaptive behavior; behavioral ratings that were administered during the school years; and the retrospective administration of the FABS and a behavioral screening that encompassed three time periods before the age of eighteen. Additionally, Mr. Fulks suffers from an FASD and a number of other risk factors for intellectual disability, which establish the origin of the diagnosis and confirm that its age of onset was in the developmental period. *See* Section F, *infra*.

93. The age of onset is further confirmed by the structural evidence of brain damage, which is a primary cause of the intellectual and adaptive deficits Mr. Fulks has suffered since birth. To the extent other risk factors such as substance abuse or head trauma have contributed to his impaired functioning, the evidence described above shows that the risk factors occurred in the developmental period and further strengthen the case for ID. *See* Section D, *supra*; Report, Julian Davies, M.D., at 2, 33 (App. 0013, 0044); Report, Natalie Novick–Brown, Ph.D., at 66–68 (App. 0116–18).

94. That Mr. Fulks received IQ scores above the presumptive range for intellectual disability in childhood is consistent with an age of onset before the age of eighteen. Childhood

IQ scores are generally unstable, particularly in individuals such as Petitioner who were born with cognitive deficits. As age–peers progress, impaired individuals such as Petitioner develop more slowly than their age–group and fall increasingly behind. As a result, their scores drop. The risk factors for intellectual disability referred to above also correlate with drops in IQ during the developmental period. *See* Section B, *supra*, and Section F, *infra*; Report, Barry M. Crown, Ph.D. at 7–8 (App. 0007–08).

95. Additionally, Mr. Fulks has had significant, pervasive adaptive deficits from early in his childhood. These deficits correspond to the ID–level intellectual functioning that was demonstrated during adulthood, not the scores from childhood. Even educators and mental health professionals who interacted with Petitioner when he was in school—who did not have the extensive imaging, record review, collateral reports, and testing that Petitioner presents—recognized that he was functionally intellectually disabled. Report, Natalie Novick–Brown, Ph.D., at 24–25, 27 (describing interviews with Joy Krug and Marilyn Lauver) (App. 0074–75, 0077); Report, Barry M. Crown, Ph.D. at 7–8 (App. 0007–08).

F. Risk Factors for Intellectual Disability

96. Cause need not be determined for an ID diagnosis to be made. Intellectual disability has been established whenever the three prongs are present. DSM–5 at 39–40; AAIDD–2010 at 61. Nevertheless, current diagnostic standards have identified risk factors that correlate with the ID diagnosis and are known causes of it. *See* AAIDD–2010 at 57–68. These risk factors include biomedical factors that result in direct insults to cognition, as well as environmental risk factors in the social, educational, and behavior domains, which also affect cognitive development. *Id.* "Because ID is characterized by impaired functioning, its etiology is whatever caused this impairment in functioning." *Id.* at 61. Frequently, biomedical risk factors interact with environmental ones to cause intellectual disability. *Id.* at 68.

97. In its 2010 diagnostic manual, the AAIDD describes a person with ID who has the biomedical risk factor of a Fetal Alcohol Spectrum Disorder that interacts with environmental risk factors such as poverty, parental substance abuse, child abuse, and child neglect. *Id.* Petitioner's life history is almost identical to this example. He was born with an FASD and has a number of additional risk factors for ID in his history.

1. Fetal Alcohol Spectrum Disorder

98. FASD is a significant recognized risk factor for intellectual disability. *See* Greenspan, S., et. al., *Age of Onset and the Developmental Period Criteria*, The Death Penalty and Intellectual Disability (AAIDD–2015), at 80 (describing FASD as a "high frequency biological cause[] of ID"). As discussed in Section D, *supra*, FASD is an umbrella term used to describe the spectrum of birth defects and neurologic impacts caused by maternal alcohol consumption during pregnancy. *See* Report, Julian K. Davies, M.D., at 1 (App. 0012).

99. Using the 4–Digit Code system, the most conservative and demanding of all diagnostic standards for evaluating FASDs, and also using the diagnostic system established by the Institute of Medicine ("IOM"), which is a subsidiary of the National Academies of Science, as well as the DSM–5, Dr. Davies concluded that Mr. Fulks suffers from an FASD. Under the 4–Digit Code, the diagnostic designation is Static Encephalopathy, Alcohol Exposed. Under the IOM Guidelines, the designation is Alcohol Related Neurodevelopmental Disorder. Under the DSM–5, he meets the definition of Neurodevelopmental Disorder Associated with Prenatal Alcohol Exposure. Report, Julian K. Davies, M.D., at 2, 29 (App. 0013, 0040).

100. Dr. Davies based his diagnosis on evidence of two diagnostic factors: prenatal alcohol exposure and brain dysfunction.

a. Prenatal alcohol exposure

101. Chad's mother, Diana Fulks, drank when she was pregnant with him. Both she and his father, Roger Fulks, reported that Diana drank alcohol throughout her pregnancies with Chad and his brothers Ronnie and Shannon. "Diana drank beer and wine, typically until she became intoxicated or the alcohol was gone." During the time she was pregnant with Chad, she and Roger drank at least every weekend and transitioned into drinking on a daily basis. Roger would regularly come home from work to find her drunk. Report, Natalie Novick–Brown, Ph.D., at 29 (App. 0079).

102. Kevin Holbrook, Petitioner's maternal uncle, reported that Diana drank heavily during all of her pregnancies, including her pregnancy with Petitioner. This included "[a] lot of whiskey. A lot of it." Both she and Roger would frequent bars during this time, and they were even out drinking on the night Diana went into labor with Chad. Tr. 6/22/04 at 129–30 (App. 1024–25) (Testimony of Kevin Holbrook).

103. Furthermore Arlene Andrews, Ph.D., who conducted an assessment of Mr. Fulks's social history prior to his 2004 trial, interviewed a number of third–party reporters who stated that Diana and Roger "both started drinking heavily early, and she drank through her pregnancies with all of the sons." Tr. 6/24/04 at 154 (App. 0410) (Testimony of Arlene Andrews, Ph.D.).

104. Diana's drinking habits after Chad's birth confirm her drinking while he was *in utero*. Diana drank heavily until Chad was fifteen years old. Christina Kirkman described Diana's problems with alcohol during Petitioner's childhood in an interview with Dr. Novick–Brown:

> She [Ms. Kirkman] recalled seeing Roger and Diana drinking alcohol together throughout her childhood, adding they both were "addicted" to alcohol. She saw Diana so intoxicated once, she urinated on herself. Another time, Diana vomited

> and "just sat in it." This was around 1982/83 when Christina was 12 or 13. She recalled Diana drinking and smoking cigarettes during the pregnancy with Shannon but said she was too young to be aware of Diana's alcohol use during the pregnancy with Chad. The Fulks [parents] would spend money on beer and cigarettes before buying clothes for their children.

Report, Natalie Novick–Brown, Ph.D., at 18 (App. 0068). *See also* Dec. Linda Adkins (describing Diana's alcohol abuse during Petitioner's childhood) (App. 0321).

b. Evidence of brain dysfunction

105. The brain dysfunction criterion of an FASD is established in one of two ways: structural evidence of brain impairment or FASD–level deficits on neuropsychological testing. Although only one of these two elements has to be present for the criterion of brain dysfunction to be met, both elements are present for Mr. Fulks. The abnormal MRI, PET scan, EEG, and QEEG and the quantitative analyses of the MRI and PET scan discussed above all establish structural evidence of brain damage under both the IOM and the more demanding 4–Digit Code criteria. Report, Julian K. Davies, M.D., at 26–27 (App. 0037–38).

106. Regarding neuropsychological evidence of impairments, the extensive neuropsychological and psychological testing conducted by four forensic practitioners prior to Petitioner's trial reflects 4–Digit Code–level neurocognitive impairments in five domains: executive functioning, memory, attention, language, and academic functioning. These deficits also meet the definition of neuropsychological evidence of brain impairment under the criteria set forth by the IOM. Mr. Fulks only needed this extent of impairments in three domains to satisfy this diagnostic element. Furthermore, Dr. Davies has found areas of dysfunction that do not rise to the 4–Digit Code level of impairment but still constitute brain damage in motor skills and intellectual functioning. Report, Julian K. Davies, M.D., at 17–21, 27 (App. 0028–32, 0038).

2. Child Abuse

107. Physical and/or sexual abuse during childhood is another risk factor for intellectual disability, regardless of whether head injuries occur. AAIDD–2010 at 60. This risk factor was present in Petitioner's history.

108. Roger and Diana Fulks were physically abusive alcoholics who beat all of their children, whipped them, and threw them against walls. Roger beat Chad and his siblings with belts, pool sticks, and his fists. Diana hit them with her hands and with whatever objects she could lay her hands on. Witnesses observed both the beatings themselves, which were regular, and also observed injuries as a result of those beatings.[7]

109. Chad also had an extensive history as the victim of child sexual abuse. Most significantly, when he was approximately thirteen years old, he was sexually abused by Gary Kaasee, Sr., the father of his childhood friend Michael Kaasee. He was sexually abused by a male stranger during that same period of time. At age fifteen, he was also sexually abused by his step–father Dean Thompson.[8]

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[7] *See, e.g.*, Tr. 6/10/04 at 13–14 (Testimony of Ronnie Fulks) (App. 0814–15); Tr. 6/4/04 at 140 (Testimony of Dewayne Fulks) (App. 0732); Tr. 6/22/04 at 135–36 (Testimony of Kevin Holbrook) (App. 1030–31); Tr. 6/22/04 at 167, 174 (Testimony of Mark Fulks) (App. 0770, 0777); Dec. Nathan Fulks at ¶ 9 (App. 0330); Dec. Christina Kirkman (8/28/08) at ¶ 5 (App. 0334); Dec. Sharon Dotson at ¶ 11 (App. 0327); Tr. 6/22/04 at 234 (Testimony of Linda Adkins) (App. 0373); Tr. 6/22/04 at 212–13 (Testimony of Brian Messenger) (App. 1044–45); Tr. 6/23/04 at 91–94 (Testimony of Martha Floyd) (App. 0702–05).

[8] *See* Report, Natalie Novick–Brown, Ph.D., at 6–7, 11, 14 (App. 0056–57, 0061, 0064); Memo, Joy Krug, 11/26/91 (indicating that Petitioner has a history of "being molested by an older man") (App. 0349); Dec. Mike Kaasee at ¶¶ 7–8 (describing prompt report of sexual abuse) (App. 0333); Dec. Lewis Lambert, Sr. (describing Petitioner's emotional state after the abuse) (App. 0358); Dec. Lewis Lambert, Jr. (same) (App. 0356–57); Dec. Harry Krop, Ph.D. (describing Petitioner's history of sexual abuse) (App. 0204–08).

3. Head Trauma During the Developmental Period

110. Head trauma is also a risk factor for ID. AAIDD–2010 at 60. Mr. Fulks had a history of head injuries during the developmental period. Beginning at age seven, he suffered multiple instances of pre–eighteen head trauma including, inter alia, being hit with a can of paint and losing consciousness at age eleven or twelve, being knocked out while fighting with his brother at age nine or ten, and getting into car accidents at ages fifteen or sixteen and experiencing post–concussive symptoms. Report, Natalie Novick–Brown, Ph.D., at 13, 66 (App. 0063, 0116); Report, Barry M. Crown, Ph.D., at 3 (App. 0003); Dec. Russell Spears at ¶¶ 5–6 (App. 364).

4. Parental Neglect, Impaired Parenting, Domestic Violence, and Malnutrition

111. Parental neglect, impaired parenting, domestic violence, malnutrition, and poverty are all risk factors for ID. AAIDD–2010 at 60. They were all present in Petitioner's history.

112. In addition to being physically abusive, Roger and Diana Fulks were neglectful, emotionally abusive, and impaired parents. Highly dysfunctional alcoholics, they drank until they were staggering or passed out. This occurred on a daily basis. They frequently drank and got high all night and slept through the day. They provided no parental supervision and overlooked obvious misbehavior such as stealing on the part of their children. The Fulks children played no sports, had no birthday parties, and did not participate in any normal childhood activities. Roger and Diana provided no support for the Fulks children to succeed academically, rarely attended conferences at the school, and, on one occasion, left Chad stranded at the school for hours after

he had a bathroom accident that soiled his clothing. Chad was described as receiving neither love nor moral guidance from his parents.[9]

113. Petitioner was malnourished as a child. The Fulks children frequently went hungry as Diana and Roger would spend money on alcohol before they would buy food. The children often asked neighbors to feed them because their parents were either unable or unwilling to provide them with food. Indeed, when the children were very young, Diana gave the children bottles of Kool Aid instead of milk. The Fulks household was also filthy. It was overrun with roaches, flies, other bugs, rodents and dirty diapers. The Fulks children were frequently dirty and wore dirty, shabby, ill–fitting clothes.[10]

114. Roger and Diana emotionally abused their children, cursing at them, insulting them, and calling them "unspeakable names." The weekly parties in the basement of their house where adults would drink, use drugs, fight, and engage in sexual acts, often in full view of the children. Roger displayed pornographic material where the children could see them and frequently showed Chad and his siblings pornographic movies, believing it to be funny.[11]

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[9] *See, e.g.*, Tr. 6/10/04 at 10–12, 15–19 (Testimony of Ronnie Fulks) (App. 0811–13; Tr. 6/4/04 at 129–32, 137–39, 143, 145–48 (Testimony of Dewayne Fulks) (App. 0721–40); Tr. 6/22/04 at 136–37, 142–43 (Testimony of Kevin Holbrook) (App. 1031–1032, App. 1037–38); Tr. 6/22/04 at 162, 166–71 (Testimony of Mark Fulks); (App. 0765–74) Dec. Christina Kirkman, 1/27/17, at ¶ 2 (App. 0334); Dec. Linda Adkins, 1/27/17, at ¶¶ 2–3 (App. 0321); Tr. 6/22/04 at 231–33 (Testimony of Linda Adkins) (App. 0370–71); Tr. 6/22/04 at 212–15 (Testimony of Brian Messenger) (App. 1044–47).

[10] Tr. 6/4/04 at 129–32, 137–39, 143, 145–48 (Testimony of Dewayne Fulks) (App. 0721–40); Tr. 6/22/04 at 136–37, 142–43 (Testimony of Kevin Holbrook) (App. 1031–1032, App. 1037–38) ; Tr. 6/22/04 at 161–62, 166–71 (Testimony of Mark Fulks) (App. 0764–74); Dec. Nathan Fulks at ¶¶ 7–8 (App. 033); Dec. Dicie Fulks at ¶¶ 3–4, 7 (App. 1082–83); Dec. Linda Adkins, 1/27/17, at ¶¶ 2–3 (App. 0321); Dec. Kelly Perry, 1/27/17, at ¶¶ 2, 8 (App. 0362); Tr. 6/22/04 at 212–15 (Testimony of Brian Messenger) (App. 1044–47).

[11] Tr. 6/10/04 at 14 (Testimony of Ronnie Fulks) (App. 0815); Tr. 6/4/04 at 141–42, 150–51 (Testimony of Dewayne Fulks) (App. 0733–43); Tr. 6/22/04 at 135–38, 141–42 (Testimony of Kevin Holbrook) (App. 1030–37); Tr. 6/22/04 at 168–69; Dec. Sharon Dotson at ¶ 11 (App.

115. Additionally, Roger and Diana had a volatile and mutually abusive relationship. They fought with each other using their fists and whatever objects were close at hand. This occurred in front of the children. Diana could fight as well as or better than most men, but Roger would eventually overcome her. In the aftermath of these fights, Diana was seen with bruises on her face and cut lips. These fights also occurred when Diana was pregnant with Chad.[12]

116. Overall, Chad's childhood was characterized by turbulence, poverty, and abject parenting failures by Diana and Roger. Chad's juvenile probation officer Susan Hatcher and Officer Alan Meeks, a police officer who arrested Chad as a juvenile, agreed that Chad should be removed from his home because his home environment was so damaging. Tellingly, whether from lack of concern or the fact that he was in an alcoholic stupor for much of Chad's childhood, when questioned by Professor Andrews, Roger could not recall anything about his son before he was twelve years old. Tr. 6/23/04 at 0100–02 (Testimony of Susan Hatcher) (App. 1012–14); Tr. 6/24/04 at 138 (Testimony of Arlene Andrews, Ph.D.) (App. 0394).

5. Family Poverty

117. Family poverty is also a risk factor for intellectual disability. AAIDD–2010 at 60. As discussed above, Mr. Fulks grew up in poverty. His alcoholic parents failed to maintain a stable income, adequately manage the few financial resources they were able to maintain, or provide a stable environment. Chad and his siblings were undernourished and lived in horrible conditions. *See* Section 4, *supra*.

0327); Tr. 6/22/04 at 213 (Testimony of Brian Messenger) (App. 1045); Tr. 6/24/04 at 156–62, 68 (Testimony of Arlene Andrews, Ph.D.) (App. 0412–18, 0424).

[12] *See, e.g.*,Tr. 6/10/04 at 12–13 (Testimony of Ronnie Fulks) (App. 0813–14); Tr. 6/4/04 at 132–34 (Testimony of Dewayne Fulks) (App. 0724–26); Tr. 6/22/04 at 132–35 (Testimony of Kevin Holbrook) (App. 1027–30); Tr. 6/22/04 at 163–64 (Testimony of Mark Fulks) (App. 0766–67); Dec. Nathan Fulks at ¶ 5 (App. 0329); Tr. 6/22/04 at 233–35 (Testimony of Linda Adkins) (App. 0372–74); Tr. 6/22/04 at 213 (Testimony of Brian Messenger) (App. 1045); Tr. 6/24/04 at 156, 178–79 (Testimony of Arlene Andrews, Ph.D.) (App. 0412, 0434–35) .

6. Substance Abuse During Childhood

118. Childhood substance abuse is also a risk factor for intellectual disability, as it can cause drops in cognitive abilities over time. Report, Julian K. Davies, M.D., at 32 (App. 0043). Petitioner began drinking vodka and moonshine at eight or nine years old. At that same age, he began huffing paint and ingesting some form of formaldehyde and he eventually moved on to pre–eighteen use of cocaine, pills, and methamphetamine. *Id.*

7. Petitioner's FASD Is the Primary Cause of His Brain Impairments.

119. Although Mr. Fulks has a number of other risk factors for intellectual disability in his history, Dr. Davies has reviewed his history and functioning and determined that his FASD is a primary cause of his intellectual and cognitive impairments. Other risk factors for ID were present and likely contributed to his intellectual disability. However, his deficits presented themselves long before these risk factors emerged. Furthermore, the nature of his structural brain damage correlates highly with fetal alcohol exposure. Accordingly, Petitioner's FASD is the predominant cause of his ID and the other risk factors are co–occurring, contributory factors in Mr. Fulks's lifelong impairments. *See* Report, Julian Davies, M.D., at 30–33 (App. 0041–44); Report, Natalie Novick–Brown, Ph.D., at 66–69 (App. 0116–19); Report, Barry M. Crown, Ph.D., at 7 (App. 0007).

G. Mr. Fulks Is Intellectually Disabled.

120. The above evidence establishes that Chad Fulks suffers from intellectual disability. He has deficits in intellectual and adaptive functioning, which had been present since before the age of eighteen. Petitioner's intellectual disability is established by extensive record review, four rounds of either neuropsychological or psychological testing, extensive imaging analyses, an EEG, and a QEEG, the presence of an FASD, and extensive interviews and testing

with collateral reports. His medical and functional history is almost identical to the archetype given by the AAIDD as to how intellectual disabilities develop.

121. Mr. Fulks has been evaluated by neuropsychologist Barry M. Crown, Ph.D. An experienced clinical and forensic practitioner with decades of experience, Dr. Crown is a Diplomate with the American Board of Professional Neuropsychology, with added certifications in Child and Adolescent Neuropsychology, Neurodevelopmental Disabilities, Geriatric Neuropsychology, Forensic Neuropsychology, Rehabilitation Neuropsychology, Addiction Neuropsychology, and Neuroimaging in Neuropsychology. Dr. Crown has also served as the president, as the chair of the examinations committee, and as a member of the board of directors of the American Board of Professional Neuropsychology. Dr. Crown has conducted a clinical interview of Mr. Fulks, reviewed the extensive data discussed above, and evaluated Mr. Fulks under current diagnostic standards and concluded that he is intellectually disabled, meeting all three prongs of the diagnosis. *See* Report, Barry M. Crown, Ph.D. (App. 0001–09).

H. Relief Is Appropriate Under 28 U.S.C. § 2241.

122. This claim is appropriately brought under 28 U.S.C. § 2241. A federal habeas petitioner is entitled to review under § 2241 when § 2255 is "inadequate or ineffective to test the legality of his detention" or sentence. 28 U.S.C. § 2255(e); *see also Brown*, 719 F.3d at 586–89 (§ 2241 applies to challenges to a habeas petitioner's sentence, in addition to his conviction). "The essential function [of Section 2241] is to give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence." *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998) (internal quotations omitted); *Webster v. Daniels*, 784 F.3d 1123, 1136 (7th Cir. 2015) (same).

123. This category of claims includes, inter alia, claims that rely on a new legal or factual basis not available at the time of the petitioner's trial proceedings or his § 2255

proceedings. *See, e.g.*, *Garza v. Lappin*, 253 F.3d 918 (7th Cir. 2001); *Davenport*, 147 F.3d at 607–09; *Webster*, 784 F.3d at 1136. The majority of circuit courts of appeal—including the Seventh Circuit—have also expressly recognized that § 2241 is available to a petitioner if circuit precedent would have required the district court and appellate panel to erroneously reject petitioner's claim. *See, e.g.*, *Davenport*, 147 F.3d at 611.[13]

124. Section 2241 is also the appropriate vehicle where a petitioner challenges the execution, as opposed to the imposition, of the sentence. *Kramer*, 347 F.3d at 217; *Valona v. United States*, 138 F.3d 693, 694 (7th Cir. 1998) ("A motion seeking relief on grounds concerning the execution but not the validity of the conviction and sentence . . . may not be brought under § 2255 and therefore falls into the domain of § 2241.").

125. The Seventh Circuit has also found that § 2241 review is appropriate for "a non–frivolous claim of actual innocence" that could not have been brought under § 2255. *Kramer v. Olson*, 347 F.3d 214, 217 (7th Cir. 2003). Likewise, § 2255 is "inadequate" when it prevents a prisoner from obtaining review of a legal theory that addresses the "fundamental legality" of a sentence. *Webster*, 784 F.3d at 1124–25 (7th Cir. 2015).

126. As detailed below, Mr. Fulks's claim that his intellectual disability renders him categorically ineligible for the death penalty fits within the category of claims cognizable under § 2241, as § 2255 was and remains inadequate or ineffective to test the legality of his sentence.

[13] *See also United States v. Barrett*, 178 F.3d 34, 51–52 (1st Cir. 1999); *Triestman v. United States*, 124 F.3d 361, 363 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245, 247–48, 251 (3d Cir. 1997); *United States v. Wheeler*, 886 F.3d 415, 434 (4th Cir. 2018); *Reyes–Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001); *Martin v. Perez*, 319 F.3d 799, 805 (6th Cir. 2003); *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011); *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002).

1. Petitioner's *Atkins* Claim Relies on New Legal and Factual Bases not Available at the Time of His § 2255 Proceedings, and on Supreme Court Jurisprudence Effectively Reversing Fourth Circuit Precedent.

127. As stated above, a federal prisoner may proceed under § 2241 when asserting a habeas claim that relies on a legal or factual basis not available at the time of petitioner's trial or § 2255 proceedings. *See Garza*, 253 F.3d at 924–25; *Davenport*, 147 F.3d at 607. For instance, in *Garza*, the § 2241 petitioner challenged his conviction and death sentence based on the issuance of an opinion from the Inter–American Commission on Human Rights, which found his execution would violate international law. *Id.* at 923. Because the opinion upon which the *Garza* petitioner relied could not have been generated until § 2255 proceedings had ended and Mr. Garza's legal claim did not satisfy the conditions necessary for a successive § 2255 petition, the Seventh Circuit found that Mr. Garza's claim was reviewable under § 2241. Similarly, in *Davenport*, the Seventh Circuit reviewed a claim based on a retroactive change in the United States Supreme Court's interpretation of federal statutory law under § 2241, explaining that § 2255 was not available because the Court's decision related to statutory, and not constitutional law. 147 F.3d at 607–11.

128. In *Webster*, the habeas petitioner had been convicted of federal capital charges and sentenced to death. At his trial, Mr. Webster claimed that he was intellectually disabled and challenged his eligibility for the death penalty under *Atkins*, a claim the trial court rejected. *Webster*, 784 F.3d at 1125–33. Mr. Webster then presented newly discovered evidence of his intellectual disability that could not have been discovered at the time of trial by diligent counsel. *Id.* at 1133. Because Mr. Webster's execution would be constitutionally prohibited if his *Atkins* claim was meritorious and he could not seek review of this evidence under a successor § 2255 petition, the Seventh Circuit ruled that Mr. Webster's renewed *Atkins* claim and the new evidence were appropriately reviewed under § 2241. *Id.* at 1146.

129. Here, Mr. Fulks's *Atkins* claim relies on the Supreme Court's decisions in *Hall v. Florida* and *Moore v. Texas*, as well as the current diagnostic standards that *Hall* and *Moore* require courts to use in evaluating ID claims. Because *Hall* and *Moore* were decided in 2014 and 2017, respectively, they constitute legal bases that were not available at the time of Mr. Fulks's 2004 trial or at the time he filed his § 2255 petition. Likewise, because the current editions of the AAIDD–2012 and DSM–5 were not adopted until 2012 and 2013, respectively, they constitute new factual bases not available at the time of Mr. Fulks's 2004 trial or at the time he filed his § 2255 petition. Accordingly, the claim is properly asserted under § 2241.

a. Petitioner's Claim that He Satisfies Prong One Relies on *Hall*, *Moore*, and Newly Adopted Diagnostic Criteria.

130. While *Atkins* established that intellectually disabled persons are categorically ineligible for the death penalty, the Court did not provide "'definitive procedural or substantive guides for determining when a person who claims mental retardation' falls within the protection of the Eighth Amendment." *Hall*, 572 U.S. at 718. However, the Court did cite to language in the then–current fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM–IV–TR) stating that "'[m]ild' mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70." *Atkins*, 536 U.S. at 308 n.3. The *Atkins* Court also observed that that an IQ "between 70 and 75 or lower" is usually considered the "cutoff IQ score" for prong one. *Id.* at 309 n.5 (internal quotation marks omitted). Indeed, at the time of Mr. Fulks's trial, several state statutes required an IQ score of 70 or below to establish intellectual disability and several others used a score of 70 or below as presumptive evidence of such a condition. *Id.* at 1196–97.[14]

[14] While federal law has prohibited the death penalty for the "mentally retarded" since 1994, the relevant statute does not define the term. 18 U.S.C. § 3596(c).

131. However, the legal landscape governing *Atkins* claims changed significantly in 2014, when the Supreme Court held that intellectual disability cannot be assessed according to any single factor, but rather is a "conjunctive and interrelated assessment." *Hall*, 572 U.S. at 723. Specifically, in *Hall*, the Court struck down a Florida statute establishing a "strict IQ test score cutoff of 70" for determining the applicability of *Atkins*. *Id.* at 712. In doing so, the Court made clear that, in addition to IQ scores, "an individual's ability or lack of ability to adapt or adjust to the requirements of daily life, and success or lack of success in doing so, is central to . . . diagnosing intellectual disability." *Id.* at 705 (citing DSM–5, at 37); *see also Brumfield*, 135 S. Ct. at 2277–78 (testimony that petitioner "scored 75 on an IQ test and *may have scored higher on another test* . . . was entirely consistent with intellectual disability" because "any IQ test score has a margin of error and is *only a factor* in assessing mental retardation") (emphasis added).

132. More broadly, *Hall* was the first decision of the Supreme Court holding that States did not have "unfettered discretion to define the full scope of the constitutional protection" identified in *Atkins. Hall*, 572 U.S. at 719. Rather, with *Hall*, the Court established that the assessment of an *Atkins* claim must be "informed by the views of medical experts." *Id.* at 721; *see also id*. at 720–21 (recognizing that "[i]f the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality").

133. Despite this requirement, however, many lower courts continued to employ outdated diagnostic standards, or to disregard clinical guidelines altogether, in assessing whether a defendant was entitled to *Atkins* relief. The Supreme Court definitively invalidated this practice with its 2017 decision in *Moore v. Texas*, in which it held that courts are required to apply the "medical community's *current standards*" when evaluating a claim of intellectual disability. *Id.*

at 1053 (emphasis added). Citing the current manuals from the APA and the AAIDD, the Court explained that "[r]eflecting improved understanding over time, . . . current manuals offer the 'best available description of how mental disorders are expressed and can be recognized by trained clinicians.'" *Id.* (quoting DSM–5, at xli).

134. Although the *Moore* case itself focused on the adaptive–behavior prong of ID, it is equally significant for prong one because current clinical standards reject hard cutoffs for IQ scores, mandate application of the Flynn Effect and practice effect, and dictate that IQ scores be assessed in relation to adaptive deficits. *See* AAIDD–2007 at 20–21; AAIDD–2010 at 37; AAIDD–2012 at 23; DSM–5 at 37; *see also* McGrew, K., *Norm Obsolescence: The Flynn Effect*, at 160–62. Because all of these factors are critical to an accurate assessment of prong one of Mr. Fulks's *Atkins* claim, *Moore* (together with *Hall*) provided him with a previously–unavailable legal basis for that claim.

135. In addition to these new legal bases for his claim, Mr. Fulks relies on new diagnostic criteria first published in the DSM–5 in 2013. For instance, the DSM–5 newly established that an individual's IQ scores must be evaluated in direct relation to his or her adaptive deficits, explaining:

> IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real–life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.

DSM–5 at 37. Consistent with this dynamic, the DSM–5 rejected the notion of ID evaluations as actuarial determinations, stating that "[t]he diagnosis of intellectual disability is based on both clinical assessment and standardized testing of intellectual and adaptive functions." *Id.*

136. The DSM–5, unlike the DSM–IV–TR, also recognizes that "[f]actors that may affect test scores include . . . the 'Flynn effect' (i.e. overly high scores due to out–of–date test norms)" and mandates that IQ scores be interpreted using clinical judgment and training. DSM–5 at 37. As discussed above, test score interpretation using clinical judgment includes correction for the Flynn Effect. *See supra* Section B.1.

137. This newly available diagnostic standard constitutes new factual evidence in support of Mr. Fulks's ID claim that makes it reviewable under § 2241 in the same way that the newly–discovered evidence in *Webster* allowed the petition in that case to proceed under § 2241.

b. Petitioner's claim that he satisfies prong two relies on *Hall*, *Moore*, and newly adopted diagnostic criteria.

138. As explained immediately above, before 2014, Supreme Court jurisprudence did not mandate that lower courts apply clinical standards in assessing an *Atkins* claim. Although this changed with the Court's decision in *Hall*, that case was limited to discussing the appropriate medical consensus regarding a prong–one evaluation. Thus, even in the wake of *Hall*, courts continued to ignore up–to–date medical consensus applicable to a prong two evaluation. For instance, in 2015, the Fourth Circuit rejected a petitioner's claim that the outcome of his sentencing would have been different had his jury been instructed pursuant to *Hall*, relying in particular on the evidence relating to his adaptive functioning. *See Prieto v. Zook*, 791 F.3d 465, 470–72 (4th Cir. 2015). In its analysis, the court deviated from the current diagnostic standards in several ways, including: overemphasizing the petitioner's perceived adaptive strengths, relying on erroneous lay stereotypes of intellectual disability, and considering the petitioner's criminal conduct and behavior in prison as part of the adaptive–deficits analysis. *See id.*; DSM–5 at 34–35, 38; AAIDD–2010 at 47, 49; AAIDD–2012 at 20, 60; *Moore–I*, 137 S. Ct. at 1046, 1050–52, n.6; *Moore–II*, 2019 U.S. LEXIS 821 at *9–13. The court also appeared to disregard

evidence of significant risk factors for intellectual disability in the petitioner's history, which was also contrary to current diagnostic standards. *See Prieto*, 791 F.3d at 470–72; DSM–5 at 39; AAIDD–2010 at 57–62; *Moore–I*, 137 S. Ct. at 1051; *Moore–II*, 2019 U.S. LEXIS 821 at *5.

139. Notably, the district court that presided over Mr. Fulks's sentencing and § 2255 proceedings committed similar errors just two years earlier in denying § 2255 relief to Mr. Fulks's co–conspirator, Brandan Basham. Specifically, the court found that Mr. Basham had failed to satisfy prong two of his *Atkins* claim based entirely on "the various 'skills' that Basham exhibited on his and Fulks's seventeen–day crime spree," agreeing with the Government that "Basham's actions clearly show that he operated at a level exceeding the ceiling abilities for mental retardation." *Basham v. United States*, 109 F. Supp. 3d 753, 841 (D.S.C. 2013). Among other unscientific aspects of the district court's analysis is the fact that it disregarded then–current diagnostic criteria expressly excluding criminal behavior from the adaptive behavior assessment. *See* AAIDD–2012 at 20; AAIDD–2010 at 49. Indeed, one of the seven so–called "*Briseño* factors" employed by Texas courts in assessing *Atkins* claims—the use of which was specifically struck down by the Supreme Court in *Moore*—asked the court to consider whether the petitioner's "offense require[d] forethought, planning, and complex execution of purpose?" *Moore–I* at 1046 n.6. As the Court observed in *Moore*, the *Briseño* factors were an "invention of the [Texas Court of Criminal Appeals] untied to any acknowledged source." *Id.* at 1044. It continued: "Not aligned with the medical community's information, and drawing no strength from our precedent, the *Briseño* factors 'creat[e] an unacceptable risk that persons with intellectual disability will be executed.'" *Id.* (quoting *Hall*, 134 S. Ct., at 1990).

140. There is no reason to believe that, had Mr. Fulks asserted an *Atkins* claim in his § 2255 petition, the district court would have analyzed prong two of his claim any differently

than it analyzed that of Mr. Basham. However, post–*Moore*, it is clear that such an analysis is contrary to diagnostic standards and invalid. Hence, Mr. Fulks is now able to assert a successful *Atkins* claim on a legal basis that was not available to him at the time of his initial § 2255 proceedings.

141. Additionally, the new prong two diagnostic criteria in the AAIDD–2012 and DSM–5, each of which was published after the district court denied Mr. Fulks's § 2255 petition, constitute new factual bases not available at the time of his § 2255 proceedings. For instance, both the AAIDD–2012 and the DSM–5 made clear for the first time that it is critical to avoid the use of stereotypes in assessing adaptive functioning. The AAIDD–2012 expressly identifies numerous commonly held, but erroneous, stereotypes relating to individuals with intellectual disability which "are unsupported by both professionals in the field and published literature" and "must be dispelled." AAIDD–2012 at 60; *see also id.* (warning that "a number of incorrect stereotypes" about ID "can interfere with justice"). These invidious stereotypes include that individuals with ID: "look and talk differently from persons from the general population," "are completely incompetent and dangerous," "cannot do complex tasks," "cannot get driver's licenses, buy cars, or drive cars," "do not (and cannot) support their families," "cannot romantically love or be romantically loved," "cannot acquire vocational and social skills necessary for independent living," and "are characterized only by limitations and do not have strengths that occur concomitantly with the limitations." *Id.*

142. The DSM–5 confronts several of these stereotypes by explicitly recognizing that persons with significant adaptive deficits can, inter alia, have romantic relationships in adulthood, maintain competitive employment in jobs that do not emphasize conceptual skills, function age–appropriately in personal care, arrange for their own transportation and manage

money with support, raise a family with support, and develop a variety of recreational skills. *See* DSM–5 at 34–35. The DSM–5 also provides more guidance as to what constitutes deficits in adaptive functioning. *Id.* at 34–36.

143. As with the new diagnostic criteria relating to prong one, the prong two criteria that appeared for the first time in the AAIDD–2012 and DSM–5 constitute new factual bases supporting Mr. Fulks's ID claim that were not available at the time of his § 2255 proceedings. Together with the legal developments in *Moore–I*, these facts render Mr. Fulks's claim appropriate for this Court's review under § 2241.

2. Petitioner's Claim Challenges the Execution—not the Imposition—of His Sentence, as well as the Fundamental Legality of that Sentence.

144. As explained above, § 2241 is the appropriate vehicle for claims that challenge the execution, as opposed to the imposition, of a petitioner's sentence. This use of § 2241 has been explained as follows:

> [F]ederal prisoners challenging some aspect of the execution of their sentence, such as denial of parole, may proceed under Section 2241. This difference arises from the fact that Section 2255, which like Section 2241 confers habeas corpus jurisdiction over petitions from federal prisoners, is expressly limited to challenges to the validity of the petitioner[']s] sentence. Thus, Section 2241 is the only statute that confers habeas jurisdiction to hear the petition of a federal prisoner who is challenging not the validity but the execution of his sentence.

Coady v. Vaughn, 251 F.3d 480, 485 (3d Cir. 2001); *see also Valona*, 138 F.3d at 694 (7th Cir. 1998) ("A motion seeking relief on grounds concerning the execution but not the validity of the conviction and sentence . . . may not be brought under § 2255 and therefore falls into the domain of § 2241.").

145. Here, Mr. Fulks is not claiming that his sentence violated *Atkins* at the time it was imposed. Rather, consistent with the Supreme Court's decision in *Moore–I*, he claims that his sentence is now unconstitutional under newly evolved diagnostic standards. *See Moore–I*, 137 S.

Ct. at 1050–53 (reversing Texas's denial of petitioner's *Atkins* claim, in part, because Texas employed diagnostic standards in effect at the time of petitioner's sentencing, as opposed to those current at the time of post–conviction review). And, because § 2241 contemplates challenges to the execution of petitioner's sentence, rather than the imposition, Mr. Fulks's claim that he is presently ineligible for the death penalty under *Atkins* and its progeny is properly brought under § 2241.

146. Section 2241 is also the appropriate avenue of relief where the petitioner challenges the "fundamental legality" of his or her sentence. *Webster*, 784 F.3d at 1124–25 (7th Cir. 2015). The *Webster* court held that the petitioner had properly filed a § 2241 petition to establish that his intellectual disability made him ineligible for the death penalty. It described the "'Kafkaesque' nature of a procedural rule that, if construed to be beyond the scope of the savings clause, would (or could) lead to an unconstitutional punishment." *Id*. at 1139. It accordingly recognized that, where a "structural problem" prevents a petitioner from bringing a second § 2255 motion, the petitioner may in some circumstances (there, because of the availability of new facts), bring a § 2241 petition. *Id*. "To hold otherwise," the Seventh Circuit explained, "would lead in some cases . . . to the intolerable result of condoning an execution that violates the Eighth Amendment." *Id.*; *see also id.* (noting that "a core purpose of habeas corpus is to prevent a custodian from inflicting an unconstitutional sentence").

147. Under current legal and diagnostic standards, Mr. Fulks is an intellectually disabled person. As such, precluding him from raising his *Atkins* claim under § 2241 to challenge the execution and fundamental legality of his unconstitutional death sentence would lead to precisely the "intolerable result" against which the *Webster* court warned.

II. BECAUSE MR. FULKS HAS THE SAME COGNITIVE AND ADAPTIVE FUNCTIONING DEFICITS EXHIBITED BY THE INTELLECTUALLY DISABLED, HE IS CATEGORICALLY INELIGIBLE FOR THE DEATH PENALTY.

148. Claim I establishes that Chad Fulks is ineligible for the death penalty on diagnostic grounds: he is intellectually disabled and meets all the criteria for intellectual disability. He is also ineligible on functional grounds, because, even assuming he is not intellectually disabled, his impairments satisfy all the requirements set forth in *Atkins*. Throughout his life, Mr. Fulks has suffered from the same adaptive deficits, measured by the same tests and clinical assessments, as the intellectually disabled. His deficits have impaired his functioning in the conceptual, social, and practical domains. He has longstanding deficits in intellectual functioning, with his three most recent IQ scores falling in the intellectually disabled range.

149. In *Madison v. Alabama*, 2019 U.S. LEXIS 1595, ___ S. Ct. ___ (Feb. 27, 2019), the Supreme Court recently established that the Eighth Amendment forbids the execution of a person whose impaired functioning meets a constitutional test of categorical ineligibility, regardless of the underlying medical diagnosis. *Madison* establishes that Mr. Fulks is constitutionally ineligible for the death penalty for two independent reasons, in addition to the reasons in Claim I. First, his pervasive deficits warrant *Atkins* relief because he has the same lifelong adaptive impairments and the same low adult cognitive functioning as an intellectually disabled person, regardless of whether he qualifies for that medical diagnosis. Second, Mr. Fulks suffers from FASD, a disorder comparable in severity to ID. The adaptive and executive functioning deficits that accompany FASD are the same as those that accompany ID. Therefore, carrying out Mr. Fulks's death sentence would violate the Eighth Amendment for precisely the

same reasons that led the Supreme Court to announce a categorical ban on the intellectually disabled in *Atkins*.

150. This claim is cognizable under 28 U.S.C. § 2241 because: (a) it relies on a new legal basis not available to Mr. Fulks at the time of his trial proceedings or his § 2255 proceedings; (b) it addresses the fundamental legality of his sentence; and (c) it involves a challenge to the execution—as opposed to imposition—of his sentence under the Eighth Amendment.

A. The Eighth Amendment Prohibits the Execution of Individuals, Such as Mr. Fulks, Who Suffer from Deficient Cognitive Functioning and Adaptive Deficits Resulting from Fetal Alcohol Exposure.

151. As discussed extensively above, the Supreme Court held in *Atkins* that the punishment of death for intellectually disabled offenders was excessive or disproportionate to their crimes. 536 U.S. at 311. Three years later, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Court used similar reasoning to hold that juvenile offenders were also ineligible for the death penalty. *Id.* at 568.

152. To make these judgments, the Court applied the "evolving standards of decency that mark the progress of a maturing society." *Atkins*, 536 U.S. at 311–12 (quoting *Trop v. Dulles*, 356 U.S. 86, 100–101 (1958)); *Roper*, 543 U.S. at 560–61. However, this objective evidence, while important, was not dispositive for either of these determinations. The Constitution, the Court held, required it to exercise its own judgment about whether there was a "reason to disagree with" the societal consensus. *Atkins*, 536 U.S. at 312–13. Regarding the intellectually disabled, the Court found:

> [Intellectually disabled] persons frequently know the difference between right and wrong, and are competent to stand trial. Because of their impairments, however, 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

> the reactions of others. There is no evidence that they 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. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 318.

153. Similarly, in *Roper*, the Supreme Court found that juveniles have a "lack of maturity and underdeveloped sense of responsibility," that they "are more vulnerable or susceptible to negative influences and outside pressures," and that the "character of a juvenile is not as well formed as that of an adult." *Roper*, 543 U.S. at 569–70.

154. Furthermore, regarding the intellectually disabled, the Court held that:

> The risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is enhanced . . . by the lesser ability of [intellectually disabled] defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. [Intellectually disabled] 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.

Atkins, 536 U.S. at 320–21.

155. These deficiencies prevented either of the traditionally recognized justifications for capital punishment—retribution or deterrence—from applying to offenders who were intellectually disabled or offenders who were under the age of eighteen at the time of the crime. *Id.* at 319; *Roper*, 543 U.S. at 570. Accordingly, the Court concluded that executing intellectually disabled defendants and juveniles constituted cruel and unusual punishment.

156. Most recently, the Court has adopted a functional, instead of a diagnostic, test for deciding whether an individual's limitations categorically exclude him or her from eligibility for capital punishment. *See Madison,* 2019 U.S. LEXIS 1595. *Madison* considered whether a prisoner's "insanity" rendered him ineligible for execution under the Eighth Amendment, and

applied the test enunciated in *Panetti v. Quarterman*, 551 U.S. 930 (2007): whether "'the prisoner's mental state is so distorted by mental illness' that he lacks a 'rational understanding' of 'the State's rationale for his execution.'" *Madison*, 2019 U.S. LEXIS 1595 at *7 (quoting *Panetti*, 551 U.S. at 958–60). In contrast to the prisoners in *Panetti* and the Court's earlier opinion in *Ford v. Wainwright*, 477 U.S. 399 (1986), Madison suffered from dementia, not delusions. Justice Kagan, for the majority, found the diagnosis constitutionally irrelevant:

> *Panetti* framed its test, as just described, in a way utterly indifferent to a prisoner's specific mental illness. The *Panetti* standard concerns, once again, not the diagnosis of such illness, but a consequence—to wit, the prisoner's inability to rationally understand his punishment. And here too, the key justifications *Ford* and *Panetti* offered for the Eighth Amendment's bar confirm our conclusion about its reach. As described above, those decisions stated that an execution lacks retributive purpose when a mentally ill prisoner cannot understand the societal judgment underlying his sentence. And they indicated that an execution offends morality in the same circumstance. Both rationales for the constitutional bar thus hinge (just as the *Panetti* standard deriving from them does) on the prisoner's "[in]comprehension of why he has been singled out" to die.

Madison, 2019 U.S. LEXIS 1595 at *20 (citations omitted). The Court remanded the case with directions that the State address Madison's impairments in light of the appropriate Eighth Amendment test, "even though he suffers from dementia, rather than delusions." *Id*., 2019 U.S. LEXIS 1595 at *15.

157. *Madison* requires a functional assessment of a particular prisoner's impairments. It also requires a functional assessment of disorders other than ID. Since *Atkins*, informed observers increasingly have recognized that other severe mental disorders are morally indistinguishable from intellectual disability. In 2006, the American Bar Association adopted a resolution providing in relevant part that:

> Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their

> conduct, (b) exercise rational judgment in relation to conduct, or (c) conform their conduct to the requirements of law.
>
> * * *
>
> A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forgo or terminate post–conviction proceedings available to challenge the validity of the conviction or sentence; (ii) to understand or communication pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case.

American Bar Association, Resolution 122A (Aug. 7–8, 2006) *reprinted in* 30 Mental and Physical Disabilities Law Review 668 (Sept.–Oct. 2006). The American Psychiatric Association and the American Psychological Association had previously adopted this resolution in identical form. *Id.*

158. Several experienced jurists, faced with the excruciatingly difficult duty of reviewing death sentences imposed on defendants who suffer severe mental disabilities, have concluded that the categorical exclusion of *Atkins* should be extended to individuals with serious mental illness. In *Corcoran v. State*, 774 N.E.2d 495 (Ind. 2002), Justice Rucker, citing *Atkins* and dissenting, wrote:

> There has been no argument in this case that Corcoran is mentally retarded. However, the underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency. . . . I would hold that a seriously mentally ill person is not among those most deserving to be put to death. To do so in my view violated the Cruel and Unusual Punishment provision of the Indiana Constitution.

Id. at 502–03; *accord State v. Scott*, 748 N.E.2d 11, 20 (Ohio 2001) (Pfeifer, J., dissenting) ("evolving standards of decency" should preclude execution of defendant who has chronic schizophrenia, a medical disease); *see also State v. Ketterer*, 855 N.E.2d 48, 81–

87 (Ohio 2006) (Stratton, J., concurring) (citing ABA resolution, and concluding that "[t]he time has come for our society to reexamine the execution of persons with severe mental illness"). Other jurists have voiced similar reservations in other contexts, as have representatives of religious communities, the European Union, and the United Nations Commission for Human Rights. *See* Laurie T. Izutsu, Note, *Applying* Atkins v. Virginia *to Capital Defendants With Severe Mental Illness*, 70 Brook. L. Rev. 995, 1007–10 & nn.86–103 (2005) (collecting references). National polling data, too, reflect increasing public opposition to the execution of those with severe mental impairments. *Id.* at 1010–11 & nn.105–16.

159. As discussed in greater detail below, Mr. Fulks's specific deficits make him functionally ineligible for the death penalty. Just as Mr. Madison could be constitutionally ineligible for execution if his impairments satisfied *Panetti* and *Ford*, regardless of his diagnosis, Mr. Fulks is constitutionally ineligible for execution if his impairments satisfy *Atkins*, independently of whether he qualifies for an ID diagnosis. Moreover, FASD—another diagnosis that applies to Mr. Fulks—impairs judgment, reasoning, impulse control, and the ability to appreciate consequences. It is a congenital birth defect that originates *in utero* for reasons beyond the sufferers' control. Thus, the *Atkins* Court's reasons for declaring the execution of the intellectually disabled unconstitutional apply equally to those who, like Chad Fulks, suffer from FASD: "Because of their disabilities in areas of reasoning, judgment, and control of their impulses . . . they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 536 U.S. at 306.

B. Mr. Fulks's Cognitive and Adaptive Deficits Render Him Ineligible for the Death Penalty.

1. Both Mr. Fulks's Adult IQ Scores and His Lifelong Adaptive Functioning Fall in the Intellectually Disabled Range and Render Him Categorically Ineligible for the Death Penalty.

160. As discussed in detail in Claim I, Mr. Fulks received three IQ tests in adulthood, over the course of a single ten–month period. On the first, he received a Flynn–corrected score of 75, which falls squarely within the range of intellectual disability. The second and third scores fell one and two points, respectively, above the presumptive range for ID when corrected for the Flynn Effect. *See* Report, Barry M. Crown, Ph.D., at 6 (App. 0006). According to Dr. Crown, practice effects could explain these slightly higher scores, given their proximity to first test. Dr. Crown found that, "overall, this pattern of test results is within the range for intellectual disability." *Id*.

161. As Claim I also discusses in detail, Mr. Fulks's lifelong adaptive functioning has manifested significant deficits in multiple domains that more than satisfy the second requirement for an ID diagnosis. Dr. Brown administered a recognized test of adaptive behavior, the Vineland Adaptive Behavior Scales – 3rd Edition. Mr. Fulks scored at or below the first percentile in all three of the tested domains, communication, daily living skills, and socialization. *See* Report, Natalie Novick–Brown, Ph.D., at 32–34 (App. 0082–84). In addition, Dr. Brown, after conducting an extensive record review, interviewing third parties who had known Mr. Fulks, and considering other third–party reports, found Mr. Fulks deficient in multiple domains. *In the conceptual domain*, he had deficits in functional academics, learning and memory, executive functioning, and communication; *in the social domain*, he had deficits in coping and interpersonal behaviors; and *in the practical domain*, he had deficits in recreation and self–management. *Id.* at 39–53 (App.0089–0103).

162. It is constitutionally irrelevant whether Mr. Fulks also qualifies for a formal ID diagnosis, as established in Claim I. As an adult, he fully satisfies the functional criteria for ID—significantly subaverage intellectual functioning and significantly deficits in adaptive behavior. As in *Madison*, therefore, he is constitutionally ineligible for the death penalty.

2. Mr. Fulks's FASD Renders Him Categorically Ineligible for the Death Penalty.

163. FASD is an umbrella term for a spectrum of birth defects and central nervous system ("CNS") impairments caused by prenatal exposure to alcohol. Mr. Fulks's test results amply satisfy the criteria for CNS impairments necessary for an FASD diagnosis:

> [N]europsychological testing by four different psychologists, using a variety of tests, found significantly impaired functioning (i.e., 1 or more standard deviations below the mean) in **nine** domains per CDC guidelines for neurocognitive disability in FAS or **eight** domains (excluding Academics) under more stringent 4–Digit Code guidelines (i.e., 2 or more standard deviations below the mean). In either case, the *number of deficient domains is consistent with ID* as well as *consistent with the central nervous system abnormality found in FASD.*

Report, Natalie Novick–Brown, Ph.D., at 57 (App. 0107) (emphasis in original). The sheer number of these dysfunctional domains, and the number of those involving at least moderate impairment, results in a "generalized processing and integration deficit" that impairs his ability to deal with environmental complexity. *Id.* at 64–65 (App. 0114–15).

164. The CNS deficits of FASD cause the same impairments that afflict the intellectually disabled. The *Atkins* Court noted the "diminished capacities" of the intellectually disabled to:

- Understand and process information;
- Communicate;
- Abstract from mistakes and learn from experience;
- Engage in logical reasoning;

- Control impulses; and
- Understand the reactions of others.

536 U.S. at 318. The Court observed that, in group settings, the intellectually disabled tend to act as "followers rather than leaders." *Id*. It held that, because of these qualities, executing the intellectually disabled would not "measurably further" the goals of retribution or deterrence, and that accordingly "such punishment is excessive and [] the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Id.* at 321 (quoting *Ford*).

165. Those who suffer from FASD have similar limitations. As Dr. Davies describes:

> The brain injuries caused by drinking during pregnancy are variable, but can include such outcomes as lower IQ, ADHD (attention deficit/hyperactivity disorder), difficulties with judgment and impulse control, language and social difficulties, learning disabilities, visuospatial deficits, motor and coordination challenges, memory problems, and impairments in executive functions – "higher–level" cognitive skills like flexibility, planning, organization, inhibition, judgment, and novel problem–solving. Individuals with FASDs have daily functioning skills and life outcomes that are often more impaired than their IQ alone would predict.

Report, Julian Davies, M.D., at 1 (App. 0012) (citing A.P. Streissguth et al., *Risk Factors For Adverse Life Outcomes In Fetal Alcohol Syndrome And Fetal Alcohol Effects*, 25(4) Journal of Developmental & Behavioral Pediatrics 228–38 (2004)).

166. Mr. Fulks, like others with FASD, has suffered from all the impairments described in *Atkins* throughout his life.

167. *Understanding and processing information*: Achievement testing in Mr. Fulks's adult years showed "deficits in most academic domains" and "deficits as low as 2.5 standard deviations below the mean" in tests of memory and learning. He scored as low as 2.5 standard deviations below the mean in tests of his visuospatial processing skills, which are associated with

learning disabilities in mathematics, and as low as 3.3 standard deviations below the mean in tests of processing speed. Report, Natalie Novick–Brown, Ph.D., at 60, 61 (App. 0110, 0111). Mr. Fulks received special education services from his second year of first grade through junior high. *Id.* at 39 (App. 0089). Beginning in kindergarten, achievement testing during his school years "indicated learning deficiency in all academic areas." *Id.* at 40 (App. 0090).

168. *Communication*: School records show that he received speech therapy throughout his school years. He received significantly low scores in comprehension on a structured rating instrument called the Devereux in third grade, and reporters who knew him in childhood described his indistinct speech. Testing of his communications skills found deficits that fell as low as two standard deviations below the mean, which was consistent with his childhood deficits. *Id.* at 47–49, 63 (App. 0097–99, 113).

169. *Abstracting from mistakes and learning from experience*: Behavior Screens administered to a teacher, a neighbor, a cousin, and a school counselor who knew Mr. Fulks reported their "concordan[t]" recollections of his "inflexible" and "stubborn" behaviors. He was unable to explain to his fifth grade Behavioral Disorder teacher "what started problems, why he got involved, or why he did things." *Id.* at 49 (App. 0099). As Dr. Brown explains:

> The generalized processing deficit in FASD explains why Mr. Fulks cannot think quickly (i.e., deficient processing speed) or generalize (i.e., deficient executive functioning) in the context of a 'new' experience that doesn't exactly resemble an old event. Consistent with the generalized processing deficit, Mr. Fulks' history was replete with examples of situations where he made bad decisions, showing he did not learn from experience or cope adequately when left to his own devices.

Id. at 65 (App. 0115).

170. *Logical reasoning*: "Executive dysfunction is *the* hallmark deficit in FASD." *Id.* at 62 (App. 0112). As Dr. Brown explains, "the executive system in an *intact* brain will conduct a complex reasoning process that includes considering consequences, weighing risks/benefits,

and linking cause and effect while resisting inappropriate impulses from the limbic system—*all before communicating with the body about how to act.* . . . If executive functioning [] is impaired, then the process of conscious cognitive processing will be faulty and produce adaptive dysfunction." *Id.* at 64 (App. 0114) (emphasis in original). Among other deficiencies in the components of executive functioning, "those with FASD tend to have problems on neuropsychological tests that assess cognitive planning . . . and multiple measures of concept formation." Mr. Fulks's scores on tests of executive function amply demonstrated deficiencies in this domain, falling as low as 2.0 standard deviations below the mean and in one case more than 4.0 standard deviations below the mean. *Id*. at 62–63 (App. 0112–13). Reporters who completed behavioral screens concurred on his deficiencies in consequential thinking, and his junior high school psychologist reported that "his verbal impairments prevented him from reasoning, [and] that his abilities to think abstractly and learn from experience were very limited." *Id.* at 46 (App. 0096).

171. *Impulsivity*: Impulsivity in FASD also stems from executive functioning deficits. The literature contains "consistent empirical evidence of impairments in . . . response inhibition and executive control." *Id.* at 62–63 (App. 0112–13). As discussed above, Mr. Fulks achieved deficient scores in tests of executive functioning as an adult. Standardized behavior rating in third grade found that he lacked self–regulatory control. *Id.* at 45 (App. 0095) Many reporters described his impulsive behaviors. Report, Natalie Novick–Brown, Ph.D., at 46 (App. 0096). As Dr. Brown explains:

> The generalized [processing] deficit does not mean a person with FASD cannot lead others or plan or make choices. However, it does mean that the capacity to lead, plan, and make choices will be flawed by deficient executive processing. That is, executive processes such as considering consequences and weighing options will be biologically derailed by strong emotions and urges from the limbic system that the individual does not have the executive capacity to override.

Id. at 65–66 (App. 0115–16).

172. *Understanding reactions of others*: On a standardized screening instrument, the Fetal Alcohol Behavior Screen, three persons who had known Mr. Fulks in childhood or youth gave concordant reports about the following behaviors: he had trouble playing on a team, established superficial friendships easily but had no close friends, and seemed unaware of "good manners." *Id.* at 50 (App. 0100). His cousin recalled that he "didn't know how to connect socially," and a teacher described him as "weak in social reciprocity." *Id.* at 51 (App. 0101). A junior high school counselor reported that he lacked social graces and did not understand humor or jokes. *Id.*

173. *Following*: Multiple persons who had known Mr. Fulks as a child described him as a follower. *Id.* at 50–51 (App. 0100–01).

174. After reviewing these and other adaptive deficits, Dr. Brown concluded:

> Data from multiple, independent, convergent sources indicate Mr. Fulks exhibited cognitive, intellectual, and adaptive impairments across his lifespan that are consistent with FASD. FASD is a medical defect that impairs judgment and ability to consider consequences and control behavior, including criminal behavior.

Id. at 66 (App. 0116). Dr. Davies, relying on the "very poor adaptive functioning described in Dr. Brown's report," concluded that "[o]n the fetal alcohol spectrum, Mr. Fulks's brain injuries and overall functioning qualify as severe." Report, Julian Davies, M.D., at 28 (App. 0039).

175. Executing a person who suffers from the CNS deficits of FASD no more serves the retributive or deterrent purposes of capital punishment than executing the intellectually disabled. Mr. Fulks's FASD, no less than his intellectual disability, should render him ineligible for the death penalty under the Eighth Amendment.

C. The Claim Is Cognizable Under § 2241.

176. Mr. Fulks appropriately brings this claim under 28 U.S.C. § 2241. As discussed in Claim I, a federal prisoner may obtain habeas review under § 2241 when § 2255 is "inadequate or ineffective to test the legality of his detention" or sentence. 28 U.S.C. § 2255(e); *see also Brown*, 719 F.3d at 586–89. The courts have recognized the availability of § 2241 various types of cases. They have sometimes reviewed claims that rely on new legal bases not available at the time of petitioners' trial proceedings or § 2255 proceedings. *See, e.g.*, *Garza*, 253 F.3d at 924–25; *Davenport*, 147 F.3d at 607–09. Courts have also found § 2255 "inadequate" when it prevents a prisoner from obtaining review of a legal theory that establishes his or her actual innocence, *see Kramer*, 347 F.3d at 217 (citing *Taylor v. Gilkey*, 314 F.3d 832, 835 (7th Cir. 2002)), or one that addresses the "fundamental legality" of a sentence, *Webster*, 784 F.3d at 1124–25. In other cases, courts have recognized the cognizability of claims under § 2241 that challenged the execution, as opposed to the imposition, of petitioners' sentences. *See Kramer*, 347 F.3d at 217; *Valona*, 138 F.3d at 694.

177. Mr. Fulks's claim should likewise receive § 2241 review because he relies on new legal developments that establish the unconstitutionality of his sentence, and challenges the execution rather than the imposition of that sentence.

178. First, Mr. Fulks relies on *Madison* to support his claim that he is functionally ineligible for the death penalty. The Supreme Court decided *Madison* on February 27, 2019, long after his trial, direct appeal, and § 2255 proceedings. A "structural problem" prevents him from seeking permission for a second § 2255 motion, *see Webster*, 784 F.3d at 1139, because the new evidence on which he relies does not establish that "no reasonable factfinder would have found [him] guilty," and the Supreme Court has not explicitly declared *Madison*'s retroactivity. *See* 28 U.S.C. § 2255(h)(1), (2).

179. Second, as in *Webster*, 784 F.3d at 1124–25, Mr. Fulks challenges the "fundamental legality" of his sentence. He relies on a series of cases, beginning with *Atkins* and culminating in *Madison*, that establish its unconstitutionality. *See Atkins*, 536 U.S. 304 (Eighth Amendment prohibits imposition of death penalty on the intellectually disabled); *Roper*, 543 U.S. 551 (Eighth Amendment prohibits imposition of death penalty on individuals who were under the age of eighteen at the time of the offense); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (Eighth Amendment prohibits imposition of death penalty for non–homicide offenses, including rape of child); *Graham v. Florida*, 560 U.S. 48 (2010) (Eighth Amendment prohibits imposition of sentence of life without parole sentence on juvenile offenders not convicted of homicide); *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Eighth Amendment precludes mandatory life in prison without possibility of parole for juvenile homicide offenders); *Hall*, 134 S. Ct. 1986 (categorical exemption for intellectually disabled established in *Atkins* cannot be statutorily limited to those with an IQ score falling below a certain number); *Moore–I*, 137 S. Ct. at 1053 (2017) (assessment for categorical exemption for intellectually disabled must employ current medical standards). As in *Webster*, a construction of the § 2255 savings clause that prevented Mr. Fulks from making this claim would qualify as "Kafkaesque." *Webster*, 784 F.3d at 1139.

180. Finally, Mr. Fulks challenges the execution of his sentence. Even if petitioners in other cases have obtained *Atkins* relief before trial, on appeal, or in initial post–conviction and habeas proceedings, executing a person ineligible for the death penalty remains unconstitutional regardless of the validity of his conviction or the imposition of his sentence. Mr. Fulks therefore appropriately invokes § 2241 to challenge the execution of his own death sentence.

181. Chad Fulks has struggled throughout his life with profound CNS deficits that followed him from the womb, impaired his development, and prevented him from understanding

and functioning adaptively in the world. This Court should recognize his ineligibility for the death penalty and grant him § 2241 relief on this ground.

III. PETITIONER'S SENTENCE OF DEATH WAS OBTAINED IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL (WITHDRAWN).

182. Petitioner withdraws this claim, which was originally advanced in his petition for writ of habeas corpus, filed on January 29, 2015 (Dkt. 1).

REQUEST FOR RELIEF

For all of the above reasons, and based upon the full record of this matter, Petitioner requests that the Court provide the following relief:

A) That an evidentiary hearing be conducted on the merits of Petitioner's claims, any procedural issues, and all disputed issues of fact;

B) That leave to amend this Petition be granted, if necessary, after further fact development through investigation and an evidentiary hearing;

D) That Petitioner be allowed a reasonable time to file a memorandum of law in support of this Petition following any further fact development or following the denial of fact development; that the Government be allowed a reasonable time to respond; and that Petitioner be allowed a reasonable time to reply;

E) That habeas relief from Petitioner's sentence of death be granted.

Respectfully submitted,

/s/ Peter Williams
PETER WILLIAMS
CLAUDIA VAN WYK
Assistant Federal Defenders
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
Tel: 215.928.0520
Fax: 215.928.0826
pete_williams@fd.org
claudia_vanwyk@fd.org

Dated: March 8, 2019

CERTIFICATE OF SERVICE

I, Peter Williams, hereby certify that on this 8th day of March, 2019, a copy of the forgoing was served via ECF filing on the following person:

Winfield D. Ong, Esquire
Assistant United States Attorney
Office of the United States Attorney
Southern District of Indiana
10 West Market Street, Suite 2100
Indianapolis, IN 46204–3048

/s/ Peter Williams
Peter Williams

The DEATH PENALTY and INTELLECTUAL DISABILITY

Edward A. Polloway, Editor

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American Association
on Intellectual and
Developmental Disabilities

10 Norm Obsolescence: The Flynn Effect

Kevin S. McGrew

Nature of the Problem

A person's IQ test score is based on the comparison of the person's tested performance to an age-appropriate norm reference group. The *norms* for an IQ test are developed to represent the snapshot of the general U.S. population (at each age level the test covers) at the time the norm or standardization data are collected (American Educational Research Association, American Psychological Association, & National Council on Measurement in Education [AERA, APA, NCME], 1999). (VandenBos, 2007, defines a norm as "a standard or range of values that represents the typical performance of a group or of an individual [of a certain age, for example] against which comparisons can be made" [p. 631]). The person's test performance is compared to this standard reference group. For example, the WISC-R IQ test was published in 1974 and the WISC-R norm data was gathered on children ages 6 through 16 from 1971 through 1973 (Wechsler, 1974). (1972 is thus considered the official date of the WISC-R norm/standardization sample.) Thus, a child who is 7 years, 2 months old who was administered the WISC-R in 1974 would have the calculation of his or her IQ test score based on a comparison to the performance of children from ages 7 years, 0 months through 7 years, 3 months in the year 1972. (The WISC-R norm tables are provided in 3 month intervals within each year of age.) If the WISC-R was administered to a child of the same age (7 years, 2 months) in 1984, rather than being compared to other children of the same age in 1984, this child's performance would still be evaluated against similarly aged children from 1972. This second comparison results in a test-date/test-norm *mismatch* of 12 years (1984 – 1972 = 12). As explained next, comparing an individual's performance on an IQ test with outdated test norms results in *a comparison to a historical reference group from the past—not the person's contemporary peers.* This *norm obsolescence* problem is more commonly referred to as the *Flynn effect* (Flynn, 1984,

1985, 2000, 2006, 2007a, 2009). The Flynn effect produces inflated and inaccurate IQ test scores.

In simple terms, psychologists and psychological measurement experts typically describe the Flynn effect as the result of a "softening" of IQ tests norms with the passage of time. That is, individuals tested today on an IQ test normed many years earlier will obtain artificially inflated IQ test scores, because the older test norms reflect a level of overall performance that is lower than that of individuals in contemporary society. This is one of the primary reasons why authors and publishers of IQ tests make every effort to periodically provide "freshened" norms by collecting new nationally representative sample data for IQ test batteries. The professional consensus among test developers is that the "shelf life" of an IQ test's norms is approximately 10 years. According to Weiss (2010), Vice President of Pearson Clinical Assessment, the company and division that develops and publishes the various Wechsler IQ batteries, "there is no definition of when a test becomes obsolete. When asked privately, most Flynn effect researchers have 10 years in mind" (p. 492). If new norms are not provided, individuals tested using IQ tests with outdated norms will typically obtain inflated and inaccurate IQ test scores.

The Flynn effect recognizes that the normal curve distribution of intelligence shifts upward over time. Thus, the same raw score performance on an IQ test, when compared to outdated norms, will produce a markedly different IQ score when it is compared to updated norms based on a contemporary sample of abilities for a person of the same age. The person's tested performance (i.e., the number of correct responses across all parts of the IQ test) does *not* change, but the person's relative standing in the distribution of IQ scores across the population *does* change as a function of which norm reference group his or her performance is compared against. The same performance that is considered average in the contemporary norm sample, yielding an IQ test score of 100 in the distribution, will result in a higher IQ test score when using older norms (Schalock, 2012).

As a result of the Flynn effect, it is possible that one or more IQ test scores reported for an individual being considered for a diagnosis of intellectual disability (ID) may be inaccurate and inflated estimates. Given the high-stakes nature of *Atkins*, ID cases and their tendency to artificially focus on specific "bright line" cutoff scores, the impact of the Flynn effect must be recognized and an adjustment to the inflated scores is recommended.

Summary of Related Research

Origins of the Flynn Effect

Probably the first widely recognized scholarly report of IQ norm obsolescence was published by Lynn in 1983. Reflecting Lynn's early writings, some intelligence scholars refer to IQ norm obsolescence as the *Lynn-Flynn effect* (Woodley, 2012a). Recently, Lynn

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(2013) provided evidence that 24 studies, the first being Runquist (1936), reported on the phenomenon of norm obsolescence before the "effect was rediscovered by Flynn" (1984). Lynn (2013) argued that the proper designation of IQ test norm obsolescence should be the "Runquist effect." Although Lynn (2013) provided a compelling argument (based on the customary practices in the history of science for naming phenomena), the term *Flynn effect* is used here given its prominent and frequent use in intelligence research and *Atkins* court cases.

Seventeen years prior to the 2002 *Atkins* decision, Flynn (1985) published an article in the *American Journal on Mental Deficiency* (now the *American Journal on Intellectual and Developmental Disabilities*). This article, titled "Wechsler Intelligence Tests: Do We Really Have Criterion of Mental Retardation?" first raised the issue of a possible "adjustment" in the context of an ID diagnosis. In hindsight, Flynn's 1985 article was the "canary in the coal mine" in that it first demonstrated that the Flynn effect may have a significant impact on the proportion of the population of individuals that would be identified as ID. At that time, Flynn proposed a form of adjusting for the softening of tests norms, although it was in a slightly different form than the current recommended Flynn effect adjustment procedure.

Flynn (1985) proposed that to account for the softening of test norms, an IQ test score of 70 on a "reference" IQ test (i.e., WAIS-R) would be set in as the *absolute criterion for mental retardation* (that is, on the intellectual functioning prong of the definition). Then, to account for norm obsolescence, each time a new IQ test was published there would be a lowering of the MR cutting line. Flynn's 1985 idea was that whenever a new IQ test was published, it would be given together with the established reference IQ test (e.g., WAIS-R) and the average mean IQ test score difference between the new test and the reference test would be used to "derive a new score equivalent to the old cutting line" (p. 243). Although different from what is now considered the standard Flynn effect adjustment approach (i.e., subtracting 3 IQ test score points from an individual's total IQ test score for every 10 years for which the test was administered to a person who was normed prior to the date of individual's testing), conceptually Flynn's 1985 proposal accomplished the same goal as the currently employed Flynn effect adjustment procedure.

Fifteen years later, and still 2 years prior to the *Atkins* decision, Flynn (2000) again sounded the alarm regarding the implication of norm obsolescence related to the diagnosis and classification of mental retardation:

> It is certain that over the past 50 years, literally millions of Americans evaded the label of mentally retarded designed for them by the test manuals. Whether this was good or bad depends on what one thinks of the label. Some will say millions avoided stigma. Others will say that millions missed out on needed assistance and classroom teachers were left unaided to cope with pupils for whom aid was needed (p. 197).

The potential impact of the Flynn effect on other diagnoses was also reported in 2001 and 2003. Truscott and colleagues (Sanborn, Truscott, Phelps, & McDougal, 2003; Truscott & Frank, 2001) reported on the impact of the Flynn effect on learning disability (LD) identification, not identification of individuals with ID. Although these authors did not offer or endorse any IQ test score adjustment procedure, these researchers concluded that

> A critical finding of this study is that the FE probably contributes to misdiagnosis of LD. If this research is combined with previous reports that academic achievement may be unaffected by the FE (Neisser, 1998) it strongly suggests that, over the life of a test version, IQ-achievement discrepancies, the most salient LD criterion, are exaggerated. One potential result of such an exaggeration of IQ-achievement discrepancies would be that, as test norms aged, fewer students would score in the mentally retarded range (Flynn, 2000) and more students would qualify for LD based on inflated severe discrepancies (p. 300).

In conclusion, the recognition of the impact of *norm obsolescence* (i.e., the Flynn effect) on IQ test scores, and more importantly, the potential for misdiagnosis of ID and other conditions (e.g., LD), has been recognized and documented as early as the 1980s. It continued to be discussed prior to and after the 2002 ID-related *Atkins* decision by researchers and professionals who did not anticipate nor were influenced by the 2002 *Atkins* decision. For obvious reasons (i.e., the life-or-death implications of the *Atkins* decision), there has been increased interest in the Flynn effect adjustment procedure since the *Atkins* decision. The facts indicate that the recognition of the impact of norm obsolescence on IQ test scores (and the idea of a norm obsolescence IQ test score adjustment) was established prior to the *Atkins v Virginia* (2002) U.S. Supreme Court decision.

Scientific Basis of the Flynn Effect

There is a scientific and professional consensus that the Flynn effect is a scientific fact. A complete reading of the extant Flynn effect research literature leads to the conclusion that, despite debates regarding the causes of the Flynn effect, differences in the rate of Flynn effect change in different countries. Whether the Flynn effect has started to plateau in Scandinavian countries or whether the Flynn effect differs by different levels of intelligence and different methodological issues in various studies, *the consensus of the relevant scientific community is that the Flynn effect is real* (Cunningham & Tassé, 2010; Fletcher, Stuebing & Hughes, 2010; Flynn, 2009; Greenspan, 2006, 2007; Gresham & Reschly, 2011; Kaufman, 2010a, 2010b; McGrew, 2010; Rodgers, 1999; Trahan, Stuebing, Fletcher, & Hiscock 2014; Weiss, 2010; Zhou, Zhu, & Weiss, 2010). The robustness of this conclusion may best be represented by Rogers' (1999) statement where, after raising valid methodological issues regarding various statistical analysis and conclusions across Flynn effect studies, that even with a "healthy dose of

skepticism, the effect rises above purely methodological interpretation, and appears to have substantive import" (p. 354).

The research literature regarding the Flynn effect is extensive. Trahan et al. (2014) found over 4,000 articles in their comprehensive literature review. (Most all norm obsolescence references and articles can be found at the regularly updated *Flynn Effect Archive Project* [http://www.atkinsmrdeathpenalty.com/2010/01/atkins-mrid-capital-punishment-flynn_11.html]. As of 2014, this archive includes approximately 190 publications.) A thorough treatment of all this research is beyond the scope of the current chapter. Fortunately, key contemporary Flynn effect issues bearing on an ID diagnosis in the *Atkins* context were covered in a special 2010 issue of the *Journal of Psychoeducational Assessment* (*JPA*). A variety of invited scholars confirmed the scientific consensus regarding the validity of the Flynn effect. For example, Dr. Alan Kaufman (2010a), arguably the most prominent scholar on intelligence testing and interpretation of the various Wechsler IQ tests, stated that

> The Flynn effect (FE) is well known: Children and adults score higher on IQ tests now than they did in previous generations (Flynn, 1984, 2007, 2009b). The rate of increase in the United States has apparently remained a fairly constant 3 points per decade since the 1930s (p. 382).

The consensus of almost all authors who contributed to the *JPA* Flynn effect issue (Fletcher et al., 2010; Flynn, 2010; Hagan, Drogin, & Guilmette, 2010a; Kaufman, 2010a, 2010b; Kaufman & Weiss, 2010; McGrew, 2010; Reynolds, Niland, Wright, & Rosenn, 2010; Sternberg, 2010; Weiss, 2010; Zhou et al. 2010) was that IQ test norm obsolescence (i.e., the Flynn effect) is an established scientific fact. The following select quotes from recent peer-reviewed articles capture the essence of the convergence of opinion regarding the validity of the Flynn effect.

> The Flynn effect (FE) is real. The FE has been shown to be nearly 3 points per decade on average across a large number of studies, countries, and tests (Weiss, 2010, p. 491).

> The point is that a person tested on an outdated test will earn spuriously high scores as each year goes by, and the amount of the spuriousness amounts to about 3 points per decade for Americans (Kaufman, 2010b, p. 503).

> The FE, whatever its cause, is as real as virtually any effect can be in the social sciences. Studies have observed an increase of 0.3 points per year in average IQs; thus, for a test score to reflect accurately the examinee's intelligence, 0.3 points must be subtracted for each year since the test was standardized (Reynolds et al., 2010, p. 478).

> The Flynn effect is a well-established psychometric fact documenting substantial increases in measured intelligence test performance over time (Gresham & Reschly, 2011, p. 131).

Since the publication of the 2010 special *JPA* Flynn effect issue, many additional Flynn effect research and commentary articles have appeared (e.g., Battarjee, Khaleefa, Ali, & Lynn, 2013; Baxendale, 2010; Cunningham & Tassé, 2010; Hagan, Drogin, & Guilmette, 2010b; Kanaya & Ceci, 2011, 2012; Lynn, 2013; Nijenhuis, 2013; Nijenhuis, Cho, Murphy, & Lee, 2012; Nijenhuis, Murphy, & van Eeden, 2011; Nijenhuis & van der Flier, 2013; Pietschnig, Voracek, & Formann, 2011; Nijman, Scheirs, Prinsen, Abbink, & Blok, 2010; Rindermann, Schott, & Baumeister, 2013; Rönnlund, Carlstedt, Blomstedt, Nilsson, & Weinehall, 2013; Skirbekk, Stonawski, Bonsang, & Staudinger, 2013; Trahan et al., 2014; Wai & Putallaz, 2011; Woodley, 2011, 2012a, 2012b; Young, 2012). The continued flow of the Flynn effect related to peer-reviewed articles confirms the consensus that the Flynn effect is a scientifically important and studied phenomenon among intelligence scholars.

Adjusting IQ Test Scores for the Flynn Effect in Atkins *Cases Is Best Practice*

Not only is there a scientific consensus that the Flynn effect is a valid and real phenomenon, there is also a consensus that individually obtained IQ test scores derived from tests with outdated norms must be adjusted to account for the Flynn effect, particularly in *Atkins* cases. (The use of a Flynn effect correction in clinical settings is less of an issue given that psychologists in such settings typically have more leeway to interpret scores as ranges, invoke clinical judgment, and incorporate information regarding measurement error in interpretation of the scores when making a diagnosis. In contrast, certain high stakes settings [e.g., *Atkins* cases; eligibility for Social Security Disability benefits] may have strict point-specific cut-scores [i.e., "bright line" criteria] where examiners, or the recipients of the scores [e.g., the courts], do not allow for such clinical interpretation. Thus, the Flynn effect adjustment is more relevant, appropriate, and primarily discussed in literature and law dealing with this type of high stakes IQ testing.) The most prominent and relevant professional consensus-based guidelines for ID diagnosis (Schalock et al., 2007, 2010, and 2012) support a Flynn effect adjustment for scores based on obsolete IQ test norms. *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed.; Schalock et al., 2010), based on an expert-consensus process, provides a written guideline that endorses the appropriateness of the Flynn effect adjustment in the diagnosis of ID. (The 11th edition was created using a group-based consensus process conducted by the AAIDD Ad Hoc Committee on Terminology and Classification [Schalock et al., 2010]). AAIDD recommends that psychologists use the most recent versions of IQ tests and, if scores are reported from an IQ test with outdated norms, a correction for the age of norms is warranted (Schalock et al., 2007). The 11th edition states

> As discussed in the *User's Guide* (Schalock et al., 2007) that accompanies the 10th edition of this *Manual,* best practices require recognition of a potential Flynn effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score. (p. 37)

As suggested in the *User's Guide to Mental Retardation: Definition, Classification, and Systems of Supports* (Schalock, 2007, pp. 20–21),

> The main recommendation resulting from this work [regarding the Flynn effect] is that all intellectual assessment must use a reliable and appropriate individually administered intelligence test. In cases of tests with multiple versions, the most recent version with the most current norms should be used at all times. In cases where a test with aging norms is used, a correction for the age of the norms is warranted. (p. 37)

The AAIDD's more recent *User's Guide to Intellectual Disability: Definition, Classification, and Systems of Supports* (Schalock et al., 2012) states

> The *Flynn effect* refers to the increase in IQ scores over time (i.e., about 0.30 points per year). The Flynn effect affects any interpretation of IQ scores based on outdated norms. Both the 11th edition of the manual and this *User's Guide* recommend that in cases in which a test with aging norms is used as part of a diagnosis of ID, a corrected Full Scale IQ upward of 3 points per decade for age of norms is warranted. (p. 23)

A consensus among the professional and scientific community of intelligence and ID scholars has emerged. This consensus is that given the high-stakes nature of *Atkins* ID cases and their tendency to artificially focus on specific "bright line" cutoff scores, *a Flynn effect correction to a person's scores in this setting is now considered best or standard practice.* This conclusion is supported by a significant number of scholars and researchers in the areas of intelligence and ID (Cunningham & Tassé, 2010; Fletcher et al., 2010; Flynn, 2006, 2007b; Flynn & Widaman, 2008; Greenspan, 2006, 2007; Gresham & Reschly, 2011; Kaufman, 2010b; McVaugh & Cunningham, 2009; Reynolds et al., 2010; Schalock , 2007; Schalock, 2012). One example of this support is the statement of Reynolds et al. (2010) that "as a generally accepted scientific theory that could potentially make the difference between a constitutional and unconstitutional execution, the Flynn effect must be applied in the legal context" (p. 480). Reynolds et al. (2010) go as far as to state that "the failure to apply the Flynn correction as we have described it is tantamount to malpractice. No one's life should depend on when an IQ test was normed" (p. 480).

A minority of scholars have offered a different approach to the issue of correcting IQ test scores due to the Flynn effect. Weiss (2010), while acknowledging the scientific validity of the Flynn effect, advocates that experts should simply inform the fact finder of what the research shows and the trier-of-fact should evaluate and decide if and how to apply it when interpreting individual scores. Hagan et al. (2010b) also agree with the need to consider the Flynn effect in capital cases but their disagreement "lies in how psychologists should convey IQ scores in light of the observation that mean scores drift over time" (p. 420). It is important to note that the more conservative positions of Weiss (2010) and Hagan et al. (2010a, 2010b) represent a minority position in the professional literature. More importantly, they do not argue against the scientific validity of the Flynn

effect or even the need to consider the effect in *Atkins* cases. Rather, their difference of opinion with the majority is only as to whether a specified score adjustment should be made to the original score or whether testifying experts should instead address the Flynn effect in narrative form.

Recently, legal scholars have also supported the application of the Flynn effect correction in *Atkins* cases. Young's (2012) recent law review article ("A More Intelligent and Just *Atkins:* Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability") concluded that

> adjusting for the Flynn effect reflects a practice consistent with both *Atkins* and the known world of IQ measurements. While a freakish strike of lightning is difficult to avoid, the potentially deadly and unconstitutional consequences of refusing to account for the Flynn effect are wholly preventable. Thus, for the intelligent and just enforcement of *Atkins*, courts and juries should adjust IQ score from outdated tests for the Flynn effect. (p. 663)

What Is the Correct Flynn Effect Adjustment for Norm Obsolescence?

The AAIDDs' *User's Guide* (Schalock, 2012) recommends a Flynn effect correction of 3 points per decade (0.3 points per year). The 3 points per decade rule-of-thumb is consistent with the previously cited comments of Kaufman (2010a, 2010b) and Weiss (2010), and is also consistent with the recommendation of most scholars in the areas of intelligence and ID (e.g., Fletcher et al., 2010; Gresham & Reschly, 2011; Trahan, et al., 2014; Widaman, 2007).

The 3 points per decade rule-of-thumb is based primarily on Flynn's (2009) seminal article where he synthesized the results of 14 estimates of IQ test score gains over time. Flynn reported an average IQ test score change, across the 14 studies, of 0.311 points per year. An average mean score of 0.299 points was reported for the Wechsler comparisons only. Flynn concluded that "the evidence suggests that a rate of 0.30 is about right, and varying it from case to case lacks any rationale" (p. 104).

More recently Fletcher et al. (2010) applied more precise quantitative meta-analytic procedures to Flynn's (2009) data and reported a weighted mean of 2.80 points per decade. After removing two outlier studies, the weighted mean per decade was 2.96. These researchers concluded that "the level of precision we reported of a mean of about 3 and a *standard error of the mean* (SEM) of about 1 supports the correction and is consistent with the Flynn correction of 3 points per decade" (p. 472). In the most comprehensive meta-analysis research synthesis of 285 studies, Trahan et al. (2014) found that for modern intelligence tests the Flynn effect size was a similar 2.93 points per decade. These researchers concluded that their "findings are consistent with previous research and with the argument that it is feasible and advisable to correct IQ scores for the Flynn effect in high-stakes decisions" (p. 22).

The best available research syntheses consistently converge on a Flynn effect rule-of-thumb of 3 IQ test score points per decade (of IQ test norm obsolescence). Although

scientific journals may report Flynn effect results to the second decimal place (e.g., 3.11 per decade or 0.311 per year), the psychometrics of IQ testing and research cannot partition human behavior with such precision. As noted by Widaman (2007), much of the variation between scores from different Flynn effect studies is due to sampling and measurement error. Using Flynn effect adjustment formulae that use numbers to the second decimal place would be akin to slicing butter with a laser beam. Consequently, the current best estimate of IQ norm obsolescence, and the recommended Flynn effect adjustment, is 3 IQ points per decade, or 0.3 points per year.

Researching the Flynn Effect "Black Box": Implications for Practice

Recently a significant portion of Flynn effect research has shifted from a focus on the secular changes in the global IQ test scores over time to changes on more specific intellectual abilities, possible differential effects by level of intelligence, and a search for the cause of the Flynn effect (Kaufman, 2010a). Zhou et al. (2010) characterized this shift to a focus on the "black box" of the Flynn effect.

The cause of the Flynn effect. In the context of the special articles in the 2010 *JPA* Flynn effect issue, Weiss (2010) stated that "Except for Flynn, there is general agreement . . . that we know precious little about the causes of the effect" (p. 487). Explanations and theories have touched on such causative variables as genetics, environmental factors (e.g., nutrition, education, improved public health, increased use of computer games), ethnicity, and different societal risks and benefits associated with different generations (Kaufman & Weiss, 2010; Weiss, 2010). Flynn (2007a), in his book *What Is Intelligence? Beyond the Flynn Effect,* suggests that the effect that bears his name is due to systematic shift in societies from concrete to abstract scientific thinking. Confounding the search for the cause(s) of the Flynn effect has been idiosyncratic and armchair-based speculations (Weiss, 2010).

In the current context, knowing that the Flynn effect exists trumps a lack of consensus regarding causation. The impact of norm obsolescence on IQ test scores is real and the professional consensus is that it should be accounted for in *Atkins* ID determination. Understanding the "why" of the Flynn effect is beyond the scope of the current chapter and is not necessary for recognizing the scientifically and professionally based consensus that IQ test scores suffering from norm obsolescence need to be adjusted in *Atkins* cases. As stated by Kaufman (2010b), "The Flynn effect is a fact, even if its cause is elusive, and it must be considered carefully when making high stakes decisions such as the death penalty" (p. 503).

Differential Flynn effects by specific intellectual abilities. The foundation of Flynn's (2007a) theoretical explanation of the Flynn effect is based primarily on the interpretation of differential rates of score changes as a function of different specific intellectual abilities (e.g., smaller gains on verbal and crystallized ability tasks and larger changes on visual-spatial and abstract fluid reasoning tasks—not a singular focus on the global IQ test score). If differential specific ability Flynn effects are eventually found to be valid, the potential implication is that different Flynn effect adjustments

may be recommended for different composite or cluster "part" scores in IQ tests, and not just the global IQ score. This would introduce a new layer of complexity in the interpretation of IQ test scores (and part scores) in *Atkins* cases.

Although the recent methodologically sophisticated attempt by Zhou et al. (2010) to examine differential ability Flynn effects within the Wechsler tests represents an important step forward in this area of inquiry, their research produced inconsistent and contradictory findings. Although differential specific ability Flynn effect findings may eventually be identified, currently the supporting research results are sparse, mixed in results, and suffer from significant measurement and methodological flaws (McGrew, 2010). The foundation of Flynn effect causal theory, which hinges on the presence of differential specific ability Flynn effects, has been questioned on logical, theoretical, measurement and methodological grounds (Kaufman, 2010a, 2010b; McGrew, 2010; Weiss, 2010). Currently the extant research is not mature enough to support differential specific-ability Flynn effect adjustments in clinical or forensic contexts.

Differential Flynn effects by level of intelligence. The use of the 3 IQ test score points per decade Flynn effect adjustment rule-of-thumb has been questioned by research suggesting that the Flynn effect may not be uniform across all levels of general intelligence (Kanaya & Ceci, 2007; Kanaya, Ceci, & Scullin, 2003; Sanborn et al. 2003; Zhou et al., 2010). More important has been the suggestion that the Flynn effect may be larger at the IQ score range at the threshold for ID diagnosis. Cunningham and Tassé (2010) have referred to this research as the investigation of the Flynn effect in the "zone of ambiguity" (IQ test scores from 71–80). Studies reviewed by Cunningham and Tassé (2010) report IQ per decade changes ranging from roughly 4 to 5 points in the zone of ambiguity. Zhou et al. (2010) also reported differential Flynn effects by level of intelligence, but the results were inconsistent in the directions of the variation and may differ for different tests or age groups.

Similar to the differential Flynn effect by specific ability research, the ability-specific research has not been fully vetted through a sufficiently large number of studies and has been questioned on methodological grounds (McGrew, 2010; Widaman, 2007; Zhou et al., 2010). As summarized by Weiss (2010), "a small number of studies have suggested differential Flynn effect by ability level, but not enough is known about this at present" (p. 492). Reynolds et al. (2010) reinforce this conclusion, when after commenting on the Zhou et al. (2010 differential Flynn effects by levels of intelligence findings, that the results were inconsistent and "for now, best practice is the application of the Flynn correction as a constant by year across the distribution" (p. 480). Until more studies replicate the possibility of larger Flynn effects near the ID diagnostic threshold, the 3 points per decade Flynn effect rule-of-thumb should be employed across all levels of general intelligence.

Implications for Practice

The following implications are based on the integration of the content of the current chapter as well as the recommendations from the *User's Guide to the 10th edition,* the *11th edition,* and the *User's Guide to the 11th edition* (Schalock et al., 2007, 2010, 2012):

First, the potential problem of norm obsolescence can be minimized, but not always eliminated, by assessment professionals using IQ tests with the most up-to-date norms. When a new version of an IQ battery is published (e.g., WAIS-IV replaces WAS-III), assessment professionals should use the newest version (WAIS-IV) in *Atkins* cases. Assessment professionals have an ethical responsibility to stay abreast with the publication of new versions of IQ batteries and when the option exists to select among different IQ tests to administer to an individual. The relative degree of norm obsolescence of each possible IQ test should be one important factor incorporated into the IQ test selection decision.

Second, in cases where current or historical IQ test scores are impacted by norm obsolescence (i.e., Flynn effect), and the scores are to be used as part of the diagnosis of ID in *Atkins* or other high stakes decisions, the global scores impacted by outdated norms should be adjusted downward by 3 points per decade (0.3 points per year) of norm obsolescence.

Third, the recommended formula for the Flynn effect adjustment is: *FE adjustment = (Date test administered – date test was normed) × 0.3.* Stated simply, subtract the date the IQ test was normed (see point seven below) from the date the test was administered to the individual, multiply the obtained difference by 0.3. The obtained Flynn effect adjustment value should then be subtracted from the inflated obtained IQ score. The final Flynn effect adjustment value should be an integer value. Thus, the treatment of decimals in the final value should adhere to standard mathematical rules of "rounding to the nearest integer." The rationale for the particular rounding strategy employed should be described in the report. Current research does not support the application of different Flynn effect adjustment values for different part scores on IQ tests or at different levels of general intelligence. The best scientific evidence and professional consensus is that until sufficient research evidence produces evidence to the contrary, the 3 points per decade (0.3 points per year) adjustment rule-of-thumb should be used only on the global IQ test score and should be employed uniformly across all levels of general intelligence.

Fourth, both the original obtained (unadjusted) and Flynn effect adjusted scores should be included in all reports or court related statements or declarations provided by assessment professionals.

Fifth, the rationale for employing a Flynn effect correction should be described with supporting references. This chapter is intended to serve this function and can be cited as an authoritative source for the use of the Flynn effect adjustment in reports.

Sixth, when writing and discussing the Flynn effect, such as in psychological reports, legal declarations, or expert testimony, professionals should make frequent use of the term *norm obsolescence* when explaining the Flynn effect. Norm obsolescence is a much more descriptive and understandable means for conveying the essence of the Flynn effect.

Seventh, the calculation of the years of norm obsolescence should be based on the difference between the year the test was administered to an individual and the best

estimate of the year the IQ test was *normed* (see also Chapters 7 and 8). The data of publication of an IQ test does not accurately capture the time period when the test norm data were gathered. For example, the WISC-R IQ test was published in 1974 and the WISC-R norm data was gathered on children from 6 through 16 years of age from 1971 through 1973 (Wechsler, 1974). Thus, the middle most year of the actual norm data collection period is 1972. For the WISC-R, the year 1972 should be subtracted from the date of testing to determine the number of years of norm obsolescence. The test norm years reported for the different IQ tests by Flynn (2009) are recommended for uniformity purposes. For tests not reported in Flynn (2009), professionals need to consult the technical manuals for the IQ test in question and establish the best year estimate that is at the middle of the norm data collection period. If not readily available, professionals should seek the expertise of the test authors, publisher, or other intelligence test experts who may possess this information.

This chapter concludes with an example from an *Atkins* case. In 1998 an individual was administered the WAIS-R and obtained a Full Scale IQ of 80. Despite knowing that the WAIS-R had been revised and published as the WAIS-III in 1997, the psychologist administered the WAIS-R despite 20 years of norm obsolescence. The WAIS-R was published in 1981 and the best estimate of the date the actual test norms were gathered, as per the recommended procedures above, is 1978. Thus, the difference between the date of WAIS-R testing (1998) and date of test norming (1978) was 20 years, Using the 0.3/year Flynn effect adjustment, the best estimate of the magnitude of IQ test score inflation due to norm obsolescence is 6 IQ test score points ($0.3 \times 20 = 6.0$). Thus, this individual's Flynn effect adjusted WAIS-R score is 74 ($80 - 6 = 74$). This example represents one of the most dramatic instances of norm obsolescence (20 years) and also reflects the fact that the examiner did not engage in proper practice by administering the WAIS-III which was available at the time the individual was assessed.

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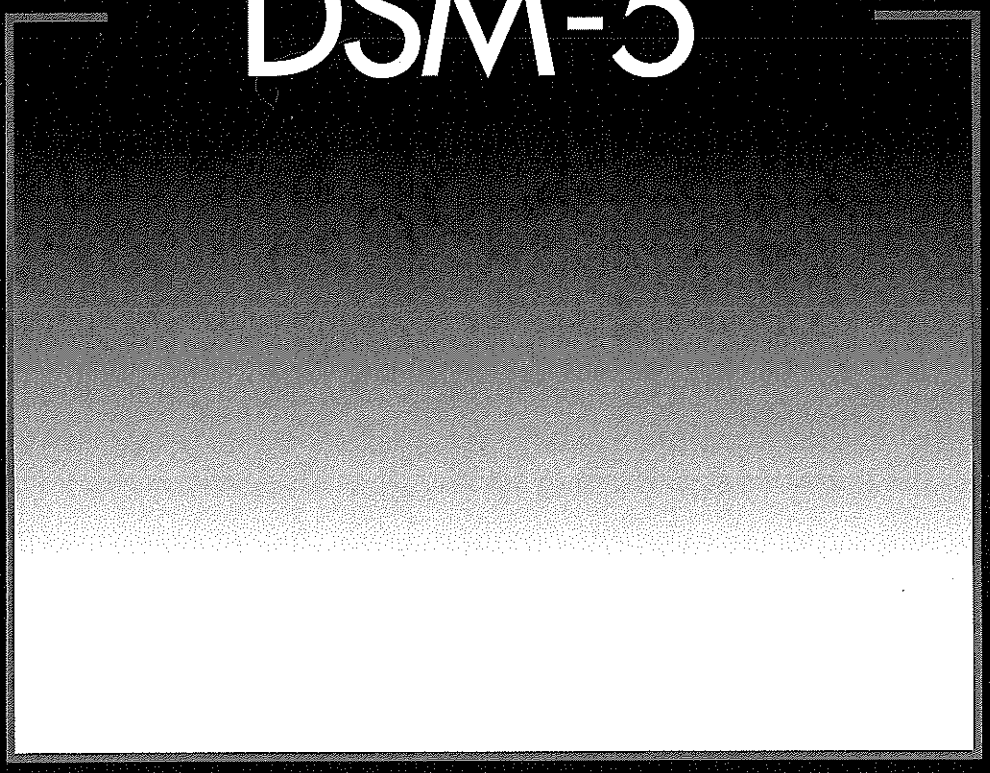
DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS

FIFTH EDITION

DSM-5®



AMERICAN PSYCHIATRIC ASSOCIATION

cians an opportunity to document factors that may have played a role in the etiology of the disorder, as well as those that might affect the clinical course. Examples include genetic disorders, such as fragile X syndrome, tuberous sclerosis, and Rett syndrome; medical conditions such as epilepsy; and environmental factors, including very low birth weight and fetal alcohol exposure (even in the absence of stigmata of fetal alcohol syndrome).

Intellectual Disabilities

Intellectual Disability (Intellectual Developmental Disorder)

Diagnostic Criteria

Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:

A. Deficits in 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 and sociocultural 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.

C. Onset of intellectual and adaptive deficits during the developmental period.

Note: The diagnostic term *intellectual disability* is the equivalent term for the ICD-11 diagnosis of *intellectual developmental disorders.* Although the term *intellectual disability* is used throughout this manual, both terms are used in the title to clarify relationships with other classification systems. Moreover, a federal statute in the United States (Public Law 111-256, Rosa's Law) replaces the term *mental retardation* with *intellectual disability,* and research journals use the term *intellectual disability.* Thus, *intellectual disability* is the term in common use by medical, educational, and other professions and by the lay public and advocacy groups.

Specify current severity (see Table 1):

317 (F70) Mild
318.0 (F71) Moderate
318.1 (F72) Severe
318.2 (F73) Profound

Specifiers

The various levels of severity are defined on the basis of adaptive functioning, and not IQ scores, because it is adaptive functioning that determines the level of supports required. Moreover, IQ measures are less valid in the lower end of the IQ range.

TABLE 1 Severity levels for intellectual disability (intellectual developmental disorder)

Severity level	Conceptual domain	Social domain	Practical domain
Mild	For preschool children, there may be no obvious conceptual differences. For school-age children and adults, there are difficulties in learning academic skills involving reading, writing, arithmetic, time, or money, with support needed in one or more areas to meet age-related expectations. In adults, 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), are impaired. There is a somewhat concrete approach to problems and solutions compared with age-mates.	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 are more concrete or immature than expected for age. There may be difficulties regulating emotion and behavior in 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 age, and the person is at risk of being manipulated by others (gullibility).	The individual may function age-appropriately in personal care. Individuals need some support with complex daily living tasks in comparison to peers. In adulthood, supports typically involve grocery shopping, transportation, home and child-care organizing, nutritious food preparation, and banking and money management. Recreational skills resemble those of age-mates, although judgment related to well-being and organization around recreation requires support. In adulthood, competitive employment is often seen in jobs that do not emphasize conceptual skills. Individuals generally need support to make health care decisions and legal decisions, and to learn to perform a skilled vocation competently. Support is typically needed to raise a family.

TABLE 1 *Severity levels for* **intellectual disability (intellectual developmental disorder)** ***(continued)***

Severity level	Conceptual domain	Social domain	Practical domain
Moderate	All through development, the individual's conceptual skills lag markedly behind those of peers. For preschoolers, language and pre-academic skills develop slowly. For school-age children, 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.	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.	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 supports 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 co-workers, supervisors, and others is 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. These typically require additional supports and learning opportunities over an extended period of time. Maladaptive behavior is present in a significant minority and causes social problems.

TABLE 1 Severity levels for intellectual disability (intellectual developmental disorder) *(continued)*

Severity level	Conceptual domain	Social domain	Practical domain
Severe	Attainment of conceptual skills is limited. The individual generally has little understanding of written language or of concepts involving numbers, quantity, time, and money. Caretakers provide extensive supports for problem solving throughout life.	Spoken language is quite limited in terms of vocabulary and grammar. Speech may be single words or phrases and may be supplemented through augmentative means. Speech and communication are focused on the here and now within everyday events. Language is used for social communication more than for explication. Individuals understand simple speech and gestural communication. Relationships with family members and familiar others are a source of pleasure and help.	The individual requires support for all activities of daily living, including meals, dressing, bathing, and elimination. The individual requires supervision at all times. The individual cannot make responsible decisions regarding well-being of self or others. In adulthood, participation in tasks at home, recreation, and work requires ongoing support and assistance. Skill acquisition in all domains involves long-term teaching and ongoing support. Maladaptive behavior, including self-injury, is present in a significant minority.
Profound	Conceptual skills generally involve the physical world rather than symbolic processes. The individual may use objects in goal-directed fashion for self-care, work, and recreation. Certain visuospatial skills, such as matching and sorting based on physical characteristics, may be acquired. However, co-occurring motor and sensory impairments may prevent functional use of objects.	The individual has very limited understanding of symbolic communication in speech or gesture. He or she may understand some simple instructions or gestures. The individual expresses his or her own desires and emotions largely through nonverbal, nonsymbolic communication. The individual enjoys relationships with well-known family members, caretakers, and familiar others, and initiates and responds to social interactions through gestural and emotional cues. Co-occurring sensory and physical impairments may prevent many social activities.	The individual is dependent on others for all aspects of daily physical care, health, and safety, although he or she may be able to participate in some of these activities as well. Individuals without severe physical impairments may assist with some daily work tasks at home, like carrying dishes to the table. Simple actions with objects may be the basis of participation in some vocational activities with high levels of ongoing support. Recreational activities may involve, for example, enjoyment in listening to music, watching movies, going out for walks, or participating in water activities, all with the support of others. Co-occurring physical and sensory impairments are frequent barriers to participation (beyond watching) in home, recreational, and vocational activities. Maladaptive behavior is present in a significant minority.

Diagnostic Features

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

Criterion A refers to intellectual functions that involve reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding. Critical components include verbal comprehension, working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficacy. Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence. 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.

Factors that may affect test scores include practice effects and the "Flynn effect' (i.e., overly high scores due to out-of-date test norms). Invalid scores may result from the use of brief intelligence screening tests or group tests; highly discrepant individual subtest scores may make an overall IQ score invalid. Instruments must be normed for the individual's sociocultural background and native language. Co-occurring disorders that affect communication, language, and/or motor or sensory function may affect test scores. Individual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single IQ score. Such testing may identify areas of relative strengths and weaknesses, an assessment important for academic and vocational planning.

IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.

Deficits in adaptive functioning (Criterion B) refer to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background. Adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical. The *conceptual (academic) domain* involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. The *social domain* involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The *practical domain* involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others. Intellectual capacity, education, motivation, socialization, personality features, vocational opportunity, cultural experience, and coexisting general medical conditions or mental disorders influence adaptive functioning.

Adaptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures. Standardized measures are used with knowledgeable informants (e.g., parent or other family member; teacher; counselor; care provider) and the individual to the extent possible. Additional sources of information include educational, developmental, medical, and mental health evaluations. Scores from standardized measures and interview sources must be interpreted using clinical judgment. When standardized testing is difficult or impossible, because of a variety of

factors (e.g., sensory impairment, severe problem behavior), the individual may be diagnosed with unspecified intellectual disability. Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained.

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.

Associated Features Supporting Diagnosis

Intellectual disability is a heterogeneous condition with multiple causes. There may be associated difficulties with social judgment; assessment of risk; self-management of behavior, emotions, or interpersonal relationships; or motivation in school or work environments. Lack of communication skills may predispose to disruptive and aggressive behaviors. Gullibility is often a feature, involving naiveté in social situations and a tendency for being easily led by others. Gullibility and lack of awareness of risk may result in exploitation by others and possible victimization, fraud, unintentional criminal involvement, false confessions, and risk for physical and sexual abuse. These associated features can be important in criminal cases, including Atkins-type hearings involving the death penalty.

Individuals with a diagnosis of intellectual disability with co-occurring mental disorders are at risk for suicide. They think about suicide, make suicide attempts, and may die from them. Thus, screening for suicidal thoughts is essential in the assessment process. Because of a lack of awareness of risk and danger, accidental injury rates may be increased.

Prevalence

Intellectual disability has an overall general population prevalence of approximately 1%, and prevalence rates vary by age. Prevalence for severe intellectual disability is approximately 6 per 1,000.

Development and Course

Onset of intellectual disability is in the developmental period. The age and characteristic features at onset depend on the etiology and severity of brain dysfunction. Delayed motor, language, and social milestones may be identifiable within the first 2 years of life among those with more severe intellectual disability, while mild levels may not be identifiable until school age when difficulty with academic learning becomes apparent. All criteria (including Criterion C) must be fulfilled by history or current presentation. Some children under age 5 years whose presentation will eventually meet criteria for intellectual disability have deficits that meet criteria for global developmental delay.

When intellectual disability is associated with a genetic syndrome, there may be a characteristic physical appearance (as in, e.g., Down syndrome). Some syndromes have a *behavioral phenotype*, which refers to specific behaviors that are characteristic of particular genetic disorder (e.g., Lesch-Nyhan syndrome). In acquired forms, the onset may be abrupt following an illness such as meningitis or encephalitis or head trauma occurring during the developmental period. When intellectual disability results from a loss of previously acquired cognitive skills, as in severe traumatic brain injury, the diagnoses of intellectual disability and of a neurocognitive disorder may both be assigned.

Although intellectual disability is generally nonprogressive, in certain genetic disorders (e.g., Rett syndrome) there are periods of worsening, followed by stabilization, and in

others (e.g., San Phillippo syndrome) progressive worsening of intellectual function. After early childhood, the disorder is generally lifelong, although severity levels may change over time. The course may be influenced by underlying medical or genetic conditions and co-occurring conditions (e.g., hearing or visual impairments, epilepsy). Early and ongoing interventions may improve adaptive functioning throughout childhood and adulthood. In some cases, these result in significant improvement of intellectual functioning, such that the diagnosis of intellectual disability is no longer appropriate. Thus, it is common practice when assessing infants and young children to delay diagnosis of intellectual disability until after an appropriate course of intervention is provided. For older children and adults, the extent of support provided may allow for full participation in all activities of daily living and improved adaptive function. Diagnostic assessments must determine whether improved adaptive skills are the result of a stable, generalized new skill acquisition (in which case the diagnosis of intellectual disability may no longer be appropriate) or whether the improvement is contingent on the presence of supports and ongoing interventions (in which case the diagnosis of intellectual disability may still be appropriate).

Risk and Prognostic Factors

Genetic and physiological. Prenatal etiologies include genetic syndromes (e.g., sequence variations or copy number variants involving one or more genes; chromosomal disorders), inborn errors of metabolism, brain malformations, maternal disease (including placental disease), and environmental influences (e.g., alcohol, other drugs, toxins, teratogens). Perinatal causes include a variety of labor and delivery-related events leading to neonatal encephalopathy. Postnatal causes include hypoxic ischemic injury, traumatic brain injury, infections, demyelinating disorders, seizure disorders (e.g., infantile spasms), severe and chronic social deprivation, and toxic metabolic syndromes and intoxications (e.g., lead, mercury).

Culture-Related Diagnostic Issues

Intellectual disability occurs in all races and cultures. Cultural sensitivity and knowledge are needed during assessment, and the individual's ethnic, cultural, and linguistic background, available experiences, and adaptive functioning within his or her community and cultural setting must be taken into account.

Gender-Related Diagnostic Issues

Overall, males are more likely than females to be diagnosed with both mild (average male:female ratio 1.6:1) and severe (average male:female ratio 1.2:1) forms of intellectual disability. However, gender ratios vary widely in reported studies. Sex-linked genetic factors and male vulnerability to brain insult may account for some of the gender differences.

Diagnostic Markers

A comprehensive evaluation includes an assessment of intellectual capacity and adaptive functioning; identification of genetic and nongenetic etiologies; evaluation for associated medical conditions (e.g., cerebral palsy, seizure disorder); and evaluation for co-occurring mental, emotional, and behavioral disorders. Components of the evaluation may include basic pre- and perinatal medical history, three-generational family pedigree, physical examination, genetic evaluation (e.g., karyotype or chromosomal microarray analysis and testing for specific genetic syndromes), and metabolic screening and neuroimaging assessment.

Differential Diagnosis

The diagnosis of intellectual disability should be made whenever Criteria A, B, and C are met. A diagnosis of intellectual disability should not be assumed because of a particular

genetic or medical condition. A genetic syndrome linked to intellectual disability should be noted as a concurrent diagnosis with the intellectual disability.

Major and mild neurocognitive disorders. Intellectual disability is categorized as a neurodevelopmental disorder and is distinct from the neurocognitive disorders, which are characterized by a loss of cognitive functioning. Major neurocognitive disorder may co-occur with intellectual disability (e.g., an individual with Down syndrome who develops Alzheimer's disease, or an individual with intellectual disability who loses further cognitive capacity following a head injury). In such cases, the diagnoses of intellectual disability and neurocognitive disorder may both be given.

Communication disorders and specific learning disorder. These neurodevelopmental disorders are specific to the communication and learning domains and do not show deficits in intellectual and adaptive behavior. They may co-occur with intellectual disability. Both diagnoses are made if full criteria are met for intellectual disability and a communication disorder or specific learning disorder.

Autism spectrum disorder. Intellectual disability is common among individuals with autism spectrum disorder. Assessment of intellectual ability may be complicated by social-communication and behavior deficits inherent to autism spectrum disorder, which may interfere with understanding and complying with test procedures. Appropriate assessment of intellectual functioning in autism spectrum disorder is essential, with reassessment across the developmental period, because IQ scores in autism spectrum disorder may be unstable, particularly in early childhood.

Comorbidity

Co-occurring mental, neurodevelopmental, medical, and physical conditions are frequent in intellectual disability, with rates of some conditions (e.g., mental disorders, cerebral palsy, and epilepsy) three to four times higher than in the general population. The prognosis and outcome of co-occurring diagnoses may be influenced by the presence of intellectual disability. Assessment procedures may require modifications because of associated disorders, including communication disorders, autism spectrum disorder, and motor, sensory, or other disorders. Knowledgeable informants are essential for identifying symptoms such as irritability, mood dysregulation, aggression, eating problems, and sleep problems, and for assessing adaptive functioning in various community settings.

The most common co-occurring mental and neurodevelopmental disorders are attention-deficit/hyperactivity disorder; depressive and bipolar disorders; anxiety disorders; autism spectrum disorder; stereotypic movement disorder (with or without self-injurious behavior); impulse-control disorders; and major neurocognitive disorder. Major depressive disorder may occur throughout the range of severity of intellectual disability. Self-injurious behavior requires prompt diagnostic attention and may warrant a separate diagnosis of stereotypic movement disorder. Individuals with intellectual disability, particularly those with more severe intellectual disability, may also exhibit aggression and disruptive behaviors, including harm of others or property destruction.

Relationship to Other Classifications

ICD-11 (in development at the time of this publication) uses the term *intellectual developmental disorders* to indicate that these are disorders that involve impaired brain functioning early in life. These disorders are described in ICD-11 as a metasyndrome occurring in the developmental period analogous to dementia or neurocognitive disorder in later life. There are four subtypes in ICD-11: mild, moderate, severe, and profound.

The American Association on Intellectual and Developmental Disabilities (AAIDD) also uses the term *intellectual disability* with a similar meaning to the term as used in this

manual. The AAIDD's classification is multidimensional rather than categorical and is based on the disability construct. Rather than listing specifiers as is done in DSM-5, the AAIDD emphasizes a profile of supports based on severity.

Global Developmental Delay

315.8 (F88)

This diagnosis is reserved for individuals *under* the age of 5 years when the clinical severity level cannot be reliably assessed during early childhood. This category is diagnosed when an individual fails to meet expected developmental milestones in several areas of intellectual functioning, and applies to individuals who are unable to undergo systematic assessments of intellectual functioning, including children who are too young to participate in standardized testing. This category requires reassessment after a period of time.

Unspecified Intellectual Disability (Intellectual Developmental Disorder)

319 (F79)

This category is reserved for individuals *over* the age of 5 years when assessment of the degree of intellectual disability (intellectual developmental disorder) by means of locally available procedures is rendered difficult or impossible because of associated sensory or physical impairments, as in blindness or prelingual deafness; locomotor disability; or presence of severe problem behaviors or co-occurring mental disorder. This category should only be used in exceptional circumstances and requires reassessment after a period of time.

Communication Disorders

Disorders of communication include deficits in language, speech, and communication. *Speech* is the expressive production of sounds and includes an individual's articulation, fluency, voice, and resonance quality. *Language* includes the form, function, and use of a conventional system of symbols (i.e., spoken words, sign language, written words, pictures) in a rule-governed manner for communication. *Communication* includes any verbal or nonverbal behavior (whether intentional or unintentional) that influences the behavior, ideas, or attitudes of another individual. Assessments of speech, language and communication abilities must take into account the individual's cultural and language context, particularly for individuals growing up in bilingual environments. The standardized measures of language development and of nonverbal intellectual capacity must be relevant for the cultural and linguistic group (i.e., tests developed and standardized for one group may not provide appropriate norms for a different group). The diagnostic category of communication disorders includes the following: language disorder, speech sound disorder, childhood-onset fluency disorder (stuttering), social (pragmatic) communication disorder, and other specified and unspecified communication disorders.

USER'S GUIDE

INTELLECTUAL DISABILITY

Definition, Classification, and Systems of Supports

11TH EDITION

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FOSTERING JUSTICE WHEN DEALING WITH FORENSIC ISSUES

Clinicians in the field of ID may be involved in forensic issues that arise when persons with ID are involved with the civil or criminal justice system. The more common of these forensic issues center around personal competence, guardianship, property and financial management, victimization in crime, or accusations of committing a crime. This section of the *User's Guide* discusses best practices and clinical judgment guidelines that address how clinicians can foster justice when dealing with these forensic issues. These practices and guidelines relate to: (1) interpreting assessment information, (2) understanding foundational aspects of ID that are critically important in fostering justice for people with ID, and (3) overcoming common stereotypes.

Interpreting Assessment Information

There are five critical areas involving the valid interpretation of assessment information that have emerged from clinical experiences dealing with forensic issues. These five areas involve understanding the following: (1) the concept of a confidence interval (CI), (2) the concept of a cutoff score, (3) that corrections need to be made in an obtained IQ score if the score was based on aging norms (i.e., the Flynn effect; Flynn, 2006), (4) the influence of practice effects on test results, and (5) the potential effect on test results attributable to faking.

Confidence interval (CI). A score obtained on a standardized psychometric instrument that assesses intellectual functioning or adaptive behavior is not absolute because of variability in the obtained score because of factors such as limitations of the instrument used, examiner's behavior and expertise, personal factors (e.g., health status of the person), or environmental factors (e.g., testing environment or testing location). Thus, an obtained score may or may not represent the individual's actual or true level of intellectual functioning or adaptive behavior because of these aforementioned factors. *Standard error of measurement (SEM),* which varies by test, subgroup, and age group, is used to quantify the variability that is attributable to the test itself and *provides the basis for establishing a statistical CI within which the person's true score is likely to fall.*

- For well-standardized measures of general intellectual functioning, the SEM is approximately 3 to 5 points. As reported in the respective test's standardization manual, the test's SEM can be used to establish a *statistical confidence interval (CI) around the obtained score.* From the properties of the normal curve, a range of confidence can be established with parameters of at least one standard error of measurement (i.e. scores of about 66 to 74, 66% probability) or parameters of two standard error of measurement (i.e. scores of about 62 to 78, 95% confidence).
- For well-standardized measures of adaptive behavior the SEM for obtained scores is comparable to that of standardized tests of intelligence. Thus, the use of plus/minus one standard error of measurement yields a statistical confidence interval (around the obtained score) within which the person's true score will fall 66% of the time; the use of plus/minus two standard error of measurement yields a sta-

tistical confidence (around the obtained score) in which the person's true score will fall 95% of the time. Thus, an obtained score on an adaptive behavior scale should be considered as an approximation that has either a 66% or 95% likelihood of accuracy, depending on the confidence interval used. There is no evidence suggesting that the population mean on standardized tests of adaptive behavior is increasing at a rate comparable to that observed on standardized tests of intelligence (i.e., Flynn effect). Because of the differences in test construction and administration between intellectual functioning and adaptive behavior, practice effect is not an issue with standardized adaptive behavior scales. One source of measurement error may be specific to measures of adaptive behavior and that is the concern that individuals may exaggerate their adaptive skills when asked to self-report their adaptive behavior. For this reason, numerous sources (e.g. Edgerton, 1967; Finlay & Lyons, 2002; Greenspan & Switzky, 2006; Schalock et al., 2010) have recommended against relying on self-reported measures of adaptive behavior when ruling-in or -out a diagnosis of ID.

Cutoff score. A cutoff score is the score(s) that determines the boundaries of the "significant limitations in intellectual functioning and adaptive criteria" for a diagnosis of ID.

- For both criteria, the cutoff score is approximately 2 standard deviations (SD) below the mean of the respective instrument, considering the SEM (see *Confidence interval*) for the specific instrument used, and the strengths and limitations of the instrument.
- A fixed point cutoff for ID is not psychometrically justifiable. The diagnosis of ID is intended to reflect a clinical judgment rather than an actuarial determination.

Flynn Effect. The *Flynn Effect* refers to the increase in IQ scores over time (i.e., about 0.30 points per year). The Flynn Effect effects any interpretation of IQ scores based on outdated norms. Both the 11th edition of the manual and this *User's Guide* recommend that in cases in which a test with aging norms is used as part of a diagnosis of ID, a corrected Full Scale IQ upward of 3 points per decade for age of the norms is warranted (Fletcher et al., 2010; Gresham & Reschly, 2011; Kaufman, 2010; Reynolds et al., 2010; Schalock et al., 2010). For example, if the Wechsler Adult Intelligence Scale (WAIS-III; 1997) was used to assess an individual's IQ in July, 2005, the population mean on the WAIS-III was set at 100 when it was originally normed in 1995 (published in 1997). However, on the basis of Flynn's data (2006), the population mean on the WAIS-III Full-Scale IQ corrected for the Flynn Effect would be 103 in 2005 (9 years $\times$ 0.30 = 2.7). Hence, using the significant limitations of approximately 2 SDs below the mean, the Full-Scale IQ cutoff would be approximately 73 and not approximately 70 (plus or minus the SEM).

Practice effect. The practice effect refers to gains in IQ scores on tests of intelligence that result from a person being tested on the same instrument. The established clinical best practice is to avoid administering the same intelligence test within a year to the same individual because it will often lead to an overestimation of the examinee's true intelligence.

Claims of faking. Sometimes in a contested legal case an allegation of intentional "faking bad" is made, asserting that the individual is attempting to gain a benefit by deliberately faking a disability. Such claims of faking, when they are made, are usually in cases involving mental disorders because mental illness can have a later-life onset, subjective symptoms, and waxing and waning symptoms.

Allegations that an individual is intentionally faking bad, by faking ID, occur in some legal cases. The cases in which such allegations occur are cases in which rights such as eligibility for financial supports or exemption from the death penalty would come into play if the individual has an ID (Keyes, 2004). The term *malingering* is often used to refer to "faking bad." The *DSM-IV-TR* (APA, 2000) defined malingering as intentionally and purposefully feigning an illness to achieve some recognizable goal or tangible benefit (e.g., feigning ID to be spared the death penalty). Such allegations that a person is faking ID must be analyzed cautiously, however, for several reasons. First, the elements required for a diagnosis of ID must have been present from an early age (ID must originate before the age of 18), so there is almost always a documented lifetime history, usually beginning at birth or early childhood and extending through the school years, of significant limitations in intellectual functioning and adaptive behavior. Second, in cases in which an earlier diagnosis of ID cannot be documented because the individual grew up in another country and/or there are no assessment records, a clinician may conduct or access a current assessment of intellectual functioning and adaptive behavior, including a history, to determine current functioning, and together with clinical judgment make a retrospective diagnosis if indicated. Third, the more common faking direction when an individual with ID attempts to fake is to "fake good" so as to hide their ID and try to convince others that he or she is more competent (Edgerton, 1967).

Claims of faking ID in an individual should be addressed by a clinician in ID conducting a thorough evaluation for ID using the diagnostic and clinical strategies outlined in the 11th edition of the AAIDD manual and in this *User's Guide.* The authors of this *User's Guide* are aware of the concern that some (e.g., Doane & Salekin, 2008) have expressed about the potential to feign deficits on currently used adaptive behavior scales. Clinicians need to be aware of this potential and ensure that they interview multiple individuals who know the person well and who have had the opportunity to directly observe the person engaging in his or her typical behaviors across multiple contexts (i.e., home, community, school, and work).

Clinicians who similarly attempt to use specific "malingering" tests in individuals with ID must use considerable caution because of two factors: (1) the lack of a research base supporting the accuracy of such tests for persons with ID (Hayes et al., 1997; Hurley & Deal, 2006); and (2) the documented misuse of common malingering tests even when the test manual explicitly precludes use with individuals with ID (Keyes, 2004). Standardized assessment instruments used to inform the clinician whether the person is putting forth his or her best effort (i.e., malingering) have not, for the most part, been normed for persons with ID (MacVaugh & Cunningham, 2009). In addition, recent studies have documented unacceptable error rates (i.e., false positive for malingering) when used with persons with IQ scores from 50 to 78 (Dean et al., 2008; Hurley & Deal, 2006). Thus, the assessment of "faking bad" with individuals with low IQs (i.e., below 80) should be conducted with great prudence when relying on standardized measures that are not strictly normed or validated with persons being assessed for ID.

Foundational Aspects of ID

Terminology and concepts used within one field or profession (such as ID) are frequently not understood clearly by members of another field or profession. As a result, confusion and misunderstanding can occur within the courtroom and impact legal decisions. Successfully addressing forensic issues requires that all key players understand the following foundational aspects of ID that are critically important in fostering justice for people with ID. First, limitations in the individual's present functioning must be considered within the context of community environments typical of the individual's age peers and culture. Thus, the standards against which the individual's functioning are compared are typical community-based environments, not environments that are isolated or segregated by ability or current placement. Typical community environments include homes, neighborhoods, schools, businesses, and other environments in which people of similar age ordinarily live, play, work, and interact.

Second, within an individual, limitations often coexist with strengths. Individuals may have capabilities and strengths that are independent of ID such as strengths in social or physical capabilities, some adaptive-skill areas, or in one aspect of an adaptive skill in which they otherwise show an overall limitation. Third, ID is not the same as an LD. An ID is characterized by significant limitations both in intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18 (Schalock et al., 2010, p. 1). In distinction, a learning disability (LD) is characterized by a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia (34 CFR sec. 300.8 [10]).

The fourth critically important foundational aspect is that adaptive behavior is conceptually different from maladaptive or problem behavior. This is true despite the fact that many adaptive behavior scales contain assessment of problem behavior, maladaptive behavior, or emotional competence. To be specific, (1) there is general agreement that the presence of clinically significant levels of problem behaviors found on adaptive behavior scales does not meet the criterion of significant limitations in adaptive functioning, (2) behaviors that interfere with the person's daily activities, or with the activities of those around him or her, should be considered problem behavior rather than the absence of adaptive behavior, and (3) the function of problem behavior may be to communicate an individual's needs, and in some cases, may even be considered an adaptive response to environmental conditions.

Overcoming Common Stereotypes

Stereotypes are not unique to persons with ID. Indeed, most individuals or groups who are perceived as different on some basis are stereotyped based on the perceiver's mental model or image of such persons or groups. In reference to persons with ID, historical terminology contributes to stereotyping as reflected in such terms as idiot, imbecile, or moron. Physical appearance can also contribute to stereotypes as reflected in the state-

ment that "if you don't have the look (as in Down syndrome) then you are not intellectually disabled." It should be noted that the vast majority of persons with an ID have no dysmorphic feature and generally walk and talk like persons without an ID.

Regardless of their origin, a number of incorrect stereotypes can interfere with justice. These incorrect stereotypes must be dispelled:

- Persons with ID look and talk differently from persons from the general population
- Persons with ID are completely incompetent and dangerous
- Persons with ID cannot do complex tasks
- Persons with ID cannot get driver's licenses, buy cars, or drive cars
- Persons with ID do not (and cannot) support their families
- Persons with ID cannot romantically love or be romantically loved
- Persons with ID cannot acquire vocational and social skills necessary for independent living
- Persons with ID are characterized only by limitations and do not have strengths that occur concomitantly with the limitations

These incorrect stereotypes are unsupported by both professionals in the field and published literature. Stereotypes are best addressed by understanding the characteristics of persons with ID, and especially those common characteristics of persons with ID with higher IQs that were summarized in Tables 3.1 and 3.2.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

UNITED STATES OF AMERICA,) CR. NO. 4:02-992
) COLUMBIA, SC
) JUNE 23, 2004
VERSUS)
CHADRICK E. FULKS)
DEFENDANT.)

BEFORE THE HONORABLE JOSEPH F. ANDERSON, JR.
CHIEF UNITED STATES DISTRICT COURT JUDGE
JURY TRIAL
VOLUME XVII

APPEARANCES:

FOR THE GOVERNMENT:
STROM THURMOND, JR., USA
SCOTT SCHOOLS, AUSA
JONATHAN S. GASSER, AUSA
UNITED STATES ATTORNEY'S OFFICE
1441 MAIN STREET, SUITE 500
COLUMBIA, SC 29201

FOR THE DEFENDANT:
WILLIAM F. NETTLES, IV, AFPD
FEDERAL PUBLIC DEFENDER'S OFFICE
MCMILLAN FEDERAL BUILDING
401 WEST EVANS STREET, ROOM 240
FLORENCE, SC 29503
JOHN H. BLUME, III, ESQ.
BLUME AND WEYBLE
P. O. BOX 11744
COLUMBIA, SC 29211

SHERRI LYNN JOHNSON, ESQ.
1118 AUTUMN RIDGE LANE
ITHACA, NEW YORK 14850

COURT REPORTER:
DEBRA R. JERNIGAN, RPR, CRR
UNITED STATES COURT REPORTER
901 RICHLAND STREET
COLUMBIA, SC 29201

STENOTYPE/COMPUTER-AIDED TRANSCRIPTION

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DIRECT EXAM OF JAMES EVANS

Q. AND DID YOU -- SO DR. VENN, HUELKE, BUTNER. DID YOU ALSO REVIEW SOME TESTING THAT WAS CONDUCTED BY DR. RUBEN GUR?

A. DR. RUBEN GUR, YES.

Q. DID YOU ALSO REVIEW A REPORT WHICH WAS DONE BY THE FEDERAL MEDICAL CENTER IN LEXINGTON, KENTUCKY, IN 1998?

A. YES. THE OLDER ONE, YES.

Q. SO, YOU ADMINISTERED A BATTERY OF TESTS TO MR. FULKS, AND THEN YOU REVIEWED THIS TESTING?

A. THAT'S CORRECT.

Q. AND WAS THE BATTERY OF TESTS YOU ADMINISTERED, WERE THESE SOME THAT YOU JUST THOUGHT UP, OR ARE THEY PART OF AN ACCEPTED -- COMMONLY ACCEPTED BATTERY OF TESTS?

A. WELL, THEY WERE PARTS OF COMMONLY ACCEPTED BATTERY, AS WELL AS A COUPLE THAT I DIDN'T JUST THINK UP, THAT I HAVE BEEN USING FOR A LONG TIME, WELL-ESTABLISHED AS MEASURES OF NEUROPSYCHOLOGICAL FUNCTIONING.

Q. WHEN WE TALK ABOUT -- I GUESS, WHAT DOES A BATTERY OF TESTS MEAN, IF YOU CAN EXPLAIN THAT TO THE JURY?

A. A BATTERY OF TESTS? WELL, USUALLY IT WOULD BE LIKE IF YOU WERE GOING IN FOR A PHYSICAL AND THEY WOULD DO NOT ONLY A BLOOD TEST, BUT A URINE TEST, AND CHECK YOUR EKG, AND MAYBE EEG. IN OTHER WORDS, IT WOULD BE A LARGE GROUP OF TESTS THAT THEY WOULD DO TO TRY TO GET A LARGER PICTURE OF YOUR TOTAL SELF AS IF YOU WERE -- WHEN YOU GO FOR A PHYSICAL EXAM.

Q. SO, CAN YOU -- WHAT I WANT TO FIRST START OUT AND JUST

DIRECT EXAM OF JAMES EVANS

HAVE YOU TALK TO THE JURY ABOUT ARE THE RESULTS OF THE TESTS THAT YOU ADMINISTERED. AND SO, YOU ADMINISTERED THIS BATTERY. FIRST, TELL THE JURY, WHAT WERE THE RESULTS OF YOUR TESTING?

A. IN THE BROAD VIEW OF IT?

Q. YES.

A. OKAY. WELL, I ADMINISTERED A FEW OF THE SUBTESTS FROM THE INTELLIGENCE TEST THAT HAD BEEN ADMINISTERED EARLIER BECAUSE EARLIER PERSONS HAD FOUND -- AND THEY HAVE WHAT WE OFTEN CALL BORDERLINE INTELLIGENCE, BETWEEN LOW TO NORMAL AND MENTAL RETARDATION. AND SINCE HE HAD ALREADY HAD THIS TEST TWO TIMES, I THOUGHT THERE MAY BE SOME PRACTICE EFFECT. I DIDN'T WANT TO GIVE THE WHOLE TEST RIGHT AWAY THAT QUICKLY. SO, I JUST ADMINISTERED CERTAIN OF THE SUBTESTS. THOSE SUBTESTS CAME OUT WITH THE SAME GENERAL RANGES BUT FOUND BY TWO EARLIER PEOPLE.

Q. THAT WAS BORDERLINE INTELLECTUAL?

A. BORDERLINE INTELLECTUAL FUNCTIONING, YES. IT WOULD BE, IN TERMS OF AN IQ SCORE, WOULD HAVE BEEN A 75 TO 79 RANGE. THEN I ALSO GAVE HIM A READING TEST BECAUSE, ORDINARILY, PEOPLE, UNLESS THEY HAVE A SPECIFIC LEARNING DISABILITY, A READING TEST WILL PROVIDE SOME INFORMATION REGARDING GENERAL ABILITY. HE CAME OUT WITH QUOTIENT OF 7TH TO 6TH GRADE LEVEL. SO, THAT QUOTIENT WAS IN LINE WITH IQ FINDINGS.

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AND THEN I ADMINISTERED A GROUP OF TESTS WHICH ARE USUALLY QUITE EASY FOR MOST PEOPLE TO DO ALL RIGHT ON, PROVIDED THEY DON'T HAVE BRAIN DAMAGE OR SOME OTHER PROBLEM OF THE BRAIN. AND IF YOU DO HAVE CERTAIN BRAIN DISORDERS, THEN YOU DON'T DO WELL ON THEM. I DON'T MEAN TO SAY YOU DON'T DO WELL ON ANY OF THEM BECAUSE, ORDINARILY, WHEN YOU HAVE A PROBLEM WITH YOUR BRAIN, IT ISN'T COMPREHENSIVE UNLESS YOU ARE IN A COMA. SOME AREAS ARE SPARED, SOME ABILITIES THAT ARE SPARED, SOME WHICH ARE DEFECTIVE. AND SO, YOU TEND TO HAVE A PATTERN OF PASSING, FAILING -- PASSING OR FAILING OF THESE NEUROPSYCHOLOGICAL TESTS.

HE HAD SOME SPECIFIC PROBLEMS ON THOSE TESTS THAT WERE OF THE TYPE SUGGESTIVE THAT THE FRONTAL LOBES OF HIS BRAIN, THE FRONT PART OF THE BRAIN WAS MALFUNCTIONING, AS WELL AS LEFT TEMPORAL, BE RIGHT IN THIS AREA, AS WELL AS SOME POSSIBILITY FROM MY TESTING OF OCCIPITAL OR POSTERIOR ON THE BACK PART OF THE BRAIN MALFUNCTIONING.

Q. DR. EVANS, LET ME ASK YOU, IF YOU CAN EXPLAIN TO THE JURY, WHAT IS THE HALSTEAD-REITAN NEUROPSYCHOLOGICAL BATTERY?

A. THE HALSTEAD-REITAN NEUROPSYCHOLOGICAL BATTERY IS ONE OF THE -- NOT ONE OF THE, BUT IS THE OLDEST BATTERY USED FOR THIS TYPE TESTING. AND IT HAS BEEN AROUND SINCE, PROBABLY, IN THE SIXTIES. IT HAS BEEN REFINED SOME, AND IT WAS NAMED AFTER HALSTEAD, WHO WAS A NEUROLOGIST, AND REITAN, WHO IS A PSYCHOLOGIST, NOW BE CALLED A NEUROPSYCHOLOGIST. AND THEY

DEVISED THESE TESTS AND STARTED USING THEM CLINICALLY IN THE LATE FIFTIES OR EARLY SIXTIES FOR CHECKING PERSONS TO SEE IF THEY HAD BRAIN DAMAGE OR BRAIN DYSFUNCTION.

Q. OKAY. AND SO, THIS IS, BASICALLY, A BATTERY OF TESTS WHICH HAS BEEN DESIGNED BY EXPERTS TO DETERMINE, NOT ONLY IF SOMEONE HAS A BRAIN DAMAGE OR NEUROLOGICAL IMPAIRMENT, BUT IN SOME CASES, IT CAN PROVIDE EVIDENCE OF WHERE THE DAMAGE MIGHT BE?

A. RIGHT. BECAUSE SOME OF THESE TESTS REQUIRES SKILLS WHICH ARE MEDIATED BY, SAY, THE FRONTAL LOBES, AND ANOTHER OF THE SUBTESTS OR PARTS OF THE BATTERY ARE REQUIRED SKILLS THAT ARE PRIMARILY MEDIATED BY THE TEMPORAL LOBES, MAY BE MEDIATED BY OCCIPITAL LOBES, AND SO ON.

Q. YOU ADMINISTERED THIS BATTERY OF TESTS. IT IS A PRETTY SET BATTERY OF TESTS?

A. I DID NOT ADMINISTERE THE ENTIRE BATTERY. I ADMINISTERED THE ONES THAT ARE AMONG THOSE SENSITIVE TO THE CORTICAL MALFUNCTIONING.

Q. YOU TAKE THESE TESTS. DO YOU THEN COME UP WITH SOMETHING CALLED AN IMPAIRMENT INDEX?

A. YES. TWO THINGS YOU DO. FIRST, YOU COMPARE THE SCORES AGAINST A DATABASE, A NORMAL DATABASE, PERSONS WHO DID NOT HAVE ANY HEAD INJURY AND WITH A HISTORY OF BRAIN DAMAGE, AND THIS GIVES YOU AN IDEA OF HOW FAR OFF THEY WERE FROM NORMAL. AND THEN THERE ARE SIX I BELIEVE OF THE --

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SEVEN OF THE SUBTESTS WHICH ARE ESPECIALLY SENSITIVE TO BRAIN DAMAGE. AND THE SCORES ON THOSE ARE CONSIDERED AND CHECKED TO SEE IF THE SCORES FALL BELOW A CERTAIN CUTOFF POINT. AND IF THEY DO, LET'S SAY THEY FALL BELOW A CERTAIN CUTOFF POINT ON FIVE OF THE SEVEN, THEN YOU WOULD PUT FIVE OVER SEVEN AND DIVIDE IT OUT TO GET A SO-CALLED IMPAIRMENT INDEX. AND IF YOU HAD THREE OVER SEVEN OR ONE, IT WAS ONLY ONE OVER SEVEN, THE IMPAIRMENT INDEX, IT WOULD BE CONSIDERED NOT REMARKABLE. IF YOU HAD FOUR OVER SEVEN, IT WOULD BE SOMEWHAT REMARKABLE, ET CETERA. AND THE IMPAIRMENT INDEX RESULTS IN STATEMENTS SUCH AS NO SIGNIFICANT IMPAIRMENT, MILD IMPAIRMENT, MODERATE IMPAIRMENT, SEVERE IMPAIRMENT. HIS WAS A POINT SIX, I BELIEVE THAT IS CORRECT ON HERE, AND IT WOULD BE IN THE MODERATE IMPAIRMENT RANGE.

Q. AND THE MODERATE IMPAIRMENT RANGE?

A. MODERATE BRAIN IMPAIRMENT.

Q. SO THEN, TO SUMMARIZE WHERE WE ARE NOW, YOU DETERMINED, BASED ON YOUR TESTING, HE TESTED IN THE BORDERLINE RANGE?

A. YES.

Q. WHICH IS CONSISTENT WITH WHAT YOU HAD SEEN FROM DR. VENN AND DR. HUELKE?

A. YES.

Q. AND THEN THE NEUROPSYCHOLOGICAL BATTERY YOU ADMINISTERED DETERMINED THAT, IN ADDITION TO THE BORDERLINE

DIRECT EXAM OF JAMES EVANS

INTELLECTUAL FUNCTIONING, THERE WERE SOME AREAS OF SPECIFIC DAMAGE TO THE FRONTAL LOBE AND THE -- I'M SORRY, THE FRONTAL, AS WELL AS, LEFT REGION?

A. AS WELL AS THE OCCIPITAL, YES, SIR.

Q. WHAT WOULD, BASED ON YOUR RESEARCH AND YOUR KNOWLEDGE OF HOW THE BRAIN WORKS AND, YOU KNOW, HOW YOU UNDERSTAND THESE TESTS WORK, WHAT WOULD BE THE EFFECTS ON AN INDIVIDUAL, YOU KNOW, REALLY, THE RANGE OF EFFECTS YOU WOULD EXPECT TO SEE ON SOMEBODY WITH THIS TYPE OF BRAIN IMPAIRMENT?

A. RIGHT. ONE OF THE MAIN EFFECTS WOULD BE THAT HE WOULD HAVE PROBLEMS WITH WHAT SOME PEOPLE REFER TO AS EXECUTIVE FUNCTIONS.

Q. CAN YOU DUMB THAT DOWN A LITTLE BIT? THAT DOESN'T MEAN MUCH TO ME. WHAT DOES IT MEAN WHEN YOU SAY THE "EXECUTIVE FUNCTIONS?"

A. MOST OF US CONSIDER THAT WE HAVE OUR OWN -- WE ARE OUR OWN CEOS. WE ARE IN CHARGE OF OUR BEHAVIORS. THAT WE DECIDE WE WILL DO THIS, AND WE DO IT. WE PLAN TO DO SOMETHING, AND WE FOLLOW THROUGH WITH THE PLAN. WE SAY IT IS BECAUSE WE DECIDED TO DO SO. IF WE DON'T FOLLOW THROUGH, YOU MIGHT SAY, BECAUSE WE DECIDED NOT TO. SO, IN THAT SENSE, WE ARE OUR OWN CEO'S. AND THAT IS THESE EXECUTIVE FUNCTIONS THAT ARE, SUPPOSEDLY, WHAT WE CALL EXECUTIVE FUNCTIONS. THESE ARE IMPAIRED IN PERSONS WHO HAVE FRONTAL LOBE DAMAGE BECAUSE THE FRONTAL LOBE IS WHAT CONTROLS, LARGELY, OUR ABILITY TO BE OUR

OWN CEO'S.

Q. OKAY.

A. MORE SPECIFICALLY, WHAT HAPPENS IF YOU HAVE DAMAGE TO THE FRONTAL LOBES, AT LEAST CERTAIN TYPES OF DAMAGE TO THE FRONTAL LOBES, IS THAT YOU HAVE A TENDENCY TO ACT IMPULSIVELY. THAT IS NOT THINKING ABOUT THE CONSEQUENCES OF YOUR ACTIONS, THAT IS ONE THING.

ANOTHER THING, IS YOU VERY LIKELY DON'T LACK FLEXIBILITY OF THOUGHT. IN OTHER WORDS, YOU HEAR PEOPLE SAYING, WELL, YOU HAVE TO THINK OUTSIDE THE BOX. WELL, THAT IS NOT POSSIBLE OR VERY, VERY DIFFICULT FOR PERSONS WITH FRONTAL LOBE DAMAGE. IN FACT, THEY MIGHT HAVE TROUBLE EVEN THINKING IN THE BOX. SO, THEY END UP HAVING SOME TROUBLE WITH SPEED OF LEARNING AND WITH BEING CREATIVE. SOMETIMES YOU GET STUCK ON ONE AREA AND THEN CONTINUE TO ENGAGE IN SOME BEHAVIOR, EVEN THOUGH IT IS MALADAPTIVE, EVEN THOUGH IT IS NOT GETTING ANYWHERE. THEY MIGHT CONTINUE TO DO IT.

A THIRD THING IS THAT THEY OFTEN FAIL TO PLAN AHEAD. IT DOESN'T MEAN THEY ALWAYS FAIL TO PLAN AHEAD BUT HAVE A TENDENCY TO FAIL TO PLAN AHEAD.

AND, FINALLY, THEY FAIL TO ATTEND TO OR THEY HAVE TROUBLE ATTENDING, GENERALLY, AND THAT INCLUDES FAILING TO ATTEND VERY WELL TO THEIR OWN BEHAVIORS. SO, IT IS ALMOST LIKE THEY DO SOMETHING AND THEN NOT AWARE THAT THEY DID IT.

AND THIS FAILURE TO ATTEND TO YOUR OWN BEHAVIORS AND ALL

OF THESE OTHER THINGS THAT I JUST MENTIONED AS EXECUTIVE CONTROL PROBLEMS, LEAD TO WHAT AN OUTSIDER MIGHT LOOK AT THE PERSON THAT HAS POOR JUDGMENT. AND THAT IS WHAT IT IS, POOR JUDGMENT. THIS WILL BE MADE WORSE BY USE OF ALCOHOL. IT CAN BE MADE A LOT WORSE WHEN YOU ARE UNDER STRESS. AND IT CAN BE MADE WORSE IF YOU -- PERSONS IN YOUR ENVIRONMENT NEVER TAUGHT YOU HOW TO PUT ON THE BRAKES VERY WELL.

Q. SO THEN, AS I UNDERSTAND IT, IF YOU HAD THIS TYPE OF NEUROLOGICAL IMPAIRMENT, YOU EXPECT TO SEE IMPULSIVE ACTING, IMPULSIVE BEHAVIOR?

A. THAT IS FRONTAL LOBE PART, YES, SIR.

Q. AND BAD JUDGMENT, BAD DECISION-MAKING?

A. YES, SIR.

Q. NOT TRYING TO PUT WORDS IN YOUR MOUTH?

A. THAT'S TRUE.

Q. AND YOU TALKED ABOUT COGNITIVE RIGIDITY OR FLEXIBILITY OR SOMETHING. THAT IS A TWO-DOLLAR WORD. WHAT DOES THAT MEAN?

A. WELL, AS I WAS EXPLAINING EARLIER, IT LOWERS ONE'S ABILITY TO THINK FLEXIBLY. YOU START TO DO SOME TASK AND, INSTEAD OF BEING FLEXIBLE ABOUT IT AND THINKING, WELL, IF I CAN'T DO IT THIS WAY, MAYBE I CAN DO IT THIS WAY, OR THIS WOULD BE A BETTER WAY TO DO IT. I GET BETTER RESULTS IF I DO IT THAT WAY. YOU JUST GET RIGID AND KEEP ON HAMMERING AT THE SAME -- TRYING TO DO IT THE SAME WAY, EVEN THOUGH IT IS NOT

SUCCEEDING. WE CHECKED THAT.

ONE WAY WE CHECK IT IN THE REITAN TEST BATTERY, THE PERSON IS BLINDFOLDED, AND THEY ARE SUPPOSED TO PUT BLOCKS IN HOLES. AND SOMETIMES THEY, INSTEAD OF REACHING OUT AND FEELING THE HOLE AND THEN REACHING DOWN AND GETTING A BLOCK, THEY WILL KEEP TRYING TO PUT THE BLOCK IN THE SAME HOLE. THAT IS ONE OF THE WAYS OF CHECKING IT.

Q. NOW, DID YOU ALSO ADMINISTER TO MR. FULKS WHAT IS CALLED A QUANTITATIVE EEG?

A. YES, I DID.

Q. AND CAN YOU TELL THE JURY WHAT A QUANTITATIVE EEG IS?

A. MOST PEOPLE REALIZE OR HAVE HAD SOMEBODY, OR HAD IT THEMSELVES, OR THEY REALIZE THAT IT EXISTS FROM HAVING A RELATIVE HAVING HAD TO GO AND GET AN EEG DONE. AN EEG EVALUATION IS THE ELECTRICAL ACTIVITY OF YOUR BRAIN. IT IS LIKE AN EKG, IN A SENSE, WHERE YOU HAVE ELECTRICAL ACTIVITY OF YOUR HEART BEING MEASURED WITH AN EKG, BUT HERE, IT IS THE BRAIN ELECTRICAL ACTIVITY. ORDINARILY, IN THE PAST, ONE WOULD GO TO A NEUROLOGIST, AND THEY WOULD SEND THEM OUT TO HAVE AN EEG DONE. AND WHAT IT WOULD BE IS, IT WOULD BE A CONTINUOUSLY MOVING PAPER WITH ALL OF THESE PENS ON THE TOP THAT ARE GOING UP AND DOWN, UP AND DOWN, UP AND DOWN IN CORRESPONDENCE TO THE BRAIN ELECTRICAL ACTIVITY, WHICH IS GOING POSITIVE, NEGATIVE, POSITIVE, NEGATIVE. IT CREATES A TRACING ON THIS PAPER.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

UNITED STATES OF AMERICA,) CR. NO. 4:02-992
) COLUMBIA, SC
) JUNE 16, 2004
)
VERSUS)
)
CHADRICK E. FULKS)
DEFENDANT.)
)

BEFORE THE HONORABLE JOSEPH F. ANDERSON, JR.,
CHIEF UNITED STATES DISTRICT COURT JUDGE
JURY TRIAL
VOLUME XII

APPEARANCES:

FOR THE GOVERNMENT:
STROM THURMOND, JR., USA
SCOTT SCHOOLS, AUSA
JONATHAN S. GASSER, AUSA
UNITED STATES ATTORNEY'S OFFICE
1441 MAIN STREET, SUITE 500
COLUMBIA, SC 29201

FOR THE DEFENDANT:
WILLIAM F. NETTLES, IV, AFPD
FEDERAL PUBLIC DEFENDER'S OFFICE
MCMILLAN FEDERAL BUILDING
401 WEST EVANS STREET, ROOM 240
FLORENCE, SC 29503
JOHN H. BLUME, III, ESQ.
BLUME AND WEYBLE
P. O. BOX 11744
COLUMBIA, SC 29211

SHERRI LYNN JOHNSON, ESQ.
1118 AUTUMN RIDGE LANE
ITHACA, NEW YORK 14850

COURT REPORTER:
DEBRA R. JERNIGAN, RPR, CRR
UNITED STATES COURT REPORTER
901 RICHLAND STREET
COLUMBIA, SC 29201

STENOTYPE/COMPUTER-AIDED TRANSCRIPTION

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DIRECT EXAM OF RUBEN GUR

MR. BLUME: I'M SORRY. I WILL HAVE HIM AFFIRMATIVELY SAY HE IS NOT.

(WHEREUPON, THE BENCH CONFERENCE CONCLUDED.)

MR. GASSER: THANK YOU, YOUR HONOR.

THE WITNESS: AND IF YOU LOOK AT THE BEHAVIORAL ABNORMALITIES, THE DEFICITS ARE EXACTLY WHAT YOU WOULD EXPECT IF YOU PUT THESE IN EXECUTIVE FUNCTIONING MEMORY, IN THE VIGILANTS, THAT IS THE SWITCHBOARD PART, AND SENSORY MOTOR FUNCTION.

Q. SO, BASICALLY, THAT IS REAFFIRMING YOUR POINT ANATOMICALLY, PHYSIOLOGY, AND BEHAVIORALLY, HIS BRAIN IS BAD?

A. AND IN ABOUT THE SAME PLACES.

Q. AND SO, THEN YOU PREVIOUSLY DISCUSSED, AS I UNDERSTAND IT, THAT HIS BRAIN IS DAMAGED IN WAYS WHICH ARE CONSISTENT WITH FETAL EXPOSURE TO ALCOHOL?

A. YES. YOU CAN TRY TO GAUGE THE AGE AT WHICH DAMAGE OCCURRED. THE DIFFERENT STAGES OF DEVELOPMENT, THE DAMAGE WOULD RESULT IN A DIFFERENT WAY OF ADJUSTING. AS THE BRAIN IS GROWING, IN SOME WAYS, IT IS GOOD IF THE DAMAGE OCCURS TO A YOUNG BRAIN BECAUSE THE SAME DAMAGE OCCURRED TO A YOUNG AND ELDERLY BRAIN COULD KILL THE ELDERLY, AND THE YOUNG WOULD STILL SURVIVE. BUT THE FLIP SIDE OF THAT SAME COIN IS THAT, THE EARLIER THE DAMAGE, THE MORE THERE WILL BE ABNORMALITIES DOWN THE STREET, AND THE BRAIN WILL JUST LOOK MISSHAPED.

IT IS THE SAME WAY IF YOU TAKE THE ANALOGY OF A TREE THAT

GETS STRUCK BY LIGHTNING. IF IT IS AN OLD TREE, YOU WILL SEE THE SIGN OF THE LIGHTNING, YOU WILL SEE THE BURNING, YOU WILL ALWAYS LOOK AT THE TREE AND SAY, THIS IS A TREE HIT BY LIGHTNING. IF THE TREE IS HIT WHEN IT IS YOUNG, IT WILL STILL GROW TO FULL SIZE, MAY LIVE AS LONG AS A NORMAL TREE. BUT BECAUSE OF IT, IT WOULD BE MISSHAPEN. THE TRUNK WILL NOT BE QUITE WHERE IT SHOULD BE. THE BRANCHES WILL COME OUT BEFORE THEY ARE SUPPOSED TO, OR AFTER THEY ARE SUPPOSED TO, AND YOU WILL SEE THAT THERE IS SOMETHING SERIOUSLY MISSHAPEN ABOUT THAT TREE. AND YET, THE TREE HAS SURVIVED.

THE BRAIN IS THE SAME WAY. IT KEEPS TRYING TO REPAIR ITSELF. AND IN THAT PROCESS, PRODUCES ANOMALIES, SOME SUGGEST BEING LARGE, SOME BEING SMALL FOR THE KIND OF ENERGY THAT HAPPENS VERY EARLY. THE REASON I AM THINKING OF FETAL ALCOHOL IS BECAUSE THE REGIONS ARE EXACTLY THOSE REGIONS THAT YOU SEE AFFECTED BY ALCOHOL. THESE ARE PARTS OF THE BRAIN THAT ALCOHOL LIKES TO GO TO, AND ACTIVATE, AND DESTROY.

Q. AND THEN AS I TAKE IT, BUT THERE WERE ALSO ABNORMALITIES, AS I UNDERSTAND YOUR TESTIMONY, ABOVE AND BEYOND WHAT YOU WOULD, NECESSARILY, EXPECT FROM FETAL EXPOSURE TO ALCOHOL?

A. YES.

Q. AND THEN I BELIEVE YOU INDICATED THE TWO MOST LIKELY CAUSES OF THAT ARE HEAD INJURIES AND SUBSTANCE ABUSE?

A. CORRECT.

DIRECT EXAM OF RUBEN GUR

Q. I MEAN, HEAD INJURIES WOULD RESULT IN LOSS OF CONSCIOUSNESS OR -- I GUESS ANY TYPE OF HEAD INJURY COULD CONCEIVABLY AFFECT THE BRAIN?

A. WE USED TO THINK THERE IS NO LOSS OF CONSCIOUSNESS, THEN THERE WAS NO STRUCTURAL DAMAGE. BUT THAT IS, CLEARLY, INCORRECT. THERE ARE SOME, DEPENDING UPON WHERE YOU GET THE BLOW, SOME BLOWS WILL PRODUCE LOSS OF CONSCIOUSNESS MORE THAN OTHERS. AS A RULE, IT IS, YOU DON'T GET A LOT OF TISSUE DAMAGE IF THERE IS NO LOSS OF CONSCIOUSNESS, BUT THERE HAVE BEEN DOCUMENTED CASES WHERE NO LOSS OF CONSCIOUSNESS OCCURRED AND YET, THERE IS STRUCTURAL DAMAGE.

IN THE CASE OF MR. FULKS, THERE WERE NUMEROUS INSTANCES OF HEAD INJURIES WITH LOSS OF CONSCIOUSNESS. AND THOSE THAT ARE MOST WORRISOME ARE THOSE THAT WERE HIT STRAIGHT ON TOP OF HIS HEAD BECAUSE THEY WOULD AFFECT THE VERY SAME REGIONS THAT WERE ALREADY SUSCEPTIBLE BECAUSE OF THE FETAL ALCOHOL EXPOSURE.

Q. BUT, AGAIN, THE BOTTOM LINE IS, BASED UPON THE MRI AND THE PET SCAN, YOU CAN CLEARLY SEE ABNORMALITIES IN THE BRAIN ABOVE AND BEYOND WHAT YOU WOULD EXPECT FROM FETAL ALCOHOL?

A. YES.

Q. AND YOU ALSO HAVE IMPOVERISHED, STRESSFUL ENVIRONMENT. WHY IS THAT AN ELEMENT?

A. WE USED TO THINK THE ENVIRONMENT DOESN'T REALLY CHANGE THE BRAIN. BUT THERE IS MORE AND MORE EVIDENCE THAT SOME

DIRECT EXAM OF RUBEN GUR

BRAIN STRUCTURES ARE HIGHLY SENSITIVE TO ENVIRONMENTAL STRESS. AND EVEN PEOPLE NOW THAT WE CAN LOOK AT PEOPLE WHEN THEY ARE ALIVE, PEOPLE WERE STUDIED BEFORE AND AFTER STRESSFUL EVENTS, WAS A JAPANESE STUDY ON PEOPLE, WITH FLOOD AND EARTHQUAKES. YOU CAN ACTUALLY SEE STRUCTURAL CHANGES AND, PARTICULARLY, SEE THEM IN THEIR REGION CALLED THE HIPPOCAMPAL. PROLONGED STRESS DOES ALSO IMPACT THE BRAIN, THE BRAIN FUNCTION.

Q. WHAT IS THE BOTTOM LINE. HE HAS A HIGHLY ABNORMAL BRAIN?

A. THAT IS VERY CLEAR.

Q. AND AREAS THAT ARE MOST AFFECTED, THE EXECUTIVE FUNCTIONING AND, AGAIN, JUST BRIEFLY, WHAT IS THE EXECUTIVE FUNCTIONING?

A. IT IS THE PART THAT TELLS YOU STOP, THINK ABOUT THE CONTEXT, THINK ABOUT YOUR LONG-TERM GOALS, AND ACT IN ACCORDANCE WITH WHAT IS GOOD FOR YOU.

Q. SO, THAT WOULD AFFECT THINGS LIKE JUDGMENT, IMPULSE CONTROL?

A. MOSTLY IMPULSE CONTROL, BECAUSE THAT IS THE PART THAT HOLDS THE ANALAGOUS LINE IN CHECK, AS WELL AS JUDGMENT.

Q. DECISION MAKING?

A. DECISION MAKING.

Q. THAT IS ONE AREA THAT IS AFFECTED. THEN YOU TALK ABOUT SWITCHBOARD. AGAIN, WHAT IS THAT?

A. THAT IS THE THALAMUS. THE THALAMUS, IN ORDER FOR THE

EXECUTIVE TO MAKE GOOD DECISIONS, THEY NEED TO HAVE THE INFORMATION COME FROM THE RIGHT PLACES. AND WHEN THE SWITCHBOARD IS SENDING INFORMATION TO THE WRONG PLACES, IT IS HARD FOR THE EXECUTIVE TO GAUGE, EVEN IF THE EXECUTIVE WAS INTACT, IT IS HARD FOR THE EXECUTIVE TO COME UP WITH APPROPRIATE DECISIONS. AND SO, ALONG WITH THE EXECUTIVE IS IMPAIRED, AND IT IS WORKING ON BAD INFORMATION THAT, INEVITABLY, WILL LEAD TO A LOT OF BAD DECISIONS.

Q. THAT IS A DOUBLE WHAMMY TO THE THINKING PROCESS?

A. YES.

Q. AFFECT?

A. THAT IS THE ABILITY TO UNDERSTAND AND COMMUNICATE EMOTION. WE MEASURE THE VERY NARROW FACET OF THAT IS THE ABILITY TO INTERPRET FACIAL EXPRESSIONS OF EMOTION. HE WAS IMPAIRED IN THAT.

Q. NOW, JUST TO MAKE CLEAR HERE, YOU ARE NOT SAYING THAT MR. FULKS IS LEGALLY INSANE? IN OTHER WORDS, THAT HE DIDN'T KNOW THE DIFFERENCE BETWEEN RIGHT AND WRONG?

A. NO. HE IS MORE LIKE THAT ADOLESCENT. IF YOU ASKED HIM, AFTER THE FACT, DID YOU KNOW THAT WHAT YOU DID WAS WRONG? YEAH. THEY CAN EXPLAIN BETTER THAN YOU CAN EXPLAIN WHAT IS RIGHT AND WHAT IS WRONG, EXCEPT AT THE MOMENT THE BRAIN DOESN'T WORK EFFICIENTLY ENOUGH TO RELAY THAT INFORMATION TO THE EXECUTIVE AND ALLOW THE EXECUTIVE TO MAKE AN INFORMED DECISION OF THAT TOPIC.

Q. AND YOU ARE NOT SAYING THAT MR. FULKS IS MENTALLY RETARDED?

A. WELL, NO, I DON'T. I AM NOT SAYING HE IS RETARDED. HE IS CLEARLY NOT A VERY BRIGHT INDIVIDUAL. HE IS LESS INTELLIGENT THAN THE AVERAGE PERSON.

Q. AS I UNDERSTAND, HIS OVERALL IQ FALLS IN THE HIGH SEVENTIES, WHICH PUTS IT IN THE SORT OF THE BORDERLINE RANGE?

A. JUST AT THE BORDERLINE. A FEW MORE POINTS -- LESS POINTS, HE WOULD HAVE PASSED THE THRESHOLD; A FEW MORE POINTS, HE WOULD BE IN THE NORMAL RANGE. THE IQ, ITSELF, IS SORT OF A FRUIT SALAD. YOU TAKE ALL OF THE ABILITIES, YOU MEASURE AND MIX THEM TOGETHER AND COME UP WITH ONE NUMBER. WHEN REALLY, AS WE ALL KNOW, THERE ARE DIFFERENT THINGS THAT WE HAVE TO DO FOR OUR INTELLIGENCE. AND EVERYBODY HAS SOME STRENGTH AND SOME WEAKNESSES.

AND SO, IN SOME AREAS, HE IS WEAK ENOUGH TO BE WELL BELOW WHAT WE WOULD CALL A THRESHOLD FOR RETARDATION. IF YOU DIVIDE THE INTELLIGENCE INTO THE DIFFERENT COMPONENTS, WELL ONLY ONE OF THEM IS EXECUTIVE, ANOTHER ONE IS MEMORY. ANOTHER ONE IS VISUAL SPATIAL PROCESSING. IN A REGULAR IQ MEASURE, YOU HAVE ALL OF THOSE MEASURES. YOU COME UP WITH ONE NUMBER. THAT ONE NUMBER, WHEN YOU DO IT WITH MR. FULKS, COMES UP ON THE BORDERLINE SLIGHTLY ABOVE THE CUT OF RETARDATION. BUT A LOT OF THE MEASURES THAT GO INTO THAT FRUIT SALAD ARE BELOW THAT, WELL BELOW THAT THRESHHOLD.

DIRECT EXAM OF RUBEN GUR

Q. SOME ARE ABOVE AND SOME ARE BELOW?

A. YES.

Q. THE OVERALL COMPONENT PUTS HIM IN THE BORDERLINE?

A. EXACTLY.

Q. NOW, IF YOU -- I JUST WANTED TO SORT OF ASK YOU ONE MORE THING, WHICH I FORGOT TO ASK ABOUT AND GO BACK. NOW, YOU WERE TALKING ABOUT THE EFFECTS OF THE STRESSFUL ENVIRONMENT. IF MR. FULKS, LET'S SAY, HAD BEEN, YOU KNOW, BORN JUST LIKE HE WAS AND ADOPTED, AND JUST, HYPOTHETICALLY, ADOPTED AND PUT IN A LOVING, SUPPORTING, NURTURING FAMILY, WOULD HE LIKELY HAVE THE SAME BRAIN FUNCTION THAT HE DOES TODAY?

A. IT IS UNLIKELY THAT IT WOULD BE ANYTHING DIFFERENT ABOUT THESE MRI OR HIS PET SCAN. BUT BEHAVIOR IS, TOO, A LARGE EXTENT SHAPED BY YOUR UPBRINGING. IT IS NOT ALL BIOLOGY. YOU CAN TAKE THE SAME KID AND USE THE ENVIRONMENT IN ORDER TO GIVE HIM A BETTER EXECUTIVE. WHEN THE EXECUTIVE IS NOT WORKING WELL, THEN, IN FACT, THOSE INDIVIDUALS TEND TO BE EVEN MORE LIKELY TO ACCEPT DIFFERENT STRUCTURES. THEY LIKE STRUCTURE, AND THEY REALIZE THERE IS SOMETHING WRONG IN THEIR OWN EXECUTIVE, SO THEY ARE LOOKING FOR GUIDANCE. IF YOU GUIDE THEM WELL, THEY CAN TURN OUT BEING FINE. IF THEY ARE GUIDED OTHERWISE, THEY CAN TURN OUT TO BE VERY DIFFICULT.

Q. JUST TO MAKE SURE I UNDERSTAND YOUR LAST STATEMENT. EVEN ASSUMING HE HAD BEEN, YOU KNOW, BORN IN AN ADOPTIVE

FAMILY, HE WOULD STILL HAVE DIFFICULTIES?

A. YES.

Q. THEY JUST PROBABLY WOULDN'T BE THE SAME MAGNITUDE THAT THEY ARE NOW?

A. THAT IS EXACTLY WHAT I AM TRYING TO SAY.

MR. BLUME: I OFFER DEFENDANT'S EXHIBIT 8.

MR. GASSER: NO OBJECTION.

THE COURT: ALL RIGHT. WITHOUT OBJECTION.

MR. BLUME: DR. GUR, IF YOU WOULD PLEASE ANSWER ANY QUESTIONS THAT MR. GASSER MAY HAVE.

THE COURT: CROSS-EXAMINATION.

CROSS EXAM

BY MR. GASSER:

Q. GOOD AFTERNOON, DR. GUR.

A. GOOD AFTERNOON.

Q. MY NAME IS JOHNNY GASSER. I WORK IN THE U. S. ATTORNEY'S OFFICE HERE IN COLUMBIA, SOUTH CAROLINA. AND YOU AND I HAVE NOT HAD AN OPPORTUNITY TO MEET; IS THAT CORRECT?

A. THAT'S CORRECT. NICE TO MEET YOU.

Q. WE JUST HAD, ACTUALLY, WHEN WE GOT BACK FROM WORK YESTERDAY AFTER INTERVIEWING SOME WITNESSES, ME AND MY COLLEAGUES LOOKED ON MR. SCHOOLS'S COMPUTER, AND WE JUST GOT YOUR REPORT E-MAILED TO US LAST NIGHT OR YESTERDAY MORNING, BUT WE DIDN'T GET TO LOOK AT IT UNTIL LAST NIGHT. SO, I WANT YOU TO BEAR WITH ME. I MIGHT NOT BE UNDERSTANDING SOME

Jonathan Venn, Ph.D., ABPP

DIPLOMATE IN CLINICAL AND FORENSIC PSYCHOLOGY

5000 Thurmond Mall • Suite 348
Columbia, South Carolina 29201-2374
Tel: (803) 765-1800 • Fax: (803) 765-1804
email: mail@jonvenn.com

REPORT OF NEUROPSYCHOLOGICAL EVALUATION

CONFIDENTIAL - FOR PROFESSIONAL USE ONLY

Name:	Chadrick Evan Fulks
Age:	26
Date of Birth:	[redacted]
Dates of Examination:	03/27/2003, 04/11/2003, 04/15/2003, 04/17/2003, 04/28/2003, 04/30/2003, 05/01/2003, and 05/02/2003
Date of Report:	03/30/2004

REFERRAL STATEMENT:

This right-handed, Caucasian man was referred for neuropsychological evaluation by his attorney, John Blume, Esquire, of Columbia, SC, in relation to criminal charges.

QUALIFICATIONS:

I studied neuropsychology and neuroscience at Northwestern University and earned a Ph.D. in Clinical Psychology at Northwestern University in 1977. I received further training in neuropsychological assessment during my internship and traineeships at Veterans Administration Hospitals. I continued to receive training in neuropsychology as a Lieutenant in the U.S. Naval Reserve and as an employee of the South Carolina Department of Mental Health. I have received continuing education in neuropsychology and neuroscience through the National Academy of Neuropsychology, the American Board of Professional Psychology, the American Psychological Association, the American Academy of Forensic Psychology, Marquette University, Hamot Institute for Behavioral Health, the South Carolina Psychological Association, Reitan Neuropsychology Laboratory, and other organizations. I have been a member of Division 40 (Neuropsychology) of the American Psychological Association since 1987. I have dissected human and animal brains. I have lectured on neuropsychology at the William S. Hall Psychiatric Institute in Columbia, SC, which is affiliated with the University of

South Carolina School of Medicine.

I have been licensed as a psychologist in the State of Maryland since 1983, in the State of South Carolina since 1988, and in the State of Alabama since 2002. I am Certified by the American Board of Professional Psychology in Clinical Psychology (1986) and in Forensic Psychology (1996). I am certified by the American Board of Psychological Specialties in Neuropsychology (1998).

I have conducted neuropsychological evaluations as an intern at a Veterans Administration Hospital; as an employee of the South Carolina Department of Mental Health, the South Carolina Department of Juvenile Justice, and the Baltimore Gas and Electric Company; by contract with the South Carolina Vocational Rehabilitation Department; and by private referral from physicians, attorneys, and a variety of health care providers. I have conducted over 300 neuropsychological evaluations.

I have testified as a neuropsychologist in civil courts in South Carolina and in California. I have never failed to be qualified as an expert.

SOURCES OF INFORMATION:

Booklet Category Test (BCT) (04/28/2003)
Boston Diagnostic Aphasia Examination (Complex Ideational Material subtest) (BDAE) (04/11/2003)
Boston Naming Test (BNT) (04/28/2003)
California Verbal Learning Test - Second Edition (CVLT) (04/11/2003)
Clinical Interviews (03/27/2003, 04/17/2003, 04/30/2003, 05/01/2003, and 05/02/2003)
Controlled Oral Word Association Test (COWAT) (04/11/2003)
Digit Vigilance Test (DVT) (04/11/2003 and 05/01/2003)
Grooved Pegboard Test (04/11/2003 and 05/01/2003)
Hand Dynamometer (04/11/2003)
Judgment of Line Orientation (JLO) (04/11/2003 and 05/01/2003)
Luria-Nebraska Neuropsychological Battery: Form I (Motor Functions Scale, Receptive Speech Scale, Expressive Speech Scale) (04/30/2003)
Manual Finger Tapping Test (04/11/2003)
Motor Impersistence Test (MIT) (05/01/2003)
Reitan-Indiana Aphasia Screening Test (RIAST) (04/11/2003)
Reitan-Klove Sensory Perceptual Examination (04/28/2003 and 04/30/2003)
Rey Memory Test (RMT) (04/11/2003)
Seashore Rhythm Test (SRT) (04/28/2003)
Snellen Visual Acuity Test (04/15/2003)
Speech Sounds Perception Test (SSPT) (04/28/2003)
Tactual Performance Test (TPT) (04/30/2003)

Telephone Consultations: Elin Berg, M.D. (02/17/2004); Oliver P. Harden, M.D. (02/17/2004); Daniel Martell, Ph.D. (02/05/2004); Gail Rodin, Ph.D. (06/19/2003); Charlton Stanley, Ph.D. (01/20/2004)
Test of Memory Malingering (TOMM) (04/28/2003)
Trail Making Test (TMT) (04/11/2003 and 05/01/2003)
Wechsler Adult Intelligence Scale - Third Edition (WAIS-III) (04/15/2003 and 04/28/2003)
Wechsler Memory Scale - Third Edition (WMS-III) (04/15/2003 and 04/28/2003)
Wide Range Achievement Test - Revision Three (WRAT 3) (04/28/2003)
Wisconsin Card Sorting Test (WCST) (04/11/2003)

RECORDS REVIEWED:

1. EMSA Correctional Care.

Mr. Fulks reports neck pain. Percogesic (acetaminophen; analgesic, antipyretic) is prescribed. (03/13/2003)

Mr. Fulks has Bell's palsy. Prednisone (prednisone acetate; anti-inflammatory, immunosuppressant) and Percogesic (acetaminophen; analgesic, antipyretic) are prescribed. (04/09/2003)

Mr. Fulks has Bell's palsy. Prednisone (prednisone acetate; anti-inflammatory, immunosuppressant) is continued. (04/13/2003)

2. Prison Health Services.

Mr. Fulks is diagnosed with Posttraumatic Stress Disorder, Major Depressive Disorder, Generalized Anxiety Disorder, and Tic Disorder.

On 01/20/2003 he was prescribed Elavil (amitriptyline hydrochloride; antidepressant); Serzone (nefazodone hydrochloride; antidepressant); and Klonopin (clonazepam; anticonvulsant). There is no mention of any side-effects.

Mr. Fulks has Major Depressive Disorder. Elavil (amitriptyline hydrochloride; antidepressant) is continued. Serzone (nefazodone hydrochloride; antidepressant) is increased. There is no mention of any side-effects. (Angela Harper, M.D.; 03/02/2003)

Elavil (amitriptyline hydrochloride; antidepressant) and Serzone (nefazodone hydrochloride; antidepressant) are continued. Mr. Fulks denies having any side effects, and there is no mention of

any side effects. Mr. Fulks seems cognitively limited. (Angela Harper, M.D.; 03/31/2003)

Serzone (nefazodone hydrochloride; antidepressant), Elavil (amitriptyline hydrochloride; antidepressant), Percogesic (acetaminophen; analgesic, antipyretic), and Prednisone (prednisone acetate; anti-inflammatory, immunosuppressant) are prescribed. (Oliver Harden, M.D., 04/01/2003 through 04/30/2003)

Mr. Fulks is combative with officers and he is placed in a restraint chair. (04/24/2002 [presumably 04/24/2003])

On 04/30/2003, Serzone (nefazodone hydrochloride; antidepressant) was discontinued, Elavil (amitriptyline hydrochloride; antidepressant) and clonazapem (Klonopin; anticonvulsant) were continued, and Effexor (venlafaxine hydrochloride, antidepressant) was added. There is no mention of any side-effects.

COLLATERAL INTERVIEWS:

1. Elin Berg, M.D.; psychiatrist (telephone).

Dr. Berg saw Mr. Fulks at the Lexington County Detention Center and at the Alvin S. Glenn Detention Center in Columbia, SC, beginning in 01/2003. Mr. Fulks has Major Depressive Disorder, Generalized Anxiety Disorder, Tic Disorder, and symptoms of Posttraumatic Stress Disorder. In 01/2003 he was treated with Elavil (amitriptyline hydrochloride, antidepressant) for sleep difficulties; Serzone (nefazadone hydrochloride, antidepressant) for anxiety and depression; and Klonopin (clonazepam, anticonvulsant) for anxiety and tic disorder. On 04/30/2004 Dr. Berg discontinued Serzone and added Effexor (venlafaxine hydrochloride) for anxiety and depression. Mr. Fulks' medications improved his concentration and did not cause any side effects. (02/17/2004)

2. Betty Burroughs; Mental Health Social Worker; Medical Division; Alvin S. Glenn Detention Center; Columbia, SC.

Mr. Fulks arrived at the Alvin S. Glenn Detention Center on 04/24/2003. On 04/30/2003 Dr. Elin Berg diagnosed him as having Major Depressive Disorder, Post-Traumatic Stress Disorder, and Generalized Anxiety Disorder. He creates no problems and there are no behavioral reports against him at the Center. He is very quiet, always stays to himself, and does not interact with his

peers. (05/02/2003)

3. Lt. Bob Garrison; Lexington County Detention Center.

Mr. Fulks has created no behavior problems and there are no disciplinary reports against him. (04/17/2003)

4. Oliver P. Harden, M.D.; Eau Claire Adult and Internal Medicine (telephone).

Dr. Harden saw Mr. Fulks at the Lexington County Detention Center and treated him for Bell's palsy with prednisone acetate (anti-inflammatory, immunosuppressant). The medications prescribed by Dr. Harden did not cause any side effects. (02/17/2004)

INTERVIEW RESULTS:

Family History:

Mr. Fulks was born in West Hamlin, WV. He spent most of his life in Huntington, WV. He also has lived in Ohio, Kentucky, Florida, and South Carolina. His biological father was an auto mechanic and also worked in manufacturing and has been disabled for the last couple of years with a bone disease. His biological mother was a heavy drinker. His biological mother has been a nurse for years, and she preaches at a Pentecostal Holiness church. A biological sister works for a photographer. A biological brother works in manufacturing. Another biological brother works in manufacturing and also works as a cook. Another biological brother supervises a trailer park.

Mr. Fulks married his first wife, Amber Fowler (age 26), at age 18 or 19. They divorced in 1996 or 1997. A son [redacted] from this marriage died at age 6 months. Mr. Fulks married his second wife, Veronica Fulks (age 23), in 2002.

Educational History:

Mr. Fulks attended high school in Ohio. He was a special education student because of behavioral difficulties. He had difficulty with math and found school to be too difficult. He left school during the 11th grade. He earned a welding certificate at a vocational school in West Virginia. He was on the basketball

team at the vocational school but he never got to play.

Employment History:

Mr. Fulks worked as a welder in Indiana, Ohio, and Florida. He worked as a cook and did parking lot maintenance for a restaurant. He has packaged hamburgers.

Substance Abuse History:

Mr. Fulks began using alcohol around the age of 9 to 11. By the age of 12 to 14 he was drinking regularly. He has used alcohol heavily at times and has lost consciousness frequently from drinking alcohol. He huffed paint during middle school. He huffed gasoline regularly for a couple of months in the 11th grade. He has abused methamphetamine, marijuana, cocaine, crack, LSD, and unidentified pills. He has been a heavy user of cocaine and methamphetamine.

Health History:

Mr. Fulks has a history of concussions. At age 10 his brother threw a gallon can of paint at him, hitting him in the left frontal area. He lost consciousness for one minute. He received stitches at the emergency room. He again suffered concussion when his brother hit him using a boxing glove and he lost consciousness briefly. Around the ages of 12 to 16 he suffered two or three concussions with loss of consciousness due to assaults. He again lost consciousness in 1995 when he was shot in the back at a party. He has lost consciousness from abusing unidentified pills.

He has been in motor vehicle collisions and has suffered bilateral knee injuries. He suffered a possible brain injury in only one collision: around 1996 his brakes went out at an intersection and he was struck on the driver's side door. His scalp was split open on the top of his head. He lost consciousness for about ten minutes. This was his worst head injury. He has suffered headaches since that time. Headaches are bifronto-temporal and involve eye pain. He denies any other sequelae from that injury.

Dizzy episodes began around the ages of 17 to 18, and he continues to feel dizzy at times. During dizzy episodes he tingles all over, he feels like his head is tightening up, and he has to sit or lie down. He gets dizzy when he stands up. He has lost consciousness while standing up on ten to twenty occasions. In

11/2002 he injured his nose and mouth in a fall when he lost consciousness while standing up.

Current Status:

At 6'0" Mr. Fulks is of average height and weighs 225 lbs. He reports good vision and hearing. He denies having any difficulties with his upper extremities. His medication regimen during this evaluation did not cause him any side effects.

Activities of Daily Living:

Mr. Fulks is independent in self-care. He can tell time. When he lived at his mother's house his chores were to mow the grass and wash the dishes. He drives a car. He has difficulty with directions. His nickname was "Turn Around Chad" because he was always getting lost while driving. He attended church regularly with his mother and stepfather. He enjoys fishing, swimming, going to the beach, driving to new places, and watching auto races on TV. His stepfather tried to teach him to play the guitar: they tried for hours but it was too complicated for him and he could not learn. As a boy he was a good runner and a good football player at home with his brothers. He was not good at shooting baskets.

BEHAVIORAL OBSERVATIONS:

Mr. Fulks was neatly groomed and his hair was neatly combed at all times. His motor coordination tended to be a little stiff and awkward. His gait was a slow shuffle. He held his neck and upper body stiffly while walking. A small scar is apparent on his left forehead where he reports his brother hit him in the head with a gallon can of paint. A scar from a gunshot wound to his back is visible at the right side of T2. Mild tremor was observed in his right hand. He made frequent movements of his head, neck, mouth, upper torso, and hands; and he said he has done this all his life. Head and neck movements had a writhing quality. He bounced in his chair. I asked him to try holding perfectly still, and he tried to do so, but his right hand moved slightly, and he said it was difficult for him to hold still.

Attending to and participating in conversation was difficult for Mr. Fulks and required an unusual amount of effort. He closed his eyes and struggled to comprehend my questions. He was not good at following instructions. A low level of receptive vocabulary was apparent.

At times Mr. Fulks spoke at a good rate of speed, but in general he tended to move, think, and speak slowly. A mild stutter was noted. At times his speech lacked prosody. He was quiet and soft-spoken. He was so soft-spoken that his speech was not always intelligible, and I had to ask him to speak up. His speech was generally understandable but at times was indistinct and poorly articulated. He spoke in full sentences, at a simple level of vocabulary, with normal latencies and some elaboration. He did not volunteer information between questions but sat silently waiting for the next question. He had difficulty responding to questions. He tended to be concrete in his thinking and could not always formulate answers to abstract questions. Recalling personal information was difficult for him and required an unusual amount of effort: he closed his eyes and worked hard to retrieve personal information. His discourse was poorly organized. He tended to be circumstantial, and his answers were not always relevant to the question that had been asked. He related his personal history in a confused and sometimes irrelevant manner. His answers to questions were not well-organized but tended to be jumbled and inconsistent. At times his sentence construction was jumbled. He did not maintain continuity of time or person while answering questions. Word-finding difficulty was apparent.

Mr. Fulks was polite, pleasant, respectful, and cooperative with all procedures. He was child-like in manner. No deficits were noted in alertness or persistence. His energy level was low to normal. He was despondent in mood. His affect was full in range.

On a "Go" task he gave one echopraxic response, which he self-corrected. He had greater difficulty with a "No-Go" task: he was slow to initiate responses, he repeatedly gave responses that were partially echopraxic or partially anticipatory, and ultimately he developed a compensatory strategy of keeping his fingers down by holding them tightly against his hand.

MENTAL STATUS EXAMINATION:

Mr. Fulks was oriented to place. He was not consistently oriented to time: at one interview he was oriented to the month and the year but not to the day of the month. He knew the year but not the date, month, or season of his second marriage, even though this had taken place only one year before. A low level of numerical skill was apparent: he did not know the year of his wife's birth, and he could not calculate it accurately. He said he lived in Florida when he was 21, but he could not calculate what year that was. He knew the name of the President of the United States, the name of the President's wife, and the President's state of origin, but he did not know the President's political party. He knew the Presidents in order only back to Clinton. He understood the

nature and purpose of the evaluation.

Memory problems were apparent. He could not always remember important personal information. He had difficulty with a simple memory task: he registered three words with his eyes closed and exerting an unusual amount of effort. He recalled the words one minute later, and he recalled them five minutes after that. Concentration tasks required an unusual amount of effort. He performed serial threes slowly. He performed serial sevens slowly and could do it only by counting aloud and on his fingers. He closed his eyes during serial sevens and worked effortfully. He calculated change from a dime but his receptive speech skills are low and he needed this question repeated. He calculated change from a dollar. He interpreted proverbs at a basic level of abstraction. He interpreted a proverb slowly and effortfully. He demonstrated a basic knowledge of current events. He denied auditory or visual hallucinations. He experiences brief visual images of his deceased son. He reports that at times he has been so pre-occupied with memories of his deceased son that he was unresponsive to people. No delusional thinking was elicited. He showed insight into his depressed mood.

PSYCHOLOGICAL TEST RESULTS:

Mr. Fulks cooperated with psychological testing and exerted good effort. He was fully attentive. He repeatedly had difficulty comprehending test instructions (i.e., on BCT, COWAT, TMT-B, WMS-III Family Pictures I, WMS-III Logical Memory II, WMS-III Word Lists I, and WMS-III Mental Control). On TMT-B he focused on only the last few words of the instructions, and his response had to be corrected. Occasionally he gave impulsive, anticipatory responses during tests. At times he moved slowly. His energy level varied and was low at times.

Responding to neuropsychological tests was a struggle for Mr. Fulks. His test behaviors showed how much effort was required for him to participate in this examination. He used compensatory strategies like pressing his eyes shut tightly, covering his eyes, and putting his head down to facilitate concentration. On the Digit Symbol subtest of the WAIS-III he used his left thumb to hold his place. On the TMT-B he cued himself aloud. He laughed inappropriately during WMS-III - Faces I and II and during Family Pictures II. He looked puzzled and did not monitor his responses efficiently on the WCST.

During the course of this evaluation Mr. Fulks had an episode of Bell's palsy on the left side of his face that lasted a number of days including our sessions on 03/27/2003 and 04/11/2003. For that reason certain tests (DVT, JLO, TMT, and Grooved Pegboard) that require vision were given on 04/11/2003 and were repeated on 05/01/2003 when the Bell's

palsy had resolved. He did not remember the TMT-B accurately, even though he had taken it only three weeks earlier.

Intellectual Functioning:

On a test of intellectual functioning, the Wechsler Adult Intelligence Scale - Third Edition (WAIS-III), Mr. Fulks obtained scores as follows:

IQ	SCORE	PERCENTILE
Verbal	79	08
Performance	78	07
Full Scale	77	06

INDEX	SCORE	PERCENTILE
Verbal Comprehension	76	05
Perceptual Organization	84	14
Working Memory	86	18
Processing Speed	79	08

SUBTEST	SCALED SCORE	PERCENTILE
Vocabulary	6	09
Similarities	6	09
Arithmetic	8	25
Digit Span	8	25
Information	5	05
Comprehension	6	09
Letter-Number Sequencing	7	16

SUBTEST	SCALED SCORE	PERCENTILE
Picture Completion	6	09
Digit Symbol-Coding	5	05
Block Design	8	25
Matrix Reasoning	8	25
Picture Arrangement	6	09
Symbol Search	7	16
Object Assembly	8	25

His Full Scale IQ score of 77 places him in the borderline range of intelligence. He copied figures slowly (Digit Symbol-Copy = 67, cumulative percentage = 1-2%).

Academic Achievement:

On a test of academic achievement (WRAT 3), Mr. Fulks obtained borderline scores as follows:

WRAT 3	GRADE LEVEL	STANDARD SCORE	PERCENTILE
Reading	5	75	05
Spelling	5	76	05
Arithmetic	6	79	08

Learning and Memory:

On a memory test (WMS-III) Mr. Fulks obtained low to low-average scores as follows:

WMS-III	SCORE	PERCENTILE
Auditory Immediate Index	83	13
Visual Immediate Index	68	02
Immediate Memory Index	71	03
Auditory Delayed Index	89	23

Visual Delayed Index	84	14
Auditory Recognition Delayed Index	80	09
General Memory Index	82	12
Working Memory Index	83	13

His Visual Immediate Index is lowered by the fact that he switched two items on Family Pictures II. If he had not made this error, his Visual Immediate Index would have been 81. Intrusions were apparent during verbal tests (Logical Memory I and II, Verbal Paired Associates I and II, and Word Lists I and II).

His CVLT-II performance is remarkable for 43 intrusions. On the CVLT-II he obtained low scores as follows:

CVLT-II	RAW SCORE	STANDARD/T SCORE	PERCENTILE
Trial 1	3	-2.0	02
Trial 2	9	-0.5	31
Trial 3	10	-0.5	31
Trial 4	8	-2.0	02
Trial 5	8	-2.0	02
Trials 1-5that	38	36T	08
List B	5	-1.0	16
Short-Delay Free Recall	8	-1.0	16
Short-Delay Cued Recall	9	-1.0	16
Long-Delay Free Recall	5	-2.5	Below 01
Long-Delay Cued Recall	7	-2.0	02

Impairment Index:

On the Halstead Impairment Index, Mr. Fulks earned a score of 0.7/1.0 (04th percentile). This score is in the range of mild to moderate impairment.

Sensory Functions:

Mr. Fulks' visual fields are full. His visual acuity is 20/25 in his right eye and 20/30 in his left eye. He does not wear corrective lenses. Tactile suppressions appeared reliably in both hands. There may be hearing loss in his left ear, although audiology would be needed to confirm this. He made only one error in visual stimulation, only two errors in finger agnosia, and only four errors in graphesthesia. The difference between his right and left hands on Tactile Form Recognition is only one second (21/20), which is not significant.

Attention, Concentration, and Cognitive Flexibility:

Mr. Fulks obtained a low-average score on a test of listening skill (SRT: 23/30 correct, 14th percentile). He obtained an average score on a test of listening to phonemes (SSPT: 04/60 errors, 62nd percentile).

A test of visual scanning and attention (DVT) was administered twice (on 04/11/2003 and on 05/01/2003). As can be seen from the table below, when the test was repeated he worked a little faster and made fewer errors:

	04/11/2003		05/01/2003	
DVT	**RAW SCORE**	**PERCENTILE**	**RAW SCORE**	**PERCENTILE**
Total Time	6:52	54	6:38	69
Errors	47	Below 01	22	04

A test that involves visual scanning and cognitive flexibility (TMT) was administered twice. On 05/01/2003 he cued himself during this test by reciting aloud. He obtained low to low-average scores as follows:

	04/11/2003		05/01/2003	
TMT	**SECONDS**	**PERCENTILE**	**SECONDS**	**PERCENTILE**
TMT-A	60	01	40	08
TMT-B	165	02	107	12

Language and Communication Skills:

On a test of receptive speech skills (Luria), Mr. Fulks' worked slowly and his performance was characterized by paraphasias. His Scale Total at 57T is below his Critical Level of 59.45T.

On a test of expressive speech skills (Luria), his performance was characterized by paraphasias and simplifications. Simplifications could be related to his West Virginia dialect. His Scale Total at 63T exceeds his Critical Level of 59.45T. Low levels of grammar and articulation as well as his regional dialect probably contribute to this high score.

On a test of receptive language skills (BDAE) he scored 08/12 (07th percentile).

On a naming test (BNT) he scored 46/60 (below 01st percentile).

He generated only 20 words on a test of verbal fluency (COWAT) (05th percentile).

On the RIAST he showed difficulties with reading, spelling, calculating, listening, pronouncing, and right-left orientation.

Visual-Spatial Skills:

A test of visuospatial perception (JLO) was administered twice. On 04/11/2003 he was observed to move his head around the test booklet to an unusual degree, and he scored 25/30 (56th percentile). On 05/01/2003 he scored 28/30 (72nd percentile).

Motor Skills:

On a test of finger tapping speed (Manual Finger Tapping Test), he obtained scores as follows:

TAPPING	RAW SCORE	PERCENTILE
Dominant Right Hand	37.8	04
Non-Dominant Left Hand	37.8	04

The identity between his right- and left-hand performances is a significant finding, in the range of mild to moderate impairment.

A test of finger dexterity (Grooved Pegboard Test) was administered twice (on 04/11/2003 and on 05/01/2003). On both occasions he was notably awkward with his left hand. He obtained low to low-average scores as follows:

	04/11/2003		05/01/2003	
GROOVED PEGBOARD	**SECONDS**	**PERCENTILE**	**SECONDS**	**PERCENTILE**
Dominant Right Hand	96	Below 01	77	04
Non-Dominant Left Hand	125	Below 01	90	13

A test of grip strength (Hand Dynamometer) was administered twice on 04/11/2003. He obtained average to low-average scores as follows:

GRIP STRENGTH	KGS.	PERCENTILE	KGS.	PERCENTILE
Dominant Right Hand	44.5	24	51.5	62
Non-Dominant Left Hand	39.0	14	48.0	46

On a test of motor functions (Luria), his movements tended to be stiff, awkward, and perseverative. He had difficulty coordinating the movements of his left upper extremity, and he was observed to rest his left upper extremity on a table or to use his right hand to steady it. His Total Score at 53T is below his Critical Level of 59.45.

On a test of motor impersistence (MIT), he passed all items, although some items appeared to be difficult for him. His head, tongue, and upper extremities were in constant motion. He used a compensatory strategy of biting his tongue to hold it in place.

Abstraction and Concept Formation:

On a test that involves concept formation, learning, and memory (BCT) Mr. Fulks made 78 errors (05th percentile), which is in the range of severe impairment.

On a test of concept formation and cognitive flexibility (WCST) Mr. Fulks completed only four categories and made 27 perseverative responses (13th percentile).

Problem-Solving:

On a test of haptic problem-solving (TPT) he obtained average to low-average scores as follows:

TPT	RAW SCORE	PERCENTILE
Dominant Right Hand	6:59	14
Non-Dominant Left Hand	7:53	14
Both Hands	3:12	16
Total Time	18:04	14
Memory	7	24
Localization	3	18

SUMMARY:

Chadrick Evan Fulks is a 26-year-old, right-handed, Caucasian male who was a special education student in school because of behavioral difficulties. He left school in the 11th grade and later earned a welding certificate at a vocational school. He worked as a welder and also has worked as a cook, has packaged hamburgers, and has done parking lot maintenance for a restaurant. He reports a number of closed head injuries, as reviewed above. The history that Mr. Fulks reported indicates five or six mild traumatic brain injuries as defined by the American Congress of Rehabilitation Medicine.

Mr. Fulks had an unusually difficult time responding to neuropsychological tests. As reviewed above, he used compensatory strategies like closing his eyes, covering his eyes, putting his head down, using his thumb to mark his place, biting his tongue, and pressing his fingers tightly in place. These compensatory strategies indicate difficulties in attentional skills and in monitoring his own behavior.

Mr. Fulks' Full Scale IQ score of 77 is in the borderline range of intelligence. As reviewed above, he obtained low scores on many neuropsychological tests, at a level consistent with borderline intelligence. However, some of his behaviors and test scores are unusual even for persons with borderline intelligence. He reliably demonstrated tactile suppression in both hands. Forty-three intrusions on the CVLT-II is highly unusual and indicates significant failure to regulate his behavior in response to stimuli. Mr. Fulks moves almost constantly, and the possibility of a movement disorder should be ruled

out. Other signs observed during this evaluation like mild echopraxia; a mild stutter; and occasional, impulsive, anticipatory responses during test administration are not necessarily consistent with borderline intelligence but are consistent in indicating difficulties in cognition, communication, and self-monitoring.

Thank you for referring your client for neuropsychological evaluation.

Jonathan Venn, Ph.D.
Licensed Psychologist, South Carolina License No. 440
ABPP Certified in Clinical Psychology and Forensic Psychology
Diplomate in Neuropsychology, American Board of Psychological Specialties
Adjunct Professor, University of South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
Florence Division

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	CRIMINAL NO. 4:02-992
	)	
	)	
CHADRICK E. FULKS	)	
	)	

DECLARATION OF JAMES H. HILKEY

1. My name is James H. Hilkey. My curriculum vitae is attached as Exhibit A. I am a licensed practicing psychologist in Durham, North Carolina. From 1980 to 1996, I was the Chief of Psychology Services with the Federal Bureau of Prisons in Butner, North Carolina. I was responsible for the clinical and administrative supervision of twenty psychologists servicing the forensic/psychiatric in-patient unit, substance and sex offender programs, and general psychological services for the Federal Correctional Institution. Prior to becoming the Chief of Psychology Services, I served as a supervisory clinical psychologist at FCI Butner from 1976 to 1980. In this position, I was responsible for clinical and administrative services to an acute psychiatric in-patient population of mentally ill federal offenders. I often conducted pre-trial forensic evaluations for the federal courts and the Witness Protection Program. From 1973 to 1976, I was a staff psychologist for the substance abuse program at USP Terre Haute.

2. In 1968, I received my B.A. degree in Psychology from Westmont College in Santa Barbara, California. In 1970, I received my M.C. degree in Counseling Psychology from Arizona State University. In 1975, I received my Ph.D. in Counseling Psychology from Indiana State University.

PA Document #4

3. I have served on the Federal Bureau of Prisons Task Force for Correctional Medical Center Design, the Federal Bureau of Prisons Standing Committee for Psychological Testing, and the Federal Bureau of Prisons Task Force for Critical Incident Debriefing. I have presented papers to the International Congress of Mental Health, the National Sheriffs' Association, the American Correctional Association, and the Southeastern Psychological Association.

4. My research and clinical work has focused on assessing and evaluating federal prisoners in a psychiatric in-patient setting.

5. I was asked by John Blume to perform a psychological evaluation on Chad Fulks to assess his psychological functioning as it pertains to the mitigating factors as defined in 18 U.S.C.A. § 3592.

6. I initially examined Mr. Fulks on August 12, 2003 at the Alvin S. Glenn Detention Center in Columbia, South Carolina. Mr. Fulks was further examined on August 13, 2003 at the Alvin S. Glenn Detention Center. Mr. Fulks was also examined on January 5, 2004 at the Columbia Care Center in Columbia, South Carolina, and on February 18, 2004 at the Federal Medical Center in Butner, North Carolina. Approximately fourteen hours were spent in direct examination of Mr. Fulks which included the administration of the following battery of psychological tests and assessment procedures:

a. Wechsler Adult Intelligence Scale, Third Edition;

b. Wide-Range Achievement Test, Third Edition;

c. Bender Gestalt Visual Motor Test;

d. Rey Fifteen Item Test;

e. Personality Assessment Inventory;

f. Millon Clinical Multiaxial Inventory, Third Edition;

g. Minnesota Multiphasic Personality Inventory, Second Edition;

h. Rorschach Projective Technique, Structurally Scored; and

i. Mental status examination and clinical interviews.

I also reviewed medical, school, mental health, and criminal records pertaining to Chad Fulks.

7. On the four occasions I examined Mr. Fulks, he presented as a dependent and primitive young man. His insight and judgment appeared generally poor. His behavior was consistent with an individual with significant personality and neurological problems. During our meetings, Mr. Fulks was fully oriented and was cooperative. During several of our longer sessions, Mr. Fulks became distracted but was able to return to task with minimal encouragement. Mr. Fulks presented as an isolated and dependent young man who appeared socially younger than his chronological age.

8. Mr. Fulks admitted to a pronounced lack of stability during his early years, stating that his parents were heavy abusers of alcohol and that both parents were "mean" when drinking. Poor parental guidance including abusive punishment and sexually inappropriate behavior was cited. Mr. Fulks' parents had a very violent relationship which only worsened over the years. His mother was often seen with black eyes, cut lips, bruises, and other marks of violence. The children in the Fulks home were often without supervision and basic necessities such as food. The parents' desire for alcohol took precedence over providing a proper home environment.

9. As a child, Mr. Fulks indicated that he felt depressed and estranged from other children because of his speech impediment and tattered clothing. Mr. Fulks failed the first grade and continued to struggle academically until he dropped out of school in the tenth grade. Mr. Fulks exhibited learning disabilities and was placed in special education programs for learning disabled and behaviorally disturbed children.

10. Mr. Fulks acknowledged a significant history of substance abuse beginning with inhaling petrochemicals and drinking moonshine liquor around the age of ten. Throughout his life, Mr. Fulks has used various drugs including LSD, prescription pain killers, marijuana, powder cocaine, crack cocaine, and methamphetamine.

11. As a teenager, Mr. Fulks attempted to commit suicide by a drug overdose and hanging.

12. Mr. Fulks has a history of head trauma and once suffered a gunshot wound to his shoulder.

13. The malingering assessment revealed no evidence of exaggeration of symptoms. This result increases the confidence placed in results of cognitive and personality testing.

14. Mr. Fulks was administered the Wechsler Adult Intelligence Scale, Third Edition, and the Wide-Range Achievement Test, Third Edition. These instruments were administered on August 12 and 13, 2003. Mr. Fulks obtained a full-scale IQ score of 78, placing him in the borderline range of intelligence. This is a global assessment of his problem-solving skills; a score in the range places him in the seventh percentile of his peers. There is a 95% chance that his true IQ falls between 74 and 83. Academic achievement is measured on the Wide-Range Achievement Test, Third Edition. It indicated that Mr. Fulks is able to read at an eighth grade level and spell at a fifth grade level, and complete arithmetic problems at a sixth grade level.

15. Mr. Fulks was initially administered three separate personality tests, the Millon Clinical Multiaxial Inventory, Third Edition, the Personality Assessment Inventory ("PAI"), and the Rorschach. The validity of Mr. Fulks' responses to the items on the PAI fell in the normal range suggesting that he did not over-report or under-report psychopatholgy. His PAI profile was marked by significant elevations across several scales, including a broad range of clinical features and increasing the possibility of multiple diagnoses. His profile type is associated with

marked distress and severe impairment in functioning. Areas of clinical significance include drug-related problems, somatic concerns including rumination about physical problems, high levels of anxiety suggesting that he is easily overwhelmed, and difficulties consistent with a significant depressive experience. Mr. Fulks' responses to the PAI suggest marked suspiciousness and mistrust in his relationship with others. His image of himself is poorly established and fragile. Even minor slights from others result in real doubts about his worth.

16. The MCMI-III suggested that Mr. Fulks has marked deficiencies in the abilities to effectively manage his feelings, thinking, and behavior. He is likely to show signs of depression and dependent personality features. The modal diagnoses from the MCMI-III include dependent personality disorder with schizotypical personality features and depressive personality traits.

17. Mr. Fulks did not present with indicators of Antisocial Personality Disorder on objective personality testing.

18. The Rorschach test results confirm and extend the results from the MCMI-III and the PAI. Mr. Fulks gave nineteen responses to ten ambiguous ink blots. Results are valid with clinically significant results on two constellations, depression and coping deficit index. Mr. Fulks, based on the results from this projective test, is prone to episodes of affective disturbance that include depression that interferes with effective interpersonal functioning. He also has markedly difficult times mustering adequate psychological recourses to cope with the demands placed upon him. The Rorschach results also suggest that Mr. Fulks has marked impairment in his reality testing capacity, whereby he tends to misperceive events and to form mistaken impressions of people and the significance of their actions. Poor judgment is consistent with these findings.

19. Based on the findings of my evaluation, the following Axis I diagnoses were tendered: poly-substance dependence, dysthymic disorder, and cognitive disorder not otherwise specified.

20. In sum, Mr. Fulks presents with multiple significant psychological problems. He is a young man who has a number of biological problems. Both parents have had significant substance abuse problems, which in itself drastically increases the likelihood that he will be more prone to have problems with substance abuse. Specialists in neuropsychology and neurology have identified cognitive problems most likely stemming from Mr. Fulks' mother's consumption of alcohol during pregnancy. Mr. Fulks has a history of head trauma with loss of consciousness. Environmentally, Mr. Fulks was raised in a highly chaotic home characterized by poverty and a history of drug abuse, inconsistent supervision and neglect, and physical abuse. He also reports being sexually abused. Psychologically, Mr. Fulks has never developed adequate coping mechanisms. This failure severely limited his ability to meet the demands of daily life. He has also been chronically depressed, lacks self esteem, and is easily influenced by those around him. Consistent with his neurological impairment and his socialization, Mr. Fulks' behavior has been marked by impulsivity and his thinking influenced by extremely poor judgment.

21. It is my opinion that the combination of Mr. Fulks' neurological impairment and his significant psychological problems result in a lack of capacity to fully appreciate the nature of his behavior and to anticipate the consequences of his actions. He is a young man with significant deficits and is highly malleable.

22. I have reviewed the testimony of Donna Ward given at Mr. Fulks' sentencing hearing wherein Ms. Ward described a November 17, 2004 phone call allegedly made by Mr. Fulks while Brandon Basham was hiding from the police in the Ohio River. I am further aware that the prosecution used this call to argue that Mr. Fulks, without the aid of Basham, attempted

to lure Ms. Ward's daughter out for a faux job interview. Donna Ward's testimony would not have altered the opinions I was prepared to give at the sentencing hearing. In fact, the Ward incident supports my assessment Mr. Fulks has poor judgment, lacks the capacity to appreciate the consequences of his actions, and is cognitively impaired.

23. In accordance with 28 U.S.C.A. § 1746, I declare that under penalty of perjury that the foregoing is true and accurate.

James H. Hilkey, Ph.D.

Signed before me this 2nd day of June, 2008.

Notary Public for Wake County, NC
My Commission Expires: March 4th, 2012

JEREMY L. PIERCE NOTARY PUBLIC My Comm. Exp. March 4, 2012 WAKE COUNTY, N. C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
Florence Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 4:02-992
	)	
CHADRICK E. FULKS	)	

DECLARATION OF MARGARET MELIKIAN

1. My name is Margaret Melikian. My curriculum vitae is attached as Exhibit A. I am an Assistant Professor of Psychiatry and Behavioral Sciences at the Medical University of South Carolina. I have also served as the Program Director of Forensic Psychiatry at the Medical University of South Carolina.

2. I received my Doctor of Osteopathic Medicine in 1997 from the Oklahoma State University College of Osteopathic Medicine. I then did a residency in general psychiatry at the Medical University of South Carolina. After my residency in general psychiatry, I completed a fellowship in forensic psychiatry at the University of South Carolina.

3. My research and work has focused on forensic inpatient care, evaluation of competency of criminal defendants to stand trial, criminal responsibility evaluations, evaluation of sexually violent predators, and evaluation of criminal defendants scheduled to be executed.

4. I was asked by John Blume to assess Chad Fulks for cognitive deficits and mental illness. After I presented my findings to Mr. Blume, I was asked to testify at Chad Fulks' sentencing hearing. I was present in the federal courthouse and was prepared to give my opinions on these matters to the jury. I was not called by Mr. Blume at the sentencing hearing.

5. In preparation for my assessment, I interviewed and examined Chad Fulks on December 9, 2003 and December 11, 2003. I also reviewed various records, literature, and consulted with Mr. Fulks' trial counsel.

6. It is my opinion that Chad Fulks meets the diagnostic criteria for Axis I diagnosis of Cognitive Disorder, Not Otherwise Specified (NOS). Cognitive Disorder, NOS is diagnosed when a patient has a syndrome of cognitive impairment that does not meet the criteria for delirium, dementia, or amnesic disorders. The impairment is often due to a specific medical condition and/or a pharmacological reaction. Mr. Fulks' cognitive problems include low IQ, difficulties concentrating or paying attention, visual and motor abnormalities, and limited reasoning and problem solving skills. These deficits showed up very early in his childhood and in his poor performance in school. Mr. Fulks was slow to walk and talk, required special education placement by the fourth grade, had a speech impediment, and tested for a very low IQ. Mr. Fulks' cognitive dysfunction is due to the direct effect of general medical conditions. Medical conditions affecting his cognitive ability are fetal alcohol spectrum disorder, chronic substance abuse, and multiple head injuries.

7. It is my opinion that Mr. Fulks meets the diagnostic criteria for Axis I diagnosis of Major Depressive Disorder. Major Depressive Disorder is a condition characterized by a long-lasting depressed mood or marked loss of interest or pleasure in activities. These symptoms are sufficiently severe to interfere with the patient's daily functioning. Mr. Fulks attempted suicide on two occasions at the ages of 13 and 16. During my evaluation, Mr. Fulks presented with a sad mood, decreased appetite, poor sleep, poor concentration, and feelings of worthlessness and guilt. He has been on antidepressant medication and has had improvement in his symptoms.

8. It is my opinion that Mr. Fulks meets the diagnostic criteria for Axis I diagnosis of Adjustment Disorder with Anxiety. Adjustment Disorder with Anxiety is a condition in which the patient continues to feel nervous, worried, or afraid after a stressful event or events. Mr. Fulks' required the medication Klonopin for his anxiety. Klonopin is a benzodiazepine, which, in my experience, is rarely given to inmates unless they present with the most serious indicators of anxiety. Mr. Fulks also reported a history of problems with anxiety prior to his incarceration. He reported being diagnosed with panic disorder between the ages of 13 and 14. Mr. Fulks reported increased anxiety, believing others are talking about him and having trouble functioning in groups. He described separation anxiety and would hide from the school bus to avoid leaving his mother. Based on my observation and assessment, Mr. Fulks displayed an excessive amount of anxiety given his situation.

9. Mr. Fulks used illicit substances in amounts or duration that did not meet the criteria for specific Axis I diagnosis. Mr. Fulks began using LSD at age 16. He used this approximately 2 times a week by placing it in eye drops. He reported visual hallucinations while intoxicated and denied flashbacks. Mr. Fulks began abusing Lortab (a narcotic) at age 16. He used this narcotic approximately one time per week. Mr. Fulks also reported inhaling gas and paint fumes on numerous occasions at age 14.

10. Mr. Fulks meets the diagnostic criteria for Axis I diagnosis of Amphetamine Dependence. Amphetamines are addictive stimulants and extensive use can result in both physical and psychological addiction. This means that, without the substance, a person will feel that he cannot function properly. Additionally, when abruptly stopping use, the person will also experience physical symptoms of withdrawal. Mr. Fulks has a long history of amphetamine abuse. At age 17 be began using crack cocaine and used it approximately two times per week.

He also used powder cocaine for 2 to 3 months on a daily basis. He also reported snorting Ritalin on occasion. He began smoking crystal methamphetamine at age 21 and smoked on a daily basis for 2 years. He has built up a tolerance to the affect of amphetamines, has had withdrawal symptoms, has used increasing amounts, and has given up other activities in order to use the substances.

11. It is my opinion that Mr. Fulks meets the diagnostic criteria for Axis I diagnosis of Cannabis Dependence and Alcohol Dependence. Mr. Fulks began using cannabis and alcohol at a young age and was eventually able to use large amounts with a lesser effect than most people. He began smoking marijuana at age 10 and would smoke approximately 10 joints per day. He would also lace his marijuana with embalming fluid. Mr. Fulks began drinking alcohol at age 10 and also consumed moonshine. He reported drinking on a daily basis starting at age 14. He has built up a tolerance to the affect of these substances, has had withdrawal symptoms, has used increasing amounts, and has given up other activities in order to use the substances.

12. Mr. Fulks meets the diagnostic criteria for Axis II diagnosis of Anti-Social Personality Disorder. Anti-Social Personality Disorder is a condition characterized by a persistent disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood. Deceit and manipulation are central features of this disorder. Mr. Fulks exhibited disruptive behavior before the age of 15, such a lying, running away from home, fighting, and failing to conform to the social norms with respect to lawful behavior. As an adult, Mr. Fulks has continued these patterns formed in childhood. People who grow up in abusive or neglectful environments, such as Mr. Fulks, are at higher risk for this disorder. Mr. Fulks' substance abuse history contributes to his personality difficulties. While lack of remorse is significant factor in the diagnosis, it should be noted that Mr. Fulks does show

remorse and due to his upbringing he was taught and encouraged to steal by his family. His childhood environment had little structure; his mother and father were frequently intoxicated and fought often in front of the children. The parents were often too hung over to make sure the children had food, were clean, and were in school. Further, because of his diminished cognitive ability, Mr. Fulks has many childlike, gullible, and suggestible qualities to his personality.

13. Mr. Fulks' below average intelligence and impulsivity make it unlikely that he would be a leader among his peers.

14. Mr. Fulks had several instances of sexual abuse by adults at a young age. A teenage babysitter performed oral sex on him at age 8 or 9. Around age 13 he was molested by a friend's father. At age 15 he moved in with a 28 year-old woman. At approximately at age 10, he was disciplined at school for pulling down the pants of another child, which may have been acting out due to his own sexual abuse. Mr. Fulks was raised in an environment with inappropriate sexual activity in the home and graphic sexual imagery adorning the walls.

15. Mr. Fulks gave a history of excessive substance use around the time of the incident. Mr. Fulks reported snorting Ritalin just prior to escaping from the Hopkins County Detention Center. Shortly after escaping, Mr. Fulks and Brandon Basham went to a trailer owned by a Basham family member. There they found clothes and consumed one liter of whiskey. They then spent several days in a hotel drinking and smoking marijuana. Mr. Fulks then traveled to the home of his brother where they began smoking crystal methamphetamine. He reported obtaining 8 eight balls (approximately 3.5 grams each) and using 6 while in the Michigan area. He began having visual hallucinations after smoking crystal methamphetamine. Fulks and Basham took 2 eights balls with them when they left for Huntington, West Virginia. While driving they consumed another liter of whiskey. After checking into a motel in

Huntington, West Virginia, Mr. Fulks and his cohorts smoked $800.00 worth of crystal methamphetamine and smoked marijuana. After leaving Huntington and while driving to Little River, South Carolina, they consumed alcohol, marijuana and 2 eight balls. After leaving South Carolina, Mr. Fulks continued to use marijuana and crystal methamphetamine while driving. Upon arriving back in Huntington, West Virginia, Mr. Fulks and Basham went to Beth McGuffin's house where they continued to use various drugs. In addition, Mr. Fulks reported significant use of crack cocaine throughout the period after his escape. This continuous use of substances impaired his ability to sleep and he reported that he "didn't sleep for days on end." He reported using so many stimulants that the muscles in his jaw were clamped shut. He also reported visual hallucinations associated with his drug use. His significant use of substances made him more impulsive and impaired his judgment.

16. I have reviewed the testimony of Donna Ward given at Mr. Fulks' sentencing hearing wherein Ms. Ward described a November 17, 2004 phone call allegedly made by Mr. Fulks while Brandon Basham was hiding from the police in the Ohio River. I am further aware that the prosecution used this call to argue that Mr. Fulks, without the aid of Basham, attempted to lure Ms. Ward's daughter out for a faux job interview. Donna Ward's testimony would not have altered the opinions I was prepared to give at the sentencing hearing. In fact, the Ward incident supports my assessment Mr. Fulks has cognitive deficits, poor judgment, and is not likely to be a leader among his peers.

In accordance with 28 U.S.C.A. § 1746, I declare that under penalty of perjury that the foregoing is true and accurate.

Margaret Melikian, D.O.

Signed before me this 21st day of May, 2008

Notary Public for South Carolina
My Commission Expires: 9-25-12

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
Florence Division

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	CRIMINAL NO. 4:02-992
	)	
	)	
CHADRICK E. FULKS	)	
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DECLARATION OF SEYMOUR L. HALLECK

1. My name is Seymour L. Halleck. My curriculum vitae is attached as Exhibit A. I currently am a emeritus Professor of Psychiatry at the University of North Carolina School of Medicine, Chapel Hill. I was a Professor at that institution from 1972 to 1999. My current practice focus is forensic psychiatry and includes both civil and criminal cases.

2. I have been listed in the Best Doctors in America under Forensic Psychiatry several times in the 1990s. I also received of the Golden Apple award from the American Academy of Psychiatry and Law in 2003. In 1980, I received the Isaac Ray Award from the American Psychiatric Association. In 1978, I received the Edwin Sutherland Award from the American Society of Criminology. In 1974, I received the Arthur Marshall Distinguished Alumnus Award from the Menninger School of Psychiatry.

3. From 1990 to 1999, I served as the editor-in-chief of the Journal of the American Academy of Psychiatry and Law. I was also editor-in-chief of Journal of Contemporary Psychiatry between 1980 and 1990. I have been an associate editor of several other journals.

4. I have written or edited twelve books, including Evaluation of the Psychiatric Patient: A Primer (New York: Plenum Medical Book Co., 1991), The Mentally Disordered

Offender (Rockville, Md.: National Institute of Mental Health, 1986), and Law in the Practice of Psychiatry (New York: Plenum Publishing Co., 1980).

5. I have served as a consultant to the Federal Bureau of Investigation and from 2002 to 2004 I served as a Federal Monitor to the Ohio Department of Corrections. From 1962 to 1972, I served as the Chief Psychiatric Consultant for the Wisconsin Division of Corrections. From 1961 to 1963, I served as the Chief of Psychiatric Services for the Wisconsin Division of Corrections. From 1953 to 1955, I served as a staff psychiatrist for the Department of Justice's Medical Center for Federal Prisoners in Springfield, Missouri.

6. I was a member of the Advisory Research Council of the Federal Bureau of Prisons from 1983 to 1990. From 1988 to 1990, I chaired the American Psychiatric Association's Task Force on Uses and Misuses of Psychiatric Diagnosis in the Legal Process.

7. I was asked by John Blume to assess Chad Fulks for cognitive deficits and mental illness in connection with presenting mitigating circumstances at Mr. Fulks' sentencing hearing. After I presented my findings to Mr. Blume, I was prepared to testify at Chad Fulks' sentencing hearing. I was not called by Mr. Blume at the sentencing hearing.

8. In preparation for my assessment, I interviewed and examined Chad Fulks at the Butner Federal Prison on February 4, 2004 for four hours. I also interviewed Mr. Fulks at the Columbia Care Center on April 20, 2004 for two hours and on April 21, 2004 for another two hours. I reviewed various documents, including FBI's reports of Mr. Fulks' alleged criminal activity, Mr. Fulks' school records, criminal history, certain incarceration records, letters written by Mr. Fulks, and a large number of medical reports and mental health assessments. I also reviewed the expert reports of David Bachman, Margaret Melikian, Howard Becker, Fred

Bookstein, Christos Davatzikos, James Evans, Ruben Gur, James Hilkey, Alex Morton, and Jonathan Venn.

9. On November 4, 2002, Mr. Fulks and Branden Basham escaped from the Hopkins County Detention Center in Madisonville, Kentucky. Mr. Fulks insists he was persuaded to escape by Basham who had told Mr. Fulks that he knew the whereabouts of Mr. Fulks' stepson. After escaping they remained free for over two weeks and during that time they consumed a large quantity of drugs, including, alcohol, marijuana, crack cocaine, and methamphetamine. Mr. Fulks reported that he was in a state of almost constant anxiety and intoxication during this time period. He had no sense of time and was in constant fear because of Mr. Basham's erratic behavior. Mr. Fulks was also in fear that Basham would cause harm to him or one of the women traveling with them .

10. Mr. Fulks was born into a chaotic family situation. During his early childhood, Mr. Fulks' mother and father consumed large amounts of alcohol and marijuana on a daily basis. His mother drank heavily when she was pregnant with him. Mr. Fulks' brother Ronnie is very short, and is suspected of having fetal alcohol syndrome. Mr. Fulks is believed by some experts to have fetal alcohol syndrome.

11. In his earliest years, Mr. Fulks' home life was also characterized by a great deal of violence. The parents would frequently have physical altercations. Mr. Fulks' father was known to be abusive to Mr. Fulks and his brothers. The father would beat the children with his fists or belts on an unpredictable basis.

12. At one point, Mr. Fulks' parents put a pool table in their home and began to have people over in the evening for parties which were often characterized by fights between various participants. The police were frequently called to control the violence and neither of Mr. Fulks'

parents did much to try to protect the children. Pornography adorned the walls of the pool room, and participants in the partying engaged in various forms of violent and sexual behavior.

13. In addition to being characterized by violence, the Fulks home was also one in which the children were neglected. The children lived in a state of severe poverty and much of the help the family received from public assistance was diverted to alcohol and drug use. Mr. Fulks and his siblings often had to go without food. Mr. Fulks remembers his clothes as having been hand-me-downs that were usually tattered and ugly. He and his siblings were painfully aware that they had to take care of themselves. Part of their self-care was sustained by stealing, an activity which both parents condoned.

14. The situation in the Fulks home was so desperate that when Chad was approximately eleven years old, a local West Virginia newspaper wrote an article about the Fulks family and described the family's extreme poverty and the effect it was having on Mr. Fulks at school. In this article, Mr. Fulks vividly described being teased, cursed, and ostracized because of his poverty.

15. Mr. Fulks did very poorly in school. He failed the first grade and continued to struggle academically until he dropped out of school in the tenth grade. Mr. Fulks exhibited learning disabilities and was placed in special education programs for learning disabled and behaviorally disturbed students.

16. The family situation underwent some change when Mr. Fulks was twelve years old and his mother began attending church. She stopped drinking and decided to dedicate her life to religious activities. Apparently she became so involved with religion that she spent even less time with the children than she had when she was drinking. The children were still left to fend for themselves and wander the streets without any adult supervision.

17. At age thirteen, Mr. Fulks attempted suicide. Further psychiatric treatment was recommended but the family did not follow through. Later that same year, Mr. Fulks lived with his father in Indiana when he was evaluated at a mental health clinic in December 1991. He was diagnosed as having major depression with the possibility of developing an addictive disorder.

18. Mr. Fulks began drinking alcohol, together with his family, at the age of nine or ten. He reported that he would sometimes drink at any hour of the day, including early morning. He began using marijuana about the same time and experimented with LSD when he was approximately fourteen years old. By the time Mr. Fulks was fourteen or fifteen years old, he was using alcohol and marijuana heavily on a daily basis. He was also introduced by his family members to potent moonshine. In addition to these substances, Mr. Fulks has also used cocaine powder, crack cocaine, barbiturates, and methamphetamine.

19. Mr. Fulks also experienced sexual abuse at a young age. A teenage babysitter performed oral sex on him at the age of eight or nine. When Mr. Fulks was approximately twelve or thirteen, he was fondled by the father of one of his friends. At the age of fifteen, Mr. Fulks moved in with a twenty-eight year old woman. Although a child may find such experiences pleasurable, the child is not able to understand the meaning of the intimacy in a situation in which sex is divorced from love. This can lead to an increased likelihood of aberrant sexual activity in the future, including violent sexuality such as rape. Rape is an act of violence and anger toward women. Because Mr. Fulks' mother failed to provide nurturing environment and deprived him of the necessaries life, anger toward women was a probable result.

20. Mr. Fulks reported at least eight events in which he had lost consciousness beginning at age eleven when his brother hit him with a paint can. His experiences with loss of consciousness have been related to accidents, fighting, or car wrecks. He has been troubled by

headaches since the age of thirteen. He was shot in the arm and neck when he was sixteen years old after an altercation during which he was extremely intoxicated. If a person loses consciousness, they have had a concussion. Brain cells are damaged. Concussions are cumulative and lead to brain damage, which is associated with cognitive impairment.

21. Mr. Fulks was married for the first time in 1995 to Amber Fowler. Ms. Fowler gave birth to a child named [redacted] who Chad considered as his son. The child died at age six months from a blunt trauma to his abdomen when his young cousin jumped on him. Mr. Fulks was extremely distressed at the loss of [redacted] There have been long-term effects of this loss, including an increasing use of alcohol and drugs. The excessive drinking and drug use caused the marriage to end. In 2002, Mr. Fulks married Veronica Evans, a stripper with a long history of psychiatric problems. Chad was very fond of Evans' son [redacted] and tried to recapture the relationship he had lost with the death of [redacted]

22. Mr. Fulks has had symptoms of depression throughout much of his adolescence and adult life. He has been treated with a variety of anti-depressant drugs, including Imipramine, Elavil, Zoloft, and Effexor. During the time that I evaluated him he was primarily on Elavil and Zoloft and an anti-anxiety drug, Klonopin. His symptoms of depression generally include sad mood, sleep disturbance, both falling and staying asleep, diet variations, low energy, difficulty concentrating, anxiety and agitation, low self esteem and occasional suicidal thoughts.

23. Mr. Fulks has also complained on a chronic basis of headaches and anxiety attacks. He described panic attacks which are characterized by a tingling feeling in his head and body, difficulty breathing and a rapid heart rate. Sometimes he feels that these attacks will kill him and rushes to the bathroom. He claims to still be experiencing these attacks even though he is taking Klonopin which should help prevent them.

24. Mr. Fulks has been a heavy consumer of medical services when they are available in a correctional setting. Sometimes he has medical complaints which are not accompanied by a physical finding of illness. I believe that he uses his interactions with physicians as a form of dependency, gratification, and nurturance which he does not get in other ways.

25. As previously described, I have reviewed other expert reports in this case. The reports reviewed indicated the presence of serious brain damage, which led to major cognitive impairment. The brain damage was based on either the prenatal environment, head injuries sustained in childhood, or substance abuse.

26. My mental status examination of Mr. Fulks was consistent with the findings of cognitive impairment. Mr. Fulks exhibited problems with concentration, memory, and the ability to provide information in a coherent manner.

27. Mr. Fulks has very low self-esteem. It appears that he is easily taken advantage of by others.

28. Mr. Fulks clearly meets the DSM IV diagnostic requirements for polysubstance dependence, including alcohol, marijuana and amphetamines. At times he meets the diagnostic criteria for Major Depressive Disorder, although because of the variability of his depression the diagnosis of Dysthymic Disorder could also be appropriate. I also believe that on the basis of his neuropsychological testing, his clinical presentation, and history, Mr. Fulks has some type of cognitive disorder and he should be diagnosed as having Cognitive Disorder, Not Otherwise Specified.

29. Mr. Fulks at the time of the crime had a serious mental illness based on his serious depression, anxiety, substance abuse, and the many cognitive difficulties he experienced prenatally and in early childhood. Cognitive impairment and drug use made it difficult for him

to undertake a benefit-risk analysis in the situations where he was at risk of engaging in criminal acts. He also likely lacked understanding how some of these situations were influencing him. The many insults to his brain caused impairment to his executive functions, particularly his ability to control angry feelings.

30. While Mr. Fulks meets the DSM IV criteria for antisocial personality disorder, there are many troubling aspects of this diagnosis. The diagnosis of antisocial personality disorder is based on a description of bad behavior: failure to conform to social norms, deceitfulness, impulsivity or failure to plan ahead, irritability and aggressiveness, reckless disregard for safety of self or others, consistent irresponsibility, and lack of remorse. Six of the seven criteria are behavioral. In my experience, this diagnosis is often used in criminal trials to negate the presence of mental illness rather than to describe the presence of mental illness. The diagnosis does not tell us anything about causation, treatment, or future adjustment. The jury is typically left with the impression that a person is bad, not sick. In effect, there is a circularity in the manner in which this diagnosis is used in the courtroom: the answer to the question of why a person has antisocial personality disorder is that "he behaves badly." If it is then asked conversely why does a person behave badly, the answer is "he has antisocial personality disorder." Rather than using the label of antisocial personality disorder, it is far more scientific to ask the question "what causes this person to behave badly." In the case of Mr. Fulks, major causes of antisocial behavior include prenatal insults, abuse in early childhood, depression, substance abuse., and his many concussions. In fact, all of these traumas and illnesses have left him with moderate to severe brain damage.

31. Because of Mr. Fulks early deprivations and cognitive deficits, he is more likely to be a follower .

32. I have reviewed the testimony of Donna Ward given at Mr. Fulks' sentencing hearing wherein Ms. Ward described a November 17, 2004 phone call allegedly made by Mr. Fulks at a time when Brandon Basham was hiding from the police in the Ohio River. I am further aware that the prosecution used this call to argue that Mr. Fulks, without the aid of Basham, attempted to lure Ms. Ward's daughter out for an alleged job interview. Donna Ward's testimony would not have altered the opinions I was prepared to give at the sentencing hearing. In fact, the Ward incident supports my assessment that Mr. Fulks is cognitively impaired and has difficulty in accessing the benefits, risks, and alternatives to antisocial acts.

33. In accordance with 28 U.S.C.A. § 1746, I declare that under penalty of perjury that the foregoing is true and accurate.

Seymour L. Halleck, M.D.

Signed before me this 9th day of May, 2008

Notary Public for Brian B. Hege
My Commission Expires: Feb. 18, 2013

BRIAN B HEGE
Notary Public
Durham County
North Carolina
My Commission Expires Feb 18, 2013