APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12727

D.C. No. 3:09–cv–0138–CLS–JEO

Thomas Dale FERGUSON, Petitioner-Appellant,
v.
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, Attorney General, State of Alabama, Respondents-Appellees.

Filed: June 7, 2023

Appeal from the United States District Court
for the Northern District of Alabama
C. Lynwood Smith, Jr, District Judge, Presiding

ORDER

Before: BRITT C. GRANT, ROBERT J. LUCK, and CHARLES R. WILSON, CIRCUIT JUDGES.

ORDER

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: June 7, 2023
For the Court: DAVID J. SMITH, Clerk of Court

APPENDIX B

UNITED STATES COURT OF APPEALS
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Filed: June 7, 2023

Appeal from the United States District Court
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C. Lynwood Smith, Jr, District Judge, Presiding

OPINION

Wilson, Circuit Judge:

Thomas Dale Ferguson is an Alabama prisoner serving a death sentence following his jury convictions on four counts of capital murder. After pursuing a direct appeal and post-conviction relief in the Alabama state courts, Ferguson filed a federal habeas petition under 28 U.S.C. § 2254. Ferguson appeals the district court's denial of his federal habeas petition, arguing that the district court did not apply the proper standard for intellectual disability as required by *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and erred in finding Ferguson was not intellectually disabled. Ferguson also contends that the state court's determination that Ferguson's counsel was not ineffective during the pretrial and penalty phases was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). After careful review and with the benefit of oral argument, we affirm.

I. BACKGROUND

A. Guilt Phase

In 1997, an Alabama grand jury indicted Ferguson on four counts of capital murder in connection with the murder of Harold Pugh and his eleven-year-old son, Joey Pugh. *Ferguson v. State*, 814 So. 2d 925, 933 (Ala. Crim. App. 2000) (*Ferguson I*). The murder of the Pughs constituted four capital counts because the killings were committed during a robbery in the first degree (two counts); the killings involved the murder of two or more persons by one scheme or course of conduct; and Joey was less than

fourteen years old at the time of his death. *See* Ala. Code § 13A-5-40(a)(2), (10), (15) (1975).

On July 26, 1997, Ferguson and his four codefendants—Mark Moore, Michael Craig Maxwell, Donald Risley, and Kino Graham—robbed a bank in Mississippi. *Ferguson I*, 814 So. 2d at 934. Prior to robbing the bank, they went looking for a getaway vehicle at a local boat landing. *Id.* at 935. Ultimately, they decided to steal a truck belonging to Harold Pugh. *Id.* As Harold and Joey arrived at the boat landing, Maxwell ordered the Pughs back onto their boat. *Id.* After getting on the boat and heading downstream, Ferguson shot Harold and Maxwell shot Joey. *Id.* at 937. The jury found Ferguson guilty on all four counts of capital murder. *Id.* at 933.

B. Sentencing

During the sentencing phase, Ferguson called Dr. James Chudy, a clinical psychologist who had evaluated Ferguson for the sentencing phase. Dr. Chudy testified that Ferguson was not intellectually disabled but that Ferguson's IQ was likely in the borderline range. *Id.* at 962. Further, Dr. Chudy testified that

> this borderline intelligence could possibly impair Ferguson's "reasoning in social situations"; that it could affect his ability to "reason abstractly"; and that it could "diminish to a degree" his ability to appreciate the consequences of his actions. In addition, Dr. Chudy diagnosed Ferguson as having a "personality disorder" with borderline features. Dr. Chudy stated that this disorder could result

> in mood swings that could affect Ferguson's relationships. Dr. Chudy also stated that Ferguson may have some "transient or brief " psychotic periods where he is "out of touch with reality." However, in his written report, Dr. Chudy stated that Ferguson's claims of psychotic episodes—i.e., hearing voices that told him to do things to other people and having hallucinations of people and objects moving—were "difficult to substantiate" and that the accuracy of those claims "remains in question." Dr. Chudy also stated in his report that there were "no signs of disturbance in [Ferguson's] thinking"; that Ferguson was not psychotic; and that Ferguson's thinking was merely "illogical."

Id. at 962–63.

Ferguson also called his wife, Karen Ferguson. She testified that they were married in November 1992, that Ferguson had a job most of the time they were married, and that Ferguson was not violent. Karen also testified that Ferguson was mentally slow, and that she made all the decisions in their marriage, often telling Ferguson what to do.

On rebuttal, Alabama called Dr. Stephen Rosen, a clinical psychologist, who examined Ferguson before trial pursuant to a court order. Dr. Rosen testified that Ferguson was not intellectually disabled despite his IQ score of 69, but Ferguson's IQ was likely in the borderline range. *Id.* at 963. Further, Dr. Rosen testified that

> Ferguson first told him that he did not do it and then said that he was an unwilling participant;

> by the end of the evaluation, however, Ferguson was claiming that voices had told him to commit the crime. Dr. Rosen stated that during the evaluation Ferguson attempted to give him "the impression that he was more disturbed than in fact he was" by exaggerating and claiming symptoms he believed to be signs of a mental disorder—specifically, by claiming that he heard voices and saw "little green men [who] were laughing and telling him to do things." Dr. Rosen, like Dr. Chudy, also diagnosed Ferguson as having a personality disorder and stated that the disorder could result in mood swings, antisocial traits, and perhaps some transient or temporary episodes where Ferguson is "out of touch with reality."

Id.

Alabama argued the existence of one aggravating circumstance: the capital offense (murders) was committed during a robbery. Ferguson argued the existence of five mitigating circumstances, including his character. Ferguson presented evidence of his character—his school records, his relationship with his father (who was actually his stepfather), and his low IQ. After hearing all the testimony and considering the evidence, the jury recommended, 11 to 1, a sentence of life in prison without the possibility of parole.[1]

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[1] In a capital case, Alabama now requires that the jury's sentencing verdict binds the trial court and is no longer a recommendation to be overridden by the judge. Ala. Code § 13A-5-47(a) ("Where the jury has returned a verdict of death, the court shall sentence the defendant to death. Where a sentence of

At sentencing, the trial judge found one statutory aggravating circumstance: the murders were committed while Ferguson was engaged in a robbery. The trial judge found one statutory mitigating circumstance: Ferguson had no significant history of prior criminal activity. The trial judge did find the following evidence to be mitigating: (1) Ferguson's surrender and confession to authorities, and (2) the jury's recommendation of life imprisonment. Yet when discussing the jury recommendation, the trial court found that Ferguson's age at the time of the crime (24) was not a mitigating circumstance.

Ultimately, the trial court overruled the jury's vote and sentenced Ferguson to death. The trial judge explained:

> The Court does find that there is a reasonable basis for enhancing the jury's recommendation of life imprisonment without parole for the reasons stated herein, and this was a murder of a[n] adult man and his young son during a robbery, and [Ferguson] had the opportunity to reflect and withdraw from his actions and chose not to do so; that [Ferguson's] capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired.

Ferguson appealed, and relevant to this appeal, he argued that the trial court erred in not finding as a

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death is not returned by the jury, the court shall sentence the defendant to life imprisonment without parole.").

nonstatutory mitigating circumstance that he was intellectually disabled. *Ferguson I*, 814 So. 2d at 965. The Alabama Court of Criminal Appeals (ACCA) noted that "the trial court did refer to the evidence of Ferguson's low intelligence in several parts of its sentencing order." *Id.* The ACCA found that the "trial court did not err in not finding, as a nonstatutory mitigating circumstance, that Ferguson was" intellectually disabled because there was no evidence in the record to support that finding. *Id.* Ultimately, the ACCA affirmed Ferguson's conviction and death sentence. *Ferguson I*, 814 So. 2d at 970.

The Supreme Court of Alabama reviewed Ferguson's petition and found that there was no error in the ACCA's opinion. *Ex parte Ferguson*, 814 So. 2d 970, 975 (Ala. 2001). The United States Supreme Court denied Ferguson's petition for a writ of certiorari. *Ferguson v. Alabama*, 535 U.S. 907, 122 S.Ct. 1208, 152 L.Ed.2d 145 (2002).

C. State Post-Conviction Proceedings

In March 2003, Ferguson petitioned for a writ of habeas corpus in state trial court, also called a Rule 32 petition in Alabama. Although Ferguson made several claims in his Rule 32 petition, this section only discusses the issues involved in this appeal. First, Ferguson argued that he is intellectually disabled and thus constitutionally protected from being sentenced to death under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). To support the first prong of his *Atkins* claim, Ferguson pointed to his full-scale IQ score of 71 when he was in the sixth grade and his full-scale IQ score of 69 when he was awaiting

trial. Ferguson then detailed how he established at trial that he had severe limitations in adaptive functioning, including being placed in special educational programs at school.

Then, Ferguson also asserted many ineffective assistance of counsel claims, both at the pretrial and sentencing phases. For the pretrial stage, Ferguson argued that his counsel was ineffective for failing to act in his interest by providing inadequate representation during his statement to the police. Specifically, Ferguson asserted that his trial counsel failed to adequately advise him of his rights and encouraged Ferguson to talk to the police even without a plea deal. Ferguson also argued that his trial counsel failed to conduct an adequate independent investigation. To support his argument, Ferguson stated that his trial counsel had minimal contact with his family, failed to investigate the other suspects, and did not gather evidence to support his mental health defense.

For the sentencing phase, Ferguson argued that trial counsel was ineffective for failing to adequately investigate and present mitigation evidence. Relevant to this appeal, Ferguson argued that his trial counsel failed to contact and interview people who had knowledge about the abuse Ferguson suffered at the hands of his stepfather. Ferguson detailed his family history and explained how his stepfather routinely abused Ferguson's mother, Betty, and his half-brothers. Ferguson explained that witnesses would have testified about how his stepfather beat Betty to the point that she attempted suicide, which led to her institutionalization. Ferguson argued that if his trial counsel had

interviewed these witnesses, they would have been able to present a stronger, more sympathetic argument during the mitigation phase of sentencing.

In October 2006, the state trial court denied Ferguson's request for an evidentiary hearing and summarily denied his Rule 32 petition. In addressing Ferguson's *Atkins* claim, the trial court discussed Ferguson's IQ scores and how he often gave up easily on those tests, which resulted in lower scores. The trial court also stated that the expert opinions both concluded that Ferguson was not intellectually disabled. Ultimately, the trial court concluded that Ferguson's IQ was "best classified as borderline to low average intellectual functioning."

The trial court then moved on to discuss the evidence about whether Ferguson exhibited significant or substantial deficits in adaptive functioning. The trial court reviewed Ferguson's work history, including a promotion, and then discussed Ferguson's ability to develop relationships, including his marriage and his actions during and after the crime. After considering all the evidence, the trial court found that Ferguson "demonstrated a high level of adaptive functioning." Thus, the trial court found that "Ferguson does not meet either the intelligence or adaptive functioning elements necessary to establish" intellectual disability, and thus he was not intellectually disabled.

The trial court also found that Ferguson's ineffective assistance claim that his counsel should have prevented him from making inculpatory statements to police lacked merit. Specifically, the trial court found that, based on the transcript of Ferguson's confession, Ferguson initially contacted

the police to give his statement, and his lawyer advised Ferguson of his right to remain silent and of the possible consequences of speaking. Next, the trial court found Ferguson's arguments that his counsel failed to conduct an adequate independent investigation to be insufficiently pleaded under Alabama Rule of Criminal Procedure 32.6(b).

Turning to Ferguson's penalty phase arguments, the trial court found that Ferguson could not demonstrate deficient performance or prejudice as required by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Specifically, the trial court explained that "[t]rial counsel's investigation of Ferguson's case and presentation of mitigating evidence was more than reasonable in light of the circumstances of the case. The reasonableness of trial counsel's mitigation strategy is supported by the jury's 11 to 1 recommendation of life without parole." The trial court went through Ferguson's allegations about his childhood abuse and how that information was already in the record through Dr. Chudy's notes and Karen's testimony. The trial court also explained that "[e]ven if the Court assumed that the allegations in the petition are true and that counsel could have presented additional witnesses to testify regarding Ferguson's abuse as a child, ... the evidence would be nothing more than cumulative to that already presented." The trial court also agreed with the sentencing judge who determined that Ferguson's "difficult childhood" was not a mitigating factor. Specifically, the trial court noted that

> Ferguson was 24 years old at the time of the crime. He had been married for five years and was able to support himself and

> his wife while she attended nursing school. Under the circumstances of this case, the petitioner's allegations of child abuse and borderline intellect, even if true, would not mitigate his actions as an adult.

In April 2008, the ACCA affirmed the state trial court's decision. *Ferguson v. State*, 13 So. 3d 418, 445 (Ala. Crim. App. 2008) (*Ferguson II*). In regard to Ferguson's *Atkins* claim, the ACCA reviewed the record of both Ferguson's direct criminal appeal and post-conviction proceedings and then re-stated verbatim the trial court's findings from Ferguson's post-conviction proceedings. *Id.* at 433–36. Ultimately, the ACCA concluded that "the circuit court's findings are more than supported by the record." *Id.* at 435–36. The ACCA found that Ferguson was not intellectually disabled. *Id.* at 436.

Next, the ACCA reviewed Ferguson's ineffective assistance claims. First, as to Ferguson's claim that his counsel was ineffective during Ferguson's statements to the police, the ACCA found the trial court's dismissal of that claim proper. The ACCA noted that the day after Ferguson's arrest, he spoke with the police alongside his counsel, Tony Glenn. *Id.* at 437–38. The ACCA reprinted the following exchange between Glenn and Ferguson:

> Mr. Glenn: Dale, you called me earlier today and you told me that you wanted to try and help yourself with the Colbert County Sheriff's Department and the FBI on these charges that are here pending today. You had information you thought would help them. You realize that I have gone over with you your rights and told you that you don't have to talk, but it is your—

> but you have informed me that you choose to help at this point to try to help yourself; is that correct?
>
> Mr. Ferguson: Yes, sir.
>
> Mr. Glenn: Do you realize that there are no deals at this point?
>
> Mr. Ferguson: Yes, sir.
>
> Mr. Glenn: That what you are doing is voluntary and you are doing it to try to help yourself in furtherance—
>
> Mr. Ferguson: Yes, sir.
>
> Mr. Glenn: —of this; is that correct?
>
> Mr. Ferguson: Yes, sir.
>
> Mr. Glenn: And this is what you want to do?
>
> Mr. Ferguson: Yes, sir.
>
> Mr. Glenn: And do you realize that this is on the record, this tape that we are making here today can and will more than likely be used in court?
>
> Mr. Ferguson: Yes, sir.
>
> Mr. Glenn: Okay. With that, do you want to go forward?
>
> Mr. Ferguson: Yes, sir.

Id. at 438. Following this exchange, Ferguson ultimately confessed. *See id.*

In reviewing the above exchange, the ACCA noted that Ferguson himself suggested that he make the inculpatory statement to the police, not Ferguson's counsel. *Id.* The ACCA adopted the trial

court's finding that Ferguson's statements were voluntarily made and concluded that his attorney, Glenn, could not "be held ineffective for the informed and voluntary choices of [his] client." *Id.* at 438–39.

When pursuing his clam that his trial counsel failed to conduct an adequate independent investigation, Ferguson argued that "[t]rial counsel's performance was also objectively deficient, for many reasons and including the unavailability of sufficient funds for a thorough defense." *Id.* at 439. Then, the ACCA addressed:

> In a footnote, he then purports not to waive any claim presented in his petition or apparent from the record. However, he does not set forth any facts or argument in support of his bare contention. Rather, he simply moves to his next ineffective-assistance allegation. Therefore, he has not complied with the requirements set forth in Rule 28(a)(10), Ala. R. App. P., as to this allegation.

Id.

Last, as to Ferguson's ineffective assistance claim, the ACCA again repeated the findings from the trial court and adopted them as part of the ACCA's opinion finding that summary dismissal was proper. *Id.* at 439–43.

In January 2009, the Supreme Court of Alabama denied Ferguson's petition for certiorari.

D. Federal § 2254 Proceedings

In 2009, Ferguson filed a federal habeas petition in the Northern District of Alabama. Relevant

to this appeal, Ferguson challenged the state court's failure to give him an *Atkins* hearing on his intellectual disability claim and the state court's determination on his ineffective assistance of counsel claims. The district court denied Ferguson's petition on all grounds.

Ferguson then moved to amend the judgment because, among other reasons, courts cannot rely on "pre-*Atkins* evidence to determine if a petitioner qualifies for relief under *Atkins*." The district court granted Ferguson's request and vacated the portion of its prior order regarding Ferguson's *Atkins* claim.

On August 27, 2019, the district court held an evidentiary hearing on Ferguson's *Atkins* claim and heard from two experts. Ferguson retained Dr. Robert Shaffer to evaluate his "cognitive and intellectual functions, and his adaptive behavior" to determine whether Ferguson was intellectually disabled and thus ineligible for the death penalty. Alabama retained Dr. Glen King "to primarily determine the intellectual ability of " Ferguson.

To prevail on his *Atkins* claim, Ferguson had to prove that he had significantly subaverage intellectual functioning (IQ of 70 or below), substantial deficits in adaptive behavior, and the manifestation of those problems before Ferguson reached the age of 18. *See Smith v. State*, 213 So. 3d 239, 248 (Ala. 2007). At the hearing, the district court also heard about Ferguson's prior IQ scores, received prior expert reports about Ferguson's intellectual disability, and reviewed Ferguson's school reports, which included prior IQ testing. The next paragraphs lay out in chronological order the evidence Ferguson

presented to the district court to support his *Atkins* claim.

In November 1979, Ferguson obtained a full-scale IQ score of 77 on the Stanford-Binet Intelligence Scale (Binet). Before the 1985–1986 school year, Ferguson was evaluated for special education services because of a "lack of academic progress, suspected learning disability, deficient reading skills, and deficient handwriting skills." Using the Wechsler Intelligence Scale for Children-Revised (WISC-R), Ferguson achieved a verbal IQ score of 74, a performance IQ score of 71, and a full-scale IQ score of 71. The evaluator noted that Ferguson "gave up easily on both verbal and non-verbal items," and he "did not appear to be challenged by the more difficult items on the test." Using the results, the school found Ferguson was eligible for special services as "educationally mentally handicapped." Within the report, the evaluator explained that Ferguson's prior IQ score of 77 on the Binet was consistent with his current WISC-R score.

In 1988, pursuant to school policy, the school re-evaluated Ferguson, and he achieved a verbal IQ score of 87, performance IQ score of 88, and a full-scale IQ score of 87. As a result, the school moved Ferguson to normal classes, but he received special assistance such as receiving help with certain subjects, having more time to take a test, or having someone read the test to him.

In December 1997, Dr. Rosen administered the Wechsler Adult Intelligence Scale-Revised (WAIS-R), and Ferguson achieved a verbal IQ score of 76, a performance IQ score of 66, and a full-scale IQ score of 69. But Dr. Rosen noted that it was "quite apparent

that [Ferguson] did not make a good effort in this test, giving up readily on many items and seemingly not trying as hard as possible." At Ferguson's criminal trial, Dr. Rosen expounded on Ferguson's lack of effort by noting that Ferguson's assessment revealed a "somewhat inconsistent pattern" where he would get the earlier, simpler questions wrong but would then get later, harder questions right. Dr. Rosen testified that he did not see any signs of intellectual disability, but that Ferguson's intellectual abilities were below average—in the borderline intellectual functioning range with an IQ between 70 and 84. Dr. Rosen testified that if Ferguson had "really tried [then] he would have scored probably in the middle 70's for most of them, perhaps higher."

In June 1998, after conducting a psychological evaluation, Dr. Chudy did not provide a specific IQ score but noted that the Shipley Institute of Living Scale placed Ferguson in the borderline intellectual range at about the fifth percentile. Dr. Chudy also testified that borderline intellectual functioning covers "the area between low average intelligence and" intellectual disability.

In preparation for the evidentiary hearing, between September 2017 and March 2018, Dr. Shaffer met with Ferguson and interviewed Ferguson's mother, Betty. Dr. Shaffer administered the Wechsler Adult Intelligence Scale-Fourth Edition (WAIS-IV), and Ferguson received a full-scale IQ score of 77. But after applying the Flynn Effect[2] and the standard

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[2] The Flynn Effect refers to findings by Dr. James Flynn that average IQ scores have increased steadily by roughly .3 points every year since the IQ test was normed. Thus, when applying the Flynn Effect, the evaluator looks at when the test was

error of measurement (SEM),[3] Dr. Shaffer explained that Ferguson's IQ fell between 69.4 and 78.4 with 95% probability, or between 67.9 and 78.9 with a confidence level of 99%. Dr. Shaffer determined that the totality of the test scores aligned with his opinion that Ferguson has significant limitations in his ability to function intellectually, despite some tests not showing substantial impairments. As for adaptive functioning, Dr. Shaffer administered the Vineland Adaptive Behavior Scales Test (Vineland)[4] to Betty Ferguson because she could provide observations of Ferguson at the age of 18. Considering Betty's responses about Ferguson at the age of 18, Ferguson's Vineland scores showed 67 in communication, 67 in daily living skills, and 68 in socialization, giving him a composite score of 63. This placed him in the first percentile, meaning that 99 percent of comparable eighteen-year-olds had greater skills and abilities to perform daily routines than Ferguson did at the age of 18. Dr. Shaffer concluded that those findings justified an intellectual disability diagnosis.

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normed (approximately mid-2007 for the Wechsler Fourth Edition) and when the test was administered (September 2017), then determines the difference (here 10.2 years), and subsequently multiplies it by .3 (the annual increase) to get a set number (3.06), which is subtracted from the full-scale IQ score (77). So Ferguson's September 2017 full-scale score of 77 would be reduced by 3.06 points to 73.94 if adjusted for the Flynn Effect.

[3] The SEM typically involves a range from five below to five above the set IQ. This provides a range for the IQ score, which likely gives a better estimate than a fixed number for the person's IQ.

[4] The Vineland looks at three domains of adaptive behavior: communication skills, daily living skills, and social skills. Typically, the Vineland is administered to parents, caregivers, or teachers rather than the person whose IQ is at issue.

In February 2018, Dr. King evaluated Ferguson and administered the WAIS-IV and the Stanford-Binet Intelligence Test, Fifth Edition (SB-5). Ferguson received a score of 85 on the WAIS-IV and a score of 84 on the SB-5. Dr. King adjusted Ferguson's score on the WAIS-IV using the SEM, providing a range of 81 to 89. Dr. King administered the Adaptive Behavior Assessment System where Ferguson rated his own abilities on whether he could perform several tasks. Ferguson highly rated his ability to complete the identified tasks. Dr. King also administered the Independent Living Scales, which measures practical abilities of managing money, health and safety, social adjustment, and problem solving. Dr. King testified about Ferguson's performance on the test and noted his belief that Ferguson did not have subaverage intellectual functioning and that there was no indication of poor adaptive functioning (only lower social adjustment which is expected from being on death row).

After the evidentiary hearing, the district court denied Ferguson's request for relief, concluding that Ferguson failed to establish by a preponderance of the evidence that he has an intellectual disability. The district court gathered and identified all of Ferguson's IQ scores, as detailed below:[5]

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[5] This chart comes from the district court's order but does not contain the column listing when the IQ tests were normed, nor does it contain the corresponding footnotes. We have also adjusted the 2018 SB-5 score to correct an error recognized by the district court in a subsequent order—the court initially reduced the SB-5 score for "practice effect," but later acknowledged that the practice-effect reduction applied only to the 2018 WAIS-IV score. Of note, the district court correctly identified the years the tests were normed but still made

Test Date	IQ Test Given	Full Scale	Flynn Effect	SEM Range
1979	SB-3	77	75.2	70.2–80.2
1985	WISC-R	71	67.7	62.7–72.7
1988	WISC-R	87	82.2	77.2–87.2
1997	WAIS-R	69	64.2	59.2–69.2
2017	WAIS-IV	77	74.3	69.3–79.3
2018	WAIS-IV	78	75.15	70.15–80.15
	SB-5	84	79.6	74.6–84.6

The district court reduced the 2018 WAIS-IV IQ score by 7 points for practice effect[6] because Dr. King re-administered the same test Dr. Shaffer administered five months earlier.

Considering his evaluators also noted that Ferguson did not try on some of his IQ tests (specifically the ones where he scored below 70), the

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mathematical errors when calculating the Flynn Effect. *See supra* n. 2. Ferguson does not argue these errors nor do they make a difference in our ultimate decision. Thus, we use the calculation provided by the district court.

[6] In citing a 2012 study, the district court explained that when "the WAIS-IV was re-administered at three or six months after the initial, baseline administration of that test, [the study] found that their Full-Scale IQ score increased an average of 7 points."

district court found that Ferguson did not suffer from "*significantly* subaverage intellectual functioning." As for adaptive behavior, the district court found that Ferguson failed to show "substantial *present* limitations" in adaptive functioning and that most of the evidence produced focused on the time before and during Ferguson's trial. The district court did not address whether his IQ scores and deficits in adaptive functioning manifested before Ferguson reached 18-years-old.

Ferguson timely appealed the district court's denial of habeas relief. First, Ferguson argues that the district court clearly erred in finding that he was not intellectually disabled. Second, Ferguson argues that his trial counsel was ineffective at multiple stages of his case and thus the ACCA's decision is an unreasonable application of *Strickland*. We will address each argument in turn.

II. INTELLECTUAL DISABILITY CLAIM

Ferguson argues that the district court erred in two ways concerning his *Atkins* claim. [7] First,

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[7] In its order granting Ferguson's motion to alter or amend the judgment as to his *Atkins* claim, the district court, citing *Burgess v. Commissioner, Alabama Department of Corrections*, 723 F.3d 1308, 1317 (11th Cir. 2013), agreed with Ferguson's argument that it was an unreasonable application of *Atkins* to consider potential mitigation information produced before the *Atkins* decision to determine whether Ferguson is intellectually disabled. Not until oral argument when this court asked Alabama whether the district court erred in having an evidentiary hearing did Alabama contest the district court's order setting and conducting an evidentiary hearing. But Alabama's argument in response was conclusory at best. Here, we make no determination about whether the district court erred

Ferguson argues that the district court erred in requiring him to show that he *presently* suffered from substantial deficits in adaptive functioning at the time of his *Atkins* hearing, which occurred over twenty years after the crime. Second, regardless of the standard, Ferguson argues that the district court clearly erred in finding him not intellectually disabled.

"A determination as to whether a person is [intellectually disabled] is a finding of fact." *Fults v. GDCP Warden*, 764 F.3d 1311, 1319 (11th Cir. 2014). "We review for clear error a district court's finding that an individual is not intellectually disabled." *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 632 (11th Cir. 2016). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)).

In *Atkins*, the Supreme Court held that the execution of intellectually disabled people violates the Eighth Amendment, leaving to the individual states "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." 536 U.S. at 317, 122 S.Ct. 2242. But the Supreme Court noted that "clinical definitions of [intellectual disability] require not only subaverage

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in holding an evidentiary hearing and reviewing Ferguson's *Atkins* claim de novo, and we will only review the district court's finding that Ferguson is not intellectually disabled.

intellectual functioning, but also significant limitations in adaptive skills" that manifested before the age of 18. *Id.* at 318, 122 S.Ct. 2242.

In *Ex Parte Perkins*, the Supreme Court of Alabama discussed the Supreme Court's decision in *Atkins* and how the broadest definition of intellectual disability requires the prisoner to prove: (1) significantly subaverage intellectual functioning (IQ below 70), (2) significant deficits in adaptive functioning, *and* (3) that both issues manifested before the age of 18. 851 So. 2d 453, 456 (Ala. 2002). Later in *Smith*, Alabama formally adopted the broadest definition and requires that "in order for an offender to be considered [intellectually disabled] in the *Atkins* context, the offender must currently exhibit subaverage intellectual functioning, currently exhibit deficits in adaptive behavior, and these problems must have manifested themselves before the age of 18." 213 So. 3d at 248.

Turning to Ferguson's arguments, he contends that by requiring a showing of *present* deficits in adaptive functioning, Alabama's standard for determining intellectual disability conflicts with *Atkins* and is thus unconstitutional. Regardless of the validity of Alabama's requirement that Ferguson must demonstrate substantial *present* limitations in adaptive functioning, under *Smith*, Ferguson also has to show he possessed significantly subaverage intellectual functioning. Because the district court found Ferguson at no point had subaverage intellectual functioning, and because Ferguson has not shown the district court clearly erred in making that finding, we need not address whether requiring

present significant deficits in adaptive functioning runs afoul of *Atkins*.

We now turn to Ferguson's argument about his intellectual functioning. Specifically, Ferguson argues that when considering all his IQ scores, including when adjusted for the Flynn Effect and after the SEM has been applied, he has significantly subaverage intellectual functioning. We disagree.

After reviewing all the evidence, the district court found that when adjusted for the Flynn Effect, all but two of Ferguson's IQ scores were above 70, the rough cutoff for intellectual disability. The two IQ scores below 70 were the 1985 IQ test (score of 67.7) and the 1997 IQ test (score of 64.2). The district court discounted those two scores based on evidence that Ferguson did not put forth his best effort on those tests. Because we have held that the trier of fact can discount IQ scores when there is evidence of malingering, *Clemons v. Comm'r, Alabama Department of Corrections*, 967 F.3d 1231, 1248 (11th Cir. 2020),[8] we cannot say that the district court's factual finding about Ferguson's IQ scores is clearly erroneous.

Ferguson asserts that we should find the district court clearly erred in discounting the two sub-70 scores because the remaining tests, including the most recent ones, showed that Ferguson put in the appropriate effort. Ferguson's argument misses the mark. Ferguson wants us to require the district court

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[8] Although *Clemons* involved reviewing the petitioner's *Atkins* claim through the lens of the Antiterrorism and Effective Death Penalty Act of 1996, we see no reason why a district court, sitting as the trier of fact, should not be allowed to discount IQ scores when there is evidence of malingering.

to impute his legitimate effort expended on later tests to all of his tests. This would be an error—just like it would have been an error had the district court imputed the malingering accusations onto all of Ferguson's IQ scores. Rather, the district court properly reviewed each IQ score and any notes from the corresponding evaluator to weigh whether to credit those scores. Both challenged tests included notations from the evaluators about Ferguson's lack of effort, and the district court weighed those records, including Dr. Rosen's credentials, to determine whether he could have reasonably arrived at his conclusion. *See Clemons*, 967 F.3d at 1248. We find that the district court took the correct approach, and the record supports its finding.

After the SEM is applied, only one other test has a range that falls below 70: the 2017 IQ test.[9] But, importantly, the SEM "is merely a factor to consider when assessing an individual's intellectual functioning—one that may benefit or hurt that individual's *Atkins* claim, depending on the content and quality of expert testimony presented." *Ledford*, 818 F.3d at 640–41.

We find that the district court committed no clear error in its consideration of those IQ scores and the SEM range associated with those scores. Ferguson's 2017 IQ score of 77 would yield a SEM IQ range (after being adjusted for the Flynn Effect) of

[9] Although the 1985 and 1997 IQ scores would produce a range below 70, we need not address the SEM range for those tests because we found that the district court properly discredited those IQ scores based on malingering.

69.3–79.3.[10] The other four scores considered by the district court ranged from just above 70 at the low end of the SEM range to 87.2 at the high end. The experts disagreed as to whether Ferguson's intellectual functioning may be higher or lower than his overall IQ score reflected. For example, the trial experts—one appointed by the court and one called by Ferguson—testified that Ferguson's intellectual functioning was above the disabled range. Twenty years later, at the evidentiary hearing, Dr. Shaffer explained there was a 95% probability that Ferguson's full scale IQ score was between 69.4–78.4. As a result, Dr. Shaffer found that Ferguson had significantly subaverage intellectual functioning because his IQ could be less than 70. But Dr. King testified that, considering Ferguson's IQ scores and the SEM ranges, Ferguson's IQ placed him at either the high end of the borderline range (70–84) or at the low end of the average range (85–115). In ultimately concluding that Ferguson had not shown significantly subaverage intellectual functioning, the district court credited Dr. King's testimony over Dr. Shaffer, which is plausible in light of the record. *See Ledford*, 818 F.3d at 641 ("So long as the district court's findings regarding how the standard error of measurement informs its ultimate intellectual functioning determination are plausible

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[10] The district court, as we explained earlier, discounted Ferguson's IQ scores based on the Flynn Effect and (as to the 2018 WAIS-IV score) the practice effect. For clarity, we repeat what we've said in other cases: while a factfinder *may* consider both effects in assessing an offender's possible intellectual disability (if there's evidence to support them), it is *not required* to consider them. *See Jenkins v. Comm'r, Ala. Dep't of Corr.*, 963 F.3d 1248, 1276 (11th Cir. 2020); *Raulerson v. Warden*, 928 F.3d 987, 1008 (11th Cir. 2019); *Ledford*, 818 F.3d at 638–39.

in light of the record evidence viewed in its entirety, there will be no clear error.").

* * *

Because the district court's finding that Ferguson is not intellectually disabled is plausible in light of the entire record, it is not clearly erroneous. *See Anderson,* 470 U.S. at 573–74, 105 S.Ct. 1504 ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."). We therefore affirm the district court on this point.

III. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Ferguson argues that his trial counsel was ineffective during both the pretrial and sentencing stages of his case. The ACCA denied Ferguson's ineffective assistance of counsel claims, so our review is subject to the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2554 (AEDPA). *See Lynch v. Sec'y, Fla. Dep't of Corr.*, 776 F.3d 1209, 1217 (11th Cir. 2015).

Under AEDPA, a federal court can grant relief to a state prisoner *only* if he shows that the state court's determination of his claim resulted in a decision that was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence

presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2).

Here, Ferguson argues that the ACCA's decision is an unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, we will only review whether the ACCA unreasonably applied *Strickland* under § 2254(d)(1).

A state habeas court's decision is an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). "To satisfy this high bar, a habeas petitioner is required to show that the state court's ruling ... was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Woods v. Donald*, 575 U.S. 312, 316, 135 S.Ct. 1372, 191 L.Ed.2d 464 (2015) (per curiam) (internal quotation marks omitted).

To succeed on an ineffective assistance of counsel claim, a criminal defendant must show: (1) that his lawyer rendered deficient performance, such that he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment," and (2) that those errors prejudiced the defense, such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 687, 694, 104 S.Ct. 2052. As the Supreme Court described it, a "reasonable

probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

As to deficient performance, courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. 2052. "To overcome that presumption, a defendant must show that counsel failed to act reasonably considering all the circumstances." *Cullen v. Pinholster*, 563 U.S. 170, 189, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (alteration adopted and internal quotation marks omitted). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," but, importantly, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91, 104 S.Ct. 2052. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691, 104 S.Ct. 2052.

As noted above, to establish prejudice, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case"; he need only show a reasonable probability of a different outcome, which requires a showing "sufficient to undermine confidence in the outcome." *Id.* at 693–94, 104 S.Ct. 2052. A court deciding an ineffectiveness claim need not "address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697, 104 S.Ct. 2052.

Ferguson argues that his trial counsel erred at both the pre-sentencing phase and the penalty phase. We will address each phase, and Ferguson's arguments under each, in turn.

A. Pre-Sentencing Phase

Ferguson argues that his trial counsel erred in two ways during the pre-sentencing phase. First, Ferguson's trial counsel was ineffective for not acting in Ferguson's best interest during Ferguson's statement to law enforcement. Second, Ferguson's trial counsel was ineffective for failing to conduct an adequate pretrial investigation into Ferguson's mental health evidence and possible intellectual disabilities for the guilt phase.

i. Confession

Ferguson argues that, for two reasons, his trial counsel was ineffective at the time he gave his statements to law enforcement, and that, as a result, he was prejudiced to an extent sufficient to warrant relief under *Strickland*.

First, Ferguson argues that his trial counsel was deficient for letting him speak with law enforcement shortly after his arrest. As discussed above and as the ACCA noted, Ferguson called his counsel, Glenn, to set up a time for Ferguson to give a statement to police. Then Glenn explained that there was no deal on the table and that any statements made would be used against Ferguson. As the ACCA noted, Ferguson conveyed that he understood his

rights and wanted to move forward with the statement.

Ferguson has failed to show how the ACCA unreasonably applied *Strickland*. Ferguson attempts to argue that his attorney should have instructed him to remain silent absent a deal. But as the ACCA noted, Ferguson requested the meeting where Glenn appeared at the confession with Ferguson and explained Ferguson's rights to him. Glenn then explained that there were no deals on the table and that Ferguson's statements would likely be used in court—important information to help Ferguson decide whether to move forward with speaking to the police. As the ACCA noted, and confirmed by the transcripts, Ferguson understood those rights and still made the decision to proceed after speaking with Glenn. *Ferguson II*, 13 So. 3d at 438.

Ferguson argues that an attorney renders ineffective assistance when, without doing proper due diligence, counsel fails to properly advise their client of their right to remain silent or move to suppress an improper confession. Specifically, Ferguson points to two cases in which this court has found counsel to be ineffective for failing to suppress a confession. *See Smith v. Wainwright*, 777 F.2d 609, 616–20 (11th Cir. 1985) (*Smith I*); *Smith v. Dugger*, 911 F.2d 494, 497–98 (11th Cir. 1990) (*Smith II*). But Ferguson's reliance is misplaced. Both cases involved the same defendant making confessions *without* counsel present, and counsel subsequently failing to move to suppress the illegally coerced information. *See Smith I*, 777 F.2d at 610, 618; *Smith II*, 911 F.2d at 495–96, 498. Here, Glenn was present during the confession and properly informed Ferguson of his rights. In fact, Ferguson

contacted Glenn to make the voluntary choice to speak with police, which was reaffirmed by Ferguson after hearing his rights. By informing Ferguson of his rights and the likelihood that his confession would be used against him, Glenn was sufficiently "functioning as the 'counsel' guaranteed [to Ferguson] by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Thus, the ACCA's determination that Glenn "cannot be held ineffective for the informed and voluntary choices" of his client is not an unreasonable application of *Strickland*. *Ferguson II*, 13 So. 3d at 439.

Second, Ferguson argues that his counsel was deficient for failing to step in when law enforcement allegedly pressured him to change his story. But Ferguson did not fairly present this argument to the district court in his habeas petition.[11] *See Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1352 (11th Cir. 2009) (noting that an argument that is not fairly presented to the district court will not be considered on appeal). In his counseled federal habeas petition, Ferguson never mentions the alleged pressure from law enforcement but mainly argues that Glenn "failed to counsel adequately and represent vigorously his client's interest ... during Mr. Ferguson's alleged 'confession' on August 12, 1997." Ferguson's attorneys did not expressly designate the issue as a distinct claim for relief, nor did they specifically argue that the ACCA unreasonably applied *Strickland*. Thus, we will not consider Ferguson's argument on whether his counsel was deficient for not intervening during

[11] We note that Ferguson did raise this issue (although in a conclusory manner) in his state habeas petitions, despite the Commissioner's arguments to the contrary.

Ferguson's confession when police allegedly pressured him to change his story.

Because Ferguson has failed to show that his counsel was deficient in how he handled Ferguson's confession, we need not address his prejudice argument. *See Strickland*, 466 U.S. at 697, 104 S.Ct. 2052 (explaining that a court considering an ineffectiveness claim need not "address both components of the inquiry if the defendant makes an insufficient showing on one"); *see also Conner v. GDCP Warden*, 784 F.3d 752, 766–67 (11th Cir. 2015) (following *Strickland* and only addressing one prong because it disposed of the petitioner's claim).

ii. Adequate Investigation

Ferguson next argues that his counsel was ineffective for failing to conduct an adequate investigation into his mental health evidence and possible intellectual disabilities before trial. But as the Commissioner correctly argues, and the district court correctly noted, Ferguson abandoned this claim during his state post-conviction proceedings and thus it is procedurally defaulted.

Ferguson's inadequate investigation claim was procedurally defaulted under Alabama's procedural rules. The ACCA noted that Ferguson argued that "[t]rial counsel's performance was also objectively deficient, for many reasons and including the unavailability of sufficient funds for a thorough defense." *See Ferguson II*, 13 So. 3d at 439. But the ACCA explained that the conclusory statement without facts or argument did not comply "with the

requirements set forth in Rule 28(a)(10)" of the Alabama Rules of Appellate Procedure. *Id.*

"Claims presented in a Rule 32 petition but not pursued on appeal are deemed to be abandoned." *Hallford v. Culliver*, 459 F.3d 1193, 1199 n.4 (11th Cir. 2006) (per curiam) (quoting *Boyd v. State*, 913 So. 2d 1113, 1145 (Ala. Crim. App. 2003)). "[W]hen a petitioner has failed to present a claim to the state courts and under state procedural rules the claim has become procedurally defaulted, the claim will be considered procedurally defaulted in federal court." *See Collier v. Jones*, 910 F.2d 770, 772 (11th Cir. 1990). Thus, Ferguson's claim about an inadequate pretrial investigation is procedurally defaulted.[12]

* * *

Ferguson has not demonstrated, under AEDPA, that the ACCA's denial of his ineffective assistance of counsel claim about his counsel's actions before his confession was an unreasonable application of *Strickland*. *See* 28 U.S.C. § 2254(d)(1). Also,

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[12] Nestled inside the inadequate-pretrial-investigation section of Ferguson's brief, he also argues that trial counsel: "failed to present a defense that included evidence regarding [Ferguson's] disabilities"; "failed to introduce evidence regarding [his] intoxication and drug use"; and "failed to ... present testimony about [his] personality and tendencies." But these are guilt-phase arguments—not pretrial investigation claims—and, thus, they are outside the certificate of appealability. *See McClain v. Hall*, 552 F.3d 1245, 1254 (11th Cir. 2008) ("In an appeal brought by an unsuccessful habeas petitioner, appellate review is limited to the issues specified in the certificate of appealability." (alterations adopted)). Even if they weren't, as the district court explained, Ferguson's guilt-phase arguments were procedurally defaulted because he did not raise them in the ACCA and he has not given us any reason to excuse the default.

Ferguson's argument about his counsel's pretrial investigation for the guilt phase is procedurally defaulted. Thus, Ferguson has not met his burden to warrant habeas relief on his pre-sentencing stage claims of ineffective assistance of counsel.

B. Penalty Phase

Last, Ferguson argues that his counsel was ineffective by failing to investigate and present evidence of Ferguson's stepfather's abuse during the penalty phase. Specifically, Ferguson argues that the ACCA's determination that Ferguson was not prejudiced because of that deficient performance was an unreasonable application of *Strickland*.[13] Here, we need not address whether Ferguson's counsel performance was deficient because the ACCA's determination that Ferguson failed to establish prejudice was not an unreasonable application of *Strickland*.

The ACCA adopted the trial court's finding about prejudice, specifically noting:

> Finally, in light of the nature and circumstances of this crime—the robbery and murder of a father and his young son—and the specific findings made by the sentencing authority, there is no reasonable probability that the mitigating circumstances alleged in the petition, even if true, would have altered the balance of

[13] Ferguson also maintains that the district court correctly concluded that his counsel's performance was deficient and that the ACCA's determination to the opposite was an unreasonable application of *Strickland*.

> aggravating and mitigating factors in this case. The sentencing authority was well aware of the mitigation evidence presented at trial.

Ferguson II, 13 So. 3d at 442 (internal citation omitted).

Under the prejudice prong, when the defendant challenges his death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052. In determining whether there is a reasonable probability of a different result, a court must "consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweigh it against the evidence in aggravation.' " *Porter v. McCollum*, 558 U.S. 30, 41, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (per curiam) (alteration adopted) (quoting *Williams*, 529 U.S. at 397–98, 120 S.Ct. 1495).

The ACCA found that Ferguson's "trial counsel presented the vast majority of mitigation evidence that Ferguson alleges should have been presented." *Ferguson II*, 13 So. 3d at 439. We agree with the ACCA that most of the new mitigation evidence was cumulative of the nonstatutory mitigating circumstances presented during sentencing. *See Boyd v. Allen*, 592 F.3d 1274, 1298 (11th Cir. 2010) ("[M]uch (although not all) of the 'new' testimony introduced at the post-conviction hearing would simply have amplified the themes already raised at trial and

incorporated into the sentencing judge's decision to override the jury."); *Marquard v. Sec'y for the Dep't of Corr.,* 429 F.3d 1278, 1308 (11th Cir. 2005) ("There is no reason to believe that added details about Marquard's troubled childhood and substance abuse—which the sentencing court clearly recognized in imposing a death sentence—would have had any effect on the sentence.").

While more mitigation witnesses could have presented more details or different examples of these unfortunate aspects of Ferguson's life, these aspects were nonetheless known to the sentencing jury and judge. Thus, no significant prejudice can result from the exclusion of cumulative evidence, meaning Ferguson's trial counsel's failure to present cumulative evidence was not prejudicial. *See Cullen*, 563 U.S. at 200, 131 S.Ct. 1388 ("There is no reasonable probability that the additional evidence Pinholster presented in his state habeas proceedings would have changed the jury's verdict. The 'new' evidence largely duplicated the mitigation evidence at trial."); *see also Ledford*, 818 F.3d at 649–50. Because there is not a "reasonable probability" that, but for the exclusion of cumulative evidence, the last remaining juror would have voted for life imprisonment or the judge would have decided not to override the jury, we cannot find that the ACCA's determination that Ferguson failed to show prejudice was an unreasonable application of *Strickland*.

Citing *Williams v. Allen*, 542 F.3d 1326 (11th Cir. 2008), Ferguson argues that prejudice is evident in his case because, like *Williams*, the trial judge overrode the jury's recommendation for life imprisonment based on one statutory factor.

Specifically, as Ferguson points out, *Williams* stated "[t]he fact that the jury decisively voted against the death penalty, even without the powerful evidence adduced at postconviction, weighs heavily in favor of a finding of prejudice." 542 F.3d at 1343. The state responds by citing *Lee v. Commissioner, Alabama Department of Corrections*, where we said that "the fact that the jury recommended life imprisonment counsels against a determination that [the petitioner] was prejudiced under *Strickland*." 726 F.3d 1172, 1196 (11th Cir. 2013) (citing *Parker v. Allen*, 565 F.3d 1258 (11th Cir. 2009)).

Whatever tension there may be between *Williams* and *Lee*, we don't have to resolve it here because, in order to show the ACCA unreasonably applied *Strickland*, Ferguson must "show that there is a reasonable probability that, but for counsel's unprofessional errors," the trial judge would not have overridden the jury's recommendation of life imprisonment. *See* 466 U.S. at 694, 104 S.Ct. 2052. Here, the ACCA assumed all of Ferguson's allegations from his Rule 32 petition to be true, but even with that assumption, the ACCA found that there was no reasonable probability that it would have altered the balance of the aggravating and mitigating evidence. As the ACCA noted, the trial judge "was well aware of the mitigation evidence presented at trial" yet found that the circumstances of Ferguson's childhood did not amount to a mitigating factor given Ferguson's age, marriage, and employment. *Ferguson II*, 13 So. 3d at 442. In light of the trial court's determination, we cannot find the ACCA unreasonably applied *Strickland* by concluding that Ferguson did not provide enough evidence to undermine the ACCA's confidence in the trial judge's decision to override the

jury's recommendation of life. Ferguson "cannot show that 'no fairminded jurist' would have done as the state habeas court did in denying his claim." *Sealey v. Warden, Ga. Diagnostic Prison*, 954 F.3d 1338, 1359 (11th Cir. 2020).

IV. CONCLUSION

After careful review, we find that the district court did not clearly err in finding that Ferguson was not intellectually disabled. We also find that the ACCA's determination that Ferguson's counsel was not ineffective was not an unreasonable application of *Strickland*. Thus, we affirm the district court's denial of Ferguson's habeas petition.

AFFIRMED.

APPENDIX C

THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

No. 3:09–cv–0138–CLS–JEO

Thomas Dale FERGUSON, Petitioner,

v.

Richard F. ALLEN, Commissioner, Alabama Department of Corrections, Respondent.

Signed May 21, 2020

OPINION

C. LYNWOOD SMITH, Senior United States District Judge

The question addressed in this opinion is whether petitioner, Thomas Dale Ferguson, is categorically excluded from execution by the Supreme Court's opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002), holding that death is not a permissible punishment for an intellectually disabled convict. *Id.*

at 321;[1] *see also*, *e.g.*, *Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017); *Hall v. Florida*, 572 U.S. 701, 713, 722 (2014); *Bobby v. Bies*, 556 U.S. 825, 831 (2009). The issue was presented as a result of granting Ferguson's Rule 59(e) motion and vacating Part "V.F." of this court's prior memorandum opinion, which addressed Ferguson's claim that he had been improperly denied a hearing on his mental capacity claim. [2] An evidentiary hearing was held on August 27, 2019. Following consideration of the evidence, pleadings, post-hearing briefs, and additional research, the court enters the following opinion.

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[1] When *Atkins* was decided, the condition at issue was referred to as "mental retardation." Within five years, however, the diagnostic terminology employed by mental health professionals was changed to "intellectual disability." *See*, *e.g.*, Robert A. Schalock *et al.*, *The Renaming of Mental Retardation*: *Understanding the Change to the Term Intellectual Disability*, 45 Intellectual & Developmental Disabilities 116, 120 (2007) (recognizing that "every individual who is or was eligible for a diagnosis of mental retardation is eligible for a diagnosis of intellectual disability"). Congress also enacted "Rosa's Law" in 2010, which required that all references in federal laws to "mental retardation" be replaced with "intellectual disability." Pub. L. No. 111-256, 124 Stat. 2643, codified as amended at 20 U.S.C. §§ 1140, 1400-01, 7512, and 29 U.S.C. §§ 705, 764, 791 (2010). *See also*, *e.g.*, *Hall v. Florida*, 572 U.S. 701, 704-05 (2014) (adopting the change in terminology). Thus, the terms "mental retardation" and "mentally retarded" are used in this opinion only when quoting or discussing older authorities.

[2] *See* doc. no. 16 (Memorandum Opinion on Petitioner's 28 U.S.C. § 2254 Claims for Habeas Corpus Relief), at 146-89; doc. no. 17 (Final Judgment on Petitioner's 28 U.S.C. § 2254 Claims for Habeas Corpus Relief); doc. no. 18 (Motion to Alter or Amend Judgment); doc. no. 19 (Memorandum Opinion on Petitioner's Rule 59(e) Motion).

I. LEGAL CRITERIA

The Supreme Court's seminal holding in *Atkins v. Virginia* was based, at least in part, upon the majority's belief that deficits in the areas of "reasoning, judgment, and control of their impulses" did not allow intellectually disabled criminals to act with the same degree of "moral culpability that characterizes the most serious adult criminal conduct." 536 U.S. at 306. The Court majority also was not persuaded that the execution of intellectually disabled criminals would advance the deterrent or retributive purposes of the death penalty. [3] Consequently, the majority concluded that the

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[3] The Court elaborated those purposes in, *Hall*, 572 U.S. at 708-09, where the Court observed that:

"[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution." *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). ***Rehabilitation***, it is evident, is not an applicable rationale for the death penalty. *See Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). As for ***deterrence***, those with intellectual disability are, by reason of their condition, likely unable to make the calculated judgments that are the premise for the deterrence rationale. They have a "diminished ability" to "process information, to learn from experience, to engage in logical reasoning, or to control impulses ... [which] make[s] it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Atkins*, 536 U.S., at 320. ***Retributive values*** are also ill-served by executing those with intellectual disability. The diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment. *See id.,* at 319 ("If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution"). [Alterations in original, boldface emphasis supplied.]

execution of such persons was "excessive," and that the Eighth and Fourteenth Amendments placed "a substantive restriction" upon a state's power to take the life of an intellectually disabled offender. *Id.* at 321.[4]

Notably, the *Atkins* opinion did not provide definitive procedural or substantive guides for determining when a state prisoner claiming an intellectual disability fell within the protection of the Eighth and Fourteenth Amendments' prohibition against the imposition of cruel and unusual punishments. Instead, the Court left to the states "the task of developing appropriate ways to enforce the constitutional restriction." *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416-17 (1986) (addressing the execution of insane persons)).

The Alabama Supreme Court first addressed the criteria for enforcing the constitutional restriction in *Ex parte Perkins*, 851 So. 2d 453 (Ala. 2002), holding that, in order to be classified as mentally retarded (*now described as* "intellectually disabled"),

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[4] The Eighth Amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII (1791). The prohibition against cruel and unusual punishments was "incorporated" into the Due Process Clause of the Fourteenth Amendment and, thereby, made applicable to the various states by the Supreme Court's decision in *Robinson v. California*, 370 U.S. 660, 667 (1962). *See also*, *e.g.*, *Hall*, 572 U.S., at 708 (holding that "No legitimate penological purpose is served by executing a person with intellectual disability. To do so contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being.") (citing *Atkins*, 536 U.S. at 317).

a defendant "must have significantly subaverage intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior. Additionally, these problems must have manifested themselves during the developmental period (*i.e.*, before the defendant reached age 18)." *Id.* at 456.

The Alabama Supreme Court's subsequent opinion in *Smith v. State*, 213 So. 3d 239 (Ala. 2007), layered a gloss on the *Perkins* standard, and held that a defendant must exhibit *both* significantly subaverage intellectual functioning *and* significant deficits in adaptive behavior during *three periods* of his or her life: (*i*) before the age of eighteen; (*ii*) on the date of the capital offense; and (*iii*) currently. *Id.* at 248 (citing *Perkins*, 851 So. 2d at 456). *See also Holladay v. Allen*, 555 F.3d 1346, 1353 (11th Cir. 2009) (same).[5]

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[5] The "Defendant with Intellectual Disability Act" was enacted by the Alabama Legislature in August 2009, two years after the decision in *Smith v. State*, and defined the phrase "person with an intellectual disability" as meaning: "A person with [***i***] significant subaverage general intellectual functioning [***ii***] resulting in or associated with concurrent impairments in adaptive behavior and [***iii***] manifested during the developmental period, [***iv***] as measured by appropriate standardized testing instruments." Ala. Code § 15-24-2(3) (1975) (2018 Replacement Vol.) (alterations supplied). Note that the statutory definition differs from the Alabama Supreme Court's criteria in two respects: *first*, it *omits* the evidentiary requirement for a defendant's significantly subaverage intellectual functioning abilities *and* substantial deficits in adaptive behavior to be proven as manifest not just before the age of eighteen (*i.e.*, "during the developmental period"), *but also on the date of the capital offense*, *as well as currently*; *and second*, it *adds* the evidentiary requirement for all deficits to be "*measured by*

II. DISCUSSION

Ferguson bears the burden of proving, by a preponderance of the evidence, that he is intellectually disabled. *See*, *e.g.*, *Ex parte Carroll*, No. 1170575, 2019 WL 1499322, at *1 (Ala. Apr. 5, 2019). "Intellectual disability is characterized by *significant limitations* both in [**a**] *intellectual functioning* and in [**b**] *adaptive behavior* as expressed in conceptual, social, and practical adaptive skills. This disability [**c**] *originates before age 18*." American Association on Intellectual & Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Support* 5 (11th ed. 2010) (emphasis and alterations supplied).[6]

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appropriate standardized testing instruments." That diagnostic requirement is the subject of the following section.

[6] *See also* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) ("DSM-5"), providing that:

> 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, judgement, academic learning, and learning from experience, confirmed by both clinical assessment and *individualized standardized intelligence testing*. [Emphasis supplied.]
>
> 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

A. Proof of Significant Limitations in Intellectual Functioning

Proof of the first element of an alleged intellectual disability is best represented by intelligence quotient ("IQ") scores obtained by the administration of standardized assessment instruments, [7] such as the "Wechsler Intelligence Scale for Children," the "Wechsler Adult Intelligence Scale," or the "Stanford-Binet Intelligence Scales."

Even though each of the assessment instruments used to measure Ferguson's IQ at various stages of his life was, on the date of its administration to him, generally considered to be a reliable test, and

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multiple environments, such as home, school, work, and community.

C. Onset of intellectual and adaptive deficits during the development period.

[7] The term "assessment instrument" refers to a specific method of acquiring data in the psychological and intellectual assessment of individuals, such as a questionnaire or behavioral observation coding system. *See*, *e.g.*, Raymond J. Corsini, *The Dictionary of Psychology* 69 (2002) (hereafter, "*Dictionary of Psychology*"). When the adjective "standardized" modifies that term, the combined phrase means that: during the design phase, each instrument was administered to a large, representative sample of the population for which the test was intended to provide reliable, normative data; the validity and reliability of each instrument was established over time by cumulative empirical applications and analyses; and, each individual questionnaire is administered, scored, and interpreted by trained examiners in strict accordance with instructions issued by the test developers. *See*, *e.g.*, David Wechsler, *WAIS-III Administration and Scoring Manual* (1997); Gale H. Roid, *Stanford-Binet Intelligence Scales, Fifth Edition, Examiner's Manual* (2003).

capable of producing valid scores,[8] each instrument also contained potential for measurement error.[9] The Supreme Court's opinion in *Hall v. Florida* recognized that:

> The professionals who design, administer, and interpret IQ tests have agreed, for years now, that *IQ test scores should be read not as a single fixed number but as a range. ... Each IQ test has a* "*standard error of measurement*," *... often referred to by the abbreviation* "*SEM*." A test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself. ... An individual's IQ test score on any given exam may fluctuate for a variety of reasons. These include the test-taker's health; *practice from earlier tests*; the environment or location of the test; the examiner's demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing. ...
>
> *The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single*

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[8] *See*, *e.g.*, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 n.9 (1993) ("We note that scientists typically distinguish between 'validity' (does the principle support what it purports to show?) and 'reliability' (does application of the principle produce consistent results?). ... [O]ur reference here is to *evidentiary* reliability — that is, trustworthiness. ... In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*.") (emphasis in original, internal citations omitted).

[9] *See*, *e.g.*, American Association of Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 59 (9th ed. 1992) (hereafter, AAMR, *Mental Retardation*) ("Any trained examiner is aware that all tests contain measurement error; [consequently,] many present scores as confidence bands rather than finite scores.") (alteration supplied).

> *numerical score. For purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score. The SEM allows clinicians to calculate a range within which one may say an individual's true IQ score lies.* See APA Brief 23 ("SEM is a unit of measurement: 1 SEM equates to a confidence of 68% that the measured score falls within a given score range, while 2 SEM provides a 95% confidence level that the measured score is within a broader range"). *A score of 71, for instance, is generally considered to reflect a range between 66 and 76 with 95% confidence and a range of 68.5 and 73.5 with a 68% confidence.* See DSM–5, at 37 ("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). ... [T]his involves a score of 65-75 (70 ± 5)"). .... *Even when a person has taken multiple tests, each separate score must be assessed using the SEM, and the analysis of multiple IQ scores jointly is a complicated endeavor*. ...

Hall, 572 U.S. at 713-14 (citations omitted, emphasis supplied). Thus, the Standard Error of Measurement ("SEM") accounts for a margin of error of five points, both below and above the test-taker's IQ score on the standardized assessment instrument at issue. *Ledford v. Warden, Georgia Diagnostic & Classification Prison*, 818 F.3d 600, 640 (11th Cir. 2016).[10]

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[10] *See also*, *e.g.*, *Walker v. True*, 399 F.3d 315, 322 (4th Cir. 2005) ("IQ tests have a measurement error of plus or minus five points.").

1. IQ scores found in Ferguson's public school records

During November of 1979, when Ferguson was six years of age, he obtained a Full-Scale IQ score of 77 on the Stanford-Binet Intelligence Scale.[11]

Six years later, when Ferguson was on the threshold of the 1985-86 school year, he was evaluated at the request of his mother for special educational services because of a noted "lack of academic progress, suspected learning disability, deficient reading skills, and deficient handwriting skills." Doc. no. 39-5 (Petitioner's Exhibit 5), at 21 (Morgan County School System Confidential Student Evaluation). The "Wechsler Intelligence Scale for Children–Revised (WISC-R)" assessment instrument was administered on August 6, 1985, and he achieved a Verbal IQ score of 74, a Performance IQ score of 71, and a Full-Scale IQ score of 71. *Id.* at 22.[12] Significantly, however, even though Ferguson "did not appear to be challenged by

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[11] *See* doc. no. 39-5 (Petitioner's Exhibit 5), at 35, 37. **Note well**: *The page numbers of all documents filed in this court will be those imprinted at the top of each page by the CM/ECF automated filing system, and not necessarily those of counsel.* This can be confusing when citing such pleadings as doc. no. 47 (Petitioner's Brief), which begins with an *unnumbered* cover page, followed by a "Table of Contents" page numbered with a lower-case Roman numeral. As a result, the first page bearing Arabic numeral "1" was numbered "Page 3" by the CM/ECF filing system.

[12] *See also* doc. no. 39-5 (Petitioner's Exhibit 5), at 37 (August 12, 1985 Morgan County Board of Education "Eligibility Justification" stating that Ferguson "continues to be eligible for special services as Educationally Mentally Handicapped. .... Dale's re-evaluation indicates that his overall functioning is within the EMH range. A previous Binet (11/15/79) yielded an IQ score of 77 which is considered to be consistent with his current WISC-R score of 71." (ellipsis supplied)).

the more difficult items on the test," the test administrator noted that he "gave up easily on both verbal and non-verbal items."[13] After reviewing the test scores, the school system concluded that Ferguson was eligible for special services as an "educationally mentally handicapped" student. [14] Such children typically were segregated from the main student body and placed in "a self-contained classroom with about six or seven other students."[15]

During March of 1988, when Ferguson was fifteen and in the second semester of his 8th Grade, 1987-88 school year, school system policy required that he be re-evaluated for continued receipt of the special services provided to educationally mentally handicapped students. [16] The WISC-R was re-

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[13] *Id.* at 22. This court rejects Ferguson's contention that the comments of the examiner that are quoted in text cannot be used to conclude that his low score on this test was due to malingering, because the examiner also stated that Ferguson was "cooperative during the entire session," and that his scores were "considered to be valid." Doc. no. 47 (Petitioner's Brief), at 17 (citing doc. no. 39-5 (Petitioner's Exhibit 5), at 22).

[14] Doc. no. 39-5 (Petitioner's Exhibit 5), at 36-37 (August 12, 1985 justification for providing Ferguson special services as an educationally mentally handicapped student). Terms such as "Educationally Mentally Handicapped," "Educable Mentally Impaired," "Trainable Mentally Handicapped," and "Educable Mentally Retarded" were virtually sonorous descriptions of similar conditions. *See*, *e.g.*, *Dictionary of Psychology* 312.

[15] *See* doc. no. 46 (Hearing Transcript), at 127 (where the State's expert, Dr. Glen King, testified that: "Typically in Alabama if you're in an [educable mentally retarded] class, you're in a self-contained classroom with about six or seven other students and you stay there all day").

[16] *See* doc. no. 39-5 (Petitioner's Exhibit 5), at 51 ("Dale [Ferguson] is currently enrolled in the special education program *and is due the required three year re-evaluation for continued placement in that program.*") (alteration and emphasis supplied).

administered on March 1, 1988, and Ferguson achieved a Verbal IQ score of 87, a Performance IQ score of 88, and a Full-Scale IQ score of 87 — a decided, sixteen-point improvement over his performance on the same assessment instrument nearly three years before.[17] (During the hearing held in this court, Ferguson's own expert, Dr. Robert D. Shaffer, confirmed that Ferguson's scores on six of the ten subtests comprising the WISC-R improved on the 1988 re-test, and that he did not score two standard deviations below the mean on any subtest.[18]) The test administrator recorded that Ferguson's full-scale score fell "within the low average range of intellectual functioning." [19] Consequently, he was moved into classes for students classified as "learning disabled."[20] Such students were not segregated from the larger student body, but received additional assistance with certain subjects.[21]

2. State court IQ assessments

While awaiting trial in state court, Ferguson was referred by the court to Dr. C. Van Rosen for a psychological evaluation to assist in determining his

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[17] *Id.* at 52.

[18] Doc. no. 46 (Hearing Transcript), at 56-57.

[19] *See* doc. no. 39-5 (Petitioner's Exhibit 5), at 52.

[20] *Id.* at 60.

[21] *See* doc. no. 46 (Hearing Transcript), at 127-28 (where the State's expert, Dr. Glen King, testified that students classified as "learning disabled" are "mainstreamed," meaning that they are "in regular classes all day," but receive "special resources" (*e.g.*, "additional help with reading, writing"), and typically are provided an "Individualized Education Program" which allows "extra time to take tests, or you have [test] items ... read to you, or things of that nature") (alteration supplied).

competency to stand trial, as well as his mental state at the time of the offense.[22] Dr. Rosen administered a "Wechsler Adult Intelligence Scale–Revised (WAIS-R)" assessment instrument during December of 1997, and recorded that Ferguson achieved a Verbal IQ score of 76, a Performance IQ score of 66, and a Full-Scale IQ score of 69, which Dr. Rosen characterized as

> technically plac[ing] him in the very high range of the mildly retarded level. *However, it was considered quite apparent that he did not attempt to make a good effort in this test, giving up readily on many items and seemingly not trying as hard as possible. The defendant's intellectual functioning is consequently considered to be within the higher portion of the borderline range of abilities.*

Doc. no. 41-9 (Respondent's Exhibit 5), at 7 (Rosen Report) (alteration and emphasis supplied). Dr. Rosen subsequently testified during the state-court trial that: he had seen no signs of mental retardation during his evaluation of Ferguson; he was certain that Ferguson did not put forth his full effort during administration of the WAIS-R; and that, if Ferguson "had really tried[,] he would have scored probably in the middle 70's ... perhaps a little higher."[23]

Ferguson was referred by his defense attorneys to Dr. James F. Chudy for an independent psychological evaluation prior to trial. Dr. Chudy performed his examination in June of 1998. Although

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[22] *See* doc. no. 41-9 (Respondent's Exhibit 5), at 1 (Rosen Report).
[23] Doc. no. 41-9 (Respondent's Exhibit 6), at 25 (Rosen Trial Testimony).

he did not include a specific IQ score in his written report of evaluation, [24] he concluded, after administering a battery of standardized personality tests, that none of the tests revealed "organic problems,"[25] but all in combination demonstrated that Ferguson was "functioning in the borderline range" of intelligence, in "the area between low average intelligence and mental retardation."[26]

3. Recent IQ assessments

Ferguson's most recent IQ scores were derived from testing performed in preparation for the evidentiary hearing in this court.

a. *Ferguson's psychologist* — Dr. Robert D. Shaffer

Robert Daniel Shaffer, who holds a Ph. D. in clinical psychology and has specialized training in neuropsychology and forensic psychology, was retained by Ferguson's attorneys to evaluate his "cognitive and intellectual functions, and his adaptive behavior in light of current court rulings pertaining to Intellectual Disability and death penalty eligibility."[27] He met with Ferguson for a total of 13.8 hours over

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[24] *See* doc. no. 41-9 (Respondent's Exhibit 7), at 43-51 (Chudy Written Report).

[25] See doc. no. 41-9 (Respondent's Exhibit 8), at 57-58 (Chudy Trial Testimony: "I found some memory problems. They were fairly consistent with his low intelligence, but no significant organic problems.").

[26] *Id.* at 58 (Chudy Trial Testimony).

[27] Doc. no. 39-1 (Petitioner's Exhibit 1), at 1.

three days.[28] He also interviewed Ferguson's mother, Mrs. Betty Ferguson, for an additional 4.2 hours.[29] He concluded that Ferguson demonstrated "significantly sub-average intellectual ability,"[30] and recorded that his condition was

> most evident in the profile of neuropsychological functions. The DSM-V states that this profile of abilities is to be more strongly weighed than single IQ numerical scores, owing to the imprecision of IQ tests themselves. This profile of neurocognitive abilities reveals significant sub-average deficits in intellectual ability. IQ scores obtained in this evaluation are consistent with this finding.

Doc. no. 39-1 (Petitioner's Exhibit 1), at 16.

Dr. Shaffer's opinion relied, at least in part, upon the Full-Scale IQ score of 77 achieved by Ferguson during the September 18, 2017 administration of a "Wechsler Adult Intelligence Scale–Fourth Edition (WAIS-IV)" assessment instrument. Adjustment of that score for the "Flynn

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[28] Dr. Shaffer's evaluations of Ferguson occurred on September 18 and 19, 2017, and March 22, 2018. *Id.* Notably, Shaffer's last evaluation was conducted the month after Ferguson was examined by the State's psychologist.

[29] Dr. Shaffer interviewed Mrs. Betty Ferguson on January 29, 2018 (*id.*) in an attempt to assess Ferguson's adaptive functions "from her reference point" during the periods she and Ferguson lived together. *See* doc. no. 46 (Hearing Transcript), at 12.

[30] Doc. no. 39-1 (Petitioner's Exhibit 1), at 9.

effect" [31] reduced it to 73.4. [32] After applying the standard error of measurement to the Flynn-effect-adjusted score, Dr. Shaffer testified that there was a 95% probability that Ferguson's "true IQ" lay in a range between 69.4 and 78.4, and a 99% probability that his true IQ lay somewhere in a range between 67.9 and 78.9. [33] Thus, according to Dr. Shaffer, Ferguson's intellectual functioning is significantly substandard, because his true IQ *could be* less than 70.

Dr. Shaffer also administered several neuropsychological tests in an attempt to assess Ferguson's executive, verbal, visual-processing, organizational, memory, and fine-motor functions. Not all of the tests demonstrated substantial impairments, but Dr. Shaffer concluded that the totality of all test results were consistent with his

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[31] The "Flynn effect" is a term that refers to the finding that average IQ scores have increased steadily in the United States and European nations for many decades. The concept is discussed more thoroughly in Part II.A.4.a of this opinion, *infra.*

[32] *See* doc. no. 46 (Hearing Transcript), at 26-27. Dr. Shaffer said that, when adjusting Ferguson's Full-Scale IQ score for the "Flynn effect," he began by calculating the number of years that had elapsed between the date on which the WAIS-IV assessment instrument had been standardized, or "normed," and the date on which he administered the test to Ferguson (September 18, 2017). He testified that difference was 10.2 years. *Id.* at 27. (10.2 x 0.3 = -3.6 deducted from 77 = IQ score of 73.4 following adjustment for the Flynn effect). However, as discussed in the textual paragraph accompanying notes 64 and 65, *infra*, this court concludes that Dr. Shaffer's adjustment calculations require revision because he miscalculated the number of years that elapsed between the date on which the WAIS-IV assessment instrument was published and the date on which he administered it to Ferguson.

[33] *See id.* at 27-28.

opinion that Ferguson has significant limitations in his ability to function intellectually.[34]

b. *The State's psychologist* — Dr. Glen D. King

Glen David King, who holds a J.D. degree and Ph. D. in clinical and forensic psychology, was retained by the Alabama Attorney General's office "to primarily determine the intellectual ability of Mr. Ferguson."[35] Dr. King met with him for five-and-a-half hours on February 13, 2018 — five months after Dr. Shaffer had completed the second of his three meetings with Ferguson — and administered six tests, "just to make sure" that he employed at least one assessment instrument that had not previously been administered by Dr. Shaffer.[36] Even so, Dr.

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[34] *See id.* at 29-32. *See also* doc. no. 39-1 (Petitioner's Exhibit 1), at 5-6 & 7-13 (where Shaffer summarizes the neuropsychological tests administered to Ferguson and the results obtained from each).

[35] Doc. no. 41-1 (Respondent's Exhibit 1), at 1.

[36] *Id.* at 3; Doc. no. 46 (Hearing Transcript), at 122. The assessment instruments administered by Dr. King were: the "Wechsler Adult Intelligence Scale–Fourth Edition (WAIS-IV)"; the "Stanford Binet Intelligence Scale–Fifth Edition (SB-5)"; the "Wide Range Achievement Test–Fifth Edition (WRAT-5)"; the "Adaptive Behavior Assessment System–Third Edition (ABAS-3)"; the "Independent Living Scales (ILS)"; and, a test he referred to as the "Shipley-2." Doc. no. 41-1 (Respondent's Exhibit 1), at 2, 5-7. ("Shipley-2") is an abbreviation of the "Shipley-Institute for Living Scale for Measuring Intellectual Impairment–Second Edition (Shipley-2)." *See* https://www.stoeltingco.com/shipley-institute-of-living-scale-second-edition-shipley-2.html (last visited Apr. 6, 2020). The test is "used for determining pathological deterioration of intelligence. A conceptual quotient is obtained and scores below 100 are purported to indicate mental impairment due to age, disease or injury." *Dictionary of Psychology* 899.

King's opinions were principally grounded upon the results obtained from his re-administration of the "Wechsler Adult Intelligence Scale–Fourth Edition (WAIS-IV)" test, [37] as well as his unique administration of a "Stanford Binet Intelligence Scale–Fifth Edition (SB-5)" assessment instrument.[38] Ferguson obtained Full-Scale IQ scores of 85 on the WAIS-IV, and 84 on the SB-5.[39]

Dr. King testified that Ferguson's Full-Scale IQ score of 85 on the WAIS-IV placed him on the boundary between two categories of intellectual ability: that is, his IQ score could be classified as lying *either at* the high end of the "borderline range" of intellectual ability (*i.e.*, IQ scores between 70 and 84), *or at* the low end of the "average range" of intellectual ability (*i.e.*, IQ scores from 85 to 115). [40] After

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[37] Dr. King described the WAIS-IV as a test that had "ten subtests associated with it. Those ten subtests are divided into four different domains: verbal comprehension index, perceptual reasoning index, working memory index, and processing speed index. We get a score on each one of those indices, and then they're all combined to give us a full scale IQ score." Doc. no. 46 (Hearing Transcript), at 117-18. Scores on the WAIS-IV subtests, as well as the full-scale score, average 100 (*the mean*), with a standard deviation of 15, which means that a Full-Scale IQ score of 85 would be "one standard deviation below the mean." *Id.* at 118.

[38] Dr. King described the "Stanford Binet Intelligence Scale–Fifth Edition (SB-5)" as being "an individually administered intelligence test. It has no items that overlap with the Wechsler Adult Intelligence Scale, but [it] is also considered to be one of the two gold standard IQ tests for measuring IQ and school placement. It is – it has also an average of a hundred and a standard deviation of 15." *Id.* at 120 (alteration supplied).

[39] *See* doc. no. 41-1 (Respondent's Exhibit 1), at 5-6 & 8.

[40] *See* doc. no. 46 (Hearing Transcript), at 119, lines 12-14 (testifying that IQ scores between 70 to 84 are classified in "the

adjusting Ferguson's 85 score for the standard error of measurement, Dr. King stated that an evaluator could be 99% confident that Ferguson's Full-Scale IQ score on the WAIS-IV would lie somewhere between 81 and 89,[41] a span that straddled both the "borderline" and "average" ranges of intellectual functioning.

Ferguson's Full-Scale IQ score of 84 on the "Stanford Binet Intelligence Scale–Fifth Edition (SB-5)" assessment instrument placed him "at the high end of the borderline range" of intellectual functioning.[42] The closeness of Ferguson's scores on the WAIS-IV and SB-5 — Dr. King characterized them as being in "absolute agreement with each other"[43] — indicated that the tests had accurately measured Ferguson's intellectual abilities. Dr. King added that, while a test subject can "always malinger, or not put forth good effort and have a reduced score" on an IQ test, it is not possible to "fake good," and "the highest score ... would be an indication of your best performance."[44]

Dr. King also reviewed the IQ scores found in Ferguson's public school records,[45] and testified that the full-scale score of 87 attained on the "Wechsler Intelligence Scale for Children–Revised (WISC-R)" in March of 1988, when he was fifteen, was "in good

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borderline range," while IQ scores from 85 to 115 are classified as "average" intelligence).

[41] *Id.* at 119-20.

[42] *Id.* at 120-21.

[43] *Id.* at 122.

[44] *Id.* at 123.

[45] Those scores were summarized in Section II.A.1 of this opinion, *supra.*

agreement with what I found on all of the tests I gave him."[46]

Based upon such considerations, Dr. King testified that Ferguson's intellectual functioning abilities were not "significantly subaverage." Instead, in Dr. King's opinion, Ferguson's IQ scores placed him either at the high end of the borderline range, or at the low end of the average range, of intellectual functioning.[47]

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[46] Doc. no. 46 (Hearing Transcript), at 125. King did not believe that the low, Full-Scale IQ score of 71 obtained by Ferguson on the WISC-R administered in July 1985, when he was twelve years old (and indicating that he was in the borderline range of intellectual functioning), cast doubt upon the accuracy of the IQ scores obtained in February 2018, because the notation of the 1985 examiner indicated that Ferguson "gave up easily, [and] was not necessarily putting forth his best effort": in other words, he could have done better. *Id.* at 124 (alteration supplied). King added that Ferguson's school records indicated that he suffered from a "learning disability," as opposed to an intellectual disability. *See id.* at 125-26.

[47] *Id.* at 129 ("Based on all the tests together, he's somewhere right at the high borderline to below average."). King also noted that, with but one exception — that being the WISC-R test administered in July 1985 that is addressed in the preceding footnote — Ferguson scored somewhere between 70 and 85 or 86 on every IQ test administered over the course of his life. *Id.* at 130.

Dr. King also reviewed Ferguson's prison records, spanning an eighteen year period from 1998 to 2016, and found that he "was in segregation on multiple occasions and had to be reviewed. *In every one of those occasions the rating was again normal intelligence* [even though] there were boxes to check off for borderline or disabled. So there were no indications [of intellectual disabilities] from that." *Id.* at 128 (emphasis and alterations supplied). Finally, King found a letter written by Ferguson in his prison files, requesting a transfer to another

4. The parties' contentions:

a. Adjustment for the Flynn effect

Ferguson contends that, "contrary to established procedures in the authoritative texts, Dr. King failed to quantitatively or qualitatively account for the shifting norms" of his IQ tests by adjusting his scores for the "Flynn effect"[48] — a term that refers to the discovery in 1984 by political scientist James R. Flynn that average IQ scores had increased steadily in the United States and Europe for more than forty years at an average rate of 3.0 points a decade, or 0.3 points annually.[49]

Dr. King based his failure to make such an adjustment on his opinion that the Flynn effect is only

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penal facility closer to family, and King described it as notable in several respects: *i.e.*, it was divided into "paragraphs," "neatly written," "punctuated and spelled correctly," and demonstrated "good handwriting." *Id.* at 129.

[48] Doc. no 47 (Petitioner's Brief), at 16.

[49] James R. Flynn, *The Mean IQ of Americans: Massive Gains 1932 to 1978*, 95 Psychol. Bull. 29 (1984); *see also* James R. Flynn, *Massive IQ Gains in 14 Nations: What IQ Tests Really Measure*, 101 Psychol. Bull. 171 (1987). Flynn's studies revealed a 13.8-point increase in IQ scores in the standardization samples of successive versions of Stanford-Binet and Wechsler intelligence tests between 1932 and 1978, amounting to a 0.3-point increase per year, or approximately 3 points per decade. More recently, the Flynn effect was supported by calculations of IQ score gains between 1972 and 2006 for different normative versions of the Stanford-Binet (SB), Wechsler Adult Intelligence Scale (WAIS), and Wechsler Intelligence Scale for Children (WISC). The average increase in IQ scores per year was 0.31, which was consistent with Flynn's earlier findings. James R. Flynn, *Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect*, 12 Psycho. Pub. Pol'y & L. 170, 177-78 (2006).

"a theory" that has "not been completely validated."[50] Moreover, Dr King stated that, when standardized assessment instruments are administered to the same subject over a long period of time, and the IQ scores generally

> agree with each other, it actually increases your expectation that the score that you're getting is accurate. So the idea is that if you keep getting scores in the 70s and 80s, the scores are in the 70s and 80s. You don't need to alter them from that point.

Doc. no. 46 (Hearing Transcript), at 137-38.

The disagreement between Drs. Shaffer and King reflects the Eleventh Circuit's observation that there is "no consensus about the Flynn effect among experts or among the courts." *Raulerson v. Warden*, 928 F.3d 987, 1008 (11th Cir. 2019); *see also Thomas v. Allen*, 607 F.3d 749, 757-58 (11th Cir. 2010) (same); *Ledford*, 818 F.3d at 635-37 (explaining the divergent approaches to the Flynn effect taken by other circuits).

Any attempt at reconciliation of that disagreement must begin with recognition of the fact that intelligence assessment instruments are rarely revised, sometimes no more frequently than every fifteen or twenty years. For example, the Wechsler Adult Intelligence Scale was developed in 1955,[51] but

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[50] *See* doc. no. 46 (Hearing Transcript), at 130-31.

[51] The WAIS was released by David Wechsler in February 1955, as a revision of the "Wechsler–Bellevue Intelligence Scale (WBIS)": a battery of tests published by Wechsler in 1939. *See Wechsler Adult Intelligence Scale*, Wikipedia, https://enwikipedia.org/wiki/Wechsler_Adult_Intelligence_Scale (last visited Apr. 20, 2020).

only updated in 1981,[52] 1997,[53] and, most recently, 2008.[54] Each version had to be "standardized," meaning that during the design phase, each test instrument was administered to a large, representative sample of the population for whom the test was intended to provide reliable, normative data. To promote accuracy and avoid bias, the standardization sample of individuals had to be representative of all potential test subjects, which meant that test developers first had to identify and track key census data variables, such as age, gender, race, socio-economic status, educational attainments, and geographic residence. Test developers then selected a "standardization," or "normative," sample of individual test subjects matching the census proportions. For example, the current, fourth edition of the Wechsler Adult Intelligence Scale was standardized on a normative sample of 2,200 U.S. citizens ranging in age from 16 to 90, and stratified by gender, education level, ethnicity, and geographic region of residence.[55] In like manner, the current "Wechsler Intelligence Scale for Children–Fifth Edition (WISC-V)," was released in 2014, and had

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[52] The "Wechsler Adult Intelligence Scale–Revised (WAIS-R)," a revised form of the WAIS, was released in 1981. It consisted of six verbal and five performance subtests, from which Verbal IQ, Performance IQ, and Full-Scale IQ scores were obtained. *Id.*

[53] The "Wechsler Adult Intelligence Scale–III (WAIS-III)," a subsequent revision of the WAIS and the WAIS-R, was released in 1997. It provided scores for Verbal IQ, Performance IQ, and Full-Scale IQ, along with four secondary indices (Verbal Comprehension, Working Memory, Perceptual Organization, and Processing Speed). *Id.*

[54] The current version of the test, the "Wechsler Adult Intelligence Scale–IV (WAIS-IV)," was released in 2008. *Id.*

[55] *Id.*

been standardized on a normative sample of 2,200 children between the ages of 6 and 16 years & 11 months.[56] Following administration of the test to each member of the standardization sample, a graph was created from the scores achieved by the test subjects. The graph is in the form of a normal distribution, and the mean or median raw score of the normative sample:[57] always is arbitrarily defined as the number "100"; always is located at the apex of the symmetric, "bell-shaped" curve; and always means that a score of 100 represents average performance on the IQ test. The standard deviation is defined as fifteen points above and below the median. Figure 1 displays a

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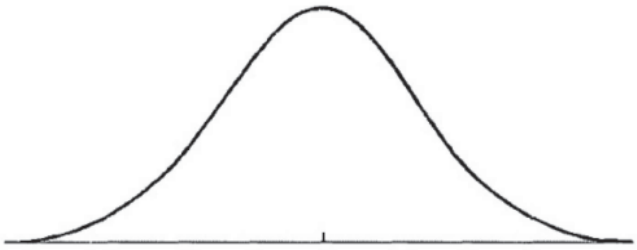
[56] *See Wechsler Intelligence Scale for Children*, Wikipedia, https://en.wikipedia.org/wiki/Wechsler_Intelligence_Scale_for_Children (last visited Apr. 20, 2020).

[57] The terms "average," "mean," and "median" can be confusing. The **average** and **arithmetic mean** are calculated by adding together all numerical values in a data set, and dividing that sum by the number of terms in the set. For example, if there were nine numerical values in a data set (*e.g.*, 30, 56, 65, 70, 84, 90, 95, 110, 130), the sum of all added together would be 730, and 730 divided by 9 yields 81.11, which is the "average," or "arithmetic mean." In contrast, the **median** is the middle numerical value in an ordered set of data. If the set has *an odd number of data points*, then regardless of whether the numerical values are ranked from lowest to highest (*e.g.*, 30, 56, 65, 70, 84, 90, 95, 110, 130), or from highest to lowest (*e.g.*, 130, 110, 95, 90, 84, 70, 65, 56, 30), the "median" is the numerical value in the middle: here, 84. On the other hand, if the ordered set contains *an even number of data points*, then the "median" is the "arithmetic mean" (or average) of the two data points in the middle: *e.g.*, in an ordered data set of ten numbers ranked from lowest to highest (30, 56, 65, 70, 75, 84, 90, 95, 110, 130), the sum of the middle numbers 75 + 84 is 159, which when divided by 2 yields the "median" of 79.5. The same would be true if the ordered set were ranked from highest to lowest: *e.g.*, 130, 110, 95, 90, 84, 75, 70, 65, 56, 30.

normal distribution of IQ scores, illustrating how scores are distributed based on standard deviations:[58]

FIGURE 1: NORMAL DISTRIBUTION OF IQ SCORES[38]



Standard Deviations	-3	-2	-1	0	1	2	3
IQ Scores (SD = 15)	55	70	85	100	115	130	145
Cumulative Percentage	0.135	2.275	15.866	50.000	84.134	97.725	99.865

On any of the Wechsler IQ assessment instruments, with a mean or median of 100, and a fifteen-point standard deviation, one standard deviation from the mean, encompassing about two-thirds of all test takers, results in a range of scores between 85 and 115 (fifteen points below and above the mean score of 100). Two standard deviations from the mean, encompassing about ninety-five percent of all test takers, results in a range of scores between 70 and 130 (thirty points below and above the mean score). A score of 130 on Wechsler tests often operates as the lower threshold for a classification of "giftedness," while a score of 70 to 75 often marks the

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[58] The following Figure was copied from an excellent student note authored by Geraldine W. Young, and published in the March 2012 edition of the Vanderbilt University Law Review: *i.e.*, Geraldine W. Young, *A More Intelligent and Just Atkins*: *Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability*, 65 Vand. L. Rev. 615, 622 (2012).

upper threshold for "intellectual disability" (or, as it formerly was called, "mental retardation").[59]

The foregoing description of the process for standardizing an IQ assessment instrument underscores that it is a lengthy and expensive process. For such reasons, test publishers do not frequently re-standardize tests. Moreover, given the effort and expense required to replace aging assessment instruments, administrators often continue to use tests standardized many years before — a fact that results in the administration of IQ tests a decade or more after the publishers originally normed the standardization sample.[60]

Dr. Flynn's original, 1984 study documented IQ gains among American citizens over a period of more than forty years, from 1932 through 1978.[61] He used data collected from seventy-three previous studies, with a combined total of almost 7,500 subjects to

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[59] *See*, *e.g.*, *Atkins*, 536 U.S. at 309 n.5 ("It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.") (citing 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 2952 (B. Sadock & V. Sadock eds., 7th ed. 2000)).

[60] The foregoing discussion of the manner of creating IQ assessment instruments is based upon Young, *A More Intelligent and Just Atkins*, 65 Vand. L. Rev. at 621-23. *See also* Alan S. Kaufman, *IQ Testing 101* 107, 125, 130 (2009); William E. Benet, *Genius: An Overview*, Assessment Psychol. Online (Jan. 2005), http://www.assessmentpsychology.com/genuis2.htm; *IQ Classifications*, Assessment Psychol. Online, https://www.assessmentpsychology.com/iqclassifications.htm (last visited May 1, 2020).

[61] James R. Flynn, *The Mean IQ of Americans: Massive Gains 1932 to 1978*, 95 Psychol. Bull. 29 (1984).

whom various Stanford-Binet and Wechsler IQ assessment instruments had been administered. He discovered that, on average, the subjects scored higher on earlier-normed IQ tests than on later-normed IQ tests.[62]

> Flynn then calculated IQ gains by (1) measuring the difference between the subjects' mean scores on the two tests — the earlier and later tests, normed at different times but taken around the same time — and (2) dividing that difference by the number of years that had passed between the norming of the earlier test and the norming of the later test, resulting in a figure around 0.3 points per year.
>
> From his findings, Flynn concluded that the IQ gains reflected the obsolete, outdated norms of the earlier IQ tests, as compared to later, more recently normed tests. *Flynn defined obsolete norms as "simply ones that are earlier and easier than later norms*." Given the relative nature of IQ scores and the observed IQ gains over time, *when a person takes an IQ test in 2010 and that test's norms are based on a standardization sample from 1980, the person receives an inflated score because the score is based on the weaker performance of the 1980 sample, rather than the performance of the person's peers in 2010*. In other words, a person's IQ score on an earlier test with obsolete norms may be above average, while the same performance may be average or below average on a later test with updated norms. Psychologist and IQ-test developer Alan S. Kaufman explains this phenomenon with an analogy: while a runner's time may have won a track

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[62] *Id.* at 32.

> meet twenty years ago, the same time may not even qualify for a meet today.

Geraldine W. Young, *A More Intelligent and Just Atkins*: *Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability*, 65 Vand. L. Rev. 615, 624-25 (2012) (footnotes omitted, emphasis supplied).

For such reasons, this court adjusted the IQ scores of a habeas petitioner in accordance with the Flynn effect in a previous *Atkins* appeal. *Thomas v. Allen*, 614 F. Supp. 2d 1257, 1275-81 (N.D. Ala. 2009), *affirmed* 607 F.3d 749, 753 (11th Cir. 2010) (holding that an evaluator "may also consider the 'Flynn effect,' a method that recognizes the fact that IQ test scores have been increasing over time"). Nothing that has been presented in this case by either Dr. King or the State's attorneys persuades this court that it should not do so again.[63]

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[63] The *User's Guide* to the tenth edition of the American Association on Intellectual and Development Disabilities' treatise on *Mental Retardation Definition, Classification and Systems of Supports* recommends that clinicians take the Flynn effect into account when performing evaluations in less than optimal circumstances (*e.g.*, the legal and physical constraints of a maximum-security prison environment). Specifically, the *Guide* directs diagnosticians to:

> Recognize the "Flynn Effect." In his study of IQ tests across populations, Flynn (1984, 1987, 1989) discovered that IQ scores have been increasing from one generation to the next in all 14 nations for which IQ data existed. This increase in IQ scores over time has been dubbed the Flynn Effect. Flynn reported a greater increase in the Wechsler Performance IQ, which is more heavily loaded on fluid abilities than on the Wechsler Verbal IQs. On average, the Full-Scale IQ increases

> by approximately 0.33 points for every year elapsed since the test was normed (Flynn, 1999). The main recommendation resulting from this work is that all intellectual assessments must use a reliable and appropriate individually administered intelligence test. In cases of tests with multiple versions, the most recent version with the most current norms should be used at all times. In cases where a test with aging norms is used, a correction for the age of the norms is warranted. For example, if the Wechsler Adult Intelligence Scale (WAIS-III, 1997) was used to assess an individual's IQ in July 2005, the population mean on the WAIS-III was set at 100 when it was originally normed in 1995 (published in 1997). However, based on Flynn's data, the population mean on the Full-Scale IQ raises roughly 0.33 points per year; thus, the population mean on the WAIS–III Full–Scale IQ corrected for the Flynn Effect would be 103 in 2005 (9 years x 0.33 = 2.9). Hence, using the "at least two standard deviations below the mean" (Luckasson et al., 2002), the approximate Full-Scale IQ cutoff would be approximately 73 (plus or minus the standard error of measurement). Thus the clinician needs to use the most current version of an individually administered test of intelligence and take into consideration the Flynn Effect as well as the standard error of measurement when estimating an individual's true IQ score.

American Association on Intellectual and Development Disabilities, *User's Guide: Mental Retardation Definition, Classification and Systems of Supports* 20-21 (10th ed. 2006) (hereafter, AAIDD, *User's Guide*). *See also*, *e.g.*, American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013) (hereafter "DSM-5") ("Factors that *may* affect [intelligence] test scores include practice effects and the 'Flynn effect' (*i.e.*, overly high scores due to out-of-date test norms)") (emphasis and alteration supplied); Marc J. Tassé *et al.*, *The Relation Between Intellectual Functioning and Adaptive Behavior in the Diagnosis of Intellectual Disability*, 54 Intell. & Developmental Disabilities 381, 382 (2016) ("All other sources of measurement error, *such as the Flynn effect and*

Having said that, however, does not mean that this court unequivocally endorses Dr. Shaffer's conclusions. His adjustment calculations require revision because he miscalculated the number of years that elapsed between the date on which the WAIS-IV assessment instrument was published and the date on which he administered it to Ferguson. He computed that difference as 10.2 years, which he then multiplied by the factor 0.3, the rate at which Flynn predicted outdated IQ norms increase each year. However, the WAIS-IV was released in August 2008,[64] and the difference between that date and the September 18, 2017 date on which Dr. Shaffer administered the test to Ferguson was nine years and one-and-a-half months, or 9.08 years. Multiplying 9.08 by the Flynn factor of 0.3 produces a product of 2.7 which, when subtracted from Ferguson's Full-Scale IQ score of 77, yields an adjusted IQ score of 74.3 — not, as Dr. Shaffer testified, 73.4.[65]

b. Adjustment for the standard error of measurement

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practice effects, should also be considered when interpreting test results.") (emphasis supplied).

[64] David Wechsler, *Wechsler Adult Intelligence Scale: Technical and Interpretative Manual* 22 (4th ed. 2008).

[65] The only calculations that come close to Dr. Shaffer's testimony must begin with March 2007: the date during which data began to be collected from individuals who ultimately comprised the normative sample for the WAIS-IV that was published in August 2008. The difference between March 2007 and Shaffer's September 18, 2017 administration was ten years and seven months, or 10.583 years, which — when multiplied by the Flynn factor of 0.3 — produces a product of 3.1749. Subtracting that product from Ferguson's Full-Scale IQ score of 77 yields an adjusted score of 73.8251, but not the product of 73.4 to which Dr. Shaffer testified.

Ferguson also accuses Dr. King of ignoring proper diagnostic practices by reporting his IQ scores as a single fixed number, as opposed to a range of numbers accounting for the statistical error of measurement.[66] That criticism is not entirely fair, however, in view of King's testimony that, after adjusting Ferguson's Full-Scale IQ score of 85 on the WAIS-IV for the standard error of measurement, an evaluator could be 99% confident that his "true IQ" would lie somewhere between 81 and 89:[67] a range that straddled both the "borderline" and "average" ranges of intellectual functioning. The more pertinent criticism is addressed in the following section.

c. Adjustment for the "practice effect"

Dr. Shaffer administered the WAIS-IV assessment instrument to Ferguson on September 18, 2017. Dr. King re-administered the same test just five months later, on February 13, 2018, but made no adjustment for the "practice effect," even though he acknowledged that an IQ test score can be inflated "when a test is given twice within a fairly short period of time," ordinarily no more than six months apart, because the individual "can remember some of the items and perhaps have an increased performance on

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[66] *See* doc. no 47 (Petitioner's Brief), at 15 ("At the hearing, Dr. King agreed that 'reporting an IQ score with an associated confidence interval is a critical consideration [*sic*: *King actually said* 'I think it's important'] underlying the appropriate use of intelligence tests and best practices.' ") (citing doc. no. 46 (Hearing Transcript), at 180, lines 7-10).

[67] Doc. no. 46 (Hearing Transcript), at 119-20.

the subsequent administration of that test."[68] Dr. King explained his failure to make any adjustment to Ferguson's IQ score on the WAIS-IV by pointing to the fact that his Wechsler and Stanford Binet test scores were so close to one another.[69] He characterized them as in "absolute agreement."[70]

Even so, a 2012 study of the effect on IQ scores achieved by fifty-four persons to whom the WAIS-IV was re-administered at three or six months intervals after the initial, baseline administration of that test found that their Full-Scale IQ scores increased an average of 7 points. Such an increase occurred regardless of whether the re-administration occurred at three or six month intervals after the baseline test.[71] In fairness, therefore, the Full-Scale IQ score achieved by Ferguson on Dr. King's re-administration of the WAIS-IV will be reduced by 7 points.

d. The majority of Ferguson's IQ scores are above 70

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[68] *Id.* at 138. *See also* doc. no. 47 (Petitioner's Brief), at 15 ("Intelligence tests are made up of certain tasks, and a tester's score is determined based on how well they perform the tasks"; and, "with practice, any task becomes easier, *resulting in an upward skew known as the 'practice effect.'* ") (emphasis supplied).

[69] Doc. no. 46 (Hearing Transcript), at 139.

[70] *Id.* at 122.

[71] Eduardo Estevis, Michael R. Basso, & Dennis Combs, *Effects of Practice on the Wechsler Adult Intelligence Scale Across 3- and 6-Month Intervals*, 26 Clinical Neuropsychologist 239 (Feb. 2012). The participants' Verbal Comprehension, Working Memory, Perceptual Reasoning, Processing Speed, and General Ability IQ sub-test indices also increased 5, 4, 5, 9, and 6 points, respectively.

Ferguson concedes that "a few" of his "IQ test result ranges are above 70, even when accounting for the Flynn effect and the SEM," but he contends that "the majority of [his] tests have ranges that place his IQ scores below 70, which is strong evidence of significantly subaverage intelligence." [72] He argues that, because "most" of his IQ scores "fall 'within the clinically established range for intellectual-functioning deficits,' the Court must 'continue the inquiry and consider other evidence of intellectual disability.' "[73] He contends that he has satisfied the first prong of the *Atkins* test for intellectual disability, because the "neurocognitive tests and the totality of [his] IQ test results show that his intelligence is significantly subaverage."[74]

The following chart sets out the dates on which IQ assessment instruments were administered to Ferguson, the standardized tests administered on each occasion, the Full-Scale IQ score he achieved on each, followed by his scores after adjustment for the Flynn effect, and then the standard error of measurement.

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[72] Doc. no. 47 (Petitioner's Brief), at 18.

[73] *Id.* at 19 (citing *Moore v. Texas*, 137 S. Ct. 1039, 1050 (2017)). ***Nota bene***: *Moore v. Texas* is not retroactive to cases on collateral review. *See In re Bowles*, 935 F.3d 1210, 1220 (11th Cir. 2019); *Smith v. Comm., Ala. Dep't of Corr.*, 924 F.3d 1330, 1337-40 (11th Cir. 2019).

[74] Doc. no. 47 (Petitioner's Brief), at 25.

Date of Test	IQ Test Given	Test Normed	Full-Scale Scor	Adjusted for Flynn effect	SEM Range
1979	SB-3	1973	77	75.2	70.2 - 80.2
1985	WISC-R	1974	71	67.7	62.7 - 72.7
1988	WISC-R	1974	87	82.2	77.2 - 87.2
1997 (Dr. Rosen)	WAIS-R	1981	69	64.2	59.2 - 69.2
2017 (Dr. Shaffer)	WAIS-IV	2006	77	74.3[75]	69.3 - 79.3[76]

[75] See the discussion in the textual paragraph accompanying notes 64 and 65, *supra*.

[76] Dr. Shaffer testified to a bidirectional SEM range of 69.4 to 78.4 (*see* doc. no. 46 (Hearing Transcript), at 28), but adjustment of the Full-Scale IQ score of 77 achieved by Ferguson on the WAIS-IV for the Flynn effect reduced that number to 74.3 (see the discussion in the textual paragraph accompanying notes 64 and 65, *supra*), and required a re-computation of the SEM's bidirectional range.

2018	WAIS-IV	2006	78[77]	75.15[78]	70.15 - 80.15
(Dr. King)	SB-5	2003	77[79]	72.6[80]	67.6 - 77.6

The preceding chart graphically demonstrates that only two of the seven standardized tests administered between 1979 and 2018 resulted in IQ scores below 70, when adjusted for the Flynn effect: *i.e.*, the 1985 WISC-R and the 1997 WAIS-R. The record also reflects, however, that the persons who administered both of those tests remarked that Ferguson did not put forth his best effort. For

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[77] Dr. King's score of 85 reduced by 7 as an adjustment for the "practice effect": *see* the discussion in Part II.A.4.c of this opinion, *supra.*

[78] Dr. King's score of 84 reduced by 7 for the "practice effect": *see id.*

[79] The difference between August 2008 (WAIS-IV published) and February 18, 2018 (re-administration of that test by Dr. King) was nine-and-a-half years. Multiplying 9.5 by the Flynn factor of 0.3 produces a product of 2.85 which, when subtracted from 78 (Ferguson's Full-Scale IQ score adjusted for the "practice effect") yields an IQ score adjusted for the Flynn effect of 75.15.

[80] The "Stanford Binet Intelligence Scales-Fifth Edition (SB-5)," as revised by Gale H. Roid, Ph.D., was released by Riverside Publishing Co. on May 20, 2003. *See* https://www.businesswire.com/news/home/20030520005137/en/Riverside-Publishing-Announces-Edition-Stanford-Binet-Intelligence-Scales (last visited Apr. 25, 2020). The difference between May 20, 2003 and February 18, 2018, when the SB-5 was administered to Ferguson by Dr. King, is 14.75 years (14 years and 9 months); and 14.75 multiplied by the Flynn factor of 0.3 produces 4.425 which, when subtracted from 77 (Ferguson's Full-Scale IQ score on the SB-5 adjusted for the "practice effect") yields an IQ score adjusted for the Flynn effect of 72.575, or 72.6 rounded.

example, the person who administered the 1985 WISC-R noted that, even though Ferguson "did not appear to be challenged by the more difficult items on the test," he "gave up easily on both verbal and non-verbal items."[81] The 1997 WAIS-R was administered by Dr. C. Van Rosen while Ferguson was awaiting trial for capital murder in state court, and Dr. Rosen stated in his written report of evaluation that he considered it "quite apparent that [Ferguson] did not attempt to make a good effort in this test, giving up readily on many items and seemingly not trying as hard as possible. [Ferguson's] intellectual functioning is consequently considered to be within the higher portion of the borderline range of abilities." [82] (As noted earlier, Dr. Rosen also testified at trial and reiterated that it was clear to him that Ferguson did not put forth full effort during administration of the WAIS-R, and that, if he had "really tried[,] he would have scored probably in the middle 70's ... perhaps a little higher."[83])

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[81] Doc. no. 39-5 (Petitioner's Exhibit 5), at 22. As recorded in note 13, *supra*, Ferguson argues that this court cannot use the comments of the examiner on the 1985 WISC-R test to conclude that his low score was due to malingering, because the examiner also stated that Ferguson was "cooperative during the entire session," and that his scores were "considered to be valid." Doc. no. 47 (Petitioner's Brief), at 17. This court rejects that argument because Ferguson's Full-Scale IQ scores before and after that test were so much higher.

[82] Doc. no. 41-9 (Respondent's Exhibit 5), at 7 (Rosen Report) (alterations supplied). (The Bates Number stamped in the lower, right-hand corner of this page of Respondent's Exhibit 7 is 623.)

[83] Doc. no. 41-9 (Respondent's Exhibit 6), at 25 (Rosen Trial Testimony). (The Bates Number stamped in the lower, right-hand corner of this page of Respondent's Exhibit 8 is 641.)

Ferguson argues that it would be illogical and unfair to discredit his IQ test scores on the basis of such a rationale because, "[o]utside of Dr. Rosen's speculative statements, there are no objective facts in the record to show that [he] *malingered* on this IQ test."[84] He claims that it is "eminently possible" that he gave up easily because the tasks and questions were beyond his intellectual ability. He also notes that Dr. Shaffer administered a "Memory Malingering test" to determine whether he "was putting forth his best effort on the various tests as part of his examination."[85] Based upon the results of that test, Dr. Shaffer "assumed" that the results of the WAIS-IV he administered to Ferguson were valid.[86]

The State contends that a review of Dr. Rosen's credentials from his penalty-phase testimony in the trial court shows that he was highly qualified on the basis of education and clinical experience to form an opinion about whether Ferguson was malingering, and that Ferguson has presented no evidence to the contrary.[87] The State adds that the results of the Memory Malingering test administered by Dr. Shaffer "have nothing to do with whether Ferguson malingered during Dr. Rosen's evaluation in 1997 before his capital murder trial."[88]

This court is not persuaded by Ferguson's argument. He has offered nothing to indicate that Dr.

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[84] Doc. no. 47 (Petitioner's Brief), at 18 (alterations and emphasis supplied).
[85] *Id.* at 17.
[86] Doc. no. 46 (Hearing Transcript), at 41.
[87] Doc. no. 50 (Respondent's Brief), at 37 (citing doc. no. 41-9 (Respondent's Exhibit 8), at 13-16 (Rosen's Trial Testimony)).
[88] *Id.* at 37-38.

Rosen, an experienced clinical psychologist, was not qualified to state an opinion that Ferguson did not devote his full and best intellectual effort during administration of the WAIS-R prior to trial in state court, based upon Dr. Rosen's personal observations of Ferguson, and the specific inconsistencies he observed during the testing processes. This court accepts Dr. Rosen's subjective opinion that Ferguson's IQ scores on that 1997 assessment instrument were not accurate representations of his intellectual abilities.[89]

Ferguson next argues that "the majority" of his test scores, as adjusted by the standard error of measurement, yield "ranges that place his IQ scores below 70, which is strong evidence of significantly subaverage intelligence." [90] That assertion is not accurate. Half of his Full-Scale IQ test scores — *i.e.*, the 1979 SB-3, 1988 WISC-R, and 2018 WAIS-IV — even when adjusted for the Flynn effect and the Standard Error of Measurement, have IQ ranges completely above 70. Three of his tests — *i.e.*, the 1985 WISC-R, 2017 WAIS-IV, and 2018 SB-5 — even when adjusted for the Flynn effect and the Standard Error of Measurement, have IQ ranges only partially below 70. The WISC-R test administered during August of 1985, when Ferguson was twelve years old and on the threshold of the 1985-86 school year, resulted in a SEM range of 62.7 to to 72.7. However, the test administrator noted that, even though Ferguson "did not appear to be challenged by the more difficult items on the test," he "gave up easily on both verbal and non-

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[89] For the same reason stated in note 81, *supra*, this court could also reject Ferguson's argument about Dr. Rosen's observations, because Ferguson's Full-Scale IQ scores before and after the 1997 WAIS-R test were consistently higher.

[90] Doc. no. 47 (Petitioner's Brief), at 18.

verbal items." [91] Further, the standard error of measurement for the test administered by Dr. Shaffer in 2017 results in a range from 69.3 to 79.3, and the lower end of that range barely dipped below 70.[92]

Only the WAIS-R test administered by Dr. Rosen in 1997, prior to trial in state court, has an adjusted range totally below 70 — and the court previously discounted that score based upon Dr. Rosen's opinion that the low scores were the result of Ferguson's malingering, rather than an accurate measure of his intellectual ability. Thus, the court finds that the majority of Ferguson's IQ scores — even when adjusted for both the Flynn effect and the Standard Error of Measurement — are in a range above 70.

However, Ferguson's scores on those three tests — when adjusted for the Flynn effect and the Standard Error of Measurement — indicate that it is *possible* his IQ falls within the range of intellectual disability.

Dr. Shaffer's opinion that Ferguson suffers from significantly subaverage intellectual functioning is based on the results of Ferguson's 1985, 1997, and 2017 tests, which exhibit adjusted IQ ranges that include scores below 70. However, Dr. Shaffer did not

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[91] Doc. no. 39-5 (Petitioner's Exhibit 5), at 22.

[92] As discussed in note 76, *supra*, Dr. Shaffer testified to a bidirectional SEM range of 69.4 to 78.4 (*see* doc. no. 46 (Hearing Transcript), at 28), but adjustment of the Full-Scale IQ score of 77 achieved by Ferguson on the WAIS-IV for the Flynn effect reduced that number to 74.3 (see the discussion in the textual paragraph accompanying notes 64 and 65, *supra*), and required the re-computation of the SEM's bidirectional range that is stated in text.

consider the possibility that the 1985 and 1997 ranges are artificially low because Ferguson malingered, and did not fully apply himself in taking those tests.[93] Moreover, Shaffer's inclusion of the 2017 test, on which Ferguson had an adjusted IQ range of 69.3 to 79.3,[94] requires a presumption that Ferguson's true IQ score falls at the very bottom of that range. But, the standard error of measurement "does not carry with it a presumption that an individual's IQ falls to the bottom of his IQ range." *Ledford*, 818 F.3d at 641.[95] Rather, in the case of the 2017 test, it is more likely that Ferguson's true IQ score is above 70. Further, the results of all the other IQ tests Ferguson has taken place his range of scores above 70.

In light of the three scores placing him above the range of intellectual disability, the three scores placing him within the range of intellectual disability do not establish that Ferguson suffers from *significantly* subaverage intellectual functioning.

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[93] Ferguson's 1985 and 1997 IQ scores could place him in the range of intellectual disability. But, the fact that there is evidence that Ferguson was malingering on those tests makes that chance less likely.

[94] See note 76, *supra.*

[95] As the Eleventh Circuit noted, however, the standard error of measurement is a "bidirectional concept." *Raulerson*, 928 F.3d at 1008 (citing *Ledford,* 818 F.3d at 641). "The standard error of measurement accounts for a margin of error both below *and* above the IQ test-taker's score." *Id.* (quoting *Ledford*, 818 F.3d at 640).

B. Proof of Significant Limitations in Adaptive Behavior

The clinical authorities all agree that an individual may achieve an IQ score greater than 70, but still " 'have such severe adaptive behavior problems ... that the person's actual functioning is comparable to that of individuals with a lower IQ score.' " *Hall*, 572 U.S. at 712 (quoting DSM-5, at 37). Thus, this court must determine whether Ferguson established, by a preponderance of the evidence, that he has significant limitations in at least two of the skills deemed by psychologists to be necessary for independent living: *i.e.*, "communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." *Atkins*, 536 U.S. at 308 n.3 (citation omitted); *see also*, *e.g.*, *Perkins*, 851 So. 2d at 456(same); *Jenkins v. Commissioner, Alabama Department of Corrections*, 936 F.3d 1252, 1278 (11th Cir. 2019) (same).

Such skills are generally referred to as "adaptive behaviors" — "functions that enable individuals to adjust to the environment appropriately and effectively,"[96] and they often are grouped into three categories for analytical purposes: *i.e.*, communication skills; daily living skills; and socialization skills. *Communication skills* refers to the "process by which one person transmits an idea to another person by means of spoken or written words, pictures, sign language, gestures, and non-verbal communications such as body language."[97] *Daily living skills* refers to the typical, routine actions of

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[96] *Dictionary of Psychology* 17.
[97] *Id.* at 191.

daily living, such as "getting in and out of bed, dressing, eating, toileting." [98] *Socialization skills* refers to the manner in which a person interacts with other people in the family and larger community. The label also includes "recreational activities and what we call coping skills, which has to do with how [the subject] handles stress and ... manages difficult situations."[99]

1. Ferguson's psychologist — *Dr. Robert D. Shaffer*

Dr. Shaffer utilized an assessment instrument known as the "Vineland Adaptive Behavior Scales" to evaluate Ferguson's adaptive behaviors.[100] That test comes in three versions: "Two are administered through parents or care-givers, and the third is to be filled out by a classroom teacher."[101] In other words,

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[98] *Id.* at 14.

[99] Doc. no. 46 (Hearing Transcript), at 35-36 (Shaffer Testimony) (alterations supplied). *See also* doc. no. 47 (Petitioner's Brief), at 27 (defining the three domains).

[100] Dr. Shaffer said that he selected the Vineland Scales because he considered the assessment instrument to be "the gold standard, in terms of assessing adaptive behaviors." Doc. no. 46 (Hearing Transcript), at 32.

[101] *Dictionary of Psychology* 1052. Dr. Shaffer testified that the "Vineland Adaptive Behavior Scales" is an extension of the "Vineland Social Maturity Scale," which the foregoing *Dictionary of Psychology* defines on the same page as:

> A test used in assessing the development of individuals, including possible mental deficiency, from infancy to 30 years of age. *Persons acquainted with participants rate them* on self-help, locomotion, communication, self-direction, socialization, and occupation. Named after the Vineland Training School for the mentally retarded by Edgar A. Doll, the author of the scale.

all versions are designed to be administered by "an informant who was very familiar with the behavior of the person" to be evaluated. [102] Dr. Shaffer administered the Vineland to petitioner's mother, Mrs. Betty Ferguson, because she "was able to provide observations of [her son] at the time of his developmental period at age 18."[103]

The scaled Vineland scores assigned to Ferguson as a result of his mother's responses to questions in each domain were: communication 67; daily living skills 67; and, socialization 68. His composite score was 63, which placed him in the first percentile of the population,[104] meaning that he was "exceeded by 99 out of a hundred comparable individuals at age 18 in the development or in the demonstration of these independent living skills, behaviors that are necessary to perform daily routines."[105]

Dr. Shaffer testified that the description of Ferguson's "prior work behavior, the behaviors described related to his marriage that were made available ... through prior testimony, and the results

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Id. (emphasis supplied); *see also* doc. no. 46 (Hearing Transcript), at 32-33 (Shaffer Testimony).

[102] *Id.* at 33. Dr. Shaffer testified on the same page that:
It's not standard procedure with the Vineland to interview the person that's being rated. Instead, it is intended to be a process of observing actual behaviors; that is, someone who's watched the person, can talk about very specific concrete actions, and report those actions. Then those behaviors are subject to a very specific scoring rubric that's identified in the Vineland manual that then results in a comparison with the U.S. population.

[103] *Id.*

[104] *Id.* at 34-36.

[105] *Id.* at 37.

of the Vineland Adaptive Behavior Scales" test, all combined to reinforce his conclusion that Ferguson suffered from significant deficits in adaptive behavior skills.[106]

2. The State's psychologist — *Dr. Glen D. King*

Dr. King testified that the American Association for Intellectual and Developmental Disabilities recommends the administration of either the "Vineland Adaptive Behavior Scales" or the "Adaptive Behavior Assessment System (ABAS)" test instrument for formal assessment of an individual's adaptive behavior skills.[107]

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[106] *Id.* (alteration supplied). Dr. Shaffer added that he had also reviewed Ferguson's special education records from the Morgan County and Hartselle City School Systems. *Id.* at 38.

[107] Doc. no. 46 (Hearing Transcript), at 146. Capital murder cases present special problems in assessing a defendant's adaptive functioning abilities, as noted by Dr. King:

> One problem is that when we use standardized instruments, like the Vineland or the Adaptive Behavior Assessment System, we're basically asking somebody to try to fill out those devices based on their interaction with the person now. We have to try to do some kind of retro grade evaluation to the time of the offense or before then. We sometimes – [as] in this case, [the retrograde evaluation] can be 25, 26, years later.
>
> The Vineland [Adaptive Behavior Scale] has a problem[,] *in that it does not allow for self-report norms*, *meaning there's no way for an individual to rate himself*. You have to use an individual who has regular contact with that person on almost a daily basis *for the previous six months*. That's the way the Vineland was normed.

Dr. King preferred to use the "Adaptive Behavior Assessment System – Third Edition (ABAS-3)" [108] and "Independent Living Scales (ILS)" [109] assessment instruments, because both allowed "self-report norms," meaning that *the test subject* is allowed to "answer the questions based on his own knowledge of what he was capable of doing."[110] Ferguson's scores on the ABAS-3 ranged from 7 to 13 in all of his adaptive skill areas. "His general adaptive composite, again based on an average of a hundred[,] was 98. His conceptual, social, and practical domains were 96, 111 and 96 respectively."[111]

> There is no ... provision for asking somebody to fill out the Vineland for 27 years ago. That violates standardization procedures.

Doc. no. 46 (Hearing Transcript), at 145-46 (alterations and emphasis supplied). Dr. Shaffer voiced the opposite criticism, saying: "It's very easy for a person to have bias about their own specific abilities. And they can upgrade them or downgrade them depending on their particular bias. Most people tend to view their own capabilities as stronger than they actually are." *Id.* at 34.

[108] The third edition of the Adaptive Behavior Assessment System was released in 2015 and, according to its publisher, the test includes five rating forms, each for a specific age range and evaluator: *i.e.*, Parent/Primary Caregiver Form (ages 0–5); Teacher/Daycare Provider Form (ages 2–5); Parent Form (ages 5–21); Teacher Form (ages 5–21); and *Adult Form* (ages 16–89). *See* (ABAS™-3) Adaptive Behavior Assessment System™, Third Edition – Product Page, WPS, https://www.wpspublish.com/abas-3-adapative-behavior-assessment-system-third-edition (last visited Apr. 10, 2020).

[109] For a description of the Independent Living Scales, see the website for "The Center for Outcome Measurement in Brain Injury," *Introduction to the Independent Living Scale*, https://www.tbims.org/ils/index.html (last visited May 4, 2020).

[110] Doc. no. 46 (Hearing Transcript), at 146.

[111] Dr. King stated that a "significantly low" score "would be a score of three or below." *Id.* at 147.

Dr. King used the Independent Living Scales assessment instrument as an additional means of testing Ferguson's adaptive functioning abilities, because "it has a number of questions and tasks ... that have to do with everyday behavior," and "it is normed and has standardization scores associated with an age range."[112] He explained that the ILS assessment instrument

> has items on it, for example, [like] showing him a bill and giving him a simulated check and asking him to fill out the check to pay the bill to see if he can do that. And ... all of these [individual] items are scored on a [scale running from Zero to Two, with a] zero, meaning no points, one point meaning they get partial credit, or two points meaning they get to full criteria.
>
> And so we get a score on these various domains for this test, as well. The subscales include things — include memory and orientation, managing money, managing home and transportation, health and safety, and social adjustment. And there are two factors on this test, as well, that have to do with problem solving and performance. Again, we combine all of these subscores and we kind of come up with a full scale standard score that indicates the ability to actually function independently.

Id. at 148 (alterations supplied). Ferguson performed well on the ILS. His full scale score, based on an average of 100, with a standard deviation of 15, was 98.[113] Ferguson's scores in all of the subparts of the ILS indicated good functioning, with the exception of

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[112] *Id.* at 147-48.
[113] *Id.* at 148.

social adjustment, which was not surprising in view of the number of years he had spent on death row on the date of testing.[114]

Dr. King's overall impression, based upon the results obtained from administration of the ABAS and ILS, on both of which Ferguson scored in the average, or non-impaired range, is that he does not meet the criteria for the adaptive functioning prong of the *Atkins* intellectual disability definition.[115]

3. The parties' arguments

Ferguson contends that Dr. Shaffer employed appropriate assessment instruments for assessing his adaptive behavior, and that Dr. Shaffer established that he suffers from significant or substantial deficits in his adaptive functioning abilities.[116] He argues that, when an objective person takes into account the fact that he has been incarcerated for many years, with little regular contact with any persons other than prison guards, Dr. Shaffer's administration of the Vineland Adaptive Behavior Scales to Mrs. Betty Ferguson was the best means for determining his adaptive functioning abilities during his developmental period.[117]

Dr. King acknowledged the difficulty of obtaining out-of-prison observational data for a death

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[114] *Id.* at 148-49, 153.
[115] *Id.* at 153.
[116] *See* doc. no. 47 (Petitioner's Brief), at 25-26.
[117] *See id.* at 29.

row inmate, [118] but he still insisted there were "significant problems" with Dr. Shaffer's administration of the Vineland Scales to Ferguson's mother: *e.g.*,

> (1) the Vineland is normed for people who have regular contact with the individual for the previous six months which did not occur in Ferguson's case; (2) Ferguson's mother was assessing his behavior for 27 years ago; and (3) Ferguson's mother was not around Ferguson for the [entire] time she was evaluating him (when he was 18) because he was not living with her during this time and, in fact, was estranged from her.

Doc. no. 50 (Respondent's Brief), at 49 (citing the testimony of Dr. King found at doc. no. 46 (Hearing Transcript), at 154). The State argues that, due to such problems, the results obtained from Dr. Shaffer's administration of the Vineland Adaptive Behavior Scales to Ferguson's mother is "suspect and should not be considered by this Court." *Id.*

In response, Ferguson's brief contends that Dr. Shaffer's personal observations of Ferguson's adaptive functioning abilities during the many hours that Dr. Shaffer spent with him supports the results obtained from administration of the Vineland test to his mother:

> Over the course of his examination, Dr. Shaffer met with Mr. Ferguson on three separate occasions and interacted with him

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[118] *See* doc. no. 46 (Hearing Transcript), at 184 ("The problem ... is that the only people who might know him well are guards, and I'm not going to ask them about him.").

> for nearly fourteen hours. [*See* doc. no. 46 (Hearing Transcript), at] 11. Mr. Ferguson is a death row inmate who has been in segregated confinement since 1998 and Dr. Shaffer is likely among a handful of individuals with the most, and may be the person with *the most*, significant social interaction with Mr. Ferguson in the past two decades. [119] *See* [doc. no. 41-4 (Part 2 of Respondent's Exhibit 4), at 33 (noting, in a report dated February 16, 2019], that Mr. Ferguson had been in segregation since September 8, 1998). In his extensive observations of Mr. Ferguson, Dr. Shaffer observed behavior that was entirely consistent with the Vineland results.[120] [*See* doc. no. 46 (Hearing Transcript), at] 37.

Doc. no. 47 (Petitioner's Brief), at 28-29 (*italicized* emphasis in original, citation alterations and footnotes supplied).

Ferguson also claims that the results obtained by Dr. Shaffer's administration of the Vineland to his mother were "amply supported" by evidence from his

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[119] Petitioner's brief includes a footnote at the end of this sentence stating: "To contrast, Dr. King spent approximately five hours with Mr. Ferguson for his evaluation. [*See* doc. no. 41-1 (Respondent's Exhibit 1),] at 3."

[120] Contrary to Ferguson's representation in the last sentence of this quotation from his Brief, Dr. Shaffer *did not describe* "observed behavior that was *entirely consistent with* the Vineland results." Instead, he testified that, when he met with Ferguson, he did not observe anything that appeared to him to be "*inconsistent with* the results of the Vineland-2 test" administered to Mrs. Betty Ferguson. Doc. no. 46 (Hearing Transcript), at 37, lines 9-11 (emphasis supplied).

1985 public school records which show that he was eligible for special services as an "educationally mentally handicapped" student and, therefore, could not function independently.[121] That was "a restrictive and structured educational setting," with students staying in the same room all day with only six or seven others. [122] Even within that close setting, one of Ferguson's teachers noted that he lacked "the motivation to ... work on his own" and required "individual attention."[123]

The State contends that Ferguson fails to acknowledge that, when he achieved a Full-Scale IQ score of 87 on the WISC-R in March of 1988, he was removed from classes for "educationally mentally handicapped" students and reassigned to the less restrictive environment of classes for "learning disabled" students. [124] The examiner who administered the assessment instrument commented that Ferguson's score placed him in the "low average range of intellectual functioning."[125] Ferguson admits the reclassification, but argues the fact that he

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[121] *See* doc. no. 47 (Petitioner's Brief), at 28.

[122] *Id.* (citing doc. no. 46 (Hearing Transcript), at 127).

[123] Doc. no. 39-5 (Petitioner's Exhibit 5), at 48 (April 16, 1987 letter handwritten by Ms. Mary Beth Henry, who apparently was Ferguson's Home Economics teacher. The relevant portion read as follows: "Dale's frequent absences have put him behind on several occasions and Dale lacks the motivation to make up his work on his own. Dale works best when I give him individual attention.").

[124] Doc. no. 50 (Respondent's Brief), at 47-48. The test was required by public policy: "Dale is currently enrolled in the special education program *and is due the required three year re-evaluation for continued placement in that program*." Doc. no. 39-5 (Petitioner's Exhibit 5), at 51 (emphasis supplied).

[125] Doc. no. 39-5 (Petitioner's Exhibit 5), at 52.

> *struggled with school after being moved to a less structured setting is further evidence of his deficits in adaptive functioning*. According to Dr. Chudy, once Mr. Ferguson was reclassified as learning disabled, Mr. Ferguson "found it increasingly difficult to do the work." [Doc. no. 41-9 (Respondent's Exhibit 7), at 45 (Chudy Written Report)]. Mr. Ferguson failed most of his classes, "particularly those in which he was placed in a regular classroom setting." *Id.* In the classes with a lot of special education support, Mr. Ferguson earned "average to above average scores." *Id.* In other words, Mr. Ferguson could not independently function in a general-setting classroom like typical students. After he was removed from the EMR classroom, Mr. Ferguson "found the work to be progressively more difficult" and dropped out of school. *Id.*

Doc. no. 47 (Petitioner's Brief), at 28.[126] The State contends that the foregoing argument is a misrepresentation of the record, and argues that Ferguson "was successful in school" after

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[126] Dr. James F. Chudy included the following observations in his 1998 state-court report:

> Mr. Ferguson continued in school until he was nearly 17 years-old and was approaching the 10th grade. At that time they had placed him in learning disabilities class and he was finding it increasingly difficult to do the work. As his school work reveals he was failing most of his classes, particularly those in which he was placed in a regular classroom setting. In those classes where he got a-lot [*sic*] of special educational help he was earning average to above average scores. In any case he found the work to be progressively more difficult, so he quit school.

Doc. no. 41-9 (Respondent's Exhibit 7), at 45 (Chudy Written Report).

reassignment to the less restrictive environment of classes for learning disabled students.[127]

Unless this court has misread the documentary evidence, however, neither Ferguson nor the State is entirely correct.

To begin, Ferguson was re-tested with the "Wechsler Intelligence Scale for Children–Revised (WISC-R)" on March 1, 1988, which would have been during the second semester of his 8th Grade, 1987-88 school year. During that semester, while still enrolled in the restrictive, small-group classroom environment for educationally mentally handicapped students, Ferguson's academic performance was acceptable, but not outstanding: that is, in January 1988 (*i.e.*, the first month of the second semester of the 1987-88 school year, and prior to the March 1, 1988 WISC-R re-test), Ferguson achieved passing grades of "C" or better in Reading, Math, Language Arts/English, Social Studies, Science, Spelling, and Handwriting. Physical Education was the only class in which Ferguson did not achieve a grade of "C" or better.[128]

However, following his transfer to the less structured classes for "learning disabled" students at the beginning of the following, 1988-89 school year, Ferguson faltered. His grades for the first semester of that 9th Grade school year were three D's (Special Reading, Physical Education, and Agricultural Business I) and three F's (Special Math, Special Social Studies, and Special Science).[129] His grades for the

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[127] Doc. no. 50 (Respondent's Brief), at 48.

[128] *Id.* (citing doc. no. 39-5 (Petitioner's Exhibit 5), at 84).

[129] *See* doc. no. 39-5 (Petitioner's Exhibit 5), at 86 ("Grade 9, 89 Year, 1 Sem."); *see also id.* at 87 (a second, but less legible, copy of the same page from Ferguson's school records).

second semester of the 9th Grade, 1988-89 school year improved, but only somewhat. He earned one "B+" (Reading 9-12), one "D" (Science 9/L), two "D-minuses" (Math 9/L and Physical Education), and two "F's" (Social Studies and Agricultural Business I).[130]

Then, inexplicably, Ferguson's academic performance in both semesters of the following 1989-90, 10th Grade school year improved *significantly*. During the first semester, he earned two "A's" (Math GED and History T/L), two "B's" (English T/L and Science T/L), one "C- minus" (Physical Ed/B), and one "F" (Health Occ I).[131] During the second semester, he earned *three* "A's" (English T/L, History T/L, and Science T/L), one "C- minus" (Physical Ed), one "D" (Math GED), and one "F" (Health Occ I).[132] It only was during the first semester of the 1990-91, 11th Grade school year that Ferguson stumbled badly, yet again, and received three "F's" in English TL, Math TL, and Apartment Living, and three "Incompletes" in Math TE & TL, History TL, and Health/Science.[133] He thereafter withdrew from school and his "Incompletes" were changed to "F's."

The bottom line is: the official Hartselle City Schools' record of Ferguson's academic performance following his removal from classes for "educationally mentally handicapped" students and reassignment to the less restrictive environment of classes for "learning disabled" students is a mixed bag into which both parties can reach to find support for their

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[130] *Id.* ("SM: 2 YR: 88-89").
[131] *Id.* ("SM: 1 YR: 89-90").
[132] *Id.* ("SM: 2 YR: 89-90").
[133] *Id.* ("SM: 1 YR: 90-91").

respective arguments. Even so, there is more support for the State's position than for Ferguson's.

The State also argues that the school records relied upon by Ferguson are not consistent with the results obtained from Dr. King's administration of the "Wide Range Achievement Test – Fourth Edition (WRAT-4)." When Ferguson was tested by Dr. King in 2018, he was reading at a 9.5 grade level, spelling at a 7.5 grade level, and performing math calculations at a 6.1 grade level.[134] Dr. King believes that the ability to read and spell at those levels is not consistent with a contention that Ferguson is intellectually disabled.[135] This court agrees.

Shifting focus, Ferguson argues that neither of the assessment instruments administered by Dr. King — *i.e.*, the "Adaptive Behavior Assessment System" and "Independent Living Scales" — returned accurate or reliable data because, "[c]ontrary to best practices outlined in the authoritative texts," both of those tests relied on Ferguson's "self-reporting about whether he believed he was able to do real-life tasks," and Dr. King did not consider how the "results may be inconsistent with the record."[136] Ferguson criticizes the Adaptive Behavior Assessment System, "in which Dr. King asked Mr. Ferguson to rate his own abilities on whether he could perform a number of tasks," because most of the questions pertained to tasks Ferguson would never have an opportunity to perform in his prison environment, such as: making appointments by telephone, mobile device, or internet; using paper or digital maps to find his way to desired

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[134] Doc. no. 46 (Hearing Transcript), at 142-43.
[135] *Id.* at 144-45.
[136] Doc. no. 47 (Petitioner's Brief), at 29-30.

locations; calling a repairman when needed; showing responsibility for personal finances; or walking or riding a bike alone to locations within a mile of home or work.[137] The State responds by arguing that all of those questions addressed activities that Ferguson could have performed prior to his incarceration.[138] (The State's response requires more credulity of this judicial officer than he is inclined to grant, however, especially when one considers that mobile telephone devices, computers, "the internet," and "digital maps" (which are dependent upon Global Positioning Satellites) were technological innovations that either had not been perfected, or were not in widespread use, on the date Ferguson was arrested and incarcerated for the underlying capital offenses.)

Ferguson also faults Dr. King for allowing him to read the instructions for the Adaptive Behavior Assessment System test, without making any "further attempt to check [his] understanding of the test instructions beyond generally asking if [he] had any questions."[139] He argues that the results of that test indicate its self-reporting bias.

> On the ABAS-3, Mr. Ferguson gave himself the highest score on almost every single question, indicating that he "always (or almost always) when needed" could complete the tasks. *See generally* Pet'r Ex. 10 [*sic*]. Among the things that Mr. Ferguson indicated he could *always* do when needed were: use electrical sockets safely; check bank or other financial statements to make sure they are correct; pay bills on time; plan ahead for fun activities on

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[137] *Id.* at 30.
[138] *See* doc. no. 50 (Respondent's Brief), at 46.
[139] Doc. no. 47 (Petitioner's Brief), at 30 (alterations supplied).

> free days or afternoons; and invite others to join him in playing games and other fun activities. *See generally id.* The absurdity of these answers, considering Mr. Ferguson's highly restrictive incarceration, shows that Dr. King's administration of the ABAS-3 was plagued with self-reporting bias. *See* [doc. no. 46 (Hearing Transcript), at] 34 ("It's very easy for a person to have bias about their own specific abilities."); *id.* at 42 (Dr. Shaffer's testimony that the ABAS-3, when "applied directly to the person themselves" is "very subject to their personal bias"); [*United States v.] Lewis*, [No. 1:08 CR 404,] 2010 WL 5418901, at *23 [(N.D. Ohio Dec. 23, 2010)] ("[T]he use of Defendant as an informant to his own adaptive behavioral capabilities, known as 'self-reporting,' without any corroborating sources, is disfavored by the AAIDD."). The potential for self-reporting bias was only magnified when the test asked Mr. Ferguson to self-report on whether he could do an activity that has had no connection to his life in prison for over twenty years.

Doc. no. 47 (Petitioner's Brief), at 30-31 (alterations supplied). Ferguson contends that the mere fact he "filled out the ABAS-3 in such a manner without asking for clarification is indicative of his lack of adaptive functioning skills."[140] He argues that his limitations in his adaptive functioning abilities are self-evident: otherwise, he "would certainly have asked some clarifying questions to ensure that [he was] providing accurate results," and his failure to "raise any concerns" about the test questions underscores the inaccuracy of its results.[141]

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[140] *Id.* at 31.
[141] *Id.*

The State responds by noting that there is no *evidence* in the record indicating that Ferguson did not understand the instructions for taking the ABAS-3, and contends that he "would have understood when he was rating himself that the questions involved activities that he had done before he was incarcerated — such as riding a bike or calling a repairman."[142]

The State also disputes Ferguson's contention that Dr. King did not conduct a meaningful assessment of his adaptive functioning abilities by pointing to Dr. King's uncontradicted testimony that the Adaptive Behavior Assessment System is one of two instruments recognized by the American Association on Intellectual and Developmental Disabilities for assessing a person's adaptive functioning abilities. [143] Dr. King explained his reasons for using the ABAS as follows:

> Well, again, the American Association for Intellectual and Developmental Disabilities recommends for formal assessment of adaptive behavior that either the Vineland or the ABAS [be] used. Those are acceptable instruments to determine adaptive functioning when you're trying to come up with some standardized scoring.
>
> I prefer the Adaptive Behavior Assessment System for the reasons I've already mentioned because it has self-report norms so the individual can take it now and answer the questions based on his own knowledge of what he was capable of doing.

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[142] Doc. no. 50 (Respondent's Brief), at 46-47.
[143] *Id.* at 46 (citing doc. no. 46 (Hearing Transcript), at 146).

Doc. no. 46 (Hearing Transcript), at 146 (alteration supplied).

Additionally, the State disputes Ferguson's contention that the ABAS and Independent Living Scales are contrary to the so-called "best practices" outlined in "authoritative texts," because each test relies upon self-reporting. As the State notes, Ferguson did not "identify these authoritative texts or cite this Court to where these authoritative texts state that self-reporting is improper."[144]

Ferguson also contends that, even though Dr. King was "aware of the possibility that the ABAS-3 results were skewed and invalid," he made no attempt to "follow up," to determine whether Ferguson "could actually do the activities he said he could."[145]

Ferguson also questions the validity and usefulness of the Independent Living Scales test, which was administered by Dr. King to obtain "a measure of [his] practical abilities in Managing Money, Managing Home and Transportation, Health and Safety, Social Adjustment, and Problem Solving."[146] Ferguson contends that: the assessment instrument has not been updated since 1998; it has never been approved by the AAIDD to diagnose intellectual disabilities; and the tasks and questions

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[144] *Id.* at 46.

[145] Doc. no. 47 (Petitioner's Brief), at 31-32. The petitioner's attorneys conclude that the results of the ABAS-3 were not valid because Ferguson was required to "do an enormous amount of guesswork on whether he could perform certain tasks." *Id.* at 32.

[146] Doc. no. 41-1 (Respondent's Exhibit 1), at 9.

on the test had very little applicability to the everyday-life of a death row inmate.[147]

The State replies to that argument by saying that, even though the Independent Living Scales is not an assessment instrument approved by the AAIDD, "there was no testimony that Dr. King's use of the ILS was not appropriate"; instead, Dr. Shaffer testified that he did not administer the ILS to Ferguson "because it is his preference to use the Vineland." [148] The State adds that, even though Ferguson is critical of the ILS because individuals who may be intellectually disabled can count change and complete bank checks, "Ferguson was able to do much more than fill out a check on his administration of the ILS."[149]

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[147] Doc. no. 47 (Petitioner's Brief), at 32. Even so, Ferguson points out that the test tasks he successfully performed (such as filling out a check and counting change) "are not even dispositive for a finding of intellectual disability," and Dr. King conceded that intellectually disabled individuals do not need to be "completely unable to do ordinary living tasks." *Id.* (quoting doc. no. 46 (Hearing Transcript), at 199).

[148] Doc. no. 50 (Respondent's Brief), at 47; *see also* doc. no. 46 (Hearing Transcript), at 44.

[149] Doc. no. 50 (Respondent's Brief), at 47. Dr. King testified that Ferguson was

> shown a card that has a social security check amount on it. He [was] asked to record the amount on a piece of paper. He did that.
>
> And he was shown a bill from a gas company and was asked to fill out a check to pay that bill. He filled out the check accurately with the date, the amount, signing it. And he did that for two separate bills.
>
> He then was asked to take the amounts of those two bills and subtract them from the social security check that he was

Ferguson also contends that Dr. King's opinion that his adaptive functioning was "well within the average range" was contradicted by other evidence. He argues that he

> struggled significantly in school with learning in a non-structured setting, and ultimately dropped out after he was moved to a regular classroom. *See* [doc. no. 41-9 (Respondent's Exhibit 7)], at 45 (Dr. Chudy's ~~testimony pertaining to~~ [*sic*: actually, it was Chudy's 1998 state-court *written report* summarizing] Mr. Ferguson's school performance after being reclassified). Mr. Ferguson's ex-wife testified at trial that during their marriage, "Dale did not understand things well and ... I would make all of our decisions." *Id.* at 80. Dr. Chudy's expert report also noted Mr. Ferguson's significant social limitations:
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> > Being intellectually slow with poor social skills he seems peculiar among others. This sets him up to be taken advantage of. ... When he does develop friendships, his naïve and limited thinking allows him to be easily influenced. Family members confirm that in relationships where he has come to trust the other person, he is easily led and becomes a follower. ...

Doc. no. 47 (Petitioner's Brief), at 32-33 (quoting doc. no. 41-9 (Respondent's Exhibit 7), at 48-49 (Chudy Written Report)) (footnote omitted). [150] Ferguson

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> supposedly given. And he came up with exactly the right amount.

Doc. no. 46 (Hearing Transcript), at 151 (alteration supplied).

[150] The omitted footnote was at the end of the extract from Dr. Chudy's 1998 state-court report, and argues that his quoted description of Ferguson was "entirely in line with the Supreme

contends that the "clear inconsistencies" between the results of the assessment instruments administered by Dr. King and the record should have led Dr. King to make additional inquiries into his adaptive functioning abilities.[151]

In summary, Ferguson contends that "the adaptive functioning evidence as a whole" weighs in favor of a conclusion that he has significant and substantial limitations in his adaptive functioning abilities.

> Dr. Shaffer used observer evidence on the Vineland test, which was consistent with his own observations and the record as a whole, to determine that Mr. Ferguson was significantly limited in adaptive functioning. On the other hand, Dr. King relied on two tests that he knew to be error-prone and invalid to form his opinion that Mr. Ferguson had average adaptive functioning skills and did not confirm his findings with any other corroborative evidence. Even a cursory glance through the record shows that Mr. Ferguson was not an "average" person when it came to adaptive functioning.

Doc. no. 47 (Petitioner's Brief), at 34.

Court's characterization of individuals with intellectual disability in *Atkins*. *See* 536 U.S. at 317 ('[T]here is abundant evidence that [individuals with intellectual disability] often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.')." Doc. no. 47 (Petitioner's Brief), at 33 n.12.

[151] *Id.* at 33.

4. Analysis

The adaptive behavior component of an intellectual disability determination requires proof of, among other things, "substantial *present* limitation in at least two of the following areas: 'communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.' " *Jenkins*, 936 F.3d at 1278 (quoting *Atkins*, 536 U.S. at 308 n.3) (emphasis supplied). This court is not persuaded by a preponderance of the evidence that Ferguson has made such a showing.

Although the State contends that "Ferguson has not shown that he suffers now, or has ever suffered, from substantial or significant deficits in adaptive functioning,"[152] the parties' arguments focus only upon Ferguson's adaptive functioning abilities or deficits prior to his conviction in 1998. Ferguson's expert, Dr. Shaffer, administered the Vineland Adaptive Behavior Scales assessment instrument to Ferguson's mother, saying that Mrs. Betty Ferguson would be able to "provide observations of [her son's adaptive functioning abilities] at the time of his developmental period at age 18." [153] Although Dr. Shaffer testified that his observations of Ferguson on the three dates that he evaluated him in preparation for testifying in this court were "not inconsistent" with the results obtained by his administration of the Vineland Scales assessment instrument to Ms. Ferguson, he offered little evidence to support a finding that Ferguson *presently* suffers from substantial deficits in any area of adaptive

[152] Doc. no. 50 (Respondent's Brief), at 45.
[153] Doc. no. 46 (Hearing Transcript), at 33.

functioning. Further, the school records relied upon by Ferguson address only his adaptive functioning abilities decades ago, and not presently.

III. CONCLUSION

After consideration of the testimony and documentary exhibits presented at the August 27, 2019 hearing and the parties' post-hearing briefs, this court concludes that petitioner, Thomas Dale Ferguson, has failed to establish by a preponderance of the evidence that he suffers from significantly subaverage intellectual functioning, or that he has significant or substantial deficits in adaptive behavior. Therefore, Ferguson's *Atkins* claim and his petition for writ of habeas corpus are due to be denied. A separate final judgment will be entered contemporaneously herewith.

DONE this 21st day of May, 2020.

APPENDIX D

THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

No. 3:09–cv–0138–CLS–JEO

Thomas Dale FERGUSON, Petitioner,

v.

Richard F. ALLEN, Commissioner, Alabama Department of Corrections, Respondent.

Signed July 27, 2017

MEMORANDUM OPINION ON PETITIONER'S RULE 59(e) MOTION

LYNWOOD SMITH, United States District Judge

This action is before the court on the motion filed by petitioner, Thomas Dale Ferguson, pursuant to Federal Rule of Civil Procedure 59(e), and asking the court to reconsider, and to alter, amend, or vacate the judgment denying *habeas corpus* relief from his

state court convictions and death sentences. Doc. no. 18 (Motion to Alter or Amend Judgment).[1]

The facts leading to petitioner's convictions and sentences, as well as the procedural history of his case, were described in this court's previous memorandum opinion (*see* doc. no. 16 (Memorandum Opinion), at 6-18) and will not be reiterated here, except to state that petitioner

> was indicted for four counts of capital murder in connection with the shooting deaths of Harold Pugh and his 11–year–old son Joey Pugh. The jury found Ferguson guilty of all counts charged in the indictment: two counts of murder made capital because the killings were committed during the course of a robbery in the first degree, *see* § 13A–5–40(a)(2), Ala. Code 1975; one count of murder made capital because it involved the murder of two or more persons by one act or pursuant to one scheme or course of conduct, *see* § 13A–5–40(a)(10), Ala. Code 1975; and one count of murder made capital because the victim was less than 14 years old, *see* § 13A–5–40(a)(15), Ala. Code 1975. The jury recommended, by a vote of 11–1, that Ferguson be sentenced to life imprisonment without the possibility of parole. The trial court overrode the jury's recommendation and sentenced Ferguson to death by electrocution.

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[1] *See also* doc. nos. 16 (Memorandum Opinion) and 17 (Final Judgment).

Ferguson v. State, 814 So. 2d 925, 933 (Ala. Crim. App. 2000) (alteration supplied).

Petitioner's present motion contends, among other things, that this court erroneously "examined the state courts' rejection of [his] *Atkins* claim using pre-*Atkins* evidence," and, "failed to consider the Supreme Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014)." Doc. no. 18 (Motion to Alter or Amend Judgment), at 2 (alteration supplied); *see also id.* at 11-24.

I. STANDARDS OF REVIEW

Even though the sole sentence of Federal Rule of Civil Procedure 59(e) specifically mentions only an alteration or amendment of a prior judgment,[2] it "has been interpreted as permitting a motion to vacate a judgment rather than merely amend it." 11 Wright, Miller & Kane, *Federal Practice and Procedure* § 2810.1, at 150 & n.1 (2012). The decision of whether to grant such a motion is committed to the sound discretion of the district court. *See*, *e.g.*, *American Home Assurance Co. v. Glenn Estess & Associates, Inc.*, 763 F.2d 1237, 1238-39 (11th Cir. 1985). Generally speaking, however, "[t]he only grounds for granting [a Rule 59(e)] motion are newly-discovered evidence or manifest errors of law or fact." *United States v. Marion*, 562 F.3d 1330, 1335 (11th Cir. 2009) (quoting *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (*per curiam*) (alterations supplied)). The Rule may "not be used to relitigate old matters or to

[2] "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e).

present arguments or evidence that could have been raised prior to judgment." *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009) (quoting *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005)). Moreover, a judgment should not be altered, amended, or vacated "if it would serve no useful purpose." 11 Wright, Miller & Kane, *supra* at 171 & n.24.

II. SUMMARY OF BINDING PRECEDENT

The Supreme Court's 2002 opinion in *Atkins v. Virginia* held that "death is not a suitable punishment for a mentally retarded criminal." 536 U.S. 304, 321 (2002).[3] That landmark holding was based upon the

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[3] Prior to June 20, 2002 (the date on which *Atkins* was decided), the Supreme Court's opinion in *Penry v. Lynaugh*, 492 U.S. 302 (1989), provided the rule of decision in capital cases involving mentally retarded defendants. *Penry* held that the execution of such individuals did not *categorically* violate the Eighth Amendment's prohibition against cruel and unusual punishment, *provided* jurors had been instructed that they could consider, *and give mitigating effect to*, evidence of a defendant's mental retardation when determining the sentence to be imposed. *See id.* at 328 (O'Connor, J., Part III (majority opinion)) (Justices Brennan, Marshall, Blackmun, and Stevens joined Justice O'Connor in Part III of the *Penry* opinion, thereby constituting a majority of the Court). The *Penry* judgment was based, at least in part, on Justice O'Connor's observation that there *then was* "insufficient evidence" of "a national consensus against execution of the mentally retarded." *Id.* at 340 (O'Connor, J., Part IV-C of opinion). Justice O'Connor spoke only for herself in Part IV-C of the *Penry* opinion. Four Justices (*i.e.*, Brennan, Marshall, Stevens and Blackmun) would have concluded that the

Court's conclusion that deficits in the areas of "reasoning, judgment, and control of their impulses" did not allow "mentally retarded criminals" to act with "the level of moral culpability that characterizes the the most serious adult criminal conduct." *Id.* at 306.[4] Accordingly, the Court was

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execution of mentally retarded persons violated the Eighth Amendment. *See id.* at 343–50.

At the time Justice O'Connor wrote, however, only Congress and two states (Georgia and Maryland) had enacted legislation proscribing the execution of mentally retarded defendants. Even so, just such a consensus evolved during the thirteen years following the *Penry* decision. Eighteen states enacted legislation expressly providing that a sentence of death could not be carried out upon mentally retarded persons. That number did not count the statutory prohibitions on the execution of mentally retarded persons that had been enacted by Georgia, Maryland, and the United States Congress prior to the *Penry* decision, nor the fourteen states that had rejected capital punishment altogether. The weight of that evolving national consensus, together with the consistency of the direction of change, persuaded a majority of the members of the Supreme Court to abrogate *Penry*, and to hold in that the execution of mentally retarded defendants categorically violated the Eighth Amendment's prohibition against cruel and unusual punishment. *See Atkins v. Virginia*, 536 U.S. 304, 313-17 (2002).

[4] Specifically, Justice Stevens's opinion for the Court's majority stated that:

> Those 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. Moreover*, *their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants.* Presumably for these reasons, in the 13

> not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our evolving standards of decency, we therefore conclude that such punishment is excessive and that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender.

Id. at 321 (citation and internal quotation marks omitted). [5] That holding constituted "a new,

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> years since we decided *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L.Ed. 2d 256 (1989), the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are "cruel and unusual punishments" prohibited by the Eighth Amendment to the Federal Constitution.

Atkins, 536 U.S. at 306-307 (emphasis supplied).

[5] The Eighth Amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Supreme Court has stated that "[t]he basic concept underlying the Eighth Amendment is nothing less that the dignity of man"; consequently, the "Amendment must draw its menaing from 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)) (alterations supplied); *see also Roper v. Simmons*, 543 U.S. 551, 572 (2005) ("By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of government to respect the dignity of all persons.").

substantive rule of constitutional law" and, for that reason, it was "made retroactive to cases on collateral review" on the date of the *Atkins* decision: June 20, 2002. *In re Holladay*, 331 F.3d 1169, 1172 (11th Cir. 2003).[6]

Even so, the *Atkins* opinion "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation" fell within the protection of the Eighth Amendment, as applied to the states through the Fourteenth Amendment. *Bobby v. Bies*, 556 U.S. 825, 831 (2009).[7] Instead, *Atkins* left to the states "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of

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[6] *See also Penry v. Lynaugh*, 492 U.S. at 330 (stating that, "if we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons ... regardless of the procedures followed, such a rule would fall under the first exception to the general rule of non-retroactivity [discussed in *Teague v. Lane*, 489 U.S. 288, 301 (1989),] and would be applicable to defendants on collateral review") (O'Connor, J., unanimous opinion) (alteration supplied); *In re Hill*, 437 F.3d 1080, 1082 (11th Cir. 2006) (holding that the new rule of constitutional law announced in *Atkins* "meets the requirement of 28 U.S.C. § 2244(b)(2)(A)" and, therefore, is retroactive to cases on collateral review); *In re Hicks*, 375 F.3d 1237, 1239 (11th Cir. 2004) (same).

[7] The Eighth Amendment's Cruel and Unusual Punishment Clause was incorporated into the Fourteenth Amendment's Due Process of Law Clause and, thereby, applied to the states by the Supreme Court's opinion in *Robinson v. California*, 370 U.S. 660 (1962); *see also Harmelin v. Michigan*, 501 U.S. 957 (1991); *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (*per curiam*); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law—Substance and Procedure* § 15.6(b), at 858-59 & n.38 (5th ed. 2012); Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 6.3.3, at 504 & n.88 (3rd ed. 2006).

sentences." *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986) (addressing the execution of insane persons)). In doing so, *Atkins* pointed to the following clinical standards:[8]

> The American Association on Mental Retardation [now known as the "American Association on Intellectual and Developmental Disabilities" (AAIDD) [9]] defines mental retardation as follows: "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992).
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> The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the

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[8] *See Atkins*, 536 U.S. at 317 n. 22 ("The [various state] statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth in n. 3, *supra.*") (alteration supplied).

[9] The name of the American Association on Mental Retardation was changed in 2007. *See*, *e.g.*, https://en.wikipedia.org/wiki/American Association on Intellectual and Developmental Disabilities.

> following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.*, at 42-43.

Atkins, 536 U.S. at 309 n.3 (alteration and footnote supplied, emphasis in original). As the Court observed, each of the foregoing clinical definitions required

> 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. Mentally retarded 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 (footnotes omitted).

A. A Change in Diagnostic Terminology

Within five years after the *Atkins* opinion, however, the clinical standards used by psychiatrists, psychologists, and other mental-health-care professionals to diagnose and classify persons who fit the definitional constructs quoted above shifted away from the use of such terms as "mental retardation" and "mentally retarded individuals." Relevant health-health professionals now prefer the labels "intellectual disability" and "intellectually disabled individuals." *See*, *e.g.*, "Rosa's Law," Pub. L. No. 111-256, 124 Stat. 2643 (2010). [10] The transition in

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[10] Rosa's Law amended ten federal statutes—*i.e.*, the Higher Education Act of 1965, the Elementary and Secondary Education Act of 1965, the Rehabilitation Act of 1973, the Health Research and Health Services Amendments of 1976, the Public Health Service Act, the Health Professions Education Partnerships Act of 1998, the National Sickle Cell Anemia, Cooley's Anemia, Tay-Sachs, and Genetic Diseases Act, the Genetic Information Nondiscrimination Act of 2008, and Public Law 110-154—by striking any references to such terms as "mental retardation" and "mentally retarded individuals," and substituting the terms "intellectual disability" and "an individual with an intellectual

terminology was discussed in an influential article authored in 2007 by the members of the AAIDD's Committee on Terminology and Classification, who observed that the understanding lying at the heart of the shift in terminology was

> the understanding that this term ["intellectual disability"] covers the same population of individuals who were diagnosed previously with mental retardation in number, kind, level, type, and duration of the disability and the need of people with this disability for individualized services and supports. Furthermore, every individual who is or was eligible for a diagnosis of mental retardation is eligible for a diagnosis of intellectual disability.

Schalock *et al.*, *The Renaming of* Mental Retardation: *Understanding the Change to the Term* Intellectual Disability, 45 Intellectual & Developmental Disabilities 116 (2007) (alteration supplied); *see also id.* at 120 (same).[11]

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disability," respectively. *See* Pub. L. No. 111-256, 124 Stat. 2643 (2010).

[11] The opinion in *Hall v. Florida*, 134 S. Ct. 1986 (2014), recognized that the change in terminology from "mental retardation" to "intellectual disability" was "approved and used in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders, one of the basic texts used by psychiatrists and other experts." *Id.* at 1990 (citing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 33 (5th ed. 2013)).

B. The Supreme Court's Opinion in *Hall v. Florida*

The shift in diagnostic terminology was legally noted in the Supreme Court's May 27, 2014 opinion in *Hall v. Florida*, —— U.S. ——, 134 S. Ct. 1986 (2014), which observed that the change had been approved and used in the fifth edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-5"): "one of the basic texts used by psychiatrists and other experts" in the field. *Id.* at 1990. *Hall's* significance does not lie solely in its recognition of the shift in diagnostic nomenclature, however, but in those portions of the opinion emphasizing that the statistical fact of a "standard error of measurement" negates the argument that an IQ score of 70 is a bright-line cutoff for determining when a capital defendant is "intellectually disabled," *as well as* in those passages stressing that lower courts should consider all evidence pertinent to a defendant's assertion of an intellectual disability, including assessments of any deficits in the defendant's adaptive functioning abilities.[12]

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[12] The *amicus* brief of the American Psychiatric Association stated: "the relevant clinical authorities all agree that an individual with an IQ score above 70 may properly be diagnosed with intellectual disability if significant limitations in adaptive functioning also exist." *Hall v. Florida*, 134 S. Ct. 1986, 1995-96 (2014) (quoting APA Brief at 15-15); *see also id.* at 1995 ("[A] person with an IQ score above 70 may have such severe adaptive behavior problems ... that the person's actual functioning is comparable to that of individuals with a lower IQ score") (quoting DSM-5, at 37).

1. The "standard error of measurement"

The Supreme Court's opinion in *Hall v. Florida* observes that:

> The professionals who design, administer, and interpret IQ tests have agreed, for years now, that *IQ test scores should be read not as a single fixed number but as a range.* See D. Wechsler, The Measurement of Adult Intelligence 133 (3d ed. 1944) (reporting the range of error on an early IQ test). Each IQ test has a "standard error of measurement," *ibid.*, often referred to by the abbreviation "SEM." *A test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself.* See R. Furr & V. Bacharach, Psychometrics 118 (2d ed. 2014) (identifying the SEM as "one of the most important concepts in measurement theory"). *An individual's IQ test score on any given exam may fluctuate for a variety of reasons.* These include the test-taker's health; practice from earlier tests; the environment or location of the test; the examiner's demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing. See American Association on Intellectual and Developmental Disabilities, R. Schalock et al., User's Guide To Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports 22 (2012) (hereinafter AAIDD Manual); A. Kaufman, IQ Testing 101, pp. 138–139 (2009).
>
> *The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score. For*

purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score. The SEM allows clinicians to calculate a range within which one may say an individual's true IQ score lies. See APA Brief 23 ("SEM is a unit of measurement: 1 SEM equates to a confidence of 68% that the measured score falls within a given score range, while 2 SEM provides a 95% confidence level that the measured score is within a broader range"). A score of 71, for instance, is generally considered to reflect a range between 66 and 76 with 95% confidence and a range of 68.5 and 73.5 with a 68% confidence. See DSM–5, at 37 ("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) .... [T]his involves a score of 65–75 (70 ± 5)"); APA Brief 23 ("For example, the average SEM for the WAIS–IV is 2.16 IQ test points and the average SEM for the Stanford–Binet 5 is 2.30 IQ test points (test manuals report SEMs by different age groupings; these scores are similar, but not identical, often due to sampling error)"). Even when a person has taken multiple tests, each separate score must be assessed using the SEM, and the analysis of multiple IQ scores jointly is a complicated endeavor. See Schneider, Principles of Assessment of Aptitude and Achievement, in The Oxford Handbook of Child Psychological Assessment 286, 289–291, 318 (D. Saklofske, C. Reynolds, V. Schwean, eds. 2013). In addition,

> because the test itself may be flawed, or administered in a consistently flawed manner, multiple examinations may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning.

Hall v. Florida, 134 S. Ct. at 1995-96 (emphasis supplied).

2. Consideration of additional evidence of intellectual disability

Moreover, *Hall* held that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error"—*i.e.*, a score between 70 and 75 or lower[13]—"*the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.*" *Hall*, 134 S. Ct. at 2001 (alteration and emphasis supplied).

> Intellectual disability is a condition, not a number. See DSM–5, at 37. Courts must recognize, as does the medical community, that the IQ test is imprecise. This is not to say that an IQ test score is unhelpful. It is of considerable significance, as the medical community recognizes. But in using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test

[13] This diagnostic range is drawn from *Atkins*, which noted that mental-health professions had "estimated that between 1 and 3 percent of the population has *an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation* [*intellectual disability*] *definition.*" *Atkins*, 536 U.S. at 309 n.5 (emphasis and alteration supplied, citation omitted).

> scores the same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number. A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability. See APA Brief 17 ("Under the universally accepted clinical standards for diagnosing intellectual disability, the court's determination that Mr. Hall is not intellectually disabled cannot be considered valid").
>
> ....
>
> It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment. See DSM–5, at 37 ("[A] person with an IQ score above 70 may have such severe adaptive behavior problems ... that the person's actual functioning is comparable to that of individuals with a lower IQ score"). The Florida statute, as interpreted by its courts, misuses IQ score on its own terms; and this, in turn, bars consideration of evidence that must be considered in determining whether a defendant in a capital case has intellectual disability. Florida's rule is invalid under the Constitution's Cruel and Unusual Punishments Clause.

Hall, 134 S. Ct. at 2001.

3. *Hall* emphasized preexisting principles

Neither of the foregoing points from the *Hall* opinion was a novel addition to federal law. Instead, both had been anticipated in the *Atkins* opinion, even though neither issue had been elaborated as

extensively as in *Hall*. For example, when discussing the "Wechsler Adult Intelligence Scales" test—the standard instrument for assessing intellectual functioning—the *Atkins* opinion observed that the test was

> scored by adding together the number of points earned on different subtests, and using a mathematical formula to convert this raw score into a scaled score. The test measures an intelligence range from 45 to 155. The mean score of the test is 100, which means that a person receiving a score of 100 is considered to have an average level of cognitive functioning. It is estimated that between 1 and 3 percent of the population has *an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.*

Atkins, 536 U.S. at 309 n.5(citations omitted, emphasis supplied). Thus, *Atkins* clearly rejected an IQ score of 70 as a mandatory cutoff score for determining whether an individual was mentally retarded/intellectually disabled, in favor of a range of five points from 70 to 75, corresponding to the standard error of measurement elaborated in *Hall*.

Moreover, the clinical standards of the American Association on Intellectual and Developmental Disabilities (formerly known as the "American Association on Mental Retardation") and American Psychiatric Association that were quoted in *Atkins* required not only evidence of subaverage

intellectual functioning, but also evidence of significant limitations in adaptive skills. Again, therefore, the *Hall* opinion merely elaborated a point previously addressed in *Atkins*.

4. The Supreme Court's opinion in *Moore v. Texas*

The Supreme Court's March 28, 2017 opinion in *Moore v. Texas*, —— U.S. ——, 137 S. Ct. 1039, 2017 WL 1136278 (2017), also emphasized principles announced in *Atkins* and elaborated in *Hall*: *e.g.*, even though both of those opinions had left to the states "the task of developing appropriate ways to enforce" the constitutional restriction on executing intellectually disable convicts, the states' discretion was not "unfettered." 2017 WL 1136278, at *9 (quoting *Hall*, 134 S. Ct. at 1998). "As we instructed in *Hall*, adjudication of intellectual disability should be 'informed by the views of medical experts.' That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus." *Id.* at *4 (quoting *Hall*, 134 S. Ct. at 2000[14]). In summary, the Supreme Court's opinion in *Moore v. Texas* stated:

> *Hall* instructs that, where an IQ score is close to, but above, 70, courts must account for the test's "standard error of measurement." ... As we explained in *Hall*, the standard error of measurement is "a statistical fact, a reflection

[14] *See also Hall*, 134 S. Ct. at 1993 (observing that "this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability").

> of the inherent imprecision of the test itself." ... "For purposes of most IQ tests," this imprecision in the testing instrument "means that an individual's score is best understood as a range of scores on either side of the recorded score ... within which one may say an individual's true IQ score lies." ... A test's standard error of measurement "reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score."...
>
> Moore's score of 74, adjusted for the standard error of measurement, yields a range of 69 to 79, ... as the State's retained expert acknowledged.... Because the lower end of Moore's score range falls at or below 70, the [Texas Court of Criminal Appeals] had to move on to consider Moore's adaptive functioning.

Moore, 2017 WL 1136278, at *10 (citations omitted).

III. DISCUSSION

Ferguson contends in the following passages copied from his Rule 59(e) motion that this court erred when evaluating his *Atkins* claim by considering only evidence that had been produced by his attorneys prior to the Supreme Court's opinion in that case.

> It is an unreasonable application of *Atkins* to consider only information produced prior to the *Atkins* decision in determining whether a petitioner meets the definition of mentally retarded as accepted by *Atkins*. Stated differently, courts cannot rely solely on pre-

> *Atkins* evidence in determining whether a petitioner qualifies for relief under *Atkins*.
>
> Mr. Ferguson was convicted and sentenced to death in 1998, four years before the 2002 decision in *Atkins*. The Alabama Court of Criminal Appeals affirmed Mr. Ferguson's conviction and sentence in 2000, *Ferguson v. State*, 814 So. 2d 925 (Ala. Crim. App. 2000), and the Alabama Supreme Court affirmed that decision in 2001—all before *Atkins*. *Ex parte Ferguson*, 814 So. 2d 970 (Ala. 2001). The United States Supreme Court denied Mr. Ferguson's petition for writ of certiorari on March 4, 2002, *Ferguson v. Alabama*, 535 U.S. 907 (2002)—over two months before it decided *Atkins* on June 20, 2002.

Doc. no. 18 (Motion to Alter or Amend Judgment), at 13-14.

Upon reconsideration, this court agrees. This court's prior memorandum opinion overlooked the significance of the Eleventh Circuit's July 30, 2013 opinion in *Burgess v. Commissioner, Alabama Department of Corrections*, 723 F.3d 1308 (11th Cir. 2014), which observed that *Atkins*

> highlighted the fact that there is a difference between using mental retardation as a mitigating factor (a balancing inquiry) and categorically excluding mentally retarded persons from the death penalty altogether (a categorical prohibition) such that pre-*Atkins* it could have been detrimental to a defendant's case to present thorough evidence of mental retardation: "reliance on mental retardation as

> a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury."

Id. at 1317 (quoting *Atkins*, 536 U.S. at 320-21); *see also Bobby v. Bies*, 556 U.S. 825, 829 (2009) ("[M]ental retardation for purposes of *Atkins*, and mental retardation as one mitigator to be weighed against aggravators, are discrete issues." (alteration supplied)).

> In other words, *Atkins* gave defendants an incentive to definitively demonstrate mental retardation, rather than simply demonstrate low intellectual functioning. Accordingly, "evidence presented pre-*Atkins* may not in every case be conducive to an *Atkins* inquiry and may not enable a court to make reasonable factual determinations relating to mental retardation for purposes of the Eighth Amendment." *Burgess*, 723 F.3d at 1317 (emphasis added). Indeed, in *Atkins*, the Supreme Court remanded for a hearing on the question of whether *Atkins* was in fact mentally retarded ***for purposes of the Eighth Amendment***, even though a jury had already heard evidence regarding mental retardation during the penalty phase. *Atkins*, 536 U.S. at 321.

Doc. no. 18 (Motion to Alter or Amend Judgment), at 16 (all emphasis in original).

IV. ORDER ON MOTION

Accordingly, defendant's Motion to Alter or Amend Judgment is **GRANTED IN PART** and **DENIED IN PART**. It is **ORDERED**, **ADJUDGED**, and **DECREED** that Part V.F. of this court's prior memorandum opinion addressing the claim that "Ferguson Was Improperly Denied a Hearing on His Mental Capacity Under Atkins v. Virginia" (*i.e.*, doc. no. 16, at 146-189) be, and the same hereby is, rescinded, vacated, and held for naught.

The attorneys for petitioner, Thomas Dale Ferguson, are ORDERED to inform this court and opposing counsel, on or before the close of business on Wednesday, July 19, 2017, of the date upon which they reasonably anticipate being prepared to proceed to an evidentiary hearing on petitioner's assertion that he is categorically excluded from eligibility for the imposition of the death penalty as a result of intellectual disability. Respondent must file a response no later than Wednesday, July 26, 2017.

In all other respects, it is **ORDERED**, **ADJUDGED**, and **DECREED** that petitioner's motion to alter or amend this court's previous judgment be, and the same hereby is, **OVERRULED** and **DENIED**.

DONE and **ORDERED** this 27th day of June, 2017.

APPENDIX E

CIRCUIT COURT OF MOBILE COUNTY,
ALABAMA

No. CC 97-3254

STATE OF ALABAMA
v.
THOMAS DALE FERGUSON,
DEFENDANT

Argued and Submitted: Sep. 8, 1998
Mobile, Alabama
Filed: Sep. 24, 1998

SENTENCING ORDER

The Defendant, Thomas Dale Ferguson, was charged by the indictment with the Capital offense of Murder during a Robbery in the First Degree, as set out in Section 13A-5-40(2), wherein one Harold Pugh was intentionally killed.

The Defendant, Thomas Dale Ferguson, was further charged in the indictment with the Capital offense of Murder during a Robbery in the First

Degree, as set out in Section 13A-3-40(2), wherein one Joey Pugh was intentionally killed.

The Defendant, Thomas Dale Ferguson, was further charged in the indictment with the Capital offense of Murder wherein two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct, set out in Section 13A-5-40(10), wherein one Harold Pugh and Joey Pugh were intentionally killed.

The Defendant, Thomas Dale Ferguson, was finally charged in the indictment with the Capital offense of Murder when the victim is less than 14 years of age, as set out in Section 13A-5-40(15), wherein one Joey Pugh was intentionally killed.

This case came before the Court in Mobile County on June 22, 1998, where a petit jury was impaneled and sworn as required by law. After hearing and seeing evidence, hearing arguments of the attorneys and the Court's Charge as to the applicable law, including the lesser included offenses of Murder, Felony Murder, Reckless Manslaughter, Robbery in the First Degree, and Robbery in the Second Degree, the jury returned a verdict of guilty as charged with respect to each count in the indictment, on June 25th, 1998. On the same day a Sentencing Hearing was conducted before the same jury pursuant to Section 13A-5-45. After hearing and seeing the evidence and hearing the attorneys' arguments, the jury was again charged as to the applicable law and they returned a verdict affixing the defendant's punishment at life imprisonment without the benefit

of parole. The vote was eleven for life imprisonment without parole and one for death, as reflected in the verdict form.

This Court commends the respective attorneys for putting aside any attempt to emotionally influence the jury with passion, prejudice or any other arbitrary factors in arriving at their advisory verdict.

The trial record abundantly supports the Court's finding that the jury's verdict was not imposed under influence of passion, prejudice or any arbitrary factors.

A pre-sentence investigation was ordered by the Court and a Sentencing hearing was set for September 8, 1998 at 9:00 a.m.

At the Sentencing hearing, conducted by the Court, the State through the District Attorney, urged the Court to override the jury's recommended verdict of life without parole and to fix the punishment at death. The defendant, through his attorney, argued that the Court should fix punishment at life without parole in accordance with the recommended jury verdict.

FINDINGS OF FACT FROM THE TRIAL

The Court finds that Harold Pugh and his son, Joey Pugh, who was eleven years of age, were residents of Colbert County, Alabama in July of 1997. Mike Sennett who was a friend of Harold and Joey

Pugh testified that he got off work on or about July 21st, 1997, at which time he had learned that Harold and Joey Pugh had been missing. Mike Sennett, who is familiar with the Cane Creek area in Colbert County, which is a popular place in which to fish, went there with two of his friends to search for Harold and Joey Pugh. At the time there was an organized search going on in the area and Mike Sennett and his friends decided to go in a boat up Cane Creek and shortly around dark they found the bodies of Harold and Joey Pugh and returned to the boat landing at Cane Creek and reported this to the rescue squad.

The rescue squad returned the Pugh bodies to the landing at Cane Creek. The bodies were later turned over to Dr. Joseph Embry, a forensic pathologist, who performed an autopsy on Harold and Joey Pugh on or about July 22nd, 1997 at the Cooper-Green Hospital in Birmingham, Alabama. Dr. Embry described the gunshot entrance wound to Joey Pugh which was a gunshot entrance wound in front of his scalp and a gunshot exit wound in the back of the neck. Joey Pugh also had a larger re-entry wound in his back, and Dr. Embry recovered a bullet or projectile under the skin of his back. A second gunshot wound was found on the side of Joey Pugh's head and exited through the middle of his forehead. Dr. Embry further testified that Joey Pugh died from the gunshot wounds to the head. Dr. Embry further testified to the injuries of Harold Pugh with two projectiles recovered. Dr. Embry further testified that the cause of Harold Pugh's death was the gunshot wound to the head.

Brent Wheeler, the administrator in charge of the Department of Forensic Sciences in Huntsville, Alabama testified from his examination of the firearms, cartridges and bullets that were submitted to him for testing and examination. He concluded that the bullet which produced the wound to Harold Pugh had been fired by the Ruger Semi-automatic 9 mm pistol introduced into evidence as State's Exhibit No. 77, but admitted by photographs marked State's Exhibit Nos. 74-A and 74-B.

Frank Brians, investigator with the Colbert County Sheriff's Department testified about the defendant making a statement to him after giving the Miranda Warning to the defendant. This statement was recorded and transcribed and admitted as State's Exhibit Nos.

89 and 89-A:

INVESTIGATOR BRIANS: My name is Frank Brians. I am a lieutenant with the Colbert County Sheriff's Department. I am at the Colbert County Jail in Tuscumbia, Alabama. This is August 22nd, 1997. It is 5:58 p.m. by my clock. At 5:52 p.m. Dale Ferguson signed a Miranda Warning and Waiver of Rights.

Present in the room are Dale Ferguson, his attorney Tony Glenn, and myself.

Mr. Glenn, would you like to say something?

MR. GLENN: Yes.

INVESTIGATOR BRIANS: If you will, speak up now.

MR. GLENN: Dale, you called me earlier today and you told me that you wanted to try to help yourself with the Colbert County Sheriff's Department and the FBI on these charges that are here pending today. You had information you thought that would help them. You realize that I have gone over with you your rights and told you that you don't have to talk, but it is your-- but you have informed me that you choose to help at this point to try to help yourself; is that correct?

MR. FERGUSON: Yes, sir.

MR. GLENN: Do you realize there are no deals at this point?

MR. FERGUSON: Yes, sir.

MR. GLENN: That what you are doing is voluntary and you are doing it to try to help yourself in furtherance--

MR. FERGUSON: Yes, sir.

MR. GLENN: --of this; is that correct?

MR. FERGUSON: Yes, sir.

MR. GLENN: And this is what you want to do?

MR. FERGUSON: Yes, sir.

MR. GLENN: And do you realize that this is on the record, this tape that we are making here today can and will more than likely be used in court?

MR. FERGUSON: Yes, sir.

MR. GLENN: Okay. With that, do you want to go forward?

MR. FERGUSON: Yes, sir.

MR. GLENN: Okay. All right.

INVESTIGATOR BRIANS: Dale, if you will, just call me Frankie and we will get started. I want you to be relaxed now, okay?

If you will, when you talk if you will sort of turn around and talk towards the tape recorder there.

I would like for you in great detail to tell this whole situation that you have been in to me as a story. Just relate all the instants you have been involved in concerning what we are investigating at your own pace, at your own time. Go ahead. I might interrupt if I think that something is not right or I need to ask you a question, but just, you know, be relaxed and go ahead.

MR. GLENN: Let me tell you something. Turn that off just a minute, I want to tell you something before we start.

INVESTIGATOR BRIANS: Okay. Just one second. We are going to turn the tape off. It is six p.m.

(Brief pause.)

INVESTIGATOR BRIANS: It is 6:01 p.m. The tape has been off for one minute. The attorney wanted to stress the importance of this statement to Mr. Ferguson.

Q. The -- Go ahead with your next statement. I am just checking this tape to make sure it is still going. Okay. Go ahead.

A. Mark stated -- he told me he knew ways that I could make some money and come out of debt. Ah, I went along with it. I didn't know nobody was going to be hurt. And they -- him--Mark was the ring leader and Craig was behind him and they done all the planning and all the ideas -- the 11idealling11 it. Ah, Mark was the main one about planning the stuff and coming up with the ideas and stuff like that.

Q. Okay. Go ahead and tell me what they planned.

A. Mark starts talking about a bank job. Ah, Craig, he's the one that was supposed to go and scope it out and do the getaway plan, you know, and all of that. Well, he went to Belmont -- and he is from Mississippi.

Q. Who is now?

A. Craig.

Q. Okay.

A. Ah, he had a plan made out. Ah, him and Mark discussed it.

Q. Why did you choose or did they choose Belmont?

A. I don't know.

Q. Now, if you would, go ahead and pick up there and carry on.

A. They came down to get my getaway vehicle. Ah, they was -- Me and Craig was going to go and get a getaway vehicle. He went the Highway 101 and there was a lake up there. Ah.

Q. You can turn around. I will sit over here, if it will be easier.

A. We walked -- parked the car and walked around. We looked to see if anybody looked like left the keys in the vehicle or anything and nobody had. Ah, these people came up on a boat and there was kids and I chickened out, I went back to Craig's car, the gold Cadillac.

Q. Who was there now?

A. Me and Craig.

Q. Okay.

A. Craig -- and he got real mad at me and from there we went straight home. Ah, went to work-- seems like I went to work the next day. The next time Mark seen me --

Q. Okay. Go ahead.

A. Ah, Mark, he -- he gave me a real big cussing and told me that if I said anything that I'd get shot. Well, later on --

Q. So, ya1ll went back to Mark's place?

A. Not - -

Q. Or Mark came to Craig's place and ya'll talked about it?

A. Craig took me home.

Q. Okay.

A. And the next time I seen -- I don't remember if it was a work day or the next day or not, but I remember the next time I seen Mark, Mark was real mad about me --

Q. So, you -- But you hadn't told him about it, so evidently Craig had told him that you chickened out?

A. Uh-huh. (Yes)

Q. Okay. Go ahead.

A. Ah, a couple of nights later or maybe a week or so -- I really don't remember, but everybody went to Cane Creek. Ah - -

Q . Who is "everybody?"

A. Myself, Donnie Risley, Kino Graham, Mark Moore and Craig Maxwell.

Q. All five?

A. All five. We was at Cane Creek --

Q. Whose vehicle were you in?

A. We was in mine and one of Mark's. Mark had his wife's car.

Q. Your vehicle is a what?

A. Oldsmobile Achieva.

Q. Okay. And the other vehicle was what?

A. A red Thunderbird.

Q. Okay. That is Mark's. Okay. And you went where?

A. Cane Creek.

Q. How do you know Cane Creek?

A. I've been there before camping.

Q. With who?

A. Donnie Risley.

Q. When?

A. Ah, three or four years ago.

Q. Okay. So, you hadn't been there in three or four years?

A. (No audible response.)

Q. Okay. How did you choose Cane Creek this time?

A. Ah, that is where Craig wanted -- he knew about the creek itself.

Q. So, you didn't suggest it, he did?

A. Right.

Q. Okay.

A. Ah, it was all five of us. We got out. We noticed a black Z-1 truck sitting there with a boat trailer. Nobody was around it. Kino went up to it.

Q. What time of day was this?

A. It's six, seven o'clock. Kino Graham went up to it and it was locked up tight. We walked down to where people camps at and there was a red car sitting

there and there was a family sounding like they was out in the water playing, swimming and stuff. I heard a man, I heard a woman, I heard a kid. At this time, I started walking back, me and Donnie did. Kino, he was following us and Mark and Craig was behind Kino up you know, back.

We made it back down to where the boat ramp and stuff was and a boat starts coming in. Ah, it was a man and a son. They pulled up and Craig and Mark was like calling a dog like they'd lost a dog or something. And before I knew it, Craig had a gun pulled on the people and he told the man, "that was father (sic) enough." But the man done got his boat up there and got out and engaged the truck and backed down to the water. He was messing around in the boat. I guess, he had his back turned. I looked around, I heard Craig say, "that is father (sic) enough, buddy." I looked and Craig was standing there with a gun on him.

Ah, Mark jumps on - - jumps in the boat. Craig tells the man to hook the gas line back up. I guess, the man unhooked his gas line or something. I heard Craig tell the man, "hook the gas line back up."

Craig gets in the boat and Mark tell me "get in the boat," so I get in. Craig --

Q. Did Craig have a gun?

A. Yes.

Q. What kind of gun was it?

A. I believe he had a nine. Mark had a revolver, .357.

Q. What did you have?

A. I didn't have a gun.

Q. Okay. What happened then?

A. Me, Donnie Risley or Kino Graham didn't have a gun that night.

Q. Okay.

A. Ah, Craig was driving the boat. He went maybe a half a mile or mile so out in the water. I heard the first shot. Craig shot, that's why I turned my head. I heard like -- it was like boom, boom -- boom, boom. I looked back around and the kid was rolling out of the boat. Mark and Craig both picked up the man and like tumbled him off the side. Throwed him out. There was blood everywhere. I was throwing up. I was -- it made me real bad sick.

Q. So, there were three of ya1ll in the boat?

A. Yes. Ah, I believe it was Mark's footprint inside the boat.

Q. Okay. I want you to slow down right here and this is where we are going to get this straight, okay, son?

If you need to talk to your attorney that's fine. I will turn the tape off and we will leave the room for a minute -- I will leave the room.

I want you to make sure that you tell me the truth now about who was in the boat. And –

A. It was us three.

Q. Just a minute -- and who had the guns?

A. It was Mark and Craig.

Q. Son, I want you to --

A. Mark --

Q. I don't want you to speak, I want you to listen to me. I want you to tell me the truth.

A. I am.

Q. Listen. I don't want you to talk. I want you to understand that this tape could and will likely be played in front of a jury after we have presented alot of evidence. Do you understand what I am saying?

A. (No audible response.)

Q. So, the only thing that they will be listening to you -- from you is the truth. If you lie about this one bit, they will be hearing a lie on this. You are not lying to me; you are lying to the people that are listening to this tape. Do you understand?

A. (No audible response.)

Q. I want to caution you and I think your attorney is going to -- this is extremely important. Do not fool yourself by thinking you cannot tell -- you can tell a lie and get away with it. You have got to tell the truth no matter what the truth is. You understand what I am saying, son?

A. Yes.

Q. We talked a couple of weeks ago and you did not tell me the truth. Up to this point, I believe you have told me the truth. Now, this is what the jury is

going to hear now so you start again. Just start at the boat ramp, okay? Because, son, I know what happened at the boat ramp, okay? I know everything that happened.

A. Okay.

Q. I can tell you exactly what happened, but I am asking -- the only reason I'm here tonight is so you can tell the truth. Not for me, but for the people who are going to be listening to this tape. They're going to be listening to this and they are going to be able to see what is in your heart by the truth that comes out of you now and nothing else. Does that -- Does that make sense to you, son?

A. Yes.

Q. So, we are going back to the boat ramp now and now you are going to tell me everything. Do you understand what I am saying? The truth. Okay. Now, you start again at the boat ramp and you tell me the truth.

A. They act like they'd lost a dog. Okay. I hear Mar -- Craig say, "That is further (sic) enough, buddy." I looked around and he has a gun drawn on him.

Mark jumps in the boat with a -- he --Mark had a

.357, Craig had a nine millimeter. Ah, Mark, was sitting like -- I was sitting in the seat up here. Craig was driving. Mark was like right here squatted down. The man and his son was sitting back here beside the motor. Craig drove the boat a half a mile, a mile or so out -- it was in the slough -- just, you know, it's like a

slough off the creek. He goes in there and he stops and he starts looking around and I seen him shoot the man. I turned my head --

Q. Who said what?

A. When?

Q. When they got up there, when you were up the creek, who had the guns and what was said to the man and the boy?

A. Nothing was said to them?

Q. What did the man say?

A. Nothing.

Q. Did he ask what was going on or anything?

A. The whole time he was just, you know, talking to his son.

Q. What was he saying to his son?

A. That everything would be all right and so on and so on.

Q. Was his son upset?

A. Not really.

Q. Okay. Did the man have a gun?

A. There was a .22 in the boat with a clip and a scope on top of it. Mark has it now. Ah, Kino was up there searching the truck and he'd fount (sic} the – a .38 and he kept it and Mark kept the .22.

Q. That was the only two guns you found?

A. Yes.

Q. What kind of .38 was it?

A. I believe it was a revolver. I never seen it. I heard Kino say that he kept -- he fount (sic} the gun and it was his gun --

Q. Okay.

A. --and as this went on and went on, Mark got paranoid about Kino getting caught with the gun and, you know, bringing everybody down.

Q. Okay. You have told me that you were in the boat, that Craig is in the boat, and that Moore is in the boat, right?

A. Yes.

Q. The man is in the boat and the boy is in the boat, correct?

A. Yes.

Q. And who drove up --who drove?

A. Craig.

Q. Craig drove the boat?

A. Yes.

Q. And you were sitting where in the boat?

A. Up the front there was a seat. I didn't have no gloves on so the next morning I took the seat off. And when we left the truck and it was set on fire, I threw the boat seat inside of it so --

Q. You are jumping ahead. I don't want you to jump ahead. I don't want to do that. Where were you in the boat while you were in the water?

A. Up -- Like here is the back of the boat with the motor, I was at the front of the boat in the seat.

Q. Where were the man and the boy, where were they sitting?

A. Sit back at the motor. Back at the motor.

Q. Where was Craig?

A. Driving.

Q. Okay.

A. Mark was squatted down where some fishing poles and stuff was laying.

Q. And you had no gun?

A. I had no gun.

Q. And Craig had a?

A. Nine millimeter.

Q. And Moore had a?

A. Three fifty-seven.

Q. Okay.

A. Ah, the nine millimeter that ya'll got was Craig's gun, the one he used that was in Mark's name. Ah

Q. Have you ever fired that weapon?

A. Ah, I believe I have once.

Q. Where?

A. At Mark's house.

Q. What about Craig?

A. He -- he kept -- he -- Mark would let him, you know, take the gun home and stuff.

Q. Okay. So, what happened when ya'll got up the

river -- or at the creek, rather, I am sorry?

A. Craig stopped the boat. We was pretty close to the bank. He did sit up -- him and Mark is both standing at this time. I'm still sitting in the boat seat. They are looking around like, 11yeah, that's the road where we are supposed to meet", you know, all this. They was just, you know -- I guess, wasting wind till they got their nerve up or something. I don't know.

Q. Uh-huh.

A. I hear a shot. I heard the man start crying, I turned my head. I got sick. I started throwing --

Q. Why was the man crying?

A. Craig shot him.

Q. Okay. What about the boy?

A. Well, it was boom, boom --boom, boom.

Q. Okay. Now, boom, boom -- boom, boom does not explain to me what happened. I want you to tell me what you saw?

A. I saw Craig come down like this with his gun

and come back so far and he pulled the trigger.

Q. To who?

A. To the man.

Q. Okay. How far away was he from the man?

A. No more than three or -- three foot.

Q. Okay. Where did he hit the man?

A. I don't know.

Q. Who did he shoot next?

A. The kid was shot next.

Q. Who shot the kid?

A. At this time, I was throwing up. Ah, I don't -- I don't know which one of them shot the kid.

Q. Okay. What happened next?

A. I looked and the kid is like rolling out of the boat. Mark --

Q. Who was -- Was the kid rolling out of the boat explain to me.

A. When I looked he was like just -- I don't-

Q. Why was he rolling out of the boat?

A. I guess with the impact of the bullet.

Q. Did you see where the boy was shot?

A. No.

Q. Was the boy and the man

A. I didn't see no

Q. --facing --

A. I didn't see no blood on the kid.

Q. Okay. Was the boy and the man facing the people with the gun?

A. Yes.

Q. Okay. You just got through telling me awhile ago they are both at the back of the boat, correct?

A. Yes. They was facing me at the front of the boat.

Q. Okay. Okay. So, all three of you are at the front of the boat?

A. Yes.

Q. So, the boy rolls out of the boat?

A. Yes.

Q. What happens then?

A. Mark and Craig both -- they -- the man was laying like between the seat and the motor and they have to like pick him up and throw him out. There was blood all over him.

Q. Was he still alive?

A. No, not that I know of. I don't know.

Q. What about the boy, was he trying to swim or was he still alive?

A. No.

Q. Could you see them after they were in the water?

A. (No audible response.)

Q. Did they sink?

A. (No audible response.)

Q. What happened then?

A. Craig, he got back into the boat seat. We drove back to the bank. Kino done had the -- well, the truck was already backed up. Before we left, the best I remember, Kino drove his truck back up and parked it. But when we came back, his truck was already backed back down.

Q. Okay. Who was driving the boat?

A. Craig.

Q. Where were you sitting?

A. Still in front of the boat.

Q. Okay. Where was Moore?

A. He was still squatted down by the poles and stuff just like we was when we left.

Q. Okay. So, when you came back to the landing, what happened then?

A. Ah, Craig and Donnie puts the boat -- you know, ties the boat down on the trailer.

Q. Okay. Let's stop a minute. Who was driving the truck?

A. Ah, at this time nobody was in the truck.

Q. Okay. I'm talking about when ya'll pulled up to the landing, who was in the truck?

A. Nobody.

Q. Had somebody already backed it down to the water?

A. Yes.

Q. Who had been driving it?

A. I believe, Kino.

Q. Who else was there?

A. Donnie Risley.

Q. Okay. So, Kino and Donnie are there beside the truck or in the truck or what?

A. They was searching the truck and stuff.

Q. Did they have any guns at that time?

A. Kino done fount the man's gun.

Q. Okay. So, he had found the gun that was in the truck?

A. Yes.

Q. What happened to the .22 then when ya'll came back, who was holding the .22?

A. It was in the boat, Mark had it.

Q. Mark had it.

A. Yeah, before we left the murder scene, Mark stuck the .357 to my head. He told me if I talked -- if I breathed a word that my family would die one by one till the only person was left would be me and I'd know it would be my turn. And Craig said that -- that he would make damn sure that it would happen.

Q. Okay. How -- Who loaded the boat on the trailer?

A. Craig droved (sic} it up on the trailer and Donnie was helping do some tack down somewhere.

Q. Did you get out of the water or what happened? How did ya'll get out of the boat?

A. I stepped off from the boat onto the trailer hitch down onto the ground.

Q. Okay. What happened to Mr. Moore?

A. Ah, I really don't remember what -- how he, ah, you know, got out.

Q. Okay.

A. I got out and I started walking back up. Ah, Kino drives the truck --

Q. Okay. Let's stop here. The truck -- the truck is there, the trailer is behind it, the boat is put on the trailer; what does Donnie Risley and Kino say?

A. Nothing.

Q. Did they ask where the man and the boy were?

A. They knew what was going to happen.

Q. Well, how did they know was going to happen?

A. Mark--Mark done discussed it with Kino, I reckon.

Q. Well, were you with him when he discussed it?

A. No.

Q. Did you know they were going to do it?

A. No. As it -- as it was supposed to be planned, that we got the vehicles from was supposed to be people tied up till the job was completed.

Then there was supposed to be an anonymous call made to the law enforcement to find the boat so they could locate the people.

Q. Whose idea was that?

A. That -- that's -- was supposed to have been

Q. Whose - -

A. -- the idea the whole time.

Q. I understand that, but whose idea was that?

A. I really don't remember.

Q. Okay.

A. Mark had purchased rope and stuff to do that.

Q. And you had the rope with you?

A. Ah, I don't know if the rope was with us or not.

Q. Where did he buy the rope?

A. Super Wal-Mart.

Q. Where?

A. In Muscle Shoals.

Q. When?

A. Ah, it was before that day.

Q. I know, but

A. A couple of days. I really

Q. What day of the week did this take place?

A. On a Sunday, Sunday night,

Q. Why do you remember it being on a Sunday?

A. Because the bank was robbed the next morning on a Monday.

Q. Okay. When you left and you got out of the boat, what did you do when you got out of the boat?

A. I started walking to my car. I was real sick. I was crying. I've been having nightmares every night. (Inaudible.) (Crying.)

Q. All right, son.

A. (Crying.)

Q. Do you want me to stop the tape?

A. (Crying.)

MR. GLENN: (Inaudible)

INVESTIGATOR BRIANS: All right. I am going to stop the tape. It is 6:43 p.m.

(Recess)

INVESTIGATOR BRIANS: The tape has been turned back on. It is 6:58 p.m. Present in the room is Mr. Glenn, Mr. Ferguson and myself. Mr. Ferguson was a little upset and because of the situation we have given him some time to get a drink and relax and he is ready to continue.

Q. If you would -- Dale, if you would continue by telling me -- start when you approach the landing and who was there and who was in the boat and what transpired there.

A. Going back to the beginning at the boat ramp?

Q. Start at the boat ramp again when you came back from the killing.

A. I went to my car. Craig was with me. Donnie and Kino was in the truck and Mark followed in his red Thunderbird.

Q. Okay. Who was in that vehicle?

A. I was in my car. Craig was with me. Donnie

Q. Okay just -- just a minute. Dale -- and who was with-you?

A. Craig.

Q. Okay. In whose car?

A. Mine.

Q. Okay. Who was driving the truck?

A. Donnie.

Q. Donnie in truck. Who else is in there with him?

A. Kino.

Q. Okay. What else?

A. Mark followed in his red Thunderbird.

Q. Okay. Now, what did you tell me before this when you went to the boat ramp, how many vehicles were there?

A. Two.

Q. What did you tell me awhile ago? Now, I have got the tape right here now. I am not trying to confuse you, son. I am trying to keep you straight. You've already told me some things about this.

A. It might have been Mark's truck.

Q. No, no, no. Okay. I don't want to confuse you. I want to make sure you understand you have got to continue to tell the truth.

A. It was either Mark's truck or Mark's Thunderbird.

Q. Okay. You told me Mark's Thunderbird, okay? And what else?

A. And my car.

Q. Okay.

A. Then the truck would have been the third. Donnie knew the place where the truck was left overnight and the boat was left.

Q. Okay. How did you get there?

A. Donnie, he went -- he was in the lead. I was second and Mark was behind us.

Q. Donnie was in the lead --

A. Yes.

Q. --with the truck and trailer and the boat? And who was next?

A. Me.

Q. You in your car?

A. Yeah. And Mark was in his.

Q. Okay. And where did you go?

A. In Franklin County on -- I don't know what highway or what the community is called.

Q. Okay. When you left Cane Creek which direction did you go?

A. Towards Franklin County.

Q. Towards Franklin County on which road?

A. It was the back roads.

Q. Okay. So you went the back roads?

A. Yes.

Q. Did you go through Tuscumbia?

A. I don't remember.

Q. Did you go through Russellville?

A. No.

Q. Okay. So, you stayed on the back roads?

A. Yes.

Q. How long did it take you to get where you went to after you left Cane Creek?

A. Probably thirty to forty-five minutes something like that.

Q. Okay. Where did you drive to?

A. It was -- Donnie's parents used to live in a trailer and there used to be this place that we could party at. It was called "the field."

Q. Was it close to the trailer?

A. Just down the road.

Q. Okay. What community is this in?

A. Frankfort, I think.

Q. Okay.

A. I'm not sure.

Q. Okay. Where did ya'll go that night?

A. That night?

Q. Uh-huh. I am talking about you left Cane Creek, ya'll drove up to the mountain somewhere and what did you do when you got up to -- you said Frankfort, where did you go to that night in Frankfort?

A. To "the field."

Q. Okay. What happened there?

A. They parked the truck. Ah, Craig gets out of my car and gets in the car with Mark, Donnie gets in my car. Me and Donnie --

Q. I'm sorry, what? Craig did what?

A. Gets out of my car.

Q. And gets in the car with who?

A. Mark. Ah, Kino rode with them. They took Kino home that night.

Q. Okay.

A. I -- I -- I took Donnie home.

Q. Okay. Did you see them after you left that site up there that night?

A. No.

Q. Okay. Did Donnie stay with you that night or did you take him home?

A. Ah, he stayed back at my neighbor's house.

Q. Whose house?

A. His wife's sister's, Tina.

Q. Okay.

A. Ah, the next morning

Q. Where did you spend that night?

A. That night? At home.

Q. At home. Okay.

A. Mark --

Q. Was your wife there that night?

A. Yes.

Q. Okay. Go ahead, I'm sorry.

A. The next morning Mark comes and my wife's already left to go to clinicals that day. He comes in, he wakes me up and he tells me, "let's go". He, ah, drove back there and picked up Donnie. He was in his truck. We go up there --

Q. Okay. So, you were in --

A. Mark - -

Q. You say “we” go, you and Mark are in whose vehicle?

A. His truck.

Q. You are in his truck. What color truck is it or kind of truck?

A. Red.

Q. Red what?

A. I don't know if it's a Ford or Dodge or it might be a Chevrolet.

Q. Okay. So, Mark picked you up in his red truck and you went where?

A. To Tina's to get Donnie.

Q. What time was that?

A. It was early in the morning.

Q. Before daylight?

A. No, it was daylight.

Q. Okay. Go ahead.

A. We go to Craig's.

Q. Where does he live?

A. In Russellville on Jackson -- on the main highway from town that goes through town.

Q. Okay. Does he have a girlfriend there?

A. No.

Q. Who is his girlfriend?

A. I don't reckon he has one.

Q. Okay. What time did you get there?

A. I don't know. It was early.

Q. Okay. What did you do when you got to Craig's?

A. We went inside. Ah, Craig drives his car, his gold Cadillac. Mark is in his truck. We go back to the where we left the boat.

Q. Slow down here. You say Craig drives his gold--

A. Cadillac.

Q. With who, who is in that?

A. By hisself.

Q. Is he by himself? Okay. You are in the truck with --

A. Mark -- ah, no, Ki --Donnie was in the car with Craig at this time.

Q. Where did you -- so, ya'll picked up Donnie before you went to --

A. Craig's.

Q. Okay. Okay. So, you and Mark --

A. We go --

Q. -- are in the truck.

A. Yes. And we go back to where we left the boat and trailer.

Q. Okay. Where is Kino?

A. He didn't show up.

Q. Okay. Did ya'll wait on him?

A. For a little bit. Not long.

Q. Did you try to call him?

A. No.

Q. Okay. What did anybody say about that?

A. Mark was mad and cussing and saying that he is going to probably kill him.

Q. Okay. Okay. Where were ya'll going to go? You say you went up to the truck and --

A. Boat.

Q. Okay.

A. Ah --

Q. Why -- Ya'll had planned to do the bank robbery that day, correct?

A. (No audible response.)

Q. Okay. Tell me about the planning that day, were you wearing any special clothes or anything?

A. Not at this time.

Q. Okay. What about the other guys, did they have any special clothes on?

A. Not at this time.

Q. Okay.

A. Ah - -

Q. Did ya'll later on put on some special clothing?

A. (No audible response.)

Q. Okay. When we get to that part, you make sure you tell me about it, okay? Okay. Go ahead. You went to the boat and the truck, what happened then?

A. Donnie was driving the truck. I rode with him.

Q. So, you rode in the black truck.

A. Yeah.

Q. Okay. Go ahead.

A. Ah - -

Q. Where did ya'll go?

A. We went to this back road in Mississippi.

Q. Okay. So, we have got the black truck?

A. Yes.

Q. We've got -- who was driving Mr. Moore's truck?

A. He was.

Q. Was there anybody in there with him?

A. No.

Q. Who was driving the --

A. Craig.

Q. Craig was driving his vehicle, was there anybody in there with him?

A. (No audible response.)

Q. Okay. So, you have got all three vehicles in -- who led the way is what I am trying to get to.

A. Craig.

Q. Craig led the way. So, he knew where ya'll were going?

A. Yes.

Q. Had ya1ll planned this out ahead of time?

A. Him and Mark had.

Q. Had they told you anything about it?

A. Uh-uh. I didn't know where we was going. We knew we was going to rob a bank, but we didn't know

Q. Did you know at that time which bank it would be?

A. No.

Q. They had never even told you what city it would be in?

A. I knew it was in Mississippi in Belmont.

Q. You knew it was in Belmont?

A. Yeah.

Q. But you didn't know the name of it?

A. No.

Q. Okay. So, Craig leads the way?

A. Yes.

Q. Who is next?

A. I think it was me and Donnie and then Mark behind us.

Q. Okay. Which road do you use to go over to Mississippi?

A. Ah, went through Red Bay.

Q. So, you went through Red Bay. What time of day did you go through Red Bay?

A. I don't remember. We didn't have no watch or nothing on.

Q. Okay. Did ya'll stop and get gas anywhere?

A. No.

Q. Okay. Did you have a gun --

A. No.

Q. -- at that time?

A. No.

Q. Do you own a gun?

A. No.

Q. Okay. Did you see any guns at this time?

A. They was all in Craig's trunk.

Q. Just laying in the back of the truck or what?

A. Yeah.

Q. You saw guns laying back there?

A. They was in his trunk at this time.

Q. The trunk of the car?

A. Yes.

Q. Okay. So, you had already seen them?

A. They's already been loaded up. I didn't see them.

Q. Did you -- Did you load them up?

A. No. We get to the back road and

Q. Okay. Let's hold up a minute. Where were they loaded up from?

A. From -- I guess, Mark --

Q. I don't want you to guess, son. I want you to tell me what you saw.

A. I really don't remember about where the guns --

Q. Well, how did you know they were in the trunk of Craig's car?

A. That is where we got them out when we got to Mississippi.

Q. Okay. So, you went to Mississippi, what happened in Mississippi?

A. We was on a back road, we all put on green jumpsuits. There was no vest wore or nothing.

Q. Who got the green jumpsuits?

A. Mark and Craig.

Q. Where did they get them?

A. I believe somewhere in Jasper, I'm not for sure.

Q. Where in Jasper?

A. I'm not for sure. They went and done this by theirselves before, you know.

Q. Did they purchase them?

A. Yes.

Q. At a store?

A. Yes.

Q. Did they say what kind of store?

A. I believe it was like a pawn shop.

Q. When did they do this?

A. It was a couple of days before time.

Q. Okay. Who bought them you said?

A. Mark.

Q. Mark bought them himself?

A. (No audible response.)

Q. Was anybody with him?

A. Craig.

Q. Okay. And so you said you got to this road in Mississippi and you put on jumpsuits?

A. Yes.

Q. Did everybody put on jumpsuits?

A. Yes.

Q. Okay. So, you had four jumpsuits. Were they all identical?

A. (No audible response.)

Q. Okay. Tell me what happened - - were they just laying in the back of the car or what?

A. Yes.

Q. Just open?

A. Yeah.

Q. Then you saw guns You are talking about the Cadillac, right?

A. Yes.

Q. Then you saw the guns, how many guns were there?

A. Mark had his .45, Craig had a nine millimeter. Ah, there was a sawed-off shotgun and --

Q. Who had that?

A. Donnie. There was an SKS. We go

Q. So, there were only four guns?

A. Yes.

Q. And -- So, you had the SKS?

A. It was in the truck with me and Mark.

Q. Okay. I'm sorry. I thought all of these came out of the back of the car.

A. Well, they did, but -- See, when we left, I was in the truck with Mark.

Q. In which truck now?

A. The red truck.

Q. Okay. You were in the truck with Mark?

A. Yes. Donnie and Craig was in the black truck. We parked --

Q. Who was in the red -- the black truck?

A. Black truck was Donnie and Craig.

Q. Okay.

A. They parked across the road from the bank.

Q. What's over there?

A. Some type of grocery store.

Q. Okay. So, you were in the -- both trucks were over across the street at the grocery store?

A. Yes.

Q. Okay. Were you in front of the grocery store or beside the grocery store?

A. Beside it.

Q. Beside it. Okay. What happened at the grocery store and what time was this?

A. I don't remember no time. Ah, Donnie and Craig was putting on their masks and stuff and they hollered on the radio --

Q. Okay. Just a minute. What color and kind of masks were they?

A. Just black pull-over masks. And they wore sunglasses.

Q. Where did they come from -- the masks?

A. I -- I consi -- I considered they come from the same place the green jumpsuits did.

Q. Had you ever seen the masks before that time?

A. (No audible response.)

Q. Okay. Did they give you a mask?

A. Yeah.

Q. Okay. You had a jumpsuit on. At this time - -

A. Me and Mark, we never put our masks or nothing on.

Q. Okay. So, you are sitting in the black truck?

A. No. Donnie and Craig was in the black truck.

Q. Okay. Donnie and Craig are in the black truck?

A. Yes.

Q. Do they get out and come over to you and give you the masks or had they already given them to you?

A. The already gave them to us.

Q. So, ya'll never got out of the truck once you got to the grocery store?

A. (No audible response.)

Q. You had a mask, why did you have a mask?

A. It was just there. I never put it on.

Q. I know that, but why did he give it to you?

A. I don't know.

Q. Did he tell you to put it on?

A. No.

Q. Did you ask?

A. No.

Q. What about Mark, did he say anything about it?

A. About the mask?

Q. Uh-huh.

A. No, he didn't put any

Q. So, he didn't have it on, either?

A. No.

Q. So, you -- Okay. So, you have already told me that Mark's got a .45, correct?

A. Yes.

Q. Okay. And at this time you have got the SKS; is that right?

A. Well, at this time it was in the truck.

Q. Did you have a pistol or anything?

A. No. Ah - -

Q. So, what happened then?

A. Craig hollered over the walkie-talkie and said that we had better -- that Mark had better have his back.

Q. So, Craig had a walkie-talkie and who had the other walkie-talkie?

A. Mark.

Q. So, there were only two walkie-talkies. Where did the walkie-talkies come from?

A. Mark had got 'em from Radio Shack.

Q. Which Radio Shack?

A. Muscle Shoals.

Q. Where in Muscle Shoals, do you know?

A. (No audible response.)

Q. Huh. Do you know when?

A. No.

Q. Did he say how much they cost?

A. Two something.

Q. Two hundred and something dollars? Who had the radio in the car -- in the truck with you? Did you ever use the radio?

A. No.

Q. Did Mark say anything to him back on the radio?

A. Ah, I don't remember at this time. They, ah, went to the bank --

Q. Who is "they?"

A. Donnie and Craig.

Q. Did they drive over or walk?

A. Drove. Craig jumps out and his is the first one into the door. Donnie is following him. They was in there a couple of minutes and then they came out.

Donnie had jumped in the back of the truck in the tailgate part. Craig drives the truck.

Q. Why did he jump in the back? Was anything ever said about him getting in the back of the truck?

A. No.

Q. While they were in the bank, did they ever say anything to you over the radio?

A. They did and I believe Mark said -- told them they was clear or something while they was inside.

Q. Okay. What sort of arrangements were made about the police?

A. If the police rode up, Mark was supposed to let Craig know then -- I guess, he was going to take the SKS and start shooting for them -- to where the could come out.

Q. How come you don't have a gun? Why do they have you along?

A. (No audible response.)

Q. Okay. Ah - -

A. At this point they are scared of me because the night before.

Q. Why?

A. Because I got sick and I was crying.

Q. Okay. You are in the truck with Mr. Moore?

A. Yes.

Q. They go in the bank, they come out.

A. Yes.

Q. He is watching for police officers. Does he know the police or the routine? Did ya1ll see any police officers?

A. (No audible response.)

Q. Okay.

A. Ah - -

Q. Did you get nervous while they were inside?

A. Yes.

Q. Did you seen anything unusual going on outside?

A. No. At this point in time, I think Mark was trying to figure out a way to get rid of me without it looking suspicious to the family.

Q. You have lost me there, son. I don't know what you are talking about.

A. I believe Mark was trying to come up with the idea to kill me where it would look like -- where it wouldn't be suspicious enough to make --

Q. Has he said anything or anybody say anything like that or is that just what you think?

A. It's what I think.

Q. Okay.

A. Because they both threatened me that the night before after what was done.

Q. Okay. Craig and Donnie come out of the bank?

A. Yes.

Q. What happens after they come out of the bank?

A. They get in the truck and they go back to where we started from.

Q. Okay. How far out of town was that?

A. Just a couple of miles.

Q. Okay. What happens when you get there?

A. We undress. Donnie slung gasoline in the truck and he makes a line away from the truck with the gas.

Q. Uh-huh.

A. I run up. I had -- I didn't wear gloves while I was in the boat, so I took the seat off before we left the boat that morning and before Donnie threw a match to it, I ran over and threw the boat seat inside the truck that I was sitting in.

Q. Okay. Tell me what happened to the things you were wearing and all of that.

A. They was all threw into the truck.

Q. They were all thrown into the truck?

A. Yes.

Q. Okay. What about the guns?

A. Ah, the SKS was put in Craig's car along with the sawed-off shotgun. And Mark still had his .45 on and I'm pretty sure Craig still had his gun -- pistol on him.

Q. Okay. Let me get this straight now. From what I understand, you are telling me that you used the two trucks to go do the bank robbery; is that correct?

A. Yes.

Q. Where did you leave the car?

A. Where we started from.

Q. Okay. So, nobody stayed there with the car?

A. No.

Q. When you return you said that Donnie set fire -

A. Yes.

Q. -- to the truck?

A. The truck.

Q. Okay. And the SKS, Mark did what with it?

A. Put it in the trunk of Craig's car.

Q. Okay. What about the guns that they had?

A. The sawed-off was put in there, the pistols

I know Mark rode home with his because I rode home with him. Craig, I don't know if he put his pistol in the trunk or kept it on him.

Q. Okay. You are leaving the scene, who goes first? We are talking about there where the truck was burning. · Who gets in what vehicle and who leaves?

A. It was me and Mark in his truck and Donnie and Craig in his car. And, I believe, me and Mark went first.

Q. Okay. So you are in Mark's red truck?

A. Yes.

Q. Okay. And ya'll leave first?

A. (No audible response.)

Q. And who follows you?

A. Craig and Donnie.

Q. And Craig is driving

A. Yes.

Q. -- his car? Where do you go?

A. Back to Craig's house.

Q. Do you go back the same way you went out there?

A. No.

Q. Okay. Which way do you go? When you went out there to start off with before the bank robbery, did ya'll drive through Belmont?

A. As we was leaving we went through Belmont.

Q. So, when you left, you came back through Belmont?

A. Yeah.

Q. Did you go right back by the same bank?

A. Yes.

Q. Okay. What time was this?

A. I don't know.

Q. How long after the bank robbery did ya'll come back by there?

A. Probably no more than five to six minutes.

Q. Was there anything going on at the bank?

A. No.

Q. Didn't see any police then?

A. On our way out of town, we passed a cop with its blue lights on. A couple of miles down, we passed another one.

Q. Were they coming into town?

A. Yes.

Q. Okay. When you left Belmont, did you go north or south of town?

A. I don't know.

Q. Which way did what town did you go through after you left Belmont?

A. We came back through Cherokee.

Q. So, you came to Cherokee?

A. Yeah.

Q. What did you do then?

A. Go to Craig's apartment.

Q. Did you stop anywhere along the way before you got back to Craig's apartment?

A. Not that I remember.

Q. So, ya'll didn't stop and get gas anywhere or anything to eat or anything like that?

A. (No audible response.)

Q. Okay. Where did the gas come from that was used to burn the truck?

A. It was in Craig's car in a gas can.

Q. Do you know where he got it?

A. (No audible response.)

Q. What kind of -- Describe the gas container.

A. Red, five-gallon gas -- two or three gallon. It wasn't no five-gallon's worth. It was two and a half, three gallon.

Q. It was about two and a half, three gallons. Was

it metal or plastic?

A. Red plastic.

Q. It was red plastic. Do you know where that was purchased?

A. No.

Q. Do you know who purchased it?

A. No.

Q. Did you see it before they got it out of the trunk of the car?

A. (No audible response.)

Q. Okay. You said you went back through Cherokee. So, you and Mr. Moore are in front in the red pickup truck and they are following you?

A. Yes.

Q. And ya'll went all the way up to Tuscumbia?

A. Yes.

Q. And then turned and went down 43?

A. Yes.

Q. And you went to Craig's

A. Yes.

Q. -- in Russellville?

A. Yes.

Q. Okay. Now, tell me what happened after you got there.

A. Well, Mark took 2500 off the top and the rest of it was splitted (sic) four ways. I believe that Mark took 2500 off the top, then he took like a thousand off and gave Kino and then the rest of it was splitted between four ways.

Q. You're -- you're -- you're -- Okay. Mark took $2500 up front?

A. Yeah, because he said he'd paid for the radios and stuff like that and that was his money to pay for that.

Q. And he gave Kino some money even though Kino wasn't participating?

A. (No audible response.)

Q. How much did he give him?

A. A thousand.

Q. Okay. How much money did ya'll get?

A. After that I think it was like nine thousand and something a piece.

Q. Nine thousand each?

A. Yes, counting Mark.

Q. Huh?

A. Counting Mark, he got the twenty-five plus the nine thousand.

Q. So, it was each -- all four of you got $9,000?

A. Yeah.

Q. Okay. Where are you at now?

A. Craig's apartment.

Q. Okay. When you get back to Craig's apartment all the things are in the back of his car, correct?

A. Uh-huh. (Yes)

Q. What happens -- what happens to the guns and everything?

A. The only thing he took out was the money. The guns was left in his car. Where he lives there's people outside and stuff, so··

Q. So, ya1ll didn't take anything out of the car?

A. But the bag that the money was in.

Q. What kind of bag was that?

A. It was a green duffel bag.

Q. Okay. The money was in a green duffel bag, is that what they took in the bank?

A. Yes.

Q. Who provided that?

A. It was already there.

Q. Already there where?

A. At Craig's.

Q. Okay, I'm sorry. What did they use in the bank to put money in?

A. The green duffel bag.

Q. So, you saw Craig take that from his house before you went to do the bank robbery?

A. (No audible response.)

Q. And it was put in Craig's car. And then when you got back to Craig's you took the green duffel bag out?

A. Yes.

Q. Okay. All right.

A. And the money was split. Mark takes me home and Craig and Donnie stayed together. I don't know what happened after that with them two.

Q. What about the guns, did the guns stay in the back of Craig's car or did Mark get his guns?

A. They stayed -- they stayed at Craig's.

Q. So, Mark didn't get his guns?

A. Uh-uh. (No)

Q. Okay. What happened after that, did you go home or what?

A. Yes, I went home.

Q. So, Mark took you home?

A. Yes.

Q. Where was your car during this whole time?

A. My wife, she was gone to clinicals.

Q. Okay. What time did you get home?

A. I don't really remember.

Q. Okay. What did you do after that?

A. I stayed at home the rest of the day.

Q. Did you call them?

A. No.

Q. Did you talk to them about this anymore?

A. No. Ah, but Mark told me several days later that he hid the sawed-off shotgun and the .357 out behind his house in the woods.

Q. Okay. Okay. What about -- You told me earlier that you had on a jumpsuit, did ya'll have any boots on or anything like that?

A. Me and Mark didn't. Donnie and Craig wore rubber boots.

Q. Where did these rubber boots come from?

A. I don't know.

Q. What happened to the rubber boots?

A. The was burnt, too.

Q. They were burned in -- okay. What about the masks?

A. They was burnt.

Q. Okay. Did ya'll have gloves on?

A. Yes, and they was burnt.

Q. Did you have gloves on, too?

A. (No audible response.)

Q. Okay. What kind of gloves did they have on?

A. Just regular brown wool.

Q. Okay. All right. I am going to go back now and go over a couple of things, okay? I want to go back to the night before after ya'll leave the truck and the boat up on the mountain, you go to Craig's house, correct?

A. No., me and Donnie went home.

Q. You did not go to Craig's house?

A. No, not - -

Q. Not on Sunday night?

A. No. I was in my car and we went home.

Q. Okay. What clothes were you wearing that Sunday?

A. Shorts and a pull-over shirt.

Q. Where are those shorts and that pull-over shirt now?

A. I have no idea.

Q. Do you still have them?

A. Probably.

Q. What color were they?

A. Just blue jean shorts and I don't remember what color the shirt was.

Q. This is important, son. Have you destroyed those?

A. No.

Q. Did they have blood on them?

A. No.

Q. And you did not go to Craig's apartment that night?

A. Not that I can remember, no.

Q. Okay.

A. I believe my shirt was black that I had on.

Q. All right. Do you know where the guns are that were used in the murder and the bank robbery?

A. Hid out behind Mark's house, the sawed-off shotgun and it's supposed to be a .357 revolver.

Q. And who owns that .357?

A. Mark.

Q. Do you know anything about guns? Do you know the name brand on it or anything?

A. (No audible response.)

Q. It was a revolver, though, you said. Okay. The shotgun and the .357 are buried. Where are the radios?

A. I believe they're with that.

Q. You think they are buried, also? Is there anything else buried out there?

A. Not that I know of.

Q. Okay. Where is the money that you received?

A. It's done been blew on drugs.

Q. You spent $9,000 on drugs?

A. (No audible response.)

Q. What kind of drugs?

A. Crack rock and marijuana.

Q. Okay. I interviewed you a couple of weeks ago and you told me this tale about you and Donnie going to Birmingham?

A. Yes.

Q. Is there anything about that that was a lie? You told me where you had spent the nights and all of that. You also said that you let Donnie out in Birmingham, was that true?

A. Yes.

Q. Okay. Along the way is there anything that you did not tell me the truth about that you told me earlier?

A. Not that I know of.

Q. Okay.

A. Not as I can remember.

Q. Where did you spend $9,000 on drugs?

A. Most of it went through what Kino got for me.

Q. So, you gave most of the money to Kino?

A. Yeah.

Q. Where does he buy drugs?

A. In Reedtown.

Q. Okay. From who?

A. I don't know. Sometimes I have done it on my own.

Q. Okay.

A. Just - -

Q. Who did you buy it from?

A. I don't know their names. They would be standing there --

Q. What did you buy? After you bought -- after you got the $9,000?

A. I would buy two or three hundred dollars worth.

Q. Of what?

A. Crack rock, 11bingo11 pack the same night and get two or three hundred dollars worth.

Q. Okay. We have covered the guns, we have covered the walkie-talkies, we have talked about the face masks -- do you know where the glasses came from?

A. Uh-uh. (No)

Q. Do you know who provided the glasses?

A. No.

Q. Why did they wear glasses in the bank?

A. I don't know. I guess to keep their eyes covered up.

Q. Okay. Who carried the money when they came out of the bank?

A. Craig.

Q. Okay. Did you talk to Craig about this anymore after this?

A. Uh-uh.

Q. You have not seen him since the bank robbery?

A. We have seen each other, but we ain't talked about it. I've seen him up at Mark's house.

Q. Okay. The -- Is there anything that you have not told me about this that I need to know because I'm tired, I will be honest with you, and I don't want to miss anything. I want you to have the opportunity while we are recording this to make sure you get it all on tape.

A. Right now not that I know of.

INVESTIGATOR BRIANS: Mr. Glenn, anything from you?

MR. GLENN: No.

INVESTIGATOR BRIANS: All right. We are going to turn the tape off. It is 7:34 p.m.

---INVESTIGATOR BRIANS: All right. It is 7:46 p.m. I

have turned the tape back on. We have had a little break. We were tired. We did a little talking.

Mr. Glenn, would you say something so we can prove you are in the room?

MR. GLENN: Yes, I'm here.

INVESTIGATOR BRIANS: All right. If you would like to say something, go ahead.

MR. FERGUSON: So far I have told one lie tonight. Ah, Mark was not in the boat. It was me and Craig, but Craig did shoot both victims. And when he was trying to get the man out, he was asking for my help, but I did not help him. I never touched neither one of them and that's --

Q. Okay. So you were in the boat with Craig and Mr. Moore was not there? Where was Mr. Moore?

A. I think he might have been at home.

Q. So, he was not with you at all?

A. (No audible response.)

Q. So, you lied about that earlier?

A. That's the only lie I told.

Q. Okay. Now, I want you to tell me about both guns. Which gun did you have? Which gun did he have?

A. He had a nine millimeter.

Q. Okay. And he shot both of them?

A. (No audible response.)

Q. Okay.

A. He either had a nine millimeter or a .357.

Q. Okay.

A. That's the truth. I did not shoot neither one of them and --

Q. Did you have a gun?

A. No.

Q. Speak up.

A. No time. He'd been threatening me and, like I said, Mark has threatened me. And I believe they both--

Q. I am not talking about them. We are back in the boat, we are up the creek. You are sitting at the front of the boat; is this correct?

A. Yes.

Q. Who is driving?

A. Craig.

Q. Craig is driving the boat. Where are they sitting?

A. In the back.

Q. He is facing forward, he is driving the boat, he has got a gun and they are behind him?

A. Uh-huh.

Q. Why didn't they jump out of the boat? Because you had a gun, son? You were pointing it at them?

A. No.

Q. Tell me the truth. This is you last chance. You are -- You have told me everything, son?

A. I am telling you the truth.

Q. You've told me everything?

A. That's the whole truth.

Q. I don't want you to -- Son, relax, okay?

A. Craig told me if the man made a move or something to let him know.

Q. Okay.

A. And he told -- he told me that in front of the man. I guess that's why they didn't try nothing.

Q. Isn't it true that you had a gun?

A. No, sir. I didn't have no gun.

Q. How many guns did he have?

A. I know he had one. I didn't have no gun. I did not shoot neither of them. At this point, I don't see no reason to lie about it. I have told the truth so far -- and I have told you the truth.

Q. Okay. The -- would you like to say anything on

the tape?

A. I just hope I get to keep my life and not end up in no chair.

MR. GLENN: Do you have remorse about this?

A. I have been crying everyday. I have nightmares every night. (Crying.)

INVESTIGATOR BRIANS: It is 7:52 p.m. I will end

the tape at this time.

Donnie Risley, one of the parties charged with Capital Murder and has now plead guilty to the lesser included offense of Robbery and received a sentence of

15 years, testified in this case. Donnie Risley is a twenty-three year old white male from Russellville, Alabama, who had known the defendant for some seven or eight years. Risley testified as follows: He, Mark Moore, Craig Maxwell, Dale Ferguson and Kino Graham planned to rob a bank in Mississippi. They first planned to steal a vehicle as a get-away car. Mark

Moore was the leader of the group and more-or-less told them what to do. On the day of the killing, Donnie Risley, Thomas Dale Ferguson, Craig Maxwell and Kino Graham were at Cane Creek looking to steal a vehicle. Dale Ferguson recruited Risley, as they were close friends. Ferguson asked him if he wanted to make some easy money by robbing a bank. They all met at Craig Maxwell's apartment about six times to discuss the bank robbery. On the day of the killing, they went to Cane Creek in Dale Ferguson's automobile and they were all drinking. He, Dale Ferguson and Kine Graham were smoking pot. They walked around at Cane Creek looking for a vehicle to steal. He and Dale Ferguson had camped at Cane Creek before. He was armed with a .357 Smith & Wesson, Craig Maxwell had a 9 mm pistol, Kine Graham had a Colt .45 and Dale Ferguson had a .357 pistol. All the pistols were owned by Mark Moore. It was late in the afternoon when Risley saw Harold and Joey Pugh coming to the boat ramp. The other people they saw at the campground had left. Harold Pugh got out of his boat and got in his truck and backed it down to the water. Craig Maxwell then approached Harold Pugh and pulled his gun on him. Craig and Dale got in the boat with Harold Pugh and Joey Pugh. Craig Maxwell was driving the boat and Harold and Joey Pugh were behind him. Dale Ferguson was at the front of the boat holding a gun on the Pughs. Risley pushed the boat off and saw them leave the landing at Cane Creek. During this time Kino Graham was in the truck and pulled it up. The boat went up the creek with Harold and Joey sitting down in the back of the boat. Risley did not hear any shots and about ten

minutes later Craig Maxwell and Dale Ferguson came back in the boat without Harold and Joey Pugh. Risley backed the truck back down to the water and loaded the boat on the trailer. Risley drove Harold Pugh's truck from Cane Creek. They took the truck, boat and trailer and hid them in a field some miles away. Harold Pugh had a handgun in the truck which was taken. The next day they went and got the truck and followed Mark Moore to Mississippi to rob the bank. After robbing the bank they burned Harold Pugh's truck. The next day Risley went back to work and did not know that Harold Pugh and Joey Pugh had been killed until he read about it in the newspaper. Risley talked to Dale Ferguson at his home after work. He asked Dale Ferguson if they had shot the Pughs and Ferguson said yes. Risley talked to Dale Ferguson the following weekend at Craig Maxwell's apartment. Present at the apartment was Dale Ferguson, Mark Moore, Craig Maxwell, and Donnie Risley. Risley asked them why they killed the Pughs, and Dale Ferguson and Craig Maxwell said they did not want any witnesses. Dale Ferguson told Risley he shot Harold Pugh and then Joey Pugh. Risley was later arrested and gave a complete statement which was recorded.

DEFENSE CASE

FIRST PHASE:

The Defendant presented no evidence.

The Court finds that the Defendant intentionally killed Harold Pugh and Joey Pugh by

shooting them with a pistol. The Jury was charged on Capital Murder, Felony Murder, Reckless Manslaughter, Robbery 1st Degree and Robbery 2nd Degree. The Jury assessed the sufficiency of the evidence and announced its verdict heretofore as stated.

SECOND PHASE:

The State and the Defendant both made opening statements. The State called two witnesses, Dana Hester, who testified that he was a close friend of Harold Pugh and had known him since the eighth grade. He further stated Harold Pugh was active in the church and active in little league baseball with his son, Joey.

Glenda Freeman testified that she was Joey Pugh's fifth grade teacher and knew he and Harold Pugh.

The State also reintroduced all the evidence from the first phase of the trial.

The Defendant called Dr. James F. Chudy, Ph.D., who is a clinical psychologist. He made a psychological evaluation of the defendant which is evidenced by the Defendant's Exhibit No. 1. He testified to the defendant's borderline lower average intelligence and that he was mentally retarded to some degree. He further testified that the defendant's reasoning and social skills were limited and he had a low I.Q. He said the defendant was easily influenced.

The Defendant also called as a witness Karen Ferguson who is the defendant's wife. They were married on or about November 21, 1992. She testified that the defendant has never been violent, and had a job most of the time they were married. She was in high school when they married and at that time the defendant had a drinking problem and smoked pot. She further testified that the defendant was slow mentally and that she made all the decisions in telling him what to do. She said that Mark Moore was her stepfather. On cross examination she admitted that Mark Moore was like a father to her husband.

The State called as a rebuttal witness Dr. C. Van Rosen who testified that the defendant's reading level was third grade but that he was not retarded. He further testified that he thought that the defendant was not trying very hard when he was interviewing him and giving him certain tests. He further stated that the defendant's I.Q. was 69. He said that if the defendant tried harder he would have scored in the middle seventies or higher on his tests. He said that the defendant had a personality disorder. His evaluation is State's Exhibit No. 94.

The State was permitted to argue the existence of one (1) aggravating circumstances:

The fact that the Capital offense was committed during a robbery.

The Defense argued the existence of the following mitigating circumstance:

1. The Defendant has no significant history of prior criminal activity, Section 13A-5-51(1), Code of Alabama.

2. The Defendant acted under extreme duress or under substantial domination of another person, Section 13A-5-51(5), Code of Alabama.

3. The Defendant had turned himself in to the authorities and had made a full confession.

4. The Defense also argued as mitigating circumstances aspects of the Defendant's character and record, including his fear of Mark Moore if he did not follow Mark Moore's instructions in the commission of the crime.

5. The Defendant also argued as mitigating circumstances aspects of the defendant's character, his school records, learning that his father was really his step-father, and having a low I.Q.

The Jury was charged on the mitigating circumstances listed above in One thru Five, and was charged on Section 13A-5-52, Code of Alabama. The Jury was charged in accordance with the Pattern Jury Instructions and was not informed by the Court that their verdict was advisory.

The Jury returned a verdict as described above fixing the Defendant's punishment at Life Imprisonment Without Parole, the vote being 11 for life imprisonment without parole and 1 for death.

The final sentencing was set for September 8, 1998, and a Pre-Sentence Report was ordered.

THIRD PHASE:

Both the State and the Defendant presented arguments and there were no witness called. A Pre-Sentence Report was complied by the Alabama Department of Pardons and Parole.

Pursuant to Section 13A-5-47(d) the Court makes the following findings concerning aggravating and mitigating circumstances:

13A-5-49 AGGRAVATING CIRCUMSTANCES

1. The Capital offense was committed by a person under the sentence of imprisonment. DOES NOT EXIST.

2. The Defendant was previously convicted of another Capital offense or a felony involving the use or threat of violence to a person. DOES NOT EXIST.

3. The Defendant knowingly created a risk of death to many persons. DOES NOT EXIST.

4. The Capital offense committed while the Defendant was engaged or was an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit robbery. DOES EXIST.

The Defendant by his own admission engaged in the robbery of Harold and Joey Pugh. The Defendant along with Craig Maxwell took Harold and Joey Pugh out in a boat where they were each shot with two different pistols. The evidence supports the fact that the Defendant shot Harold and Joey Pugh, stole Harold Pugh's pickup truck, took Harold Pugh's pistol, money, truck and boat and later burned the truck.

5. The Capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. DOES NOT EXIST.

6. The Capital offense was committed for pecuniary gain. DOES NOT EXIST.

7. The Capital offense was committed to disrupt or hinder the lawful exercise of any government function or enforcement of laws. DOES NOT EXIST.

8. The Capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. DOES NOT EXIST.

The Court finds no other aggravating circumstances to exist.

13A-5-51 MITIGATING CIRCUMSTANCES-GENERALLY

1. The Defendant has no significant history of prior criminal activity. DOES EXIST.

The Court finds no evidence of any significant history of prior criminal activity on the part of the defendant.

2. The Capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. DOES NOT EXIST.

Although the clinical psychologist testified that the defendant had a low I.Q., may be mildly retarded, and may be handicapped mentally. He also testified he did not suffer from any delusions or was psychotic. He knew right from wrong and was not insane. He had the ability to make choices, had a good job, was married, had advanced in his job, and had opportunities. There was no evidence that the defendant suffered from any extreme mental or emotional disturbances.

3. The victim was a participant in the defendant's conduct or consented to it. DOES NOT EXIST.

4. The defendant was an accomplice in the Capital offense committed by another person and his participation was relatively minor. DOES NOT APPLY.

The defendant was with Craig Maxwell in the boat with Harold and Joey Pugh, and the evidence reflects that the defendant had a .357 pistol and shot first, Harold Pugh, and then Joey Pugh.

5. The defendant acted under extreme duress or under the substantial domination of another person. DOES NOT EXIST.

Although the evidence supports the fact that the defendant was afraid of being killed by Mark Moore if he did not follow his instructions, there was no evidence that Mark Moore verbally had threatened the defendant with such actions or indicated such result to the defendant other than the defendant's belief of this. The defendant had a choice of not being involved in the killing and robbing of Harold and Joey Pugh. And the people involved in this met several times before the crime was carried out and even after

the killings the people involved met together. Mark Moore was not physically present when the defendant shot Harold and Joey Pugh. In the defendant's statement he at first indicated that Mark Moore was present, but all the evidence reflects that Mark Moore was not present at Cane Creek on the day of the occurrence of the killing of Harold and Joey Pugh. And the defendant said he lied when he stated Moore was present. The defendant indicated that he was very much in control of the events surrounding the killings and he further took part in the bank robbery later in Mississippi, and during one of the meetings he confessed he shot and killed Harold and Joey Pugh. The contention by the defendant that he lacks the ability to weigh things, his intellect is low, he looked up to Mark Moore as a leader, relied on other people to get things done, is found by the Court to be simply an expression of the defendant's personality. The evidence reflects that he was not insane and had a good job, had advanced in his job, was married, and had other opportunities. Therefore, the Court finds that said mitigating circumstance does not apply.

6. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. DOES NOT EXIST.

The defendant's action in or around the time of the killings indicate that he knew he was committing

a criminal act, he tried to cover up his actions after the murders were committed.

7. The age of the defendant at the time of the crime. DOES NOT EXIST.

The defendant's age at the date of the killings was 24 years old.

13A-5 ·52 - MITIGATING CIRCUMSTANCES

SAME INCLUSION OF DEFENDANT'S CHARACTER, RECORD, ETC.

In addition to the mitigating circumstances specified in Section 13A-5-Sl, mitigating circumstances shall include any aspect of a defendant's character or record and any other circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstances which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.

Does apply in that the defendant did turn himself in to the authorities and did make a confession. However, he did not turn himself in immediately. It was approximately one (1) month

after the death of Harold and Joey Pugh before the defendant did so.

The Court does find that the Jury's recommendation of life imprisonment without parole is a mitigating factor and the Court has considered said mitigating factor at the sentence hearing. However, the Jury was allowed to hear an emotional appeal from the defendant's wife. The Court further finds that the defendant's problems during his childhood is not a mitigating factor.

There was also evidence presented to the jury that Mark Moore was the instigator of the killings of Harold and Joey Pugh, but that fact alone does not make the defendant any less culpable and is not a mitigating factor. The defendant was able and capable to make choices.

The Court has also considered the Pre-Sentence Investigation Report as set out in Section 13A-5-47, Code of Alabama, as amended, in determining a sentence in this case.

The Court having considered the aggravating circumstances and the mitigating circumstances, finds that the aggravating circumstances due to the nature of the crime and the defendant's involvement in it outweighs the mitigating circumstances presented, and the mitigating factor that the jury recommended a sentence of life imprisonment without parole and the vote was 11 for life and 1 for death.

The Court does find that there is a reasonable basis for enhancing the jury's recommendation of life imprisonment without parole for the reasons stated

herein, an& this was a murder of a adult man and his young son during a robbery, and the defendant had the opportunity to reflect and withdraw from his actions and chose not do so; that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired.

Therefore, on this the 8th day of September, 1998, with the defendant, Thomas Dale Ferguson, being present and having been convicted by a jury of Capital Murder, and the Court having weighed the aggravating circumstances against the mitigating circumstances and factors, and the Court having found that the aggravating circumstance outweighs the mitigating circumstances and factors;

It is therefore, ORDERED, ADJUDGED AND DECREED by the Court and it is the judgment of the Court and the sentence of law that the defendant, Thomas Dale Ferguson suffer death by electrocution. The Sheriff of Mobile County is directed to deliver Thomas Dale Ferguson to the custody of the Director of the Department of Corrections and the designated executioner shall, at the proper place for execution of one sentenced to suffer death by electrocution, cause a current of the electricity of sufficient intensity to cause death in the application and continuance of such current to pass through the said Thomas Dale Ferguson until the said Thomas Dale Ferguson is dead.

May God have mercy on you;

DONE AND ORDERED this the 8th day of September, 1998.

s/ N. Pride Tompkins

cc: Gary Alverson
Greg Hughes
Arthur Madden
Sheriff of Mobile County
Department of Corrections

STATE OF ALA. MOBILE CO

I CERTIFY THIS PLEADING WAS FILED ON

1998 SEP 24 A 11:30

s/ Susan Wilson
CLERK CIRCUIT COURT

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12727

D.C. No. 3:09–cv–0138–CLS–JEO

Thomas Dale FERGUSON, Petitioner-Appellant,
v.
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, Attorney General, State of Alabama, Respondents-Appellees.

Filed: August 7, 2023

Appeal from the United States District Court
for the Northern District of Alabama
C. Lynwood Smith, Jr, District Judge, Presiding

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before WILSON, GRANT, and LUCK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.