

No. 24-872

Supreme Court of the United States

JOHN Q. HAMM,
COMMISSIONER OF THE ALABAMA
DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

JOSEPH CLIFTON SMITH,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

**JOINT APPENDIX
VOLUME I OF III**

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[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

Case No. CV05-0474

JOSEPH CLIFTON SMITH,
Petitioner,

v.

JEFFERSON S. DUNN, Commissioner,
Alabama Department of Corrections,
Respondent.

COURTROOM 2B
MOBILE, ALABAMA
TUESDAY, MAY 16, 2017

REDACTED

DAY 1 OF EVIDENTIARY HEARING
BEFORE THE HONORABLE CALLIE V. S. GRANADE,
SENIOR UNITED STATES DISTRICT JUDGE

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[2] (Continued)

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THE LAW CLERK: T. SCOTT SMITH
COURT REPORTER: ROY ISBELL, CCR, RDR, CRR

Proceedings recorded by
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Judiciary Policies and Procedures Vol. VI,
Chapter III, D.2.
Transcript produced by computerized stenotype.

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[6] (Morning session, 9:01 a.m., in open court, Petitioner present.)

THE CLERK: Case set for evidentiary hearing in Joseph Clifton Smith versus Jefferson S. Dunn, Commissioner, Alabama Department of Corrections, civil action number 05-474. Counsel, please identify yourselves for the record and advise the Court if you're ready to proceed, starting with counsel for the petitioner.

MS. KEETON: Kacey Keeton for Petitioner, Joseph Smith, and Keisha Stokes-Hough. We are ready to proceed.

MS. HUGHES: Beth Hughes and Henry Johnson for the Attorney General, and we're ready to proceed.

THE COURT: All right. Ms. Keeton, you may proceed.

MS. KEETON: We would like to call our first witness, Dr. Daniel Reschly.

THE COURT: All right.

MS. KEETON: Your Honor, if I may approach, Dr. Reschly has a demonstrative PowerPoint. If I can provide the Court a copy?

THE COURT: Sure.

THE CLERK: Dr. Reschly, if you will step forward toward the witness stand, I'll swear you in.

MS. KEETON: I'm probably going to use the Elmo.

THE COURT: That's fine.

THE CLERK: Before you sit down, let me get you to [7] raise your right hand.

DANIEL J. RESCHLY, Ph.D., NCSP,
was sworn and testified as follows:

THE WITNESS: I do.

THE CLERK: Thank you, sir. Please be seated.

THE WITNESS: Thank you.

DIRECT EXAMINATION

BY MS. KEETON:

Q Good morning, Dr. Reschly.

A Good morning.

Q Would you please state your name for the record?

A Yes. My name is Daniel James – last name Reschly, R-E-S-C-H-L-Y.

Q And how are you currently employed?

A I'm retired, so I'm a professor emeritus of Vanderbilt University.

Q And how long were you a professor at Vanderbilt?

A I was a professor at Vanderbilt – I believe it was 15 years. Previous to that I was a professor at Iowa State and achieved the rank of distinguished professor. I was there for 23 years. And then my first academic job was at the University of Arizona, where I served for five years.

Q Could you briefly outline your educational background for the Court?

A Yes. I obtained a bachelor of science degree at Iowa State [8] University in 1966, a master's degree from the University of Iowa in the School of Psychology, and a specialist degree there in 1968, and a Ph.D. at the University of Oregon in 1971.

Q And outside, regarding professorships – other than as a professor, have you had any other employment experience?

A Yes, I was employed full time as a school psychologist in the state of Iowa, and later part time on a consulting basis through much of the rest of my career.

Q And as a school psychologist what were your duties?

A The principal duty – although that's evolved somewhat over time – but the principal duty, I would say, would be the identification and programming for students with disabilities. Now, over time our roles have evolved to more of a prevention effort and the development of behavioral interventions that are carried out prior to child being referred in an effort to try to resolve problems before evaluations are conducted and disability status is determined.

Q Are you certified in any certain specialty areas of psychology?

A Yes, I have a National Certificate of School Psychology, which makes me eligible for certification in 38 states, including the state of Alabama; and that is, practice as a school psychologist.

Q And do you have any professional licenses?

A I am not licensed as a psychologist in any state.

[9] Q Okay. Do you have experience in assessing intellectual disability?

A Yes, I've been involved with that in one way or another for approximately 50 years. I became very interested in that area during my senior year as an undergraduate student and then I pursued graduate work that focused on school psychology with a particular emphasis on persons with mild intellectual disability as well as specific learning disabilities.

Q And what actually was the area that you taught in at Vanderbilt?

A Vanderbilt I taught test and measurements to doctoral students as well as undergraduate students.

At Iowa State I focused primarily on administering and leading the development of the school psychology program. So I taught school psychology professional course work, intellectual assessment. I taught the intellectual assessment class for 23 years. Persons enrolled in our class were graduate students in school psychology and counseling in an APA accredited counseling psychology program.

Q Do you have any publications in the area of intellectual disability?

A Yes. I've had quite a number of publications. Sometimes the focus on intellectual disability in publications is not entirely apparent. But in all of the publications and data analysis I did regarding disproportionate placement of minority [10] students in special education, the principal disability category that was of concern was what used to be called educable mental retardation, which the modern equivalent term is mild intellectual disability.

Q Have you served on any boards or organizations regarding intellectual disability?

A I have. I've spent a number of years in my career serving on various National Academy of Sciences panels. The first panel I served on was the standards based reform in students with disabilities. The second panel that I served on had to do with the overrepresentation of minority students in special education and underrepresentation in gifted programs. The third panel, that I chaired, developed a report that advised the Social Security Administration on the identification of persons with – and we used the term then “mental retardation.”

To clarify, the term “mental retardation” was established in 1960 to replace older terms like

“moron,” “imbecile,” “idiot,” “feeble-minded,” and et cetera. And that term “mental retardation” then existed officially from about 1960 to 2008. In 2008 the American Association on Intellectual and Developmental Disabilities changed the terminology from “mental retardation” to “intellectual disability.” The terms have equivalent meaning.

The Diagnostic and Statistical Manual of Mental Disorders also changed its terminology in the most recent [11] revision of what’s called DSM. It’s the fifth edition of the DSM that was issued in 2013.

Q And have you assessed individuals for intellectual disability outside the school setting?

A Yes. On a number of occasions I’ve been called to consult with outside psychologists or other – or forensic psychologists, to assist them with the evaluations of persons with intellectual disability. Many of the persons who do SSA evaluations have not had any specific background, experience, and training, particularly formal training, in their graduate work specific to intellectual disability or what used to be called mental retardation. That varies, of course, by the individual involved.

Q Have you ever testified as an expert in a criminal case on intellectual disability?

A I have. I’ve testified in a number of court cases, having been accepted as an expert witness in all cases in which I was called to testify. I have been involved with doing evaluations relevant to appeals of the death penalty. I believe I have consulted on 42 cases, if memory serves. They are listed in my vitae on pages 45 to 47. I believe I’ve consulted on a total of 43 cases. In 32 cases – incidentally, to put that in some kind of context, I’m not brought in on a case unless the

attorneys believe there is a chance that there's evidence that suggests the person might meet the criteria for intellectual [12] disability. So I've been brought in, if you will, hired by attorneys on 43 cases.

In ten cases I found that the individual did not meet the criteria for intellectual disability. In another approximately 31 or 32 cases I decided, based on my evaluation and other information, that the person met the criteria for intellectual disability.

Q And, Doctor –

A I've also been involved – I want to say at the outset, in those two cases – I was involved in two cases where my work was criticized, and those were cases where I made a mistake and I was convinced by attorneys to do a hurried-up evaluation and I was criticized in court opinions. Those were in Montgomery and Chase, in case somebody wants to look them up. And I learned from that experience.

Q What were the situations in those two cases?

A In the case of Chase, my best guess – although the attorney didn't tell me this – my best guess is that their expert bailed on them and he wanted me to do an evaluation and I was only focusing on adaptive behavior. So I interviewed, I believe, a dozen persons. The attorney promised that he would get affidavits from those persons confirming the information that I took copious notes on. In fact, he didn't do the affidavits and so I was cross-examined pretty rigorously about whether I was simply reporting hearsay. And without the [13] affidavits – I had my notes, which I took contemporaneous with the conversation – but it was a mistake to go forward without having the sworn depositions – I mean the affidavits.

Q Okay.

A In Montgomery I simply was convinced by an attorney to do an inner report before I'd seen the client. And later I saw the client. It was interesting, that case. It was a federal court case. The judge was critical of my work and then later complimented me in the case for being a competent psychologist. But anyway, in that case the judge ruled against the claim of intellectual disability. But within a few weeks the prosecution gave up the death penalty and Mr. Montgomery was then sentenced to life, life without parole.

Q And have you testified for the State in cases?

A Not in death penalty cases. In some other cases I've testified for the state – for a state.

Q And has that been in the role as an expert?

A Yes.

Q In regard to what area?

A Generally in regard to the identification of intellectual disability and learning disabilities, as part of class action suits against the state and local school districts.

Q And I believe you have a copy of Exhibit 11 in your notebook up there? If not, I can hand you a copy.

A I don't – I'm not sure.

[14] MS. KEETON: If I may approach, Your Honor?

A Is it my vitae or not?

Yes, this appears to be my vitae. It was updated through June 2016, although I think on this version I have done some other updates, particularly in terms of cases in which I've been involved.

Q And that's what's been marked as Exhibit 11; correct?

A Yes.

MS. KEETON: Your Honor, I would move to admit Exhibit 11 at this time.

MR. JOHNSON: Your Honor, we have no objection.

THE COURT: All right. Mark it in.

(Petitioner's Exhibit 11 was entered into evidence.)

MS. KEETON: May I approach?

THE COURT: Do you need it back?

MS. KEETON: Your Honor, at this time I would like to offer Dr. Reschly as an expert in the areas of mild intellectual disability, special education, and the assessment of intellectual functioning in adaptive behavior.

THE COURT: Any objection?

MR. JOHNSON: We have no objections.

THE COURT: All right. So designated.

BY MS. KEETON:

Q Dr. Reschly, what rate do you charge in consulting?

A It depends on the work that I'm doing. But in cases like [15] this, \$200 an hour.

Q What were you asked to do in this case?

A I was asked to look at the records and review the evidence concerning Mr. Smith's status as a person with intellectual disability prior to age 18. So I focused primarily on the evaluations done in the school and the various educational records, including special

education records. I was also asked to develop a presentation concerning the phenomenon of mild intellectual disability, to contrast that with more severe levels of intellectual disability and to talk about the typical capabilities of persons with mild intellectual disability.

Q Dr. Reschly, are you familiar with the American Association of Intellectual and Developmental Disability?

A Yes.

MS. KEETON: And if I may approach, Your Honor?

Q I want to show you two publications. And if you can identify those for me?

A These are the American Association of Intellectual Developmental Disabilities documents. The larger document is the 11th edition of the classification manual, the AAIDD. And its former organizations – for example, earlier it was called the American Association of Mental Retardation. That organization's published a classification manual for what we now call intellectual disability beginning in 1916. That classification manual, the work of the AAIDD with regard to [16] classification, is, I would argue, the preeminent organization in the United States and the world.

There is another authoritative organization that you're probably going to want to ask me about later. So, but I'll just mention it. It's the Diagnostic and Statistical Manual of Mental Disorders. And I can document through citing the two manuals that DSM follows, rather than leads, AAIDD with regard to the developmental classification criteria for intellectual disabilities.

The second document is called the Users Guide, and it was developed by the AAIDD committee to provide guidance to professionals who are making decisions about persons with intellectual disabilities.

Q In your practice assessing intellectual disability, do you regularly rely on those two manuals?

A I rely on both manuals, yes.

Q Are you familiar with the definition of intellectual disability propounded by the AAIDD?

A Yes, I am. I –

Q Could you – I’m sorry.

A I’ve studied that definition as well and I find many commonalities between the AAIDD classification manual and the 2013 revision of the Diagnostic and Statistical Manual of Mental Disorders, particularly the intellectual disability classification within the DSM-5.

[17] Q Would you turn to page five of the bigger book on the AAIDD –

A Sure.

Q – diagnostic manual? And does that provide the definition for intellectual disability?

A Yeah, it does.

Q And could you read that?

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

Q And does that manual statement with respect to intellectual disability reflect generally accepted scientific principles in the field of intellectual disability?

A Yes.

Q Is that same true for the users manual?

A Yes.

Q And you mentioned already you're familiar with the American Psychiatric Association?

A Yes.

MS. KEETON: And if I may approach, Your Honor?

THE COURT: Yes.

BY MS. KEETON:

Q And could you identify that booklet for me?

[18] A Yes, it's the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, and it's commonly referred to as DSM-5. So when I say DSM-5, so that I don't have to say the full title of the tome on every comment, I'm referring to the most recent of the American Psychiatric Association's manuals on the mental disorders.

Q And is the DSM-5 generally accepted by the psychological community as authoritative on the subject of intellectual disability?

A Yes.

Q And is that a manual that you would regularly rely on in assessing intellectual disability?

A I do. I probably rely more on AAIDD because the AAIDD is much more detailed and explicit. So the listing in the DSM-5 is maybe five pages – five, six

pages – in a much larger document that has listings and criteria for many other mental disorders, whereas the listing or rather the description of intellectual disability in this document is more detailed, more thorough, and more specific.

Q And you're familiar with the definition of intellectual disability propounded in the DSM-5?

A Yes.

Q I believe it's on page 33?

A Yes.

Q And is that definition similar to that put out by the [19] AAIDD?

A Yes. And I've done side-by-side comparisons between the two and they are virtually identical. There are some subtle differences. For example, the DSM-5 describes it as a developmental disorder – that is, it appears during the developmental period – but does not define the years associated with the developmental period. They used to do that in prior DSM versions, but they don't in this version.

Secondly, I believe it's fair to say that the DSM seems to place somewhat more emphasis on levels of adaptive behavior. And the intent, according to the chair of the committee that developed the intellectual disability listing, was to place a bit more emphasis on adaptive behavior and perhaps a bit less emphasis on intellectual functioning.

But if you do a side by side for AAIDD and for DSM, you'll find that they are virtually identical. They both, for example, identify the three adaptive behavior domains of conceptual, social, and practical.

Q And would you read that definition from the DSM-5?

A “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.” They then say: “The following three criteria must be met.” Criterion A is: “Deficits in intellectual functioning, such as [20] reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.”

Criterion B is: “Deficits in adaptive functioning that result in the failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.”

And then criterion C: “Onset of intellectual and adaptive deficits during the developmental period.”

Q And do the DSM-5 statements respecting intellectual disability reflect generally accepted scientific principles or guidelines in the field of intellectual disability?

A Yes, I believe it does. Both DSM and AAIDD establish essentially a three-pronged requirement for the identification of intellectual disability. They have significant deficits in intellectual functioning, significant limitations in adaptive behavior, and the onset has to be during the developmental period.

Q Is there any particular risk factors or etiology of intellectual disability?

[21] A Well, that varies enormously depending on the level of intellectual disability. For persons with mild intellectual disability, the risk factors typically are poverty associated with familial tendencies toward low intellectual performance. Not necessarily the level of intellectual disability, but borderline and overall low intellectual performance. These risk factors are prominent in 80 to 90 percent of all persons who are identified with mild intellectual disability.

For the severe levels of intellectual disability – that is, persons broadly with IQs below 55 and lower – there is no identifiable poverty association; that is, for example, Down’s syndrome occurs at about the same frequency regardless of socioeconomic level, so at about the same frequency, regardless of socioeconomic level, whereas mild intellectual disability is much more commonly associated with poverty.

There was a recent study that was just published in the American Journal on Intellectual and Developmental Disabilities that looked at the likelihood that there are siblings, brothers or sisters, of persons with intellectual disability who also have very low functioning or intellectual disability. For persons at the more severe levels – that is, the IQ levels roughly below 55, there was no relationship – that is, their siblings were no more likely than anybody in the general population to have low intellectual functioning or intellectual disability.

[22] For persons at the mild level of intellectual disability, there was typically evidence among siblings or close family members of low intellectual functioning at least at the borderline range or lower. And this

association between poverty and familial tendencies with mild intellectual disability has been known for at least 50 years.

Q Is intellectual disability a lifelong condition?

A Well, at the severe levels it's certainly a lifelong condition. The existence of low intellectual functioning is typically a lifelong situation. But we have some persons with mild intellectual disability who meet the adaptive behavior criteria associated with adult functioning. And if you have a low IQ but you meet the adaptive behavior criteria expected of adults, that in my – well, according to the official classification manuals, as well as my judgment, you're no longer a person with intellectual disability.

Q And what would that – what would those supports look like? A Generally persons with mild intellectual disability do reasonably well as adults. And by reasonably well, I mean they are self-supporting, they have jobs, they earn money, they support themselves, they are responsible in the community, they don't get in trouble, et cetera, et cetera. Generally that – that more positive adjustment is associated with a benefactor; that is, someone who assists the person periodically, not necessarily on a day-to-day, hour-by-hourly basis, but [23] periodically with more complex interactions with environment, with giving people advice about what behaviors are appropriate or not appropriate, warning them about different dangers that they can get involved with – for example, drinking and driving.

Moreover, the school-age programs, particularly at the high school level, for persons with mild intellectual disability focus very strongly on preparing persons to participate at work and helping them understand and

acquire the social competencies that are required to be socially responsible in the community.

So we have some persons who meet the criteria for intellectual disability. About half of all such persons are self-supporting and pretty much independent functioning with benefactor assistance as adults. About another quarter are partially self-supporting, and then about 25 percent of persons with mild intellectual disability are neither self-supporting – are not self-supporting in the community.

Q So if someone were to require those benefactor supports, would that move them outside of the classification of being mildly intellectual disabled?

A As an adult, if they are able to be self-supporting and function independently with periodic benefactor support, yes, in my judgment that moves them out of the – out of the classification of mild intellectual disability. And in fact, [24] much of what we wrote in the National Academy of Sciences report to the Social Security Administration – and I chaired the committee and was senior author of the report – was oriented toward supporting people in ways that were economically efficient as well as effective in helping them become self-supporting, tax-paying citizens. It was our belief – and certainly my belief, it's always been – that persons are much better off, if they are able, of working and supporting themselves.

Q What is intellectual functioning?

A Intellectual functioning fundamentally has to do with reasoning about issues of different complexity. There are a number of components to intellectual functioning. One component is processing information, speed of processing information.

Another component is the prior knowledge that you bring to a particular intellectual task; that is, what we have learned in the past is extremely important in how well we can function intellectually in the present.

A third is learning thinking strategies or various kinds of strategies or devices to solve different kinds of problems.

And then here's the hardest part to teach with persons of mild intellectual disability especially. The hardest part to teach is not learning a simple strategy that's useful in a [25] particular situation, but teaching individuals to try to call up that strategy in a new situation where it's applicable.

A simple example: With persons with mild intellectual disability we can typically get them to a level of numeracy, or mathematics of addition, subtraction, some multiplication, and simple division. Much beyond that it's very difficult because it becomes more abstract for persons with mild intellectual disability. So you can teach somebody how to handle change and how to subtract one number from another, but will they remember that then when they're trying to do a weekly budget or trying to decide: "Do I have enough money to purchase these goods?"

And it's often the application of strategy, not knowing the strategy per se, like addition and subtraction. It's the application of the strategy in an appropriate context that is most challenging. Still higher level of thought is being able to direct one's own thinking toward a particular goal or executive functioning.

Q And what do the definitions from the AAIDD and the DSM-5 mean when they say significant limitations in intellectual functioning?

A Generally that's operationalized, using essentially the same language. It's operationalized with an IQ of approximately two standard deviations below the mean and both of the organizations, the authoritative organizations, use the modifier "approximately," suggesting a range around an IQ [26] cutoff of 70.

Q And if you could refer to the AAIDD page 27? Does that reference the definition of substantial deficits?

A Yes. The criterion they give here is a little more complete than what I just stated. Specifically, it is: "Intellectual functioning: An IQ score that is approximately two standard deviations below the mean, considering the standard area of measurement for the specific assessment instruments used and the instruments' strength and limitations."

Q And what would the mean be in regard to intellectual testing?

A All intelligence tests, I think, that are on the market today that I know about have a mean of 100 and standard deviation of 15. There used to be some tests on the market that had a standard deviation of 16, but also a mean of 100. But I think they've all changed – at least the prominent tests of intellectual ability that are used and accepted today.

Q So using that definition of substantial deficits in intellectual functioning would mean what kind of score?

A It would be two standard deviations below the mean, is a score of 70, since the standard deviation is 15. So two times 15 subtracted from 100 gives you a score of 70. It's important to note, however, that both organizations use the modifier "approximately" and it

suggests a range around 70. In fact, [27] both organizations suggest a range of about 65 to 75 to define the top level for someone's performance on an IQ test consistent with mild intellectual disability.

Q And I believe that the definition you've just read also references standard error of measure?

A Yes, it does.

Q What does that mean?

A Standard error of measurement is a way to estimate the likely variation in a test score if the measurement procedure was repeated theoretically an infinity of times. Now, the purpose or the strength of the standard error of measurement is that it's stated in terms of the original IQ score scale. So it's a number of points on the IQ score scale. Standard error of measurement is derived from what's called the reliability of the test. Reliability has to do with the consistency with which the test items measure some kind of underlying ability and/or the degree at which those scores are stable over short periods of time; that is, if I do a test today and I use the same test accounting for the effects of practice, if I use the same test two weeks later, will I get the same result?

Now, if you use – which I think is the most important – stability coefficient with the Wechsler Adult Intelligence Scale, you end up with a standard error of measurement of about three. The stability coefficient for the Wechsler Adult Intelligence Scale, Fourth Edition, is a [28] reliability of about .91. So that's highly reliable. So that yields a standard error of measurement through a simple formula of about three.

Now, it depends on how confident we want to be with regard to the interval that includes the individual's likely true score. We can estimate a 90-percent confidence level; that is, we're 90-percent certain that the individual's true score is between five points above and below the obtained score with a standard error measurement of three.

Now, if we want to become even more certain, we have to lengthen that interval. So let's go to a 95-percent level. Technically it's a 96-percent confidence interval. We would have to go two standard errors of measurement in either direction. But common rule of thumb that I taught and that's taught in many, many assessment books is a 90-percent confidence interval based on the reliability coefficient for the test.

So 90-percent confidence interval for the stability of the reliability for the Wechsler Adult Intelligence Scale, Fourth Edition, is an interval of five points above and below the obtained score. It's probably more than you wanted to know.

Q And what's the percentage of the general population that falls into that category?

A Well, I'd have to state it slightly differently. Given an [29] obtained score, we can be 90-percent certain that the individual's true score is in that interval plus or minus five points from the obtained score. So in the general population, if we use this same device, the standard error measurement, using the stability coefficient of .91, et cetera, 90 percent of the population upon repeated assessments would obtain a score of within that plus or minus five-point interval. It's called a confidence interval.

Q I want to ask what is adaptive functioning?

A Well, I particularly like the DSM-5 brief description of adaptive functioning, which incidentally was borrowed from the 1983 American Association of Mental Retardation classification manual. The terms “personal independence” and “social responsibility,” I think, capture very well in a general sense what we mean by adaptive behavior or adaptive functioning. That personal independence and social responsibility description first appeared in the 1983 AAMR classification manual that was edited by Grossman. It’s now in the DSM-5 as sort of a general descriptor of adaptive behavior. I think it’s very good.

AAIDD provides a similar description of adaptive behavior in both with regard to adaptive behavior assessment as occurring in the conceptual, social, and practical domains of functioning.

Q And I believe the DSM reference that you made was to [30] criteria B that’s on page 33 of the DSM-5?

A The adaptive behavior functioning is criterion B for the DSM-5.

Q Okay. How do you evaluate adaptive functioning?

A Well, adaptive functioning is certainly more difficult to evaluate than current intellectual functioning. Current intellectual functioning is evaluated reasonably well by the best of the standardized measures, individually administered measures, of general intellectual functioning. However, even when evaluating general intellectual functioning or an ID identification, I always look at other expressions of low intellectual functioning. So I don’t simply use an IQ score. And if the person has a low IQ score that does well intellectually in all other domains of life, I ignore the IQ score.

However, you look for examples of or expressions of the low intellectual functioning in daily reasoning for example.

Now, with respect to adaptive behavior, we're looking at or trying to assess the typical behavior of the individual. With intellectual testing, achievement testing, we're trying to assess the individual's best level of functioning. We encourage them to do their very best, and try to set up conditions in testing that are comfortable and that will produce their very best efforts.

[31] With adaptive behavior assessment, we're not looking at their best effort but, rather, we're trying to look at their typical performance, what do they do on a day-to-day basis? I might illustrate that with my son. When he was about 12, there might be an item on adaptive measure that is: Does Blake make his own bed? And then you'll have a three- or four-point scale. A zero response would be no, he doesn't have that ability, he can't do that. A one would be he can do it, but he never does it or he almost never does it. Two, he usually does it when needed or, three, he always does it. And when he was 12, I would have rated him a one. He was certainly capable of doing it, but he didn't do it on a daily basis unless threatened with some kind of unpleasant outcome.

But adaptive behavior measures – that illustrates the point, I hope, that adaptive behavior measures try to assess an individual's typical behavior on an everyday basis. It's much more difficult to observe or assess typical behavior on an everyday basis because you have so many more settings and a wide diversity of behaviors that you have to consider.

So with adaptive behavior, I always argue that we use a wide variety of ways to collect information from different sources. So I try to look at, when I'm assessing somebody's adaptive behavior, I try to look at different sources of information, the individual himself or herself as a source, but also other persons as sources, well-informed respondents, et [32] cetera. Some good informants I've found in my work are teachers, sometimes parents, sometimes siblings, ex-girlfriends, ex-wives, et cetera. So I look at different persons to report on an individual's adaptive behavior to the extent possible.

Q Okay.

A Second, I use different methods of collecting adaptive behavior information, including formal testing and use of inventories, as well as more informal methods. And I try to assess adaptive behavior over different settings. So I'm looking at different sources, different methods of collecting the data, and different settings in the individual's functioning. And from that I try to reach a decision about adaptive behavior limitations using the convergent validity principle. If those different sources, methods, et cetera, line up toward a particular kind of decision, then I think I have a good convergent validity and I'm more confident in the decision.

If there are significant sources or types of inconsistent information, then I'm less confident in my decision.

Q And you talk about assessing the value. But what do the definitions mean by a substantial deficit in adaptive behavior?

A Well, a substantial deficit is not defined in DSM-5. A substantial deficit is suggested to be a deficit

of two or more [33] standard deviations on an adaptive behavior inventory in AAIDD with a number of cautions with the use of adaptive behavior inventories, particularly with persons with mild ID. For example, one of the cautions has to do with the often inaccurate self-reports, because persons with mild ID tend to try to mask or hide their intellectual disability. They often claim capabilities they don't have. And I've found this in many personal interviews with persons with ID as well as reports that other people have made in the literature.

So when somebody claims they can do something, you also need to check out is there evidence that they actually did it? Remember, it's typical behavior. And when did they do it and under what kind of settings and with what degree of support or assistance from a benefactor?

Q And you mentioned particular areas of adaptive behavior, I believe conceptual, social, and practical.

A Yes.

Q In order to meet the prong, the adaptive functioning prong of the definition, does one need to demonstrate significant deficits in each of those areas?

A No. Both the DSM-5 and the AAIDD specify that for the criterion B adaptive behavior limitations is met if the individual has significant deficits in one of the areas: conceptual, social, and practical. So if one area qualifies the person on criterion B with respect to adaptive behavior.

[34] Q And what's meant by conceptual behavior?

A Conceptual is the area of adaptive behavior that includes literacy skills, reading and writing, numeracy, and knowledge of money – oh, and language. I think

language is the other area. So a person in looking at conceptual skills tries to assess the degree to which the individual has those capabilities, and some of those can be assessed directly and others can be addressed through information on their daily functioning.

Q What about social area?

A The social domain of adaptive behavior refers to various social competencies in their use on an everyday basis. For example, interpersonal relationships, how well does the individual get along with other persons, self-esteem, is included in that one, also social responsibility, following rules and obeying orders, and then also being the risk that the individual is vulnerable to being tricked or exploited. And there we talk about gullibility, is the individual easily tricked. Those are the main areas. Oh, and following rules on obeying instructions is part of the social domain. So I think I've got most of the areas.

Q And what would the area of practical adaptive functioning be?

A The practical domain includes a wide diverse set of behaviors that includes the very straightforward and relatively [35] simple self-care behaviors: eating, toileting, dressing oneself. They are adaptive behavior indicators for relatively young children. Most adults – or in fact virtually all adults with mild ID handle those kinds of challenges quite effectively.

There are more complex challenges, however, in the practical domain of adaptive behavior, such as occupation, being able to support oneself, being able to function independently in the community – that is, provide for their own shelter or housing, handle their own responsibilities with regard to utilities and so on, with regard to handling money. Health and health

maintenance is included in the practical domain, as is travel and transportation.

So a quick indicator there is: Does the person have a driver's license? If they have a driver's license, how many times have they had to take the driver's license test and is there any evidence, if they do have a driver's license test, that they were somehow helped along in passing that driver's license test?

I've seen a number of cases of mild intellectual disability among adults where they report: Well, I took it five or six times and finally they gave me an oral test.

So he didn't have to read the document.

Do they have a driver's license? And even more – most persons with mild intellectual disability can drive. I [36] don't have an accurate estimate of the proportion that have driver's licenses, but a substantial number would, at least half would have driver's licenses issued by a state. Beyond that, can they travel beyond their own neighborhood?

If they need to travel from Mobile to Montgomery for some kind of business situation, could they find the way? Could they find their way back? We find that many persons with mild intellectual disability they do drive, but when they go somewhere else they are assisted by somebody with them who helps them find their way. Or when they are driving independently, they pretty much stay in a particular neighborhood or area.

I can't remember. One other area in practical skills that I recall off the top of my head is use of telephone. I think the next time they do this particular manual

they will probably say: “Use of technology.” But that remains to be seen.

Q And you mentioned that in order to diagnose someone as intellectually disabled or mildly intellectually disabled, that they only need to show significant deficits in one of those areas?

A Yes, one domain. A significant deficit in one domain is sufficient to meet criterion B in DSM-5 or the adaptive behavior prong in AAIDD.

Q Would that mean that someone could have strengths in one of [37] those areas but be significantly weak in another area?

A That is, that is exactly the case. And a significant weakness in one of those three domains would qualify the person on the adaptive behavior portion of the intellectual disability diagnosis.

Q And do the AAIDD or the DSM-5 discuss that?

A Both discuss it explicitly and specify that significant limitations in one domain meets the adaptive behavior criteria. It’s stated explicitly in both of the authoritative sources. Q In your work with individuals with intellectual disability to a mild intellectual disability, have you come across individuals with strengths and deficits?

A Yes.

Q What would be some strengths? I know you just mentioned that a large percentage might think if they may have a driver’s license. But what are some other areas?

A Sometimes persons have strength in occupational skills. I recall one client who had learned welding as part of a high school work study program

and he was able to do the simple welding but not the more complex welding that's required, for example, on constructing a pipeline. There's something part of welding that's called X-ray welding; I personally don't understand it, but it is more complex than simple straightforward welding. So this individual was able to maintain a job regarding simple welding, but other adaptive [38] behavior deficits tripped him up and he eventually was properly identified with mild intellectual disability. What tripped him up was social competencies. He wouldn't get along with anybody on the job. He wouldn't take orders from his supervisor. He tended to be mouthy, if that term is understood, and I think it's understood in this part of the country as well as elsewhere. Then he would be mouthy toward his boss and occasionally would tell his boss to go places he didn't want to go. And that meant he lost his job. And it also made it hard for him to get another job because of his social competence deficiencies. But he had strength in the sense that he had a skill at a low level, he had a skill at a low level that allowed him to be employed.

Q What testing measures are appropriate for assessing adaptive behavior?

A Well, I think a variety of information can be used. There are two adaptive behavior inventories presently available from publishers that are probably the best of the adaptive behavior inventories although both have, I think, significant limitations. So the one that's probably the oldest, the best known probably, is called the Vineland Adaptive Behavior Scales. It was restandardized and published in 2016. The other is a somewhat more recent instrument called Adaptive Behavior Assessment System, but it was published in the third edition in the year 2015.

[39] Q I'm going to –

A Limitations of both of those scales, they depend on some kind of report from other persons or self-report.

THE COURT: Can you clear the arrows off the screen? You have to do that by tapping the lower left of the screen. Either of you can do it.

THE WITNESS: I can do it too?

THE COURT: Yes. You're the one that's made all those arrows.

THE WITNESS: I made them?

THE COURT: Every time you touch the screen –

THE WITNESS: Oh.

THE COURT: – it annotates it.

THE WITNESS: Little did I know, Your Honor.

THE COURT: There you go.

THE WITNESS: Thank you.

BY MS. KEETON:

Q Actually, I think you had a copy of it up there in your notebook, but can you identify this for me? (Indicating.)

A This is the test record, if you will – I should say not test – but inventory record for the Adaptive Behavior Assessment System in its third edition. The authors of that particular device are Patti L. Harrison, who is a full professor at the University of Alabama in Tuscaloosa, and Thomas Oakland, the late Thomas Oakland.

[40] Q And this is the measurement – one of the measurements that you were discussing; correct?

A Yes, it is.

MS. KEETON: Your Honor, I would like to admit the ABAS-3 as Exhibit 19.

THE COURT: Any objection?

MR. JOHNSON: No objection.

THE COURT: All right. Mark it in.

MS. KEETON: If I may approach?

THE COURT: Yes.

(Petitioner's Exhibit 19 was entered into evidence.)

MS. KEETON: And, Your Honor, I'm not sure that we included this in our original motion, but I've been informed by a psychologist smarter than me that this actually should also be admitted under seal because it's a testing protocol.

THE COURT: It's not a published document? I mean, it's –

MS. KEETON: It's not a generally available published document.

THE COURT: Who is it available to?

MS. KEETON: Psychologists and psychiatrists.

THE COURT: And it's some sort of secret document that nobody else is allowed to see? I mean, I'm really not understanding why it needs to be sealed.

MS. KEETON: My understanding is that it's not [41] supposed to be generally shared.

THE COURT: For what reason?

MS. KEETON: Because it is a testing that they use in adaptive functioning. So to have it generally available would, I guess, dilute the validity of the answers.

THE COURT: What's the –

THE WITNESS: May I comment, please?

THE COURT: Yes.

THE WITNESS: It's a copyrighted document developed by the test publisher, Western Psychological Services, WPS, and the publisher expects users to maintain the security of the items. Moreover, the inventory can only be purchased by persons who meet certain qualifications. There are qualifications for purchasing the ABAS. I believe there are level B qualifications in the test user standards. So if my wife writes to the publisher and says: I want to buy it, they would ask her: What are your credentials?

And she would have to meet the requirements. She can't do it, because she has no background or training in the area. She's certainly well trained in other areas, but not in that area, and they would not allow her to purchase the document.

So it is a matter of what they regard as test security.

THE COURT: All right. Well, I will have it sealed, [42] then.

MS. KEETON: Thank Your Honor.

Q Dr. Reschly, how does someone use the ABAS-3 to measure adaptive behavior?

A The ABAS-3 is given to a knowledgeable respondent who is asked to fill in the ratings independently. Now, it's certainly appropriate for someone to sit with the respondent or the informant who is completing this and answer any questions they might have. For example, if there's an item they can't read, et cetera. But it's in a self-report format, is supposed to be done by the individual reading the

items themselves and completing it independently without any prompting or further suggestions from a psychologist or educator that's administering the document.

Q Are there any concerns in regard to using the ABAS as a self-report tool?

A Well, there are. And it's a general concern about self-report or using it as an interview instrument generally; and that is, that the test authors Harrison and Oakland suggest that you should not report the scores based on the norms for the Adaptive Behavior Assessment System if it's done in an interview format – that is, without the individual independently themselves reading the items and selecting the response. That's on one of the early pages in the adaptive behavior technical manual.

[43] Q We've discussed mild intellectual disability and you've mentioned others. So are there actual levels of intellectual disability?

A Yes. And I've compiled those levels across several different intellectual disability classification schemes and over scheme defined the levels by IQ points. So the mild level is defined as an IQ of approximately 55 to 75, the moderate level is IQ 40 to 55, the severe level was IQ 25 to 40, and so-called profound levels, an IQ less than 25. For various reasons the IQ levels, particularly at the lower levels, are not as appropriate as they used to be and so that particular way of organizing levels of intellectual disability has been largely abandoned.

Now, another way to organize levels was by the descriptors mild, severe – mild intellectual disability, moderate, severe, and profound levels, which is done now in the DSM-5, DSM-5. DSM-5 specifies that

behavior characteristic of persons at mild, moderate, severe, and profound levels.

Now, AAIDD has a similar scheme in which they define levels of intellectual disability by the amount of supports and the sophistication of the supports they need in order to function on a day-to-day basis. For persons with mild intellectual disability those supports are regarded as intermittent.

What's intermittent? Well, it depends on the [44] individual. It usually doesn't mean every day, but it could mean a few times a week. And the benefactor who provides that support is often, as I mentioned before, a spouse, sometimes a sibling, sometimes an employer, but there are a variety of persons who can provide that support and it does not involve minute-to-minute or hour-to-hour supervision, but periodic assistance with things that without the assistance the individual would likely get into trouble.

Q And the DSM-5, I'm going to refer you to page 34. That actually sets out adaptive functioning areas?

A Yes, it does. It organizes the level of supports needed for the degree of deficit involved by the descriptors mild, moderated, severe, and profound, and then it's a description of what persons with mild intellectual disability are likely to need in terms of help or the kind of deficits they have in the conceptual, social, and practical domains by severity level.

Q And in the conceptual domain, that's some of the things that you've already mentioned and talked about right there?

A Yes.

Q So I'm not going to have you read that definition. But is there anything there that you have

not already addressed when you were earlier talking about conceptual domain?

A Perhaps not specifically. Here they mention short-term memory and I did not mention short-term memory specifically. Another one is cognitive flexibility. And that [45] partly has to do with my description of being able to use strategies in selecting an appropriate strategy in a new situation. So some of that, much of that, is covered. Functional use of academic skills, I certainly talked about reading, money management, and so on.

Concrete approach to problems, that is another way of saying poor skills in dealing with more abstract concepts like morality, like appropriate behavior in different settings, more abstract ideas like avoiding impulsive decisions that get you into trouble.

Q And again, we've already addressed the social domain. Is there anything in this DSM-5 discussion that you don't believe you've addressed already?

A I don't think so. I think there are strong parallels between the AAIDD descriptions and the DSM-5 descriptions of adaptive behavior, noting that they both use the conceptual, social, and practical domains to organize adaptive behavior evaluation.

Q I notice there is a discussion in the social domain that there may be difficulties regulating emotion and behavior in age-appropriate fashion. Would this be true for younger people through adulthood that are mildly intellectually disabled?

A That's a problem for persons with mild intellectual disability across all levels – I'm sorry – across all age levels.

[46] Q And the practical domain area, you've already discussed that. Is there anything here in the DSM-5 that you haven't discussed?

A I think there's some specific things. And I like the second sentence that says: "Individuals need some support with complex daily living tasks in comparison to peers." In adulthood, supports specifically involve grocery shopping, transportation, home and child care, nutrition management, food preparation, and banking and money management. Those are the kinds of areas where persons with mild intellectual disability, if they get the appropriate kind of assistance when they need it, can function okay. But absent that kind of appropriate assistance in a timely manner, they are much more likely to have difficulties.

Q Here in the practical domain section it mentions that individuals generally need support to make health care decisions. Does that also mean that someone with mild intellectual disability is not aware that they need help?

A No, not necessarily. But I think it has to do more with the understanding and adoption of positive health-promoting behaviors, understanding and pursuit then of medical assistance as appropriate to one's needs. I think all of us, depending on the complexity of the issue, need help and support sometimes in making health care decisions. But this would have to do more with the simple health care decisions.

[47] For example, persons with mild intellectual disability would have more problems understanding the notion that an immunization is beneficial to your child because they would have trouble understanding what an immunization does in terms of building a

sufficient number of antibiotics to ward off the disease. Those are not very concrete. They are more abstract ideas. And so with that kind of decision, but simple decision making, they would probably need assistance, maybe a lot of assistance.

Q Okay. What is the percentage of individuals with intellectual disability in the general population?

A Well, there are several answers to that. Theoretically about two and a half percent of all persons would meet the criteria for intellectual disability, and that's based on projections from the normal curve of ability. That is, about 2.3 percent of all persons have IQ scores below 70 or below, plus the additional prevalence that comes from a larger than expected number of persons with moderate to severe levels of intellectual disability. So from that basis you would expect 2.5 percent.

If you do household surveys in the community, in a good, large representative sample, the studies find about one and a half percent of all persons in households are regarded as a person with intellectual disability. Now, these are persons in their adult years and these are the self-reports from family [48] members.

And in public schools the identification of intellectual disability varies quite a bit across states. And that's because many persons, as we noted in the National Academy of Sciences report, many persons who meet the criteria for intellectual disability during their school-age years are given some other kind of label that is more acceptable to parents. So in the staffing, if you tell a parent: We believe your child meets the criteria for intellectual disability, there's pretty strong resistance. On the other hand, if you tell them that this child has kind of a general learning disability, we're

going to call it a learning disability, there's much greater acceptance, even though the person may not qualify for a learning disability, rather meets the criteria for mild intellectual disability.

For that reason in the National Academy report the panel recommended strongly that adult evaluators – or, rather, the SSI evaluators pay close attention to school data, but not necessarily school-assigned disability labels.

So school age, presently across the entire United States according to the United States Department of Education data collected from each of the states, the prevalence is about one percent.

Q I think I put up here on the Elmo – is this kind of a visual depiction of what you just talked about?

[49] A Yes. This would be accurate for the proportion of persons that have IQs below certain points on the normal curve. Intellectual disability, as well as achievement, is normally distributed in the general population. In the general population about two-thirds of all persons, 68 percent, have IQs within one standard deviation of the mean, so about 68 percent of all persons have IQs between 85 to 115. So as we go to the extremes of the distribution – that is, really high or really low IQs – we find rapidly declining incidence of those IQs. So when we go to one standard deviation to two standard deviations below the mean of an IQ of roughly 70 to 85, it's roughly 14 percent of all persons that have IQs at that range.

Similarly, IQs between 115 and 130 occur in about 14 percent of all individuals.

When you go more than two standard deviations above or below the mean, it's only around two percent.

When you go three standard deviations from the mean, there's another .13 percent, and that's the basis for saying that roughly 2.3 percent of all persons have intellectual performance below the score of 70. Likewise, only 2.3 percent have intellectual performance above the IQ of 100 – I'm sorry – above the IQ of 130.

So scores in the extreme at both ends are extremely unlikely; that is, occur very infrequently.

Q And of the percentage of individuals with intellectual [50] disability in the population, what's the percentage there of mild intellectual disability?

A Okay. Of all persons with intellectual disability, the AAIDD and other sources suggest that about 80 to 85 percent of persons with ID are at the mild level. So there are many more persons with mild intellectual disability than there are persons With the more severe levels of intellectual disability.

Q Is it possible that someone with mild intellectual disability would go undiagnosed?

A Yes, that's certainly occurred with pretty high frequency before mandatory special education was established in the United States. It still occurs fairly frequently with persons, especially girls. One of my early studies in this area published in the mid-1970s showed that there are just as many females with IQs below 70 as males and yet there are one and a half times more males than females identified with mild intellectual disability. So we have the old stereotypical behaviors with females of being quiet, shy, sort of withdrawn. And they are less likely then to be referred in a school setting.

Males, however, stereotypical behaviors are more outgoing, more rambunctious, often more aggressive.

And if you're both aggressive and learn very slowly, you're going to get referred. If you're not aggressive and very cooperative, you're less likely to be referred.

[51] So a lot of it depends on whether the referral's actually made. If nobody ever makes the referral, there's no mechanism whereby persons get classified with mild intellectual disability.

Q Is there any reason that mild intellectual disability is maybe harder to diagnose?

A Well, I think it's certainly harder to diagnose than more severe levels of intellectual disability because persons with mild intellectual disability look normal. There are no identifying signs or physical characteristics that would assist somebody in saying this person is or is not likely to be a person with intellectual disability.

In contrast, persons with the more severe levels of intellectual disability, roughly IQs 55 and below, nearly always carry physical signs of disability and are recognized by persons, by laypersons, as looking like they have a disability.

An example that most people are familiar with is Down's syndrome. Because of public media displays, television programs, and other sources of information, a large proportion of the general public recognize somebody that has Down's syndrome from their physical appearance and they, further, know that the individual has a significant disability.

That's not true of mild intellectual disability.

These are people who look like the rest of us. I sometimes tell classes they look like you and me, then I would pause and [52] say: "Well, maybe more like me."

And that was the joke in the course – the best I could do.

But anyway, there are no physical signs of mild intellectual disability and there are physical signs for the more severe levels.

A second major difference is that persons at the more severe levels of intellectual disability typically have some or multiple identifiable underlying biological causes. There are differences in, for example, at the cell level between number of chromosomes with persons with Down's syndrome, which is a moderate to severe level of intellectual disability. We don't find those differences with mild intellectual disability.

There are no underlying biological anomalies that are reliably identified medically or otherwise, persons with mild intellectual disability.

The third biggest difference is the comprehensiveness of the disability. Persons with the more severe levels of intellectual disability generally require daily supervision, whereas persons with mild intellectual disability do not require daily supervision in most social roles.

So with more severe levels of intellectual disability, there's usually significant limitations across most, if not all, social roles: purchaser, consumer, et cetera. Whereas with mild intellectual disability, the disability is more [53] prevalent or more specific to tasks that require some kind of thinking.

Q Are there common general misconceptions about abilities of someone who is mildly intellectually disabled?

A Yeah, I think the term "intellectual disability" connotes for a lot of people not able to do hardly

anything. In fact, persons with more severe levels of disability can be taught to do a variety of things, particularly with regard to self-care. Persons with mild intellectual disability can be taught a wide range of skills, but they are generally restricted to skills that do not require abstract thinking or decision making.

Q What are some examples of those skills that someone with mild intellectual disability may be able to do?

MR. JOHNSON: Your Honor, just objection. Asked and answered. We've already been over what they can do, I think.

THE COURT: Is there any redundancy in the answer you're going to give?

THE WITNESS: Some, I would – you know, I would guess there would be some.

THE COURT: Go ahead. Overruled.

A The kind of occupations persons with mild intellectual disability have are largely unskilled. We place students with mild intellectual disability as hotel maids, if they get supervision, as laborers, in construction. Frequently persons [54] with mild intellectual disability have done jobs like being associated with masonry. When I was growing up it was called hod carrier. The hod carrier generally mixed the mason – the mud, we called it. Mortar, that's what I should be calling it. Mixed the mortar, carried the mortar to the bricklayer, also carried bricks, the blocks, to the bricklayer. So there isn't a lot of thinking or decision making made in those tasks, they are usually in close supervision of the person who is the brickmason.

Simple carpentry, basic framing, under good supervision is possible for persons with mild intellectual disability.

Q I'm going to leave adaptive functioning a little bit. What IQ tests are accepted testing instruments for intellectual functioning?

A The two tests that are accepted most widely are individually administered tests that cover a broad range of abilities; that is, they have multiple kinds of items and they require memory functioning, reasoning, problem solving, often reasoning and problem solving using language is kind of one section of the test, and reason and problem solving using spatial, geometric spatial forms, in another section of the test.

The two tests that are the most widely accepted today are the Stanford-Binet, Fifth Edition, and the Wechsler scales [55] across the age levels, Wechsler preschool, Wechsler child, Wechsler adolescent – Wechsler child and adolescent and Wechsler adult scales are the two most widely accepted.

I hear some advocacy in recent years to add to that set of acceptable tests the Woodcock-Johnson cognitive battery. But that's not yet used very widely and that would be a more controversial recommendation.

The two most widely used tests, the two most accepted and mentioned specifically in the AAIDD, are the Stanford-Binet and the Wechsler scales.

Q When a score is obtained on an IQ test, is that absolutely somebody's IQ?

A Well, we have no measure of a person's innate ability; that is, there was a time several decades ago when people believed IQ tests reflected one's innate ability – that is, the ability of attraction, born with. In

fact, IQ test scores represent both a genetic factor as well as environmental influences, your opportunities to learn, et cetera, et cetera. So no test score is etched in concrete.

The score is best understood as an estimate of the individual's abilities derived under standardized conditions; that is, the same conditions that are used for all persons taking the test and administered by a skilled examiner and interpreted by a skilled examiner.

Q Now, I believe when you were talking about the two most [56] common tests, you mentioned the Stanford-Binet, Fifth Edition, and the Wechsler Adult –

A Yeah, I would –

Q – Fourth Edition?

A – say the most recent edition of the Wechsler scales, whether that's at the child or adult level, and the most recent edition of the Wechsler Adult Intelligence Scale is the fourth edition, published in 2008 with the norms, normative data, collected in 2007, according to the technical manual.

Q And when you talk about normative data, what does that mean?

A The normative data are developed from the selection of a stratified representative sample of persons in the populations which you want to make – apply the test scores, the population to whom you want to make inferences about their ability. So the Wechsler Adult Intelligence Scale is a representative sample of persons stratified by age; that is, I think the norms go up to the 80s. Stratified by socioeconomic status; that is, by occupational level of individuals. By region; there are some regional differences, although those are

much smaller now than they were 50 years ago. I've only got three things – gender. Oh, and urban, rural residence; rural, suburban, urban. So those five stratification variables are used. Oh, and also by race and ethnicity. I think I failed to mention that. So the sample needs to be representative of the United [57] States population with respect to race and ethnicity.

Q And is there a reason that somebody would use a more updated test versus an older test –

A Yes.

Q – in assessing IQ?

A For several reasons. The first is item content may become obsolete.

Q I'm sorry?

A Item content may become obsolete.

Q And what does that mean?

A Well, an item that was familiar with persons in the 1930s might not be familiar with persons in the, say, 1960s. I remember learning the old Stanford-Binet, the 1963 version, in graduate school and some of the test objects that children were supposed to recognize and describe were from the original scale done in the 19 – well, mid to late 1930s. There was a shoe. It was a very out-of-date style of shoe that women no longer wore, and yet that was an object and it was out of date. It shouldn't have been used.

There are other things that become out of date in terms of practical knowledge. Some of the information questions used on older tests are no longer common information today and they need to be updated. So one's item content. A second one is to update the norms so they reflect the current population of the United

States. Okay. The population [58] portions in the United States have changed. There are, for example, significantly more persons with Hispanic background than there were 20 years ago. So it's update the population.

The third is to update the normative standards because there is clear evidence that normative standards become less stringent over time; that is, the norms for tests 10 years old, using the Wechsler scales, would yield a population average of 103, if used today. That's the so-called Flynn effect.

And the fact that normative standards become less stringent over time – that is, IQ scores get higher if the test isn't updated – is a scientific fact now well established.

Q And you referenced the Flynn effect as kind of the last reason. So if someone is given a test or takes a test that's an out-of-date test, not the most recent version, what do you do in consideration of that when you're assessing the score?

A Well, the Flynn correction factor is a third of a point or .3, I should say, three-tenths of a point per year. So the population mean for a test that has norms of 10 years out of date now is 103, not 100, and the point that's two standard deviations below the mean is 73 now, not 70. The Flynn effect I say now is a scientific fact because the continuing, increasing body of research documented that it exists. There are two recent, I think very impressive, articles that use the technique of meta analysis. That is a way to summarize the [59] results across a large number of studies. One article focused on international data, another article focused on U.S. data. Both, based on summarizing the results of a large number of studies,

came to the same conclusion, that the Flynn correction of three-tenths of a point per year is accurate and applicable to current tests.

That is also the case with the Wechsler scale. In the Wechsler technical manual there is, first of all, a statement that norms become less stringent over time. So it's recognized by the test author.

Secondly, in a table that's been widely ignored, I think, in the technical manual – I believe it's table 5.7 – actual data showing the Flynn effect between the WAIS-III – that is, the third edition of the Wechsler adult scale – and the fourth edition – that is, the WAIS-IV – is published for persons with IQs in the intellectual disability range.

The Flynn effect, the 4.1 points, appeared in these comparisons. Now, the study involved giving the WAIS-III and WAIS-IV to persons with low ability and to give them in a counterbalanced order so that taking one before the other didn't have any effect on the overall results.

The WAIS-III, given these same individuals at the same time in 2009 – okay – the WAIS-III yielded an IQ score for the same persons four points higher than did the WAIS-IV. The amount of the Flynn effect should have been 3.6 points on a [60] full scale score based on 12 years' difference in the time the two tests were normed. It was actually slightly above that. It was 4.1.

Anybody can check that out in the Wechsler adult intelligence scale technical manual. I remember the table number. I don't remember the page number. It's table 5.7 in the technical manual.

So clearly the Flynn effect is applicable to the Wechsler scales. There's never been any doubt –

Wechsler adult scales. There's never been any doubt about whether it's applicable to the child scales, to the WAIS, then the WAIS-R, the WAIS-III, et cetera. The child scale is the Wechsler Intelligence Scale for Children, and it usually covers roughly ages five to 16, 17, 18, somewhere in there. And the data on the Flynn effect for the child's scale has always been consistent.

There was some inconsistency for the adult scale between WAIS-Revised and the WAIS-III, but that was back soon after the WAIS-III was published and there was very little data. Subsequent studies have shown that the Flynn effect also applies to the difference between the WAIS-R and the WAIS-III. so the Flynn effect is a scientific fact.

Now, whether or not it's used to adjust scores, that becomes controversial. But it is a scientific fact.

Q Have you personally, in your own assessments, observed [61] scoring that, when corrected for the Flynn effect –

A Yes, I did a study while I was still on the faculty of Arizona in the early 1970s comparing the original Wechsler Intelligence Scale for Children that was published in 1949 with the Wechsler Intelligence Scale Revised published in 1974 and we found significantly lower scores on the WAIS-IV than on the original WAIS, meaning that the original WAIS norms had become less stringent over time. Therefore at a time that becomes increasingly remote from when it was standardized, the scores creep higher and higher in the general population.

THE COURT: I'm not sure I understand this concept. Describe what you just said. The 1949 that was given to children, you give the 1974 test to the same children and the results are higher?

THE WITNESS: At the same time.

THE COURT: At the same time? How could you give –

THE WITNESS: You counterbalance –

THE COURT: Oh, you mean you're not talking about tests that were given in 1949, you're just talking about the test that was published in 1949?

THE WITNESS: Yes. That is correct, Your Honor.

THE COURT: Okay.

THE WITNESS: So the test that was published in 1949 gave consistently significantly higher scores when used with children in 1974 who had taken both the new WAIS, Wechsler [62] Intelligence Scale for Children Revised published in 1974, and the old WAIS published in 1949. So if you took the old test, many children would not be regarded as having mild intellectual disability because they had higher scores. But if you give them the new test that has contemporary norms and content, then they meet the criteria for mild intellectual disability. And in fact, there have been studies; S. J. Ceci and Kanaya – K-A-N-A-Y-A – did a study of the identification of intellectual disability across the United States and they could show that when the test – the main test used being the Wechsler scale for children – and when the test was new, you had higher identification rates, and as the tests became older identification rates dropped because of the deterioration of the norms.

BY MS. KEETON:

Q Does that AAIDD make any statement with regard to the Flynn effect?

A The AAIDD is explicit with the Flynn effect: ought to be considered in the users manual. They apply the three-tenths per year with correction.

Q And so when you say apply, does that mean that in terms of assessing a test score, they would suggest deducting those points?

A Well, they say explicitly in identification of intellectual disability the Flynn effect ought to be applied when test norms [63] are out of date.

Q Okay.

A And I believe they use the criterion of three or more years out of date, because at the three-year point the adjustment's one point.

Q Does the DSM-5 indicate anything in regard to use of the Flynn effect?

A DSM-5 mentions the Flynn effect without any further explanation. I note that the DSM-5 is far less detailed and specific than AAIDD.

Q When you say it mentions it, is there any specific statement or is it simply that it is a consideration?

A In DSM-5 I would say that it's simply mentioned and seen as a consideration. I believe that would be accurate.

Q Are there any other things that should be considered when scoring, outside of the Flynn effect?

A Well, in children we score there's a number of things that need to be considered, including the standard error of measurement for the test, the individual's effort on the test, and the appropriateness of the test for the individual based on their unique characteristics.

Q Is there a difference in the way you approach an intellectual disability assessment when you are dealing with someone who is under the age of 18 versus someone who may be in their 40s?

[64] A Yes, there are some differences certainly. When a person's under 18, a major indicator of their adaptive behavior has to do with their academic, social, and behavioral performance in the school setting. A major developmental task for children under age 18 is to acquire literacy skills and to develop behaviors that are appropriate to the setting that they're in. We expect children to have more sophisticated and appropriate behavior as they grow older.

Q And is it easier or more difficult to do by kind of a retrospective analysis when you're talking about assessing someone who is older?

THE CLERK: Press the screen. It's right above the Clear button.

THE WITNESS: Whatever. Sorry.

THE COURT: Do you see in the lower left frame of the screen it says Clear?

THE WITNESS: Yeah.

THE COURT: If you press the screen right above that –

THE WITNESS: Oh, above that.

THE COURT: There you go.

THE WITNESS: I thought it was press the Clear button. Could you please restate the question? I'm not sure –

BY MS. KEETON:

[65] Q Are there difficulties involved in doing a retrospective analysis?

A Yes. Retrospective analyses are more accurate to the degree that there is explicit documents and other information concerning the individual's intellectual functioning and behavior. So retrospective analyses that depend on third-party respondents – that is, interviewing a former teacher or colleague – are more prone to flaws in memory or just not remembering accurately.

Now, I've used interviews retrospectively with a number of persons over the years and that's where the convergent validity principle is especially important. If one person tells me: "This individual, they were really slow in the neighborhood," that's one thing.

If multiple people who had different vantage points through the observation say: "The individual's slow," then I'm more inclined to say, well, that's probably a reliable and accurate finding. So retrospective analyses have to be understood in terms of a convergent validity sort of ID.

Q And you mentioned it's important to consult with others. When you're looking for people to be a reporter regarding adaptive functioning for someone, who are you looking for?

A I try to look for persons that are knowledgeable about the individual's everyday behavior. And to the degree that I have to use retro-spective analyses, I seek more and more confirming [66] information because, as I mentioned before, some of the limitations of retrospective analyses. I do think retrospective analyses are useful and the authors of the major adaptive behavior inventories say that using retrospective informant analyses is not ideal but it

sometimes is the only alternative. That's especially true for someone who's been in prison a long time.

Q When did intellectual disability become an issue in schools?

A Well, some schools identified children with what we now call mild intellectual disability – 110 to 115 years ago, New York City Public Schools, for example, identified persons with what – they called them feeble-minded at the time, but their descriptions are consistent with mild intellectual disability today. Schools had very uneven special education and identification practices until the mid-1970s. It depended in part on the state legislation. There was also in large part decisions made by local education agencies. So prior to 1975 many children with disabilities did not receive services in the public schools. Those with more severe disabilities were excluded from the public schools, those with mild disabilities were simply not given any kind of specialized instruction nor were they identified in most public schools.

That was changed with the enactment at the federal level of the Education for All Handicapped Children Act of [67] 1975. Now, that particular congressional legislation produced a sea change in the availability of disability services to children in the public schools. That legislation was prompted, I would say, by litigation largely in the federal and some state courts by parents suing states and school districts because they did not include services for children with disabilities. The parents in those suits won consent decrees and the consent decrees were pretty expansive in specifying what a state had to do.

So between roughly 1973 and 1976 every state legislature became concerned, if you will, about

persons with disabilities and mandatory state legislation required special education. It was established at both the state and the federal level. Now, the legislation was established in roughly 1975, although there were some one- or two-year variations, depending on the states. The full implementation of those legislative requirements took another five to 10 years until local districts consistently provided special education services that complied or were consistent with the legislation.

Q During the 1970s, when this was starting, how did schools identify children as intellectually disabled?

A Well, the term used at that time was spelled “educable mentally retarded,” and summarized as EMR. So we’ll see notations in school records from that era with EMR. And it refers to educable mental retardation. And the criteria for [68] identifying somebody with educable mental retardation at that time was largely parallel to the criteria used to identify mild intellectual disability today.

Q And are there differences between the two?

A At most subtle differences. I use the state of Alabama as an example. Studies take criteria for identifying intellectual disability. We studied states in 1979 and our work was published in the American Journal on Mental Retardation in, I believe, 1982. So we determined what each state required and what the classification criteria were for what was then called educable mental retardation.

In the state of Alabama – I checked those results before I made this trip. The state of Alabama, Alabama required that the IQ score be below 70 – I’m sorry – below 75, below 75, and that the individual have documented deficits in adaptive behavior. And, of

course, since it's applied to school-age children, the developmental criterion is inherent in the setting in which the definition is applied.

So Alabama in the late '70s, early '80s, had the requirement of both IQ and adaptive behavior deficits that are largely parallel to criteria today.

THE COURT: Can we take our morning break at this time?

(No response.)

THE COURT: All right. We will be in recess for 15 [69] minutes. Thank you.

(A recess was taken at approximately 10:46 a.m.)

(In open court, 11:03 a.m., Petitioner present.)

BY MS. KEETON:

Q Before the break, Dr. Reschly, we were talking about EMR diagnosis in Alabama versus what's considered mildly intellectually disabled today. I want to go back to talking about school programs in the '70s.

When they instituted special education and things like that, what were programs that were available in the schools for children who were either EMR or special education at all?

A Well, before the mid to late '70s, most school districts had little if any special education programming. The most common programming was speech therapy, particularly devoted to children that had speech fluency or speech articulation difficulties. The second most common program in some districts involved special classes for persons with what we now call mild intellectual disability. Before 1975 there were virtually no programs for students with specific

learning disabilities, and very few programs for students with emotional disturbances.

Q Is there a difference between resource classes or more individualized, contained classes?

A The formal identification of specific placement options occurred in the mid-70s, mostly through federal legislation. And the most common placement options were full-time special [70] education with some resource help.

A second common one was resource help more than 20 hours – or 20 percent of the school day.

And the third option – and these options are becoming a little more restrictive, involving less involvement in the general education classroom. As I go through this continuum, the third option was a special self-contained class often used with students with mild intellectual disability, but also sometimes used with children with learning disabilities and emotional – behavior-emotional disorders.

Beyond that in terms of restrictiveness are special education programs that were provided outside of a general education setting, say at centers that are under the auspices of the school district that occurred in some very large districts or centers that were outside of the school, with the school after 1975 often paying for the services provided for that center.

Then there's still more restrictive options like placement in a state institution, being put on a homebound program, which occurred with some students with complicated disabilities that were medically fragile.

So there was a continuum of options, from full time in the general education classroom to receiving special

education services entirely outside of the school setting.

Q And you referenced a self-contained classroom. Is that [71] like for just an individual student in a class or –

A A self-contained classroom would have a lower teacher-to-student ratio. The common ratio around the country was about 15 students per one teacher. And sometimes because there were more children qualified, states allowed school districts to add children to that number of 15, if they employed an educational aid to assist with the classroom structure. So it involved a smaller group.

Q And this structure that you're talking about, because it's through federal mandates, was that pretty universal across the country?

A It became common with the federal and state mandates. Before 1975 there were some school districts that had these kinds of services. But that was very much at the discretion of the local school district, whereas after 1975, with both state and federal legislation, the services were mandatory. School districts had to provide them.

Q And as part of this case, you've reviewed Mr. Smith's school records; correct?

A Yes, I did.

Q And that's what you have already marked as Exhibit 2 and 3 in that notebook. Is that what you reviewed?

A Yes.

MS. KEETON: Your Honor, I would move at this time to admit Exhibits 2 and 3.

[72] THE COURT: Any objection?

MR. JOHNSON: No objection.

THE COURT: All right. Mark them in.

(Petitioner's Exhibits 2 and 3 were entered into evidence.) MS. KEETON: May I approach?

THE COURT: Yes.

BY MS. KEETON:

Q In your review of Mr. Smith's school records, do you see anything that you would associate with records reflective of intellectual functioning deficits?

A Yes.

Q What are those things?

A Generally the records displaying that were records indicating that he had very low achievement. I believe the earliest record that's available to us indicates that he seemed to do okay in first grade but made no progress in reading in second or third grade, and that prompted the referral by the school district to special services that later led to evaluation of his intellectual abilities as well as other areas of functioning.

Q And is that Bates number one of Exhibit 2, is that the document you're referring to?

A Yes, ma'am. I think the significant notations here are: "Jody," which I believe was his nickname as a child, "Jody covered all readers, passing all tests in first grade." He was [73] marked ready for second grade. Second grade, Jody made no progress. Nothing was marked on Jody's reading card. Third grade: "Jody" – it appears to say – "needs help to function at grade-one level."

Q And then at the bottom of that, does it indicate an achievement test score?

A Yes. These are California Achievement Tests. The CAT, California Achievement Test, was a widely used standardized measure of achievement that had national normative standards. It also yielded grade-equivalent scores. A grade-equivalent score is often misunderstood. It refers to the average level of performance of students in a specific grade with a certain amount of school experience within that grade. That's measured by months. So when he was in third grade – I believe the referral is dated September 1978 – his reading level is at the first grade, third month, meaning that he – even though he was a third-grader, he's reading at the same level, the average level, of persons who were in first grade, in the third month of the school year. The math appears to be second grade, first month. The language is – on the copy that I studied, it was a little clearer than this. But the language was estimated at zero grade, first month, which would be a low kindergarten level of language.

Q After that first record, which is, I believe what you mentioned, the earliest of records that we have for Mr. Smith, [74] what's the next set of records that gave you an indication of intellectual functioning problems?

A Well, there are records related to his referral. His mother approved the – actually, actually approved the placement of Mr. Smith in a special education program on a document that's number two in this array of documents on October 18th, 1978, which is a curious record. Because the evaluation was not done until late – actually early February 1979. So it appears that the mother was asked to and actually did approve placement in special education before the evaluation was done.

Now, I want to put into context these sorts of what we would now call violations of special education law. This was at a time when special education services were being initiated throughout the United States. It appears that in Alabama there were some glitches; that is, some areas in which the practice did not conform closely to the law. That wasn't just true in Alabama. That was true all over the country, as school districts geared up to provide special education services that were consistent with the legislation, so here it appears that the parent was asked to approve placement before the evaluation to determine the child's disabilities status and educational needs had been determined. I attribute that to efforts by the school district – I believe this is Baldwin County – to catch up to the requirements of the law, which was not uncommon [75] throughout the country.

An evaluation was then conducted, I believe, in February 1979. Wechsler Intelligence Scale for Children, the revised version, was administered, it appears, February 6th, 1979.

Q And is that – can you say the Bates number at the bottom?

A Bates number is five, I believe.

Q And what's the scoring on that?

A The score on the Wechsler Intelligence Scale for Children Revised were verbal IQ of 80, performance IQ of 75, I believe – maybe it's 73 – and full scale IQ of 75.

Q And what does that suggest to you?

A Well, it suggests that his intellectual functioning is quite low. A score of 75 is about the fourth or fifth percentile. And his score also needs to be adjusted because the norms at that time were seven years out

of date. The norms for the Wechsler were collected in 1972. I know that because I and my graduate students at Arizona assisted with carrying out the normative evaluations. So it's seven years out of date. The adjustment would be about two points. So I regarded that as a score of 73.

Q And in regard to the testing conditions and observations here, what do those indicate in regard to the –

A I think she's a school psychometrist. She had the experience of testing in conditions that were less than ideal. [76] Many of us who did practice at that time experienced this sort of thing. I once – not once, several times – gave an IQ test in the boiler room for the school, in the basement. Here she's giving a test in the principal's office, where there are other things going on, people talking, people coming in and out of the room, et cetera. These are not the best conditions. She claimed, however, that throughout the test Jody gave good cooperation and rapport was felt to be established. So that's a limiting – her statements are limitations of the mean. That would be the way I would put that.

Q And there's a section at the bottom that she felt that, while Jody conversed freely with the examiner, there was a tendency to give up easily.

A Yes.

Q What would that indicate to you?

A Well, it would indicate that it was very important that this meeting be an individually administered test and I believe she mentioned that he needed constant encouragement. And so the examiner in a test like this, when he or she perceives that the

client is maybe giving up too readily, they strongly encourage them to give their best effort and so there's a good – there's a specific encouragement to children and adults to give their best efforts. There is not specific feedback on specific answers. So it's: "Please do your best. You're really trying hard. I need you to do your very best effort on [77] this," et cetera, et cetera.

So that kind of encouragement, I would guess, was provided.

Q All right. And I want to refer you to the next page there. Bates number six of Exhibit 2. That examiner made a recommendation in regard to Mr. Smith and what is that?

A Well, there were a number of recommendations here. I believe someplace on this page – and I don't have it marked in this version, I had it marked in my personal copy – there's someplace where she suggested learning disability classes in this evaluation. Maybe not on this page. But there are a number of recommendations that are related to assisting Mr. Smith in improving his academic performance.

Q And specifically, middle of the page next to Recommendations, she indicates that further evaluation is suggested in order to determine if LD class placement is appropriate?

A Yes, I see that now. That was what I was referring to.

Q And is that because further testing – would that be because on page five that she indicates that Mr. Smith's effort was generally only mediocre?

A That may have been the reason. I don't think I can decide – I mean, I don't think I can discern what the reason was at this point.

Q Okay. Is there a place in these school records where a [78] placement is eventually determined for Mr. Smith?

A Yes.

Q And can you point me to where that is?

A It's in subsequent pages. I believe he was placed in a resource program for 20 hours per week. Here it is. I believe that's on page 12 of the records. There's one general objective that says EC resource, and I believe that means emotionally conflicted, which was the term Alabama used at that time for what was called elsewhere emotional behavior disorders. So his diagnosis after this initial evaluation is he is an emotionally conflicted youngster.

On page 12 the amount of time in special education, based on my review, was a bit ambiguous. It has two listings of 10 hours per week. Now, I honestly don't know whether that means he was in special education 10 hours a week or the combination of 10 plus 10 meaning 20 hours a week. It's not clear to me from the record.

The disability or, rather, on the right, toward the right side of the page about at the middle of the page, it says: "The primary disability is emotional conflict and the setting is EC resource." That is the special education setting.

Q And to the other side of that, handwritten, does it discuss his range of intelligence?

A Yes. It says he's functioning in the borderline range of [79] intelligence.

Q A diagnosis in the '70s of emotional conflict, what would explain that typically?

A Well, given the whole picture of this from this evaluation, I think they were primarily concerned about his behavior issues and there is a mention of the administration of a Walker Problem Behavior Checklist, which was used fairly frequently at that time. It's a checklist that's completed by a teacher who rates items. And some examples of items are given there, like having a child that has temper tantrums, has no friends, et cetera, et cetera, and the individual is to rate them on a one-to-five scale.

Q And the administration of that Walker test, is that actually Bates number 10 of Exhibit 2?

A Yes.

Q And what was the information found on that administration?

A Well, behavior checklists are often scaled on what's called a T-score scale. A T-score scale has a mean of 50 and standard deviation of 10 typically. Moreover, a score that's 70 or above on a T-score scale on most behavior checklists is seen as significant.

Now, Mr. Smith at that time had a score of – I believe it's 80 in the area of acting out. Acting out generally refers to behaviors that are noncompliant, refusing to comply with the directions by the teacher, refusing to [80] apply – refusing to comply with the behavior expectations in the classroom. It sometimes also implies aggression against property, school property, or aggression against other children. He's at the level of 80 on that one. He's very low on a scale called Withdrawn. He has a score in the high 60s in a scale called Distractibility. He has a score right at 70, just under 70, for peer relations and just over 70 for maturity.

These particular ratings, although they only come from one teacher and it's one specific year, pertain to the adaptive behavior, particularly in the social domain displayed by Mr. Smith at the – at this point he's in the fourth grade when the Walker study was done.

Q After that assessment, is there another assessment of his behavior or intellectual functioning in the –

A Yes. A reevaluation was conducted, I believe, in 1982. Both federal and state law require that a child's disability status be reevaluated every three years. Now, that requirement has been, I would say, weakened a little bit in 2004, but at that time there was a strong requirement that the child's disability status and the appropriateness of the special education program be evaluated at least every three years.

So the reevaluation was done on time when it should have been done.

Q And the request for that evaluation is that document 26?

[81] A It's on page 26, the request for the evaluation. And permission to the evaluation is given by Mrs. Smith, his – it says guardian. It says actually: "Mrs. Patricia Smith, (guardian)," the word "guardian" is entered. That permission was given on November 9th, 1982, I believe. That date is illegible.

Q And do you see where the results of that test are included?

A This evaluation is a little bit overdue. The exact three-year period would have been the date of the prior evaluation in 1979, which would have been February 6th. So this evaluation was done later in 1982 but,

again, given practices at the time and also this had to do a lot with school resources, which would have been expanded at that time. This was pretty close to being on time.

He's given an evaluation, I think, somewhat similar to the evaluation that he had in 1979.

Q And the result of that will appear at Bates number 31 of Exhibit 2?

A Yes.

Q And what do those results reflect?

A It has – okay. Now I see. He has a verbal IQ of 80, performance IQ of 72, and a full scale IQ of 74. By this point in time the Wechsler Intelligence Scale for Children revised the norms of 10 years old, with the adjustment there should be three points. And I would regard this as an IQ of 72, full [82] scale IQ of 72.

Q And what would that suggest to you?

A Well, he's within the State of Alabama requirements for diagnosis as educable mentally retarded at this point because he has an IQ of – full scale IQ of 75.

Q And I believe it's the next page, page 32, where it reflects test findings and analysis -

A Yes.

Q – on testing conditions? And can you tell us what it says under the conditions of testing?

A It does say one sentence toward the end, says: "Jody responded well to the attempt to establish rapport. During the testing, he was cooperative and seemed to be trying his best."

Q So that's slightly different than the prior report?

A Yes, it is, although the results are virtually identical.

Q And the recommendation given there is what?

A Educational placement, it simply says that he's functioning intellectually in the borderline range and achievement test scores are consistent with mental expectancy. Educational placement recommendation will be given by the eligibility committee, meaning that his current achievement is consistent with his level of intellectual functioning, which would by definition rule out the diagnosis of specific learning disability, according to Alabama state education criteria.

Q And at this testing Mr. Smith is in what grade? I believe [83] if you can refer to the page before, it does indicate there.

A It says grade 6-R. I think that refers to the fact that he's probably the second time in sixth grade.

Q Actually –

A That he's retained in the sixth grade.

Q At the bottom of that page 31, the background information, doesn't it in fact indicate that?

A Yes. It says: "Jody is currently repeating the sixth grade."

Q So would that give you any other information in regard to his testing scores? Who would they be comparing him against at that age?

A Okay. The intelligence test scores are compared to normal sample defined by age. So he's compared to children of his own chronological age, own etiological measure. On achievement measures, now, he's being compared to children who are typically one year

younger than he is, because he's repeated a grade. And achievement test scores are almost always scaled and represented by grade norms. So he's being compared to other children in the sixth grade, who are there in the sixth grade for the first time, while he's there for the second time. So the achievement test scores, if you use chronological age, would be even slightly lower than they are here.

Q And on the next page, page 32, do they in fact do the grade levels?

[84] A Yes, the grade levels for the Wide Range Achievement Test, I believe – yeah, they are presented there. And his grade level is fourth grade in reading – fourth grade, fifth month, in reading. Third grade, sixth month, in spelling. And third grade, ninth month, in arithmetic.

Q And at this point he is in his second attempt at the sixth grade?

A That is correct.

Q Do you next find records regarding what the recommendation is following that testing?

THE COURT: Are you referring to a specific page?

MS. KEETON: Oh, I'm sorry. I believe it's page 36.

A Yes, I'm on page 36. Educational alternative recommended in this case was regular class. This was from the Monroe County Board of Education, Exceptional Child Services.

Q And then is there followup testing after that?

A There's a group-administered achievement test after that. I do not recall that another intelligence test was given to Mr. Smith at the Monroe County Schools. He did go into the Monroe – it was called the Monroeville

Junior High School, or maybe we'd call it – today it would probably be called middle school. There are other decisions made about his special education programming though subsequently.

By May 18th, 1984, there's a summary of his IEP – that is, individualized education program – which is a [85] document that involves the plan for the special education services. That is on page 46.

So there's another evaluation referred to on this document in May 1984, but I don't recall a report of that evaluation appearing in these records.

As a quick commentary on the school records, unfortunately, schools are instructed by the State to destroy all special education records in – I believe in Alabama an 11-year time period. Now, these records survive longer than that and we're lucky to have them. I've known one other case involving Alabama school records where the school district had destroyed all of the records and we had virtually nothing other than teacher recollections about the student. So we have more records here than is typically the case, involving an adult who is in the fourth decade of life – fifth decade of life.

So the next significant documents through this period involve an IEP for school achievement records, all of which show very low performance till we get to, I believe, page 89.

Q 79? Of Exhibit 3?

A Page 79, yes.

THE COURT: Are you on to Exhibit 3?

MS. KEETON: Exhibit 3, yes, Your Honor.

A Okay. On December 12th, 1983, it appears that the parent has given permission for a reevaluation. It's signed by his mother, whose name at that time was Glenda Luker, signed, I [86] believe, on December 12th, 1983.

We did not see a psychometrist report regarding that evaluation in the records. It may have been lost.

I do see on page 83 that the recommended placement for Mr. Smith as of December 10th, 1984, was an EMR class plus regular physical education. That's on page 83.

BY MS. KEETON:

Q Now, prior to that, page 81 of Exhibit 3, a similar recommendation is made?

A Well, on page 81 the recommendation is – the exceptionality area is defined as educable mentally retarded, on 3/9/84, and the educational alternative recommended was a special class with resource room services. That's dated March 9, 1984, in seventh grade.

Later, also approved by Mr. Smith's mother on page 82, it's clear that his disability is changed to EMR, or educable mental retardation, as per the information on page 82. On page 83 the recommended educational program and placement proposal for Joseph Clifton Smith is EMR plus regular P.E. Now, what that suggests is that all of his academic subjects were taken in a special class with other children who had mild intellectual disability, or what is called EMR, and he was mainstreamed only in a special school activity called physical education. And this was – it was not approved in December of '84 by Mrs. Luker, according to page 83.

[87] Q Now, are there –

A Subsequently, page 89, there are indications here of poor grades.

Q Actually, Dr. Reschly, if we could, Exhibit 4 is also additional records of Mr. Smith which you also reviewed; correct?

A Correct.

MS. KEETON: And I would like to admit those at this time.

MR. JOHNSON: No objection.

THE COURT: Let me ask you, Ms. Keeton, looking at the exhibit descriptions and the exhibit contents there, they don't appear to be actually accurately described, because Exhibit 2 contains records also from Monroe County, Exhibit 3 also contains Exhibits from Monroe County.

MS. KEETON: Your Honor, those were the entity that we received them from. But yes, the schools shared documents back and forth and so that there is some duplication of those. But they were denoted by the entity that we received the records from.

THE COURT: All right. Are they in chronological order?

MS. KEETON: They are for the most part. I think there are some that may not be completely, because of the sharing back and forth on them. So there may be some –

[88] THE COURT: Okay.

MS. KEETON: – tucked in in the middle because it was an earlier test that they were considering in placement at the other school.

THE COURT: All right.

MS. KEETON: And, Your Honor, may I approach to get Exhibit 4?

THE COURT: Yes.

THE CLERK: Should I mark it in, Your Honor? She offered it.

THE COURT: Yes, you can mark it in.

(Petitioner's Exhibit 4 was entered into evidence.)

BY MS. KEETON:

Q I believe that's page 89 of Exhibit 4.

A On page 89 the type of programming indicated is special education EMR self-contained, and that would mean that all of his academic subjects were taught in the special class with other students who had the same or similar level of achievement and disability status. This was in reference to the seventh grade.

Also on that page 89 there's an indication of a group-administered IQ test done in the school. It's called the Otis-Lennon School Ability Test, and the score on that school ability test is 65. I do not make a lot of meaning out of that particular score because it's a group-administered test and [89] it's, I think, indicative of very low performance. That is not sufficient or appropriate to use that test result to diagnose intellectual disability.

Q In these records do you see any indication that Mr. Smith was ever assigned or identified as learning disabled?

A No, there is nothing here. There is that one mainly kind of obscure comment that he ought to be considered for learning disability class, but he would

never have met the State of Alabama educational criteria for a specific learning disability.

Q Why do you say that?

A Because state criteria for specific learning disability has been studied periodically since the late 1970s and the State of Alabama always required a significant discrepancy between intellectual ability and educational performance, and the discrepancy could occur in one of seven areas. The main areas were reading and mathematics, but there were some other areas added to that. These reports, as well as in other documents, educators recognized that his education achievement was consistent with or commensurate with his intellectual functioning. He had low achievement, he had low intellectual functioning. Therefore, he could not have met the requirement of a discrepancy between intellectual functioning and academic achievement. That particular requirement of the severe discrepancy existed in federal law at that time and it was the [90] only area in federal law and regulations that specified classification criteria for a specific disability area. There's a lot of background on that. But to cut it short, he did not meet the criteria for specific learning disability at any time that he was in the public school setting.

Q And his grade performance in these school records, are they indicative of someone with a learning disability versus maybe an intellectual disability?

A Generally his achievement was at about the same level as his intellectual ability and both were significantly below population averages. I saw one exception to that. It's obscure. He was in about the fourth-grade level on a key math test at one point. But all of the other achievement tests showed lower

performance in math, and in all the tests he's shown low performance in reading.

Q In reviewing the records, do you have concerns in regard to Mr. Smith's attendance levels?

A Well, generally his attendance appeared to be relatively – relatively good. I believe there's one page here that I've looked at before that shows his attendance in the seventh grade. If I remember right, he missed something like 12 days total over an entire school year. Now, that's certainly not perfect attendance. But it's generally regarded as good attendance.

[91] Q Is that actually page 51?

A Right. I'm also looking at page 98, where his school attendance across four grading periods was zero days absent in the first – I believe this would be nine weeks, one day absent in the second, one day absent in the third, no days absent in the fourth nine-week period. So – actually these are six-week periods. So I stand corrected on that. But his school attendance is good.

Q And just for the seventh grade total, it appears out of 121 days, he was present 112?

THE COURT: Which exhibit is that?

MS. KEETON: Page 51 of Exhibit 2.

THE WITNESS: 51?

BY MS. KEETON:

Q Actually I think that's Exhibit 2. Yeah.

A Yes. For example, we don't have the sixth six-week period marked here, in all likelihood because he may have changed schools. Mr. Smith's custody was passed back and forth between his mother and father

and he always attended either the Monroe County or the Baldwin County schools, from what I can see in the educational records, but he did sometimes change schools in the middle of the year. So for the first 30 weeks of his seventh grade, the total number of days he could have attended school, according to this record, is 121 and he was present 112 days. He was not tardy at all. So –

[92] Q On average how would that compare to other students?

A It's close to average.

Q And these are the grades reflected for Mr. Smith when he is in seventh grade?

A Yes, they are.

Q And based on these records, is he in special education classes at this point?

A The only indication I think that is clearly – well, first of all, we have the record that said he was in self-contained EMR class the entire seventh grade.

Second, there's one subject listed here as basic skills and that's very likely a special education class, meaning that they were still working on basic reading, perhaps also basic math skills.

His other grades – English, social studies, math, science – are three Fs and a D. In P.E. he was given a B. So in the academic subjects he was failing by and large.

Q In regard to adaptive behavior deficits, do you see anything in these records that would indicate to you the presence of adaptive behavior deficits?

A Yes. First, there's the failure to acquire literacy skills at an age-appropriate level, which relates to the

conceptual demand of adaptive behavior. Clearly, he didn't do well there. He had significant limitations.

Many of the items on the Walker Behavior Problem [93] Checklist relate to social functioning, or the social domain of adaptive behavior, like following rules, obeying instructions. His peer relations were rated as being very low, very poor, and some of the descriptions of his behavior, of not complying and making in this one case a very inappropriate comment about a teacher that was observing him, reflect social domain deficits in adaptive behavior.

Q How would you differentiate that kind of behavior from just a kid that's not well behaved?

A Well, not well behaved is a social deficit in a school setting. Because the social domain includes items like obeys rules, follows instructions. And not well behaved is pretty much, by definition, failure to comply with the rules and instructions.

Q Dr. Reschly, you prepared a report in this case; correct?

A Yes.

Q I'm going to show you Exhibit 12, the first page. And I believe you have a copy of it up there with you. Is that the report you prepared in this case?

A Yes. This page is the executive summary of that report.

Q And it goes through page 34?

A I believe that is the case, yes.

MS. KEETON: Your Honor, at this time I would move to admit Dr. Reschly's report as Exhibit 12.

MR. JOHNSON: No objection.

[94] THE COURT: Mark it in.

(Petitioner's Exhibit 12 was entered into evidence.)

MS. KEETON: May I approach, Your Honor?

THE COURT: Yes.

BY MS. KEETON:

Q Based on your review of Mr. Smith's school records, do you believe he met the requirements for intellectual disability pre-18?

A Yes, I do. I think the school records show the kinds of behaviors that are associated with and denote mild intellectual disability, or what was then called educable mental retardation.

Q Do you in fact believe that the records themselves demonstrate identification of Mr. Smith as mildly intellectually disabled?

A Yes.

Q And what's that from?

A That's indicated toward the later years that he attended school, the earlier was called or identified as emotionally conflicted, but that disability identification evolved over time and he was clearly identified as a person with educable mental retardation and placed in a special class, typically with other children who had similar achievement deficits and disability designations.

Q Identifying a child later in school, around sixth/seventh [95] grade, as mildly intellectually disabled, is that common or is that something that's usually diagnosed at an earlier age?

A Well, there are varying patterns for individual children. But in the main, school disability labels often evolve. And in the early years school officials are more

likely to try to assign a label that is less pejorative; that is, has less negative connotation.

Today we see many children diagnosed as developmental delay during their preschool and early school years. That depends on the state. But the federal government allows the use of the term “developmental delay” until age nine. So many children before age nine are called developmental delay because that’s way more acceptable to parents and from a school perspective the actual disability for the child at an early age may be ambiguous or harder to determine.

After the schoolteachers, psychologists, and others have had more opportunities to observe the child’s behavior, then the disability label or category may evolve to something that’s more accurate. So today we see a number of children who have been diagnosed with developmental delay until age nine, at which time they are often diagnosed with autism.

Q This type of reticence that you’re talking about – and you kind of talked about it into the present – but was that equally true in the ‘70s?

A Yes. And the label that people tried to avoid until they [96] had to use it was “educable mental retardation.”

Q You’ve also reviewed reports regarding testing of Mr. Smith as an adult?

A I did. But I did not personally see Mr. Smith. So I am reluctant to comment in detail about the adult evaluations.

Q Actually – and I don’t want to ask you about those. But I would ask, because you have seen the scores – and I believe this is at page 37 of the item that

you prepared to assist you in testifying. That indicates – I'm sorry.

A This was the table 5.7, page 78 from the technical manual that I referred to earlier.

Q Here it is, page 44. Those are tests that Mr. Smith was evaluated with as an adult; correct?

A Yes.

Q And those are the scores, full scale scores?

A Correct. I list here both the full scale standard score as well as the full scale corrected for the obsolescence of the normative standards.

Q And those, can you tell us what those scores are that you reviewed?

A The three scores corrected for the obsolescence of the norms are a full scale of 67 for Dr. Chudy's evaluation, a full scale score of 74 for Dr. Fabian, and a full scale score of 71 for Dr. King.

Q And the scores that you're reading, those are scores that [97] you altered using the Flynn effect?

A Yes, depending on how recent the norms were for the test that was given.

Q And then comparing those to the scores you observed in Mr. Smith's educational records -

A Yes.

Q – would you consider those consistent?

A All of the scores, with the Flynn correction, are below 75 consistently.

MS. KEETON: Your Honor, may I have one moment?

THE COURT: Yes.

MS. KEETON: I have no further questions.

THE COURT: Let me ask Ms. Keeton, those last two charts that you showed us, they were from what exhibit?

MS. KEETON: Dr. Reschly prepared those. That's the PowerPoint that he was using to remind himself of some of the scores.

THE COURT: Okay. So you haven't offered it?

MS. KEETON: Those are not exhibits, Your Honor, no.

THE COURT: All right. Are you ready? We're going to go about 15 minutes before we break for lunch.

MR. JOHNSON: Certainly, Your Honor.

CROSS EXAMINATION

BY MR. JOHNSON:

Q Good morning, Dr. Reschly. My name is Henry Johnson. I [98] represent the Attorney General's Office.

A Good morning.

Q You, of course, are retained by Smith's counsel in this case; is that correct?

A Correct.

Q And I believe you've already testified that you charge \$200 an hour?

A Correct.

Q But how many hours approximately have you worked on this case?

A Well, my up-to-date billing before this trip was a total billing of \$5,500. I can't – I'd have to figure back

for the hours, but it would be commensurate with a rate of \$200 per hour.

Q Do you expect to bill any more after that for your work in this case?

A I will bill for my work yesterday with the attorneys and my work today and any work I do subsequently.

Q Okay. Could you look – I’m going to ask you a lot of questions about your report, which I believe is Exhibit 12. Looking at paragraph nine on the top of page three of your report, you state: “I’m not licensed as a psychologist in any state and I do not engage in private practice to provide individual or group treatment of mental disorders”; is that correct?

[99] A Yes.

Q Have you ever been licensed to practice psychology in any state?

A Not for private practice licensure. I’ve never sought nor obtained private practice licensure.

Q So when you say you do not engage in private practice, that’s actually because you’re not licensed to practice in private practice; is that correct?

A Well, that’s correct with regard to licensing. It’s also correct with my personal preferences.

Q Jumping back to the first page of your report and referencing your prior testimony, on page four you note that, of course, Mr. Smith, in your opinion, was a person with intellectual disability – and I’ll just refer to that as ID from now on – as a child and adolescent, “but I defer judgment about his adult status because I have not completed an independent evaluation.” Is that correct?

A Yes.

Q And that's because you've never evaluated him personally; right?

A Yes.

Q You mentioned a case – and I'd like to cite for the record it's the Montgomery case you were talking about on direct. And for the Court's benefit, it was United States v. Montgomery, 2014 Westlaw 1516, 147 Western District Tennessee, January 2nd, [100] 2014.

It's my understanding that you testified on behalf of the defendant in that case, a man by the name of Chastain, C-H-A-S-T-A-I-N, Montgomery; is that right?

A Yes.

Q And that hearing, it was approximately October of 2013? Would that be familiar?

A If you represent that that's the date, I'll accept it.

Q And it was in an Atkins hearing setting; right?

A Yes.

Q In terms of what the district court found, are you aware that the district court refused to credit your testimony largely in part because you made your diagnosis, ID, without first meeting and interacting with the defendant?

A That was the case that I described where I was convinced by an attorney to do an interim report and then meet the client and do a later report. In the interim report I said that the records appear to show intellectual disability. But I deferred judgment until I could do the evaluation myself and construct a later report. So my interim report was tentative.

Q You're familiar with the APA special guidelines for forensic psychology, are you not?

A I actually do have a copy of those guidelines.

Q I'd like to just read one thing that was quoted in the Montgomery decision. It's 9.03 and it reads: "When it is not [101] possible or feasible to examine individuals about whom they are offering an opinion, forensic practitioners strive to make clear the impact of such limitations on the reliability and validity of their professional products, opinions, or testimony." I trust you're familiar with that?

A Very much so.

Q And –

A It's also – there's also –

Q That was a yes or no. You're familiar with that?

A Familiar with yes or no? Yes.

Q And in fact you did not comply with that guideline in Mr. Montgomery's case, did you?

A I did. And why I applied it was to establish a report that was called an interim report and to call it a draft and also to say that any conclusion here is tentative, pending further evaluation of the client.

Q Would you say you've complied with that guideline here in preparing this very lengthy expert report, despite the fact that you have not ever evaluated Mr. Smith?

A Well, and that's why I restricted my inferences about Mr. Smith's capabilities to the school-age years; that is, up to age 18.

Q Let's take the other example that you cited during the direct. That was the case of Ricky Chase, or

Ricky Moore Chase, in the Circuit Court of Copiah County, Mississippi. Do [102] you recall that case?

A I certainly do.

Q And that, again, was an Atkins hearing; correct?

A Yes.

Q Are you aware that the judge – and I’ll cite the case as well – Chase v. State, 171 Southern 3d 463, 482, Mississippi, 2015. The judge in that case, if you’re aware, concluded that your opinions were unpersuasive because many of your conclusions were grounded in your own personal opinions and moral judgments and did not have a substantial scientific basis?

A Well, he referred to one specific observation I made as reflecting my personal opinion and moral judgment. That was an observation I made about Mr. Chase regarding the fact that he claimed to have children but did not make any effort to support those children. I used that example under the social responsibility part of the social domain of adaptive behavior and I regarded that as an example, one of many examples, of poor social responsibility.

The judge regarded that as me imposing my own moral judgments. And if that’s the case, so be it. I think men who father children should support them.

Q Just to clarify, just another quote from the opinion, just so we’re on the same page, you testified that, quote: “Chase demonstrated a significant deficit and social responsibility by [103] unknowingly fathering a child out of wedlock.” That’s the exact quote from the opinion. So you still stand by that opinion?

A My opinion is that men who father children should support them.

Q Well, in this case it was unknowingly; right?

A I recall in my interview that he claimed to support – that he claimed to have a child but had not supported the child, is what I recollect from my interview with Mr. Chase.

Q Okay. Let's move all that behind us and move on just to Mr. Smith. In Exhibit 12, your report, on page five, on paragraph 18 I have a question for you. You wrote even though you don't diagnose – let me step back. Even though you don't diagnose today Smith with ID as an adult, you write in that paragraph, if I'm not mistaken, that ID is, in your words, "is essentially incurable"?

A That's quoting one of the six criteria established by Edgar Doll in 1941. That criterion was revised between 1941 and 1960. The reason it was revised was because of well-documented cases in which persons met the adaptive behavior criteria for intellectual disability as a child but who were self-supporting and largely independent functioning as an adult. So there were articles back in the '50s about pseudo-feble-mindedness; that is, either these original diagnoses were wrong or the diagnosis was right but the case was a case of pseudo-feble-mindedness, [104] or pseudo- – using modern terminology – mental retardation.

For that reason in the 1960s – the organization was called AAMR – revised that and deleted the section that says it's incurable. That was about what we now call mild intellectual disability.

Q So, then, in this case it's possible that, since you have not diagnosed Mr. Smith with mild ID as an adult, would you consider it possible that he no longer

suffers from that, even if assuming he did to begin with?

A Well, I think the key word is “possible.” And under the current intellectual disability criteria, that’s a possibility. That is possible.

Q Okay. On page five, I’d like to drop down to paragraph 19, if you would. You referred to the AAIDD – the American Association of Intellectual and Developmental Disabilities – as the authoritative international organization regarding definition and classification in MRID; is that right?

A I do.

Q And jumping below again to paragraph 20 – well, let me step back.

I apologize, Your Honor. I withdraw that question.

You would agree with me that the AAIDD actually is an advocacy group really?

A Absolutely not.

Q Oh?

[105] A If I could elaborate on it, please?

Q Well, it was a yes or no question. You’ll have plenty of time to follow up with your counsel.

A Well, I –

MR. JOHNSON: Your Honor?

THE COURT: Yes, just answer his questions and your counsel can come back.

THE WITNESS: Yes, Your Honor.

BY MR. JOHNSON:

Q Are you aware on its website the AAIDD states, quote: “AAIDD” – and this is a quote from their website – “is the leader in advocating quality of life and rights for those with intellectual disabilities”? Are you familiar with that?

A Certainly. But AAIDD does a lot more than advocacy.

Q Okay. And its mission statement on its website – and this, again, is a verbatim quote – “AAIDD promotes progressive policies, sound research, effective practices, and universal human rights for people with intellectual and developmental disabilities.” Does that sound about right?

A And that does show the broader mission of the AAIDD in terms of research, for example.

Q And, for example, would you agree with me that one of those so-called progressive policies would be applying the Flynn effect only in death penalty cases and advocating as much?

A Well, I would say that’s a policy based on science, on the [106] science of the Flynn effect.

Q And, well, again, progressive policies and all, certainly the AAIDD does not advocate that students whose IQ scores make them eligible for gifted or advanced placement courses have their IQ scores downwardly manipulated by the Flynn effect, would you agree with that?

A The AAIDD does not deal with gifted. I know of no documents associated with AAIDD that develops policy recommendations in the area of gifted.

Q Does it do so in the area of vocational rehab or Social Security?

A In the context of intellectual disability, yes. But only in that context.

Q And in that context, though, the AAIDD is not telling us to downwardly adjust scores for the Flynn effect in assessing whether somebody meets a Social Security qualification or not?

A They advocate doing that whenever the diagnostic decision is about an intellectual disability.

Q Okay. Dropping down to paragraph 20, if you will, you wrote that other organizations, such as the American Psychiatric Association, follow the AAIDD rather than plead changes in ID criterion; is that right?

A I do.

Q And I just have a random question about this, sir. You cited yourself for this twice from actually 1992. Is it [107] ethical to cite yourself for propositions?

A Well, the 1992 article addressed the specific issue of the origins of criteria. The terminology then was “mental retardation.” And what I showed in that article and what I can testify to today from my personal knowledge is that when the AAIDD made changes in mental retardation, those same changes were later adopted but in the DSM. For example, in 1992 the AAMR then adopted and adapted the behavior scheme that had 10 adaptive skills areas. That was new then. DSM-IV in 2000 and DSM-IV-TR in 2004 adopted those same adaptive skills areas verbatim except one skill area for AAMR was health and safety. DSM put a comma between health and safety, so they had 11 – they produced 11 areas rather

than 10. Obviously, though, the influence was from 1992 AAMR to 2000 DSM and 2004 DSM-IV.

Moreover, AAIDD, the successor to AAMR, established three broad adaptive behavior domains in 2002 – I’m sorry – no, 2002. The next DSM revision was in 2013, and that revision adopted precisely the same three adaptive behavior domains. So the influence is from AAMR, now AAIDD, to DSM rather than vice versa.

Q Thank you for the explanation. But just to nail you down, is it, in your opinion, appropriate and ethical to cite yourself for a proposition? Yes or no?

A Yes, absolutely.

Q Now, you went over this on direct. But I just want to – [108] the APA is responsible for publishing the Diagnostic and Statistical Manual of Mental Disorders; is that correct?

A Yes.

Q And right now we’re on the DSM-5; is that correct?

A Correct.

Q Wouldn’t you agree with me that the DSM-5, the latest edition, does little more than acknowledge the possibility that the Flynn effect is a, quote, “factor,” unquote, that “may,” unquote, impact an individual’s IQ score?

A I believe that’s correct the way you’ve characterized it.

Q Well, I’ll read the definition.

A It’s also the case that the DSM is far less detailed and explicit than AAIDD.

Q There were some definitions read during direct, if we could read this definition in. It says the DSM-5, at 37 – the exact quotation is – do you have that in front of you?

A Yes, of course, I do. Let me see. It's –

Q It's page –

A – what I have here is a copy – no, I don't have it. I'll have to look at the DSM manual.

THE COURT: What page?

MR. JOHNSON: DSM-5, page 37.

THE COURT: He's ready.

MR. JOHNSON: Okay. I apologize, Your Honor.

Q The exact quote I wanted to get out was: "Factors that may [109] affect test scores include practice effect and the 'Flynn effect,'" which is in quotes, the "Flynn effect," and then in parentheses "(i.e., overly high scores due to out-of-date test norms")? Is that right?

A Yes. I haven't found the spot yet. But what you quoted to me sounds right. Where is it on page 37?

Q Third paragraph. First sentence, third paragraph.

A Yes.

Q Okay. So therefore it's true that DSM-5 does not provide any guidance as to how a clinician should actually apply the Flynn effect, let alone mandate any three point per year reduction for IQ scores obtained from tests with outdated norms?

A That's typical with DSM-5 compared to AAIDD. DSM-5 is less explicit than –

Q I understand that. But that also was a yes or no.

A What it says –

Q I mean, that's the DSM-5 does not – the DSM-5 does not say that.

A What it says is what it says.

THE COURT: All right.

MR. JOHNSON: Fair enough.

THE COURT: Let's go ahead and take our lunch break at the time. We will be in recess until 1:30. See you then.

(A recess was taken at approximately 12:17 p.m.)

[110] (Afternoon session, 1:37 p.m., in open court, Petitioner present.)

THE COURT: All right, Mr. Johnson.

MR. JOHNSON: Thank you, Your Honor.

Q Dr. Reschly, good afternoon. Continuing along with the Flynn effect, as you may recall, do you agree with me that the manual for the administration of the WAIS-IV does not specifically instruct clinicians to adjust IQs for the Flynn effect on a .3 per year basis?

A The manual does not have that specific instruction.

Q And the same is true for the Stanford-Binet 5; is that correct?

A Yes.

Q Stepping back, you would agree the Flynn effect is named after a man by the name of James Robert Flynn?

A I don't know his middle name. But I know Dr. Flynn. I corresponded with him and have met him personally.

Q Since you corresponded with him, you know he is or was a professor of political science; is that correct?

A Absolutely.

Q So he's not a psychologist; is that right?

A No, he's not.

Q He's not a clinical psychiatrist or a medical doctor?

A No, he's not.

Q Would you agree with me that he reviewed the results of [111] multiple studies of intelligence testing and published findings starting back in the '80s, 1984 and 1987, for example, showing that there are in fact gains in IQ test scores over decades?

A That's correct.

Q But back in '84 and '87, he did not propose the .3 per year correction; is that true?

A I don't think he did that until more information had accumulated over time.

Q Would you agree with me that he actually proposed that in 2006 for the first time?

A That's plausible. I can't refute it one way or the other.

Q Are you aware when the U.S. Supreme Court decided *Atkins v. Virginia*?

A I am.

Q Was that 2002, I believe?

A It was.

Q So he proposed that four years or so after Atkins was decided, the .3 per year deduction, that was proposed after Atkins was decided?

A Yes.

Q And this is just a stickler. Is it .3 per year that Dr. Flynn suggests, or is it .333 years?

A He's changed over time and he's somewhat more conservative in his more recent writings. But I believe he uses more consistently the .3 –

[112] Q Thank you.

A – degree of change per year.

Q Would you admit or would you agree that if we admit for the sake of argument that the Flynn effect inflates the IQ score of every person being scored against, as you said, obsolete norms – it does not follow that it inflates every person's score equally or consistently on a year-to-year basis?

A Well, it inflates the population mean from which, at least with intellectual disability, from which IQ scores are interpreted. So there's no question about whether the population mean changes. Whether that applies to every single individual is uncertain.

Q In which case – so what you're saying is it's more of a group effect than necessarily each person in this room, for example, would have their IQ adjusted by .3 every single year?

A I would say this, that the population mean from which we determine intellectual disability – that is, what is approximately two standard deviations above the mean – no longer is 100 for norms of 10 years out of date but, rather, it's 103. And so the score identifying

intellectual disability should be then adjusted to approximately a score of 73 plus or minus five. There's no question but whether it applies to the population.

Q As applies to the population – but even as it applies to the population, you would agree that it does not proceed [113] necessarily in a linear or predictable fashion? Would you agree with that? .3, .3, .3 every single year?

A Well, there are things that have influences on the Flynn effect such as the kind of intellectual measure. But for full scale score, like on the Wechsler scale, the population changes by the three points per decade and the point that's two standard deviations below the mean also changes by three points per decade.

Q Are you familiar with the Flynn effect in “Tethering the Elephant”? And I would just like to read the cite into the record, 12 Psychology, Public Policy, and Law 170, 177, 2006.

A I have a copy with me.

Q That's good. But before we get to that, would you agree that in “Tethering the Elephant” he found that the actual yearly rate of change – and I apologize for reading, I just want to make this right – ranges from .917 points per year to negative .117 points per year, “depending on the time period and particular version of the test”?

A Across all of the literature – national, international – that may be the case. However, for the commonly used tests in the United States, the Flynn effect has been a reliable finding, except for initially the change from the WAIS-R to the WAIS-III. That appeared to be smaller than the estimate from the

Flynn effect. However, with the accumulation of the additional results from studies after 2006, it was confirmed [114] then that the Flynn effect also applied to the differences between the WAIS-R, the WAIS Revised, and the WAIS-III. And it clearly applies in the WAIS-III and the WAIS-IV.

Q Can we go back to Exhibit 12, which is your report, I believe? Page eight, paragraph 33.

The very first sentence at the top of the page on page eight. You write: “The persons with mild ID typically, quote, unquote, ‘pass’ as normal in everyday situations, including many employment settings.” Did I read that right?

A You did.

Q Okay. And then jumping down to 35, which is on that same page, you note – I believe you did on direct – that individuals with mild ID are often misdiagnosed; is that true? That you wrote that?

A Yes, I see where I say that, and that is indeed the case.

Q But if we look at the paragraph in between them, paragraph 34, you wrote –

A I’m sorry?

Q – that: “persons with mild ID have substantial and chronic problems with everyday coping due to limited thinking and understanding that result in adaptive behavior deficits.” So my question is how is it that they can have both substantial and chronic problems, but yet go even unnoticed by their own coworkers?

A Because the substantial chronic problems may not be [115] apparent in a work setting, particularly if

a benefactor is involved and if the work itself is not complex or requires thinking and decision making. So if you're a hod carrier helping a brickmason, the other hod carriers and even the brickmason may not recognize that you're a person with mild intellectual disability unless you're asked to do something like compute the number of bricks that are required to lay up an eight-foot by 10-foot wall. Then the mild ID was more likely to emerge.

Q You address the notion of the benefactor in paragraph 43 on page 12, toward the end of that paragraph; is that correct? "Absent a benefactor and periodic supports of other kinds"...

A Please tell me what paragraph again.

Q I'm sorry. It's paragraph 43.

A Oh. Toward the end of the paragraph on the next page?

Q Yes, sir.

A Ah, okay.

Q I believe you testified to this on direct.

A Yes.

Q Let's focus on Mr. Smith with this paragraph in mind. Are you aware that Mr. Smith told Dr. King, for example, that he started working at the age of 13 or 14, mowing grass, doing the lawn, and that he earned 400 or \$500 a week? Or strike that. A month – yeah, a week.

A Well, whether it's a week or a month, I wouldn't be [116] surprised. Mowing grass does not require a lot of intellectual skills.

Q Are you aware that he told Dr. King that he also worked as a roofer, painter, And that he worked offshore on rigs and supply boats?

A I'd have to know a lot more about what he actually did in those jobs to say whether or not this is evidence that is inconsistent with the vocational abilities of persons with mild intellectual disability.

Q I understand. I'm just going to try one more. If he told Dr. King that he, quote, "always had money in his pocket and he always worked full time and he also got along with fellow employees and his employers," would that not be indicative of somebody who has certainly some strength in adaptive functioning?

A Maybe, if those statements are true. And it's also the case that many persons with mild intellectual disability brag or exaggerate their competencies and what they can do. So I don't know whether the statement is true or not.

Q Well, here's my –

A I would have to follow up on that.

Q – here's my main question. Are you aware, assuming these statements are true for the sake of argument, are you aware of Mr. Smith having a benefactor during this period in his life?

A I don't think he did, that I am aware of, although I [117] understand that he generally lived with other people – although he was in jail most of the time after he was 18 or 19, as I recall.

Q But assuming, again, for the sake of argument, that what he reported to Dr. King is true, that he didn't have a benefactor, how in your opinion would he have been able to do all of these things, working offshore and so forth?

A Well, those are his own self-report. I have seen his Social Security income records, and he never made very much money ever. Certainly not enough money to suggest that he was working full time and was self-supporting. Moreover – and this goes beyond the examination I did – but it's my understanding from reading other reports that he generally lived with other people. Moreover, I think he was only out of jail a couple of years.

Q Okay. Thank you for answering the question. You testified on direct about the WAIS-IV: Technical Manual. Do you still have that with you?

A I don't have it with me. I have a table that I constructed from that in a slide. And I might be able to remember it off the top of my head.

Q Well, let's just tie it to your report.

A It's also in the report.

Q Yes. Let's tie it to your report for a second. That's in paragraph 58 on page 15 and 16 of your report. Can you confirm [118] that is where that is?

A Yes.

Q And you compared – you looked where you said was table 5.7 and you said there was a 4.1 point difference for the Flynn effect between the WAIS-III and IV?

A Full scale score, yes.

Q Are you aware that table seven was comparing an IQ score of 58.5 to a 62.6 IQ score?

A Those are both in the range of mild intellectual disability, so I don't see the problem with that.

Q But you're aware of that? You noticed those scores; correct?

A Oh, of course.

Q And you're aware that Mr. Smith has never generated a full scale 50s or 60s; correct; without the Flynn effect?

A Not to my knowledge.

MR. JOHNSON: I apologize, Your Honor.

Q Did you look at table 5.8 where it compared the WAIS-IV and WAIS-III on a score of 73.5 and score of 74.7?

A I'd have to look at the technical manual to refresh my memory.

MR. JOHNSON: Your Honor, may I approach?

THE COURT: Yes.

MR. JOHNSON: Here it is. Your Honor, may I approach again? I'm going to hand – this is a reference. It's not an [119] exhibit.

THE COURT: Okay. Thank you.

A If you're asking me about the full scale score of WAIS-IV to WAIS-III, the borderline –

BY MR. JOHNSON:

Q I don't believe I asked you a question.

A Oh, I'll stop.

Q Looking at table 5.8, now I'll ask the question. Am I reading this correctly that there is a comparison between the 72.5 WAIS-IV and a 74.7 WAIS-III, so the difference is 2.2; is that right?

A I agree.

Q So in this particular context the difference in terms of the Flynn effect is less than 4.1, and in effect it's less than three?

A In this sample it is less than three. In the other sample it was more than three.

Q Okay. Thank you. Looking at paragraph 65 in your report, sir, that's the table, table one on page 18. Let me know when you have found it.

A Yes.

Q Okay. I just happen to notice that under the Stanford-Binet 5 you have it written that it was performed in 2017. Is that accurate?

A No. It was 2014. When I was summarizing those data, I [120] looked at Dr. Fabian's report and saw that the date on the report was 2017. And it wasn't until I looked at it later, after I had prepared this, that I realized he gave the test in 2014. So that's a mistake.

Q I understand. So that would affect the Flynn full scale from a 73 to – would it be fair to say if I multiplied 13 by .3, 3.9, so that would be 74.1 minus 73?

A I would accept that.

Q Thank you, sir.

Looking at this table, whether you look at the full scale or the Flynn effect, would you agree that his high school – his full scale IQ, whether as is stated or the Flynn effect – and I apologize – they were remarkably consistent and corroborate each other, do they not?

A From childhood through adulthood, that would appear to be the case.

Q And I believe you talked about the standard error of measurement on direct. Do you recall that?

A I do.

Q Are you aware that Flynn in "Tethering the Elephant," which I cited earlier, wrote the possibility of measurement error in terms of the standard error of measurement is, to quote him, "much reduced when you have more than one IQ score" as opposed to, say, four or what we have here, five?

A Under the assumption that the IQ scores are equally [121] reliable and valid, then I would say yes; that's correct. But you can't use poor data to increase the reliability of good data. It doesn't work that way.

Q Is it your opinion, sir, that any of this is, quote, "poor data"?

A No, no. Not in the table that I have on table one.

Q Thank you. I would like to move on to some of the questions you were asked on direct about Mr. Smith's school records. And I'm just curious. Do you specifically know what was done in terms of special education and whatnot, developing programs in Monroe County in the 1970s or 1980s?

A I can only make judgments about that based on the records that exist. I was not actually obviously in any classroom, et cetera.

Q I understand that. Did you consult any former or present teachers or administrators to find out what might have been going on back then?

A No, I did not.

Q Is the same true with Mobile and Baldwin Counties, that you didn't consult?

A Correct.

Q I'd like to refer you back to Petitioner's Exhibit 2, page one. I believe you were asked questions about it.

A Okay.

Q Do you recall this document, sir?

[122] A Yes, I do. I'm trying to collect it.

THE COURT: He has it on the screen, if you want to look.

BY MR. JOHNSON:

Q It's on the screen.

A Okay.

Q My only question for you is do you agree that if you look at reason for referral, on the first box underachiever is checked; correct?

A Yes.

Q But on the second box, or the second category, emotional factors is checked; correct?

A It is.

Q Well, there's intellectual handicap, but that's not checked, is it?

A No, it was not.

Q Thank you. It's your understanding that he was evaluated in February 1979 with the WAIS-R; is that correct?

A That's my recollection, yes.

Q And he obtained a full scale IQ of 75. I'd like to show you Exhibit 2, page six. And at the very top of the page would you agree with me that under test results

and analysis it reads: "According to his full scale IQ, Jody is currently functioning in the borderline range of measured intelligence. The three IQ scores are consistent. However, [123] the verbal IQ falls into the low average range"?

A That's what it says.

Q So you would certainly agree with me that at that point in time he was not being diagnosed as EMR?

A No, he was not at that time, although he would have met the State of Alabama criteria for that diagnosis at that time.

Q Well, that's not what they said at that time, certainly?

A That's not the diagnosis. But he met the criteria.

Q Do you happen to have page 26 in front of you? I don't happen to have that. But you were certainly asked about it on direct. It was about a reevaluation in 1982.

A Yes.

Q Would you agree with me that on that page it states specifically the reevaluation was for emotional factors?

A Could you direct me to where I would see that?

THE COURT: Paragraph 90, last sentence.

THE WITNESS: I'm sorry?

THE COURT: Paragraph 90, last sentence.

MR. JOHNSON: Actually, Your Honor, I have page 26 right here.

Q So maybe a fourth of the way down, he was reevaluated. The evaluation was for following reason: “Emotional factors”?

A I’m not trying to be – I’m certainly trying not – I’m not trying to be obtuse, but I don’t see it yet. But if you represent that that’s what it says, I will agree with you.

[124] Q That’s fair enough. But if that is the case, then, again, that shows us that we’re not looking at a diagnosis of EMR at that point in time, we’re looking again at emotional factors?

A I would say not yet.

Q Okay. And the last record I want to show you is page 81. And I will put it on the screen. And my question to you, sir, is he was in fact on this – this is 3/9/84; is that right? The date up at the top?

A The date at the top; correct.

Q Okay. So he was marked EMR at that point. But would you agree with me that if you see the other X, it says: “Regular class with resource room services”? So would you agree with me that at that point in time, even though he was marked EMR, he was in regular classes?

A I would not agree, because it’s contradicted by a later record at least in two places that says he was in an EMR special class in the seventh grade and that the committee recommended that that be continued into the eighth grade. So –

Q Would that actually reflect confusion in the records, then, as to what was actually going on in the seventh and eighth grade?

A Well, we have one record that says regular class, we have a couple of others that say EMR special class. That was his placement in seventh grade, according to the records, and it [125] was also recommended to be his placement in eighth grade as well.

Q We'll let the records show what they do.

Are you aware, sir, that by record accounts that Mr. Smith began using alcohol around the ages of 11, 12, 13?

A I think I saw that in one of the reports.

Q Well, assuming that that is true and it was in a report, would that affect or could that affect his literacy skill acquisition?

A Well, it wouldn't have affected them really in second or third grade. But if alcohol consumption continued at a high level, then it would affect both his intellectual performance and his academic skill acquisition.

Q Would it not also affect his social relations in the sense that if he was in fact, say, at age 13 abusing alcohol, he might have had difficulty making friends?

A Well, that's true. But the Walker Problem Behavior Checklist indicated that he had poor peer relations when that was first given, I believe, in 1979.

Q Did that particular test determine whether he was inebriated at the time?

A There was no alcohol testing done, to my knowledge.

Q Are you aware that his parents divorced and that he was subsequently shifted back and forth between them and back and forth between schools?

[126] A Yes.

Q Could that affect his acquisition of social skills?

A Certainly, it could. Interestingly though, he went back and forth between two school districts –

Q But –

A – where his parents resided. So when he, for example, moved back from one district to another, he probably wasn't in a completely different peer environment.

Q But you wouldn't dispute me if I said that by the time he left school, he had been in at least seven different schools even within the two systems?

A I counted that many myself.

MR. JOHNSON: Just a couple of last questions, Your Honor.

Q Are you aware that he was, unfortunately, physically abused by both his father and his stepfather?

A I am.

Q Could that affect his development of adaptive functioning, such as social skills, literacy skills?

A It could have. I would argue perhaps permanent effects. Child maltreatment often has effects that continue. But these are continuous stable behaviors of individual. So it reflects on the current adaptive behavior.

MR. JOHNSON: Thank you. May I have one moment?

THE COURT: Yes.

[127] (A discussion was held off the record between Respondent's counsel.)

MR. JOHNSON: I have nothing further.

THE COURT: All right. Ms. Keeton, did you want to put on another witness?

MS. KEETON: I'll be very brief on redirect.

THE COURT: All right.

REDIRECT EXAMINATION

BY MS. KEETON:

Q Dr. Reschly, without the Flynn effect, Mr. Smith's IQ scores pre-18, are they in the range of what would be considered mild intellectual disability?

A Yes, particularly if you consider the standard error of measurement.

Q And to be clear, you did mention on direct, I believe, that you did actually perform a study in 1979 that included what the standards were and what was being done in the state of Alabama; is that correct?

A Yes. The data were collected and I had to – the data were collected in 1979. The study was published in the premier intellectual disabilities journal in the United States in 1982.

Q And I want to reference – on the referrals that Mr. Johnson showed you on cross regarding that Mr. Smith was being referred for emotional factors or emotional conflict, that's not a diagnosis; correct?

[128] A Well, being referred for emotional factors is not a diagnosis. But it appears to me, looking at the records, that the term "emotional conflict" or "emotionally conflicted" was an Alabama special education disability category at that time. I suspect they've

changed that. That's kind of an anomalous terminology, not used else place. I would imagine that terminology has changed over time.

Q I'm sorry. I believe page 26 is one of those pages that reference that. I don't have it with me, if you could find if you do have it.

THE COURT: 26 of What?

MS. KEETON: Of Exhibit 2. I'm sorry.

THE WITNESS: Okay. I'm at that page.

BY MS. KEETON:

Q And what testing does it ask to be done because of the referral?

A There are five areas listed: "Individual intelligence test-measures of general intelligence; speech and/or vision and hearing screening; educational evaluation-measures of academic achievement; behavior rating scales and/or social maturity scale; measures" – I believe it says – "of motor development and/or physical fitness test."

Q Why would they do IQ testing if the only problem is emotional or behavioral issues?

A Well, I think IQ testing is relevant to a number of [129] disabilities and also broadly relevant to understanding a child. At this time and to a large extent continuing to the present, the administration of an individually administered IQ test is typically done with students referred who have behavior and/or achievement problems, especially achievement problems in the classroom, which Mr. Smith clearly had.

Q You referenced also the Walker behavioral test that Mr. Smith was given in 1979.

A Yes, I did.

Q And Mr. Johnson asked you about whether or not they were giving alcohol testing at that time. How old was Mr. Smith in 1979?

A He would have been eight years old when the Walker Behavior Problem Checklist was completed by his teachers. His birthday is in July. I believe this was completed – help me if I’m misstating the date – but I believe it was completed in ‘78. Let me look at the page. Yeah. The date says September 24 – wait – September 24th, 1979. He therefore was nine. His birthday is in July of 1970. He was nine years old.

Q And I do want to pull up page 81 of Mr. Smith’s school records.

A All right.

Q And that is the page.

In the exceptionality areas they list him as EMR; is that correct?

[130] A It says educable mentally retarded, and the short version of that, the acronym, is EMR.

Q And then on the educational alternative recommended it references –

A It references regular class with resource room services, meaning that he’s in special education.

Q And then on page 83 of the school records, what classroom does it recommend be continued for Mr. Smith?

A This is December 10, 1984. He is in, I believe, seventh grade. The listing is EMR plus regular P.E., meaning that – that implies to me that all of his academic subjects were in an EMR special class.

Q Would EMR with regular P.E. be the same as or considered the same as regular class with resource room services?

A No. Special class usually involves most of the school day, typically at least 70 percent of the school day in a special setting, a self-contained class, with other children with the same disability diagnosis or at least the same achievement levels.

Q Okay.

A Resource is a part-time placement in special education.

MS. KEETON: And I think that's all I have, Your Honor.

THE COURT: All right.

MR. JOHNSON: Your Honor, if I may have two quick [131] followups?

THE COURT: No, there is no recross. So –

MR. JOHNSON: Okay, Your Honor. I apologize.

THE COURT: Thank you. You may step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: Be careful. Don't back off the edge there.

All right. You may call your next witness.

MS. HUGHES: Judge, at this time we would ask that we call a witness out of turn, Sergeant Chris Earl from the Department of Corrections.

SGT. CHRISTOPHER ARTHUR EARL
was sworn and testified as follows:

THE WITNESS: Yes, I do.

THE CLERK: Thank you, sir. Please be seated.

DIRECT EXAMINATION

BY MS. HUGHES:

Q Sergeant Earl, would you state your full name for the record, please?

A Sergeant Christopher Arthur Earl.

Q And how long have you worked for the Department of Corrections?

A Almost 17 years.

Q And what is your job title?

A Correctional sergeant over segregation and death row.

[132] Q How much contact do you have with Joseph Smith?

A He's one of our tier runners. I see him just about every day I work.

Q And what exactly does a tier runner do on death row?

A Pass out juice, pass out trays, microwave things for inmates, get lists up when we're putting out walks or church lists, things like that.

Q How many inmates are on a tier?

A Typically per tier between 20 and 24.

Q And how many tier runners are on a tier?

A At a time just one.

Q How many total tier runners do you have on a tier?

A Usually about four or five.

Q How do you choose tier runners?

A We talk to the other inmates on the tiers and make sure that they all get along with them. Typically you want somebody that's clean, takes care of their self. You know, somebody that can get along with everybody on a tier.

Q Why do they have to be clean?

A Because they have to pass out food trays.

Q How does Mr. Smith perform his job as a tier runner?

A I think he does a good job.

Q Does he need much supervision as a tier runner?

A No, ma'am.

Q Do you have any conversations with Mr. Smith?

[133] A From time to time we've talked, yes, ma'am.

Q And can you tell me about your conversations with him?

A We've talked about things going on inside the prison, things going on in the news, you know, different little things, you know, no major conversations. But –

Q Can you tell me about some – do you remember any of the specific conversations about what's going on in the world?

A No, ma'am. It's usually in passing. You know, we may talk for just a few minutes.

Q Current events?

A Yes, ma'am.

Q Does he have any trouble understanding what you're talking to him about?

A No, ma'am, not that I could tell.

Q Does he respond appropriately when you ask him questions?

A Yes, ma'am.

Q Have you seen Mr. Smith write things down?

A I guess you could say that when he has to get, you know, a list of people going places, yes, ma'am.

Q Tell me how that works, when he gets a list of people that are going places.

A Just about every morning we put the walks out, we'll tell the tier runners to get a walk list up and they will just go down the tier, see who wants to go out on a walk, and they will let us know who and we'll make a list of who wants to go out on [134] the walk.

Q What does that list entail? Tell me how he writes the list.

A Each tier's different. Some of them will have a preselected list and they'll just circulate that of who wants to go, he just writes down the cell number of who wants to go out.

Q He does that and doesn't have any problems doing that?

A Not that I'm aware that he has any problems.

MS. KEETON: That's it, Judge.

THE COURT: Cross?

CROSS EXAMINATION

BY MS. STOKES-HOUGH:

Q Good afternoon, Sergeant Earl. I'm Keisha Stokes-Hough with the Federal Defenders Office. Mr. Earl, you have been a correctional officer since the year 2000; correct?

A That's correct.

Q And you were promoted to correctional sergeant in 2010; correct?

A Yes, ma'am.

Q I would like to show you what has been marked as Petitioner's Exhibit 15. Mr. Earl, these are personnel records from the Alabama Department of Corrections; correct?

A Yes, ma'am.

Q And they pertain to you, Christopher Earl; correct?

[135] A The cover says so, yes, ma'am.

Q These records include written reprimands and incident reports; correct? That should start at Bates number 5? The Bates number is the number at the bottom right corner.

A Yes, ma'am.

Q And these records include employee performance appraisals; that should start at Bates number 19?

A Yes, ma'am.

Q And they also include your duty time records; correct? That should start at Bates number 158?

A Yes, ma'am.

Q And these records also include a disciplinary history record; that should start at Bates number 205 or that should be at Bates number 205; correct?

A Yes, ma'am.

MS. STOKES-HOUGH: Your Honor, at this time I ask that Petitioner's Exhibit 15 be admitted.

THE COURT: Any objection?

MS. HUGHES: No, ma'am.

THE COURT: All right. Mark it in.

(Petitioner's Exhibit 15 was entered into evidence.)

BY MS. STOKES-HOUGH:

Q Mr. Earl, isn't it true that in March of this year you received a formal warning from your supervisor at Holman?

MS. HUGHES: Objection, Judge. That's improper [136] impeachment.

MS. STOKES-HOUGH: Your Honor, it's not improper.

THE COURT: It depends on what it was. And I don't have any context. So –

MS. STOKES-HOUGH: Your Honor, it was a mental health duty that Mr. Earl was supposed to perform, and it was determined that he didn't perform it properly. And in his response he said that he wasn't properly trained. So it directly goes to his training and his performance regarding mental health issues at the prison.

THE COURT: Well, he hasn't testified about any mental health issues at the prison. So I sustain the objection.

BY MS. STOKES-HOUGH:

Q Mr. Earl, have you been trained specifically on dealing with people with mental health issues?

A Yes, I have.

Q And have you been specifically trained on dealing with people who have intellectual disability?

A Yes, we have.

Q Has your training been adequate?

A Yes, ma'am. We go to training every year for it.

Q Have you ever complained that your training was inadequate with regard to mental health responsibilities?

A No, ma'am. The only issue we had was our suicide watch, until we were properly trained with it. But we have been now.

[137] Q Okay. So in March of this year was there an issue where you objected to not having been properly trained with regard to that mental health responsibility?

A In regards to our suicide watch, yes, ma'am.

Q Mr. Earl, isn't it true that you have been disciplined at work many other times?

A Yes, ma'am, in my career.

Q You've even been suspended multiple times; correct?

MS. HUGHES: Objection, Judge. It's not relevant and it's improper impeachment.

THE COURT: Sustained.

MS. STOKES-HOUGH: Your Honor, may I respond to the objection?

THE COURT: Well, you can state why you think it's relevant.

MS. STOKES-HOUGH: Okay. Your Honor, I think it's relevant because Sergeant Earl has testified about his interactions in relation with Joseph Smith. And part of the reasons why he's been suspended multiple times is not having been present at work, and then also he has fallen short of his duties in overseeing prisoners at work. So that's where these questions are going to, has he been responsible in observing and overseeing the inmates, including Joseph Smith.

THE COURT: Well, he has testified about specific items. You can certainly cross-examine about those items. But [138] the general attempt to impeach him as you are doing, I think, is not appropriate. I sustain the objection.

BY MS. STOKES-HOUGH:

Q Mr. Earl, in your employment at the Department of Corrections, have there been problems with attendance? Has that been noted?

MS. HUGHES: Objection, Judge. The same thing. It's improper impeachment.

THE COURT: I don't think this is – you can certainly question him about his testimony about Mr. Smith being a tier runner, about his conversations with him, and about his observing him writing down certain things. That was all he was testifying about. So I think that's not relevant.

MS. STOKES-HOUGH: Yes, Your Honor.

Q Mr. Earl, you say you see Joseph Smith nearly every day when you're at work?

A Yes, ma'am.

Q But you don't talk to Joseph Smith every day, do you?

A No, ma'am.

Q And when you do have conversations with Joseph Smith, they are typically short conversations; correct?

A Yes, ma'am. They usually only last a few minutes.

Q Isn't it true that in your role as a correctional officer Joseph has come to you for help or assistance?

A What kind of assistance, ma'am?

[139] Q Well, for instance, Joseph has asked you for permission to do things?

A Yes, ma'am, he has to do that.

Q And he's asked you for permission to, for instance, go across the hall or something like that; isn't that correct?

A Yes, ma'am. They are assigned to a tier, so they do have to ask permission before they go anywhere else.

Q And, Mr. Earl, isn't it true that death row inmates have little independence?

A What do you mean by independence, ma'am?

Q Well, I mean that there are strict rules for what they can and cannot do, correct?

A Yes, ma'am, there are rules.

Q And isn't it true that there are certain times set aside for tasks of daily living?

A There are certain times for walks, there are certain times for church.

Q That includes showering; correct? Certain times for showering?

A Yes, ma'am.

Q And there are certain times for meals; correct?

A Yes, ma'am.

Q So correctional officers and prison officials manage these inmates' behavior; correct?

A Yes, ma'am, that is our duty.

[140] Q People on death row don't make the same choices that free people have to make; correct?

A Not exactly the same choices, but they do make their own choices, yes, ma'am.

Q But not as many choices; correct?

A Correct.

Q And people on death row don't have as many responsibilities; correct?

A That is correct.

Q You didn't know Joseph Smith prior to his arrival at Holman, did you?

A No, ma'am, I did not.

Q So you don't know how he would conduct himself in the outside world; correct?

A No, ma'am, I can't say I do.

Q Okay. And have you ever asked Mr. Smith about limitations that he has or things that he struggles with?

A No, ma'am, I've never seen a reason to.

Q Earlier you mentioned Joseph's service as a hall runner; correct?

A Yes, ma'am.

Q Isn't it true that hall runners do unskilled tasks such as handing out ice and water to other inmates?

A They do do that, yes, ma'am.

Q Hall runners may also sweep or mop; correct?

[141] A Yes, ma'am.

Q And correctional officers make sure that hall runners do what they are supposed to do; right?

A Yes, ma'am.

Q Joseph began serving as a hall runner in 2016; correct?

A I believe that's about right; yes, ma'am.

Q And isn't it true that Joseph works overnight as a hall monitor?

A He works some during the day and night, I believe.

Q Does he work mostly overnight?

A Yes, ma'am.

Q Most inmates are asleep overnight; correct?

A For the most part, yes, ma'am.

Q And you mentioned earlier a walk list. Are walk lists prepared overnight or in the daytime?

A They are prepared when we ask for them.

Q When do you ask for them, overnight or in the daytime?

A In the morning, early in the morning.

Q Isn't it true that daytime hall runners have more interaction with staff and other – staff and other inmates than overnight hall runners?

A Yes, ma'am. But he does work both shifts.

Q Okay. Well, when he's a nighttime hall runner, which he is most of the time, then his interaction is less with others than a daytime hall runner's interaction would be; correct?

[142] A Yes, ma'am.

Q As a nighttime hall runner, Joseph doesn't deliver meals to other inmates, does he?

A Yes, ma'am. We serve our breakfast meal at around 2 o'clock in the morning.

Q Okay. In the middle of the night?

A Yes, ma'am.

Q Are you aware that because Joseph works as a hall runner overnight most of the time, he sleeps a lot during the daytime hours?

A I don't know his sleep schedule, ma'am.

Q Have you observed Joseph asleep during the daytime?

A Yes, ma'am.

Q Mr. Earl, are you familiar with an inmate named John Neal?

A Yes, ma'am, I am.

Q He served as a hall runner for years, didn't he?

A Yes, ma'am.

Q And he assisted correctional officers with mopping and cleaning and upkeep; correct?

A Yes, ma'am.

Q And John Neal used to be on death row, didn't he?

A Yes, ma'am.

Q Isn't it true that John Neal's no longer on death row because a court found he was intellectually disabled?

A I am not sure why he's not on death row anymore, but he is [143] no longer on death row.

Q Okay. So he's an inmate who has been removed from death row for reasons that you're not certain of, but he used to serve as a hall runner?

A Yes.

Q And he worked as a hall runner during the daytime, didn't he? John Neal?

A Yes, I believe so.

Q Mr. Earl, are you familiar with Holman's post assignment rosters?

A Yes, I am.

Q Isn't it true that these are rosters that list the staff members who will be working in certain areas of the prison each day?

A Yes, ma'am.

Q These rosters also identify staff members who will be on leave or not present at work each day; correct?

A That's correct.

Q Mr. Earl, what is a death row rover?

A A death row rover is the officer that is assigned to death row.

Q So the rover would walk the halls of death row and observe the inmates; correct?

A Yes, ma'am.

Q Mr. Earl, isn't it true from October 1st, 2016, through [144] March 31, 2017, the post assignment roster has you listed as the death row rover only two times?

A With me being the supervisor, if we do not have the help, which we are short of help, I'm a supervisor of seg and death row, so I take over the duties of death row rover.

Q But you're not listed as a death row rover; correct?

A No, ma'am. I'd be listed as supervisor over death row.

Q Okay. So for those two instances where you are listed as a death row rover, why would you be specifically listed as a death row rover when that designation isn't normally required, because you're the supervisor?

A More than likely I was working overtime.

Q Mr. Earl, I'd like to show you what has been marked as Exhibit 18. These are the post assignment rosters from Holman; correct?

A Yes, ma'am.

Q And they show where officers are assigned at the prison; correct?

A Yes, ma'am.

Q And you're listed as a death row rover on February 7, 2017? That's Bates number 37?

A Yes, ma'am.

Q And December 30th, 2016, that's Bates number 64?

A Yes, ma'am.

MS. STOKES-HOUGH: At this time, Your Honor, I ask [145] that Petitioner's Exhibit 18 be admitted.

THE COURT: Any objection?

MS. HUGHES: No objection.

THE COURT: All right. Mark it in.

(Petitioner's Exhibit 18 was entered into evidence.)

BY MS. STOKES-HOUGH:

Q Mr. Earl, earlier you testified that it's part of your job to observe Joseph Smith?

A Yes, ma'am.

Q Is that something that you've ever struggled with in your responsibilities, being more observant? Is that a criticism that you received?

A No, ma'am, not to my knowledge.

Q I would like to refer you to Petitioner's Exhibit 15, Bates number 67. And kind of in the middle of the page there it says: Officer Earl needs to improve on monitoring inmates' appearances; is that correct?

A Yes, ma'am, it does.

Q Do you see that?

A Yes, ma'am, I see it. The appearances have to do with haircuts, shaves, yes, ma'am.

Q Okay. And then Bates number 79, it says: Officer Earl needs to improve on monitoring inmates' appearances and searches. Is that correct?

A Yes, ma'am.

[146] Q Bates number 137, it says you need improvement on monitoring inmates' appearance, activities, and living assignments. Is that correct?

A Yes, ma'am.

Q Mr. Earl, isn't it true that one thing that supervisors have been concerned about in your work performance with inmates is that you've been inattentive?

A Inattentive how?

Q Not paying appropriate attention to inmates.

A No, ma'am. Not in the way you're saying, no, ma'am.

Q No, I just mean have you been – have you consistently been appropriately attentive to inmates?

A About their haircuts and shaves, yes, ma'am.

Q Well, I don't just mean that. I mean in observing them, for instance, as you testified you observed Joseph Smith. Have you been observant and attentive toward inmates consistently?

A Not inattentive, no, ma'am.

Q I'm sorry. I didn't understand.

A Not inattentive, no.

Q You haven't been inattentive?

A No, ma'am.

Q Mr. Earl, isn't it true that in December of 2005 you received a written reprimand for watching television in the TV room?

MS. HUGHES: Objection, Judge, to relevance and the [147] fact it's improper impeachment.

MS. STOKES-HOUGH: Your Honor, I don't believe it's improper because what he testified to is his observations of Joseph Smith. So –

THE COURT: I know, but observation is one thing. But duties and carrying out your duties as a supervisor is another. And, you know, I think you're talking apples and oranges here, so I sustain the objection.

MS. STOKES-HOUGH: Yes, Your Honor.

Q Mr. Earl, have there ever been instances where you've left your post without permission?

MS. HUGHES: Objection, Judge. Same, same objection.

THE COURT: I sustain.

MS. STOKES-HOUGH: Your Honor, may I have a moment?

THE COURT: Yes, you may.

(A discussion was held off the record between Petitioner's counsel.)

MS. STOKES-HOUGH: No further questions, Your Honor.

THE COURT: Any redirect?

MS. HUGHES: No, ma'am.

THE COURT: All right. Thank you. You may step down.

THE WITNESS: Thank you.

THE COURT: All right. Ms. Keeton, back to you.

MS. KEETON: Your Honor, could we take a slight break?

THE COURT: I can't hear you.

[148] MS. KEETON: Can we take a slight break? Mr. Smith is our next witness. But could we take a slight break before that?

THE COURT: How long do you need?

MS. KEETON: Five minutes.

THE COURT: All right.

MS. KEETON: I just need to run to the restroom.

THE COURT: You should have said that.

Okay. We'll be in recess for five minutes.

(A recess was taken at approximately 2:37 p.m.)

(In open court, 2:44 p.m., Petitioner present.)

THE COURT: All right, Ms. Keeton.

MS. KEETON: Your Honor, Petitioner would call Mr. Smith.

THE COURT: All right.

THE CLERK: Mr. Smith, if you'll step forward toward the witness stand, I'll swear you in.

Let me get you to raise your right hand as best you can.

JOSEPH CLIFTON SMITH
was sworn and testified as follows:

THE WITNESS: Yes, ma'am.

THE CLERK: Thank you, sir. Please be seated.

DIRECT EXAMINATION

BY MS. KEETON:

[149] Q Good afternoon, Mr. Smith.

A Good afternoon.

Q Would you please state your name for the record?

A Joseph Clifton Smith.

Q And where do you currently reside?

A Ma'am?

Q Where do you live?

A Atmore. At Holman, Unit 371, Atmore, Alabama, 04A.

Q 04A, is that your cell number?

A That's my house.

Q How long have you been at Holman?

A Since November of '98.

Q November '98?

A (Nodding head affirmatively.)

Q Over the past couple of years since 2014, have you had more than one person come visit you and do testing?

A Yeah.

Q And do you recall who those people were? Do you recall those two people, Dr. King and Dr. Fabian?

A Yeah (nodding head affirmatively).

Q You do?

A Yeah.

Q Okay. And do you recall your visit with Dr. King?

A Yeah.

Q I'm going to show you what's already been entered as [150] Exhibit 19.

MS. KEETON: If I may approach?

THE COURT: All right.

BY MS. KEETON:

Q During your visit with Dr. King, did he give you a document that looked similar to that?

A Yeah.

Q He did?

A (Nodding head affirmatively.)

Q And do you recall taking that test?

A I don't know. I did take some. I don't know if I took that particular one.

Q Okay. Well, maybe turn and look at page four of that, can you?

A (Complying.)

Q Are you on page four?

A (Nodding head affirmatively).

Q Does that look like what's on the screen?

A Yeah.

Q Okay. Do you recall taking that test and answering those questions?

A I know I took some tests. But I don't – I can't say I took this particular one. I don't know. I don't remember.

Q Okay. That's fine. But you recall taking some tests, just not necessarily the specific ones?

[151] A Yeah.

Q Could you turn – it's not numbered, but it's the second page in that Exhibit 19. Could you turn to that? And those are directions on that page; correct?

A Yeah.

Q Can you read out loud beginning at where it says: "Please read and answer all items"? It's in bold.

A Talking about the second paragraph?

Q Yes, sir.

A It says: "Please read and answer all items. Please read each item carefully and rate the individual's performance of the behavior."

Q Hold on, hold on.

THE COURT: Mr. Smith, you're going to have to back up a little bit so that you can speak directly into the microphone.

Not too far.

THE WITNESS: A little bit too far.

THE COURT: If you can, hold the document in front of you and still speak into the microphone.

THE WITNESS: It's a little hard to do that with these handcuffs on like this.

THE COURT: I know it's tough with those handcuffs on.

But do the best you can.

A "Please read and answer all items. Please read – please [152] read each item carefully and rate the individual's performance of the behavior. Select only one response (zero, one, two, or three) according to the guidelines below. Please provide a response to every item, even if – even if some items do not seem to apply to the individual's age group or are difficult to rate."

BY MS. KEETON:

Q Keep reading.

A Huh?

Q Keep reading that next part.

A "Record your answer by circling...one, two, or three. If you know that – if you know that the individual is unable to perform the behavior, circle one – circle on the rating scale, zero is not able to do this behavior. If you do – if you know that the individual is able to perform the behavior, rate how often he or she performs the behavior when needed without reminders and without help.

"1. Never (or almost never).

"2. Sometimes.

"3. Always (or almost always).

"Please circle...one rating of zero, one, two, or three for each item."

Q Okay.

A "Indicate when your answer is a guess or estimate. You may not" –

[153] Q That's good. Mr. Smith, you can stop there. I'm sorry.

A What?

Q You can stop there. That's good. So turning back to page four of the test, can you read that first question out loud?

A "Says – says the names of other people (for example, 'Mama,' 'Daddy,' or names of friends."

Q Okay. So can you tell me what rating you would give yourself on that activity, a zero, one, two, or three?

A I'm not a doctor.

Q I know you're not a doctor. But do you know if you say the names of other people?

A Yeah.

Q Would you –

A Kacey Keeton.

Q Would you give yourself a zero, one, two, or three, based on the instruction you just read?

A Three.

Q Okay. Can you read the second question?

A "Says 'Hello' and 'Good-bye' to others," three.

Q And the third one?

A "Answers the telephone by saying 'Hello.'" I don't answer no telephone.

Q Okay. The fourth one?

A "Uses sentences with a noun" or "verb." Probably do.

Q I'm sorry?

[154] A Probably do.

Q Okay. Would you give yourself a zero, one, two, or three?

A Two, three.

Q That's fair. Would you read number five?

A "Names 20 or more familiar objects."

Q Would you give yourself a rating of zero, one, two, or three?

A Yeah, I would.

Q Would you?

A Yeah, yeah, I would.

Q What would that rating be?

A Huh?

Q What rating would you give yourself for that?

A I don't – I don't know. I don't understand the question. Why would I name 20 or more – oh, it says familiar. I thought it said – "name 20 or more familiar objects." One.

Q But you can name familiar objects to yourself; correct?

A Huh?

Q You can name familiar objects to yourself; correct?

A I can.

Q Okay. Do you think you could name 20 things?

A Yeah.

Q So would the more correct response to that be a three?

A Yeah, if you ask – if I can, yeah.

Q Okay. Can you read the sixth question?

[155] A “States his or her home address, including ZIP code.”

Q And you can do that?

A If I need to.

Q So you can give – you would give yourself what rating?

A Three.

Q Three? Okay. The seventh one?

A “Gives verbal instructions to others that involve two or more steps or activities.”

Q How would you give yourself a rating?

A One.

Q A one? Will you read the next one?

A “Speaks clearly and distinctively.” I’d like to hope so. Three.

Q And the next one?

A “States his or her telephone number.” I ain’t got no phone.

Q But you know a telephone number; correct?

A Yes.

Q What’s my office number?

A It’s 334-834-2099.

Q So how would you rate yourself on that?

A Real good.

Q Would you read the next one?

A “Shakes head or says ‘Yes’ or ‘No’ in response to a simple question (for example, ‘Do you want something to drink?’)” [156] No, I also drink – get me something to drink. I ain’t gonna shake my head or none of that. I’d just get myself something to drink.

Q Would you rate yourself that you have the ability to do that?

A Oh, yeah.

Q And number 11, the next one?

A “Looks at other people’s face when they are talking to him or her.” That’s probably a two.

Q Okay. The next one?

A “Says irregular plural nouns correctly (for example, says ‘feet’ instead of ‘foots’ and ‘men’ instead of ‘mans’).”

Three.

Q Next one?

A “Nods or smiles to encourage others when they are talking.” One.

“Tells family, friends, or others about his or her favorite activities.” One.

“Listens closely for at least five minutes when people talk.” Three.

“Uses up-to-date information to discuss current events.” Three.

“Starts conversations on topics of interest to others.” Two.

“Answers complex questions that require careful [157] thought and opinion (for example, questions

about politics or current events)." (Shaking head negatively.)

Q What would you give yourself?

A A one.

"Distinguishes truthful from exaggerated claims by friends, advertisers, or others." One.

"Repeats stories or jokes correctly after hearing them from others." Three.

"Talks with others about complex topics for at least 10 minutes (for example, about politics or current events)."

Q What would you say?

A No, zero.

Q And the next one?

A Huh?

Q The next one?

A "Waits for others to finish what they are saying, without interrupting." Three.

Q The next one?

A "Participates in conversations without talking too much or too little." I want to say two, but –

Q Can you read the next one?

A What?

Q Can you read the next one?

A I'm going.

Q Okay.

[158] A "Talks – talks about realistic future educational or career goals." Two.

Q And that last one, can you read that?

A What?

Q The last one?

A "Explains – explains the terms of a legal document to others (for example, a contract to buy a house or rent a car)." Zero.

Q Thank you, Mr. Smith. I'm not going to read you any more of those.

After going through these, do you recall Dr. King asking you those questions?

A I don't remember them.

Q Okay. That's fine. How old were you when you first went to prison?

A Late '89.

Q How old were you?

A 19.

Q Okay. Had you been in jail before that?

A I've been in juvenile detention, but I ain't never been in the state school or nothing like that.

Q Okay. But you had been in a juvenile facility before?

A Yeah.

Q For short periods of time?

A Yeah.

[159] Q Okay. And when you say short periods of time, what does that mean?

A Till I went to court and my mother drove me down there.

Q So ever longer than a week? Ever longer than a week in a juvenile facility?

A (Shaking head negatively.)

Q You have to answer.

A Usually it wasn't even that long.

Q Okay. And so when you went in at 19, how old were you when you came out of prison?

A 26.

Q Okay. And then how old were you when you went back into prison?

A 27.

Q Okay. So you were – and when you went back, when you were released at age 26, when you went back to prison, why did you go back to prison?

A Why?

Q Yes.

A I guess I got to drinking and raising hell. That's what they said.

Q Was it – so you were revoked on your sentence?

A Yes.

Q Okay. And then how long – that's the next time when you went in, at 26?

[160] A I went back in at 27 and I got back out at 27.

Q Okay. And then you were out three days before the incident that you're now on death row for; is that correct?

A (Nodding head affirmatively.) Yeah.

Q Before you went to prison at 19, did you work?

A Yeah.

Q What kind of jobs?

A Shrimp boats or whatever I could do.

Q Shrimp boat work?

A As long as I didn't have to pay no taxes.

Q Okay. So you remember working on shrimp boats?

A Yeah.

Q And did you do that when you were 18?

A 16, 17, 18, yeah.

Q Okay. Working on the shrimp boats?

A Yeah.

Q And then while you were incarcerated from 19 to 26, you did some jobs at the prison?

A Who?

Q Did you do jobs while you were in prison?

A No.

Q Did you do work release while you were in prison?

A I did work release.

Q Okay. What kind of job was that?

A When I first got out – when I first went in, they sent me [161] to the first work release. I worked at the Wrangler blue jean factory in Opp, Alabama. And then when they transferred me from Opp, Alabama, to Atmore, Alabama, I worked in the – the Flowerwood

Nursery. And then from there I went to the Currie gin, cotton gin.

Q I'm sorry?

A From there I went to Currie cotton gin.

Q Okay. And then when you were released from prison at 26, what did you do? Did you work?

A Yeah.

Q Where did you work?

A I worked for Gulf Coast Landscaping awhile, I done odd jobs for people like my mom's landlord or somebody like that, for people that I knew or whatever.

Q Before you went to prison at 19, who did you live with? Or did you live on your own?

A I was on my own.

Q Did you have a roommate?

A (Shaking head negatively.)

Q Where did you live?

A Where?

Q Yes, sir.

A Just depended on where – where we was at at the time.

Q Okay. Is that because you were staying in hotels occasionally?

[162] A No.

Q Where were you staying?

A Huh?

Q Where were you staying?

A Mostly on the boat.

Q Is that the boat that you were doing the shrimp – the shrimp boat you worked on?

A Yeah, shrimp boats.

Q Okay. Did other people stay on that boat?

A It was – I – I'd hang around the motel. But don't get the wrong idea. I didn't necessarily live around there.

Q Okay. But did you – did other people stay on the shrimp boat when you were working on it?

A Yeah.

Q Okay. When you were out from age 26 to 27, out of prison, did you stay with your mom?

A Yeah, some. Not all the time.

Q Did you stay with anybody else? I'm sorry?

A Some, but not all the time.

Q Who else did you stay with?

A Huh?

Q Who else did you stay with?

A Girlfriends or whatever.

Q Would you stay with your brother?

A A little while, for awhile.

[163] Q Okay. And, now, you do have – you work on death row; correct?

A Only at night.

Q Only at night? And what is – that's a job as a hall runner?

A (Nodding head affirmatively.)

Q Okay. What have you done as a hall runner?

A I was on the hall last night from 6 o'clock till about 12 o'clock, the same as every night. I sweep and mop the floor, pass out ice, pass out hot water. If somebody needs a phone, I get the phone for them. Or if they need their food heated up in the microwave, I'll heat it up. I don't pass out no trays.

Q Okay.

A That's – that's day shift.

MS. KEETON: Okay. One moment, Your Honor.

THE COURT: All right.

MS. KEETON: No further questions, Your Honor.

THE COURT: Any cross?

MS. HUGHES: Yes, ma'am.

CROSS EXAMINATION

BY MS. HUGHES:

Q Good afternoon, Mr. Smith.

A Good afternoon, Ms. Beth Hughes.

Q Just a few questions. You do recall Dr. King coming and talking to you and asking you a lot of questions, don't you?

[164] A Yes, ma'am.

Q Did you enjoy your conversation with Dr. King?

A Yes, ma'am.

Q Do you recall Dr. King asking you whether you could read menus?

A I remember a lot of questions, but I can't say I remember any particular questions.

Q Do you recall telling him that you could not read menus in Spanish?

A No, ma'am.

Q Do you understand what a contract is?

A The best I can say is it's supposed to be some kind of work agreement or whatever.

Q When your parole was revoked, do you remember that you had drugs on your possession when your parole was revoked?

A I didn't have no drugs in my possession.

Q Do you remember biting a man's finger when your parole was revoked?

A Who?

Q Biting a man's finger?

A I don't know what you're talking about.

Q When you're a tier runner, do you have to make a list of people who are going to attend church services?

A Yes.

Q And how do you do that?

[165] A Just they got these little strips of paper, it's got one through 28 on there. There's 28 cells on each tier. You ask everybody who is going to church or who's going to go here or go there or whatever. And you write down the cell number, you circle the cell number of them particular inmates. And then you take that slip of paper and take it out there and give it to the cube officer.

Q And so you have to know which inmate is in which cell?

A Ma'am?

Q You have to know the name of the inmate in each cell?

A I would guess so, as I'm on the tier with them.

Q But you do know the name of each inmate; is that correct?

A Yes, ma'am.

Q Do you know what town Holman is near?

A Ma'am?

Q Do you know what town Holman Prison is near?

A Atmore, Escambia.

Q Is Escambia the county or is that the town?

A Well, y'all sent Escambia County to pick me up yesterday.

Q Okay. Do you get any letters from any friends while you are on death row?

A Yeah.

Q And do you write back to them?

A If I can, yeah.

Q Do you have one specific person that you get a letter from?

[166] A Ma'am?

Q Do you have one specific person that you get a letter from?

A No.

Q Who is our President right now? Who is our President right now?

A (Laughing.) You're talking about Trump?

Q I am. Do you know who the President before him was?

A Did you vote for him?

Q I did.

A (Laughing.)

Q Do you know who the President was before Donald Trump?

A Ma'am?

Q Do you know who the President was before Donald Trump?

A Obama.

Q When's your birthday?

A XXXXXXXXXX, 1970.

Q What's your Social Security number?

A Last four numbers is 6458.

Q And what's your AIS number?

A Z646.

Q What do you do when you're not feeling well when you're in prison?

A Go to sleep.

Q You don't – do you not go and ask for help?

A I try not to.

[167] Q Have you ever filled out medical slips and said that you needed dental care?

A I have.

Q Did you tell them when you were having chest pains?

A One time I did, and that's only because that nurse asked me.

Q Excuse me? I'm sorry. I didn't understand your answer.

A That's only because the nurse asked me.

Q So you didn't volunteer that you were having chest pains?

A Had I known they were going to take me to Atmore Community Hospital, I would have told them I was just fine.

Q Why didn't you want to go to Atmore Community Hospital?

A I wouldn't take my dog to Atmore Hospital.

Q Because they don't give you good care?

A Huh?

Q Because you wouldn't get good care there?

A That's right.

Q How many brothers and sisters do you have?

A I have two brothers and two sisters.

Q What are their names?

A Jason, Chris, my two brothers, and Becky and Lynne, my two sisters.

Q Do you have any contact with your brothers and sisters now?

A Only one of them.

Q Which one?

[168] A My sister Lynne.

Q Why don't you make any contact with the other ones?

A (Indicating.) For what? They don't try to contact me. I tried to write them, tried to communicate with them. They don't want to communicate with me. I'm not going to beg them to do nothing.

Q And how far did you go in school?

A Seventh grade, up and to the seventh grade.

Q Did you like school?

A No.

Q Why not?

A I just – I had no interest in it.

Q Did you try in school?

A Ma'am?

Q Did you attempt to do well in school?

A I tried.

Q Do you remember telling Dr. King that you thought that Dr. Fabian wasn't as organized as he was when he came to Holman to see you?

A Yes, I did. I still say that.

MS. HUGHES: That's all I have, Judge.

THE COURT: Redirect?

MS. KEETON: No, Your Honor.

THE COURT: All right. Thank you, Mr. Smith. You may step down.

[169] MS. KEETON: I would call Dr. Fabian at this time.

THE COURT: All right.

JOHN MATTHEW FABIAN, Psy.D., J.D., ABPP,
was sworn and testified as follows:

THE WITNESS: Yes, ma'am.

THE CLERK: Thank you, sir. Please be seated.

THE WITNESS: Thank you.

THE COURT: I think we need a bigger witness stand.

THE WITNESS: Good afternoon, Your Honor.

DIRECT EXAMINATION

BY MS. KEETON:

Q Would you state your name for the record?

A John Matthew Fabian.

Q And how are you employed?

A I am employed, self-employed, and also work as a contracting forensic psychologist in Austin, Texas.

Q Could you please review your educational background for the record?

A Yes. I have a bachelor's degree in political science and psychology from University of Cincinnati. I have a master's degree in general psychology from the same institution. I have a master's in clinical psychology and a doctorate in clinical psychology from the Chicago School of Professional Psychology. I have a juris doctorate, a law degree, from Cleveland-Marshall College of Law. I have a post-doctorate certification in [170] clinical neuropsychology from the Fielding Graduate Institute and a two-year post-

doctorate fellowship in clinical neuropsychology from the Albuquerque VA and the University of New Mexico School of Medicine.

Q Would you briefly review your professional experience?

A Yes. During graduate school I emphasized my training in forensic psychology and I worked at the Federal Bureau of Prisons and the Cook County Jail, and then I did an internship in one of the state of Ohio's court psychiatric clinics where I conducted forensic evaluations for competency, not guilty by reason of insanity, mitigation, sex-offending evaluations, through one of about 10 court psychiatric clinics in the state of Ohio. I then was a director of one and worked at three – two others, both juvenile and adults. So I typically worked in the court psychiatric system. I then worked at Minnesota's, I guess, version of Taylor Hardin, which would be Minnesota Security Hospital, in their forensic legal unit.

And I have worked also through the juvenile court psychiatric clinic, one of them in Ohio, conducting similar pretrial/presentence evaluations.

I did a fellowship in clinical neuropsychology, working primarily with clinical populations, both adolescents and primarily adults with brain-based neurological disorders.

And then I also worked at two other facilities, Neurology and Neuroscience Associates and Applewood Psychiatric [171] Centers, as a clinical neuropsychologist – the former with adult patients and the latter with high-risk youth that had neurodevelopmental delays or disabilities.

I currently work in Austin, Texas, one of the Court panels to conduct competency to stand trial evaluations within that county.

Since about 2006 I have worked primarily in private practice within forensic psychology and neuropsychology.

Q Are you certified in certain specialty areas of psychology?

A Yes, I'm board certified by the American Board of Professional Psychology, and Clinical Psychology, and Forensic Psychology, and I have post-doctorate certification and fellowship training in clinical neuropsychology.

Q Do you have any post professional licenses?

A I'm licensed, I'd say, in Illinois, Texas, Ohio, Oklahoma, and New York as a psychologist.

Q Do you have experience in assessing intellectual disability?

A I do.

Q And have you published in the area of intellectual disability?

A I have.

Q And what are those publications?

A Most of them are within these type of capital proceedings, Atkins v. Virginia, also within neuropsychology, neurology, [172] violence, I would also apply to intellectual disability and, I guess, the topic we're here to discuss.

Q About how many patients, if you can estimate, have you assessed for intellectual disability?

A I guess both forensic and clinical – clinical would be in the hundreds. I don't have a complete number on that.

Q Do you employ the same or similar methods to diagnose an individual in your private practice as you would in a criminal setting or post-conviction setting?

A I would, yes.

Q Have you ever testified in a criminal case as a forensic psychologist?

A Yes.

Q About how many times?

A I'd say 200 times.

Q Have you ever testified in a criminal case as an expert in neuropsychology?

A Yes.

Q Can you estimate the number of times?

A Oh, I would say 50.

Q And have you ever testified as an expert in a criminal case on intellectual disability?

A Yes.

Q And can you estimate the number of times?

A Probably 30.

[173] Q I'm going to put up here on the screen what's been marked as Petitioner's Exhibit 9. I believe you have that in your notebook up there. Could you identify that for me?

A This is a curriculum vitae, CV.

Q And I believe it goes through page 19?

A Yes.

Q Does the copy that you have of this accurately reflect your educational and work experience?

A I'd say for the most part, yes. It may not be exactly the most recent one, but it's close.

MS. KEETON: Okay. Your Honor, at this time we'd move to admit Petitioner's Exhibit 9.

THE COURT: Any objection?

MR. JOHNSON: No objection.

THE COURT: All right. Mark it in.

(Petitioner's Exhibit 9 was entered into evidence.)

MS. KEETON: And may I approach, Your Honor?

THE COURT: Yes.

MS. KEETON: Your Honor, at this time I would also like to offer Dr. Fabian as an expert in neuropsychology, forensic psychology, and intellectual disability.

MR. JOHNSON: No objection.

THE COURT: All right. So designated.

BY MS. KEETON:

Q Dr. Fabian, in the cases you've testified in have you ever [174] testified for the prosecution?

A I have.

Q How often?

A Not as often as defense.

Q Have you ever testified for the court?

A Yes.

Q And what would those situations be in?

A Well, they would be in different states for different forensic mental health referrals. They would be competency to stand trial, not guilty by reason of insanity, sexually violent predator, mitigation, those would be some of them.

Q Have you ever consulted for the defense in a case where you have not found intellectual disability?

A Yes.

Q Where you have not found mental illness?

A Yes.

Q And what occurs in those situations?

A Well, they often would say thank you and may not – or they may – use my evaluation for court. And then in these situations of, let's say, the Atkins litigation they typically would not go forward with a hearing then.

Q And, Dr. Fabian, what rate do you charge in consulting?

A In this case it's 250.

Q You're familiar with the American Association on Intellectual and Developmental Disabilities; correct?

[175] A Yes.

Q Are they – I think those are up there still? Maybe?

THE COURT: Mary Ann, the books?

THE WITNESS: Right there. (Indicating.)

MS. KEETON: There they are.

THE WITNESS: Thank you.

BY MS. KEETON:

Q And, Dr. Fabian, do you need some water?

A Yeah, that would be great. Thanks.

Q And those two manuals that you have in front of you, what are those?

A As Dr. Reschly said, it is the AAIDD Users Guide and then the 11th edition of the definition manual.

Q And are those tools that you use in your practice assessing intellectual disability?

A Yes.

Q Would you consider those generally accepted by the psychological community as authoritative on assessing intellectual disability?

A Yes.

Q And Dr. Reschly already did this. I'm not going to ask you to read the definition. But the general – what is the generally accepted definition for intellectual disability?

A Well, significant limitations in intellectual functioning, significant limitations in adaptive functioning and onset [176] before age 18, during the developmental period.

Q And, then, are you also familiar with the American Psychiatric Association?

A Yes.

Q I believe that manual is up there as well?

A Yes.

Q And what's that manual?

A This is the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition.

Q And would you consider the DSM-5 generally accepted by the psychological community as authoritative on the subject of intellectual disability?

A I would.

Q Do you, based on the current versions, the 11th edition of the AAIDD manual and the DSM-5, would you consider them substantially similar?

A I would agree with that, yes.

Q Are there any distinctive differences?

A I would say that both of them discuss the necessity of intellectual and adaptive assessment, but they also go beyond that and look into reasoning, problem solving, planning, abstract thinking. On page 37 of the DSM it says individual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single IQ score. So there is a trend to go beyond fine line numbers [177] and to consider more of a holistic cognitive approach intellectually and adaptively.

Q Would you agree that both the DSM and the AAIDD are generally used in clinical practice?

A Yes, I would agree. I think that clinicians probably focus more on the DSM-5 unless they are more part of a clinic or organization that focuses on MRDD or ID clients.

Q Can you define for me what the psychological community means by mild intellectual disability?

A So that would be technically an individual who, again, has significant limitations in intellectual adaptive functioning around two standard deviations

below the mean on recognized tests with an onset or evidence of onset before age 18.

Q And, Dr. Fabian, are you familiar with the petitioner in this case, Mr. Joseph Smith?

A I am.

Q And how did you come to meet Mr. Smith?

A Well, I met him in his prison at Holman, and that was a referral for an examination by your office. So that's how I met him.

Q How often did you meet with Mr. Smith?

A I met with him on four occasions: October 20th, 21st, and 23rd of 2014, and on December 3rd, 2015.

Q And about how long were these meetings?

A They were a few – I'd say several hours apiece.

[178] Q Okay. Can you estimate generally overall in those four visits how much time you spent with Mr. Smith?

A I would say it was not over 20 hours.

Q And at Holman where does an evaluation take place?

A In the, I'd say cafeteria/visiting room.

Q And would you consider those appropriate test sites – an appropriate testing setting?

A I would agree for the most part. I mean, there is some, you know, movement outside the windows. But for the most part, I think it's appropriate. It's the best you can get within that atmosphere.

Q And after your meetings with Mr. Smith, did you prepare a report regarding your evaluation?

A I did.

Q And I'm going to show you here what's marked – first page of what's marked as Exhibit 10.

A Yes.

Q Petitioner's Exhibit 10, could you identify that for me, please?

A This is an intellectual disability evaluation.

Q And it is the one you prepared?

A It is.

Q And I believe it goes through page 31?

A Yes.

MS. KEETON: Your Honor, at this time I would move to [179] admit Dr. Fabian's report as Petitioner's Exhibit 10.

MR. JOHNSON: No objection.

THE COURT: Mark it in.

(Petitioner's Exhibit 10 was entered into evidence.)

MS. KEETON: May I approach?

Q What test did you complete with Mr. Smith?

A On page two of my report there were a number of tests outlined. Do you want me to go through all of them or –

Q I'm sorry?

A Did you want me to go through all of them?

Q Yes, please.

A The Green Emotional Perception Test, Neuropsychological Assessment Battery, Independent Living Scales, Expressive and Receptive One-Word Picture

Vocabulary Tests, Stanford-Binet Intelligence Scale, Fifth Edition, Behavior Rating Inventory of Executive Functioning - Adult Version, Social Cognition Test, Delis-Kaplan Executive Function System, Repeatable Battery for the Assessment of Neuropsychological Status, Test of Premorbid Functioning, Woodcock-Johnson Test of Academic Achievement, Third Edition, Test of Memory Malingering.

Q And in conducting your evaluation of Mr. Smith, did you conduct any other interviews other than with Mr. Smith to complete your report?

A Yes. I did interview his mother, Glenda. I interviewed two collateral informants, who were his sisters, Melissa [180] Espinal and Melanie Logan, also Lynne Smith and Judy Smith.

Q And did you review other materials or documents?

A I did.

Q And what were those?

A They were the ones I'm holding that you had prepared. I can go through them. Essentially what you had reviewed with Dr. Reschly, various county educational records, Social Security earnings, adult prison records – those would be for the most part the records I reviewed.

Q Did you also review a report from Dr. Chudy?

A Yes, I did, yeah.

Q And his raw data?

A Yes.

Q And did you review records from Mr. Smith's siblings?

A I believe I did.

Q I'll point you to what's marked as Exhibit 5. Is that the first page of records for Chris Smith?

A You've got to open the album. Yeah, I've got it right here too.

Q And you received those records and reviewed them?

A I've got them right here, yes.

Q And, then, I'm going to show you the first page of what's been premarked 6, records for Jason Smith. Do you recall reviewing those records?

A I do.

[181] Q The first page of Exhibit 7, what's premarked as Exhibit 7, records for Becky Smith?

A Yes.

Q And do you recall reviewing those?

A Yeah, I did.

Q I'm going to show you the first page of what is premarked as Exhibit 9. That's Dr. Chudy's report as well as his raw data?

A Yes.

Q I'm sorry. Exhibit 8. And you reviewed that?

A Yes.

Q And then you also reviewed what's premarked as Exhibit 17, and those are the larger notebook, the DOC records?

A Yes.

Q And you reviewed those?

A Yes.

MS. KEETON: Your Honor, at this time I would move to admit Exhibits 5, 6, 7, 8, 17.

MR. JOHNSON: No objection.

THE COURT: All right. Mark them in.

(Petitioner's Exhibits 5, 6, 7, 8, and 17 were entered into evidence.)

BY MS. KEETON:

Q And I apologize. You also mentioned – and I did not refer to it – that you reviewed Mr. Smith's Social Security earnings [182] report?

A Yes.

Q Which is premarked as Exhibit 1?

A Yes.

MR. JOHNSON: No objection.

MS. KEETON: I move to admit that at this time.

THE COURT: Mark that in too.

(Petitioner's Exhibit 1 was entered into evidence.)

THE COURT: Let's go ahead and take our afternoon break at this time. We'll be in recess for 15 minutes.

MS. KEETON: Thank you, Your Honor.

(A recess was taken at approximately 3:36 p.m.)

(In open court, 3:52 p.m., Petitioner present.)

THE COURT: All right, Ms. Keeton.

BY MS. KEETON:

Q Dr. Fabian?

A Yes.

Q On page two of your report, which is Exhibit 10 –

A Yes.

Q – you mentioned on that list that you conducted forensic and clinical interviews with Mr. Smith. What did that consist of?

A Well, they are just me evaluating and interviewing him in a forensic and clinical setting back on family history, symptoms of depression, you know, things like that.

[183] Q So family history, including his personal history?

A Yes.

Q Are there risk factors for intellectual disability?

A Yes, there are.

Q What are they?

A I think Dr. Reschly had looked into this earlier. I would say prenatal substance use, domestic violence during pregnancy, birth complications, anoxic brain injuries at birth, postnatal developmental substance use, head injuries, genetic influences and such.

Q And based on your work in this case, are any risk factors for intellectual disability present in Mr. Smith's case?

A Well, there was trauma during his childhood and, more significantly, I would say poverty which was mentioned before.

Q Before we discuss actual testing that you conducted –

A Yes?

Q – what was your opinion of Mr. Smith's participation level in the testing and interviews you conducted with him?

A He was frustrated, but he performed and cooperated appropriately.

Q So what would be his effort level?

A I think it was really good. I haven't really questioned his effort level in any of these evaluations.

Q Did you give him a test to determine the reliability of his responses?

[184] A There's a test of memory malingering I did. I know it's an effort test. And basically it assesses cognitive effort through visual learning and memory. And he scored satisfactory on that one.

Q And what does a satisfactory performance indicate to you?

A Well, it indicated good effort. And then when I look at other evaluations, no one had ever questioned his effort or the word "malingering" never came up. So in my opinion, you know, there was really no reason to doubt the validity of his testing.

Q And did you observe anything outside of those tests that led you to distrust Mr. Smith's responses in any way?

A No.

Q Did the other records you reviewed assist in determining testing reliability at all?

A Yes.

Q How so?

A Well, you know, I'm actually looking on Dr. Reschly's – page 18 of his report. The overall IQ scores are pretty consistent over some decades' worth of functioning for him. So that would, you know, tell me that he's pretty consistent with his functioning and would also tell me that my test scores and, I think, Dr. King's are pretty valid.

Q What is the purpose of the Stanford-Binet 5?

A Well, the purpose is it's one of a few IQ tests that is [185] recognized in the U.S.

Q And so it measures –

A Intellectual functioning.

Q And what were Mr. Smith's results on the Stanford-Binet 5?

A I'm turning to, I think, page nine of my report. So he had a full scale score of 78, nonverbal IQ of 75, verbal IQ of 83.

Q Now, a 78 is definitely above 70 to 75 IQ range?

A That's true.

Q Does that eliminate the possibility that Mr. Smith is intellectually disabled?

A I would say no.

Q Why not?

A Well, because we're looking at a number of different data points. And there are a number of them that we really consider, as I'd say, convergent validity of data points when we're assessing intellectual disability. And so in my opinion these data points trump an overall score on one administration.

Q Page 27 of your report –

A Yes?

Q – you actually – that second paragraph there discusses rescoring of sorts. Can you read that?

A Yes. “Stanford-Binet, Fifth Edition, was the norm in 2001. The Flynn effect would include the following analysis.” So the year I evaluated him minus the year of norming would be 13 years times the formula .33, equals 4.3, which would be [186] subtracted by 78. So there would be a 73 to 74 IQ score that would be what we’d call, I guess, Flynn affected, Flynn adjusted.

Q Is the Flynn effect generally accepted in the psychological community?

A Well, I’d say that’s – I would say yes under, you know, clinical pretenses. When we look at some of the research that’s coming out on the Flynn effect, it is generally accepted and considered. I do appreciate the prosecutor’s point of I don’t think it was cited in the WAIS-IV manual. And there’s been articles on both sides of the coin within the forensic psycho-legal arena. But in my practice I’ve seen it work over and over and I think it really adjusts the IQ score in a more consistent fashion, at least in my experience.

Q The Flynn effect is accepted by the AAIDD?

A Yes.

Q And accepted by the American Psychiatric Association?

A Yes. And I would say the American Psychological Association as well.

Q Okay. Is the standard error of measure, is that applied in any way to that score?

A Yes, it would.

Q And how would that apply?

A So, Your Honor, the standard of measurement for the WAIS-IV is approximately, I'd say, two and a half to three points. So [187] that could be above and below his score, so it could take his score down to about a 70 in this case. So –

Q You said the WAIS-IV. But the reference –

A I'm sorry. Stanford-Binet would be about three points. Yeah. So it would potentially affect the score plus or minus three.

Q And is the standard area of measure you're talking about, is that generally accepted in the psychological community?

A It is, yes.

Q Also by the AAIDD?

A Yes.

Q And also by the American Psychiatric Association?

A Yes.

Q And the American Psychological Association?

A Yes.

Q And you reviewed records of prior IQ scores for Mr. Smith; correct?

A I did.

Q And what were those other scores?

A I have WAIS-R, 1979, age eight, of 75.

A WAIS-R in 1982, age 12, 74. WAIS-R, 1998, age 28, of 72. WAIS-IV, 2017, age 46, of 74.

Q And that's listed on page 26 of your report; correct?

A Yeah. All of the ones, I believe, but the 2017, the more recent score.

[188] Q Do you think those scores prior to the score you obtained with Mr. Smith on the Stanford-Binet 5, are those consistent with the score you obtained on the Stanford-Binet 5?

A I would agree, yes.

Q Dr. Chudy, in his report which is Exhibit 8, indicated borderline intellectual functioning?

A Yes.

Q Did you consider that finding conclusive?

A I would say not conclusive. And I think this opinion was before the Atkins holding. But it's one area of evidence we're looking at here.

Q And in fact in that report or in his testimony didn't Dr. Chudy indicate that Mr. Smith was closer to an intellectually disabled range?

A Yes.

Q Did he indicate that further testing would need to be done or –

A He recommended further assessment.

Q And you also reviewed – although not on this list – in your report Dr. King's IQ testing for Mr. Smith?

A Yes, I did.

Q And what was that test?

A That was a 74 full scale WAIS-IV.

Q Do you think that WAIS-IV score of 74 is consistent or inconsistent with your Stanford-Binet score?

[189] A I'd say it's pretty consistent. Yeah, it's within the same range.

Q What do those scores indicate in regard to Mr. Smith's current intellectual functioning? I'm sorry. Your score and Dr. King's scores.

A Well, they indicate that he's quite low functioning. I think, you know, one of the arguments is, you know, do you apply the Flynn effect and the standard error of measurement to your assessments. And so I think that's where the disagreement lies.

Q On the other tests that you conducted with Mr. Smith – and that's going back to the list on page two of your report – are any of those other tests relevant to the intellectual functioning prong of the intellectual disability definition?

A Yes, I would agree. So they are. I mean, they are neurocognitive, academic achievement, neuropsychological tests that would apply and be relevant under AAIDD and DSM-5 assessment criteria or guidelines.

Q So let's go through these a little bit. You note the Neuropsychological Assessment Battery?

A Yes.

Q Would that be relevant to intellectual functioning?

A I would say both towards intellectual functioning and adaptive functioning.

Q And what were Mr. Smith's results on that test?

[190] A Well, they are mentioned a bit through this evaluation here. One moment. It was more for executive functioning. I gave him a Mazes task of common Mazes to perform. He was below average.

Social comprehension judgment skills were average, a bit above my expectation regarding just social skill comprehension questions.

Verbal abstract reasoning skills were mildly to moderately impaired which, you know, showed me that he had a difficulty with abstract reasoning when given information about different people and he had put them together in different groups. So that assesses abstract reasoning skills.

Q Do those results in the Neuropsychological Assessment Battery support your finding in regard to intellectual functioning for Mr. Smith?

A Well, I think what's important here to really emphasize is that in this book, the green book and the blue book, anyone that's in this court where it may be a close call is going to have strengths and weaknesses. So not every test is going to be, you know, impaired along the lines of intellectual disability. So some were and some weren't. So the verbal abstract reasoning skills were impaired on these executive tasks. The other ones not so much.

Q And the ones that were not, do those change your opinion in regard to Mr. Smith?

[191] A No. I mean, I don't look at any one subtest or test and say: "Oh, you know, the game's over, you know, here's my decision."

Not at all. I mean, I look at all of this and it helps me, you know, really guide my opinion to see how he's functioning.

Q The Green Emotional Perception Test, is that relative to intellectual functioning or adaptive functioning?

A I would say it's related to both. It is correlated with intelligence. But there is obviously an emotional, intellectual, and a perception and an adaptive component to it essentially assessing his ability to not really focus on what is said but how it's said for emotional tones: angry, sad, happy, what tone is this person saying? Don't focus on what she's saying. It's really how she says it. And he had some significant impairments on that test, really regarding more emotional perception, which is very adaptive as well.

Q And the category test, what's the purpose of the category test?

A The category test assesses nonverbal abstract reasoning skills, ability to form concepts with limited feedback. And that is a test that assesses more executive and, I'd say, nonverbal, you know, abstract reasoning. And he had significant impairments on that test. And that would be more related to, I would say, if you're going to pick between [192] adaptive or intellectual, would be more on the intellectual side.

Q And you mentioned that he had significant impairments on that?

A Yes.

Q And what were those?

A Well, meaning that he had difficulties, you know, forming concepts that are abstract and really reasoning from a perceptual level, you know, different shapes and figures that were shown to him. Each one he had to decide what number it represented, and so he had difficulties catching on to that task, forming

concepts. I think recalling some of his earlier answers as well, so there is a working memory component to it.

Q And the Independent Living Scales test, what is that more associated with?

A So the Independent Living Scales test is really assessing one-on-one functional adaptive function, page 13 of my report. So basically I bring in a phone book, I'm bringing in a watch, or I'm asking him what the purpose of a will is, what would he do if he had a pain in his chest, things like that. How he feels about himself relative to his self-esteem, how many friends he has. So it gets at a number of areas of adaptive functioning – memory, managing money, health/safety needs – where I assessed him one on one. And I guess you want to know the results.

[193] Q Well, actually, let's come back to that one, because I want to keep talking about the ones more related to intellectual functioning.

A Sure. That would be related to adaptive functioning, by the way.

Q The Expressive One-Word Picture Vocabulary Test?

A Yes, they come in together as receptive-expressive. So the expressive one is I show him individual pictures such as a rat, a xylophone, a microscope, and I want one word to express what that picture is. It's a test of language. And he had significant impairments on that test, as he did on the Receptive One-Word Picture Vocabulary Test.

Q And would those results be more related to intellectual or adaptive functioning?

A I would say both. He's going to have some correlation with intelligence, with verbal skills, but

also related to functional academics or conceptual areas of adaptive functioning and even academic achievement. If I may, the Receptive One-Word Picture Vocabulary Test is where I show him four pictures and I give him a word and he has to receive that information and point to a correct word, such as “checking,” and he has to pick out which picture was checking. It could have been someone in a grocery store. And then three of the other pictures are going to be inaccurate and not related to checking. So his ability to express and receive language is [194] significantly impaired, on the first percentile.

Q I’m sorry, the first percentile?

A Yeah.

Q And is that clinically significant in any way?

A Well, first and third percentile; expressive first, receptive third, yes. They would be consistent with someone who is intellectually disabled.

Q And I’m guessing the Behavior Rating Inventory of Executive Functioning is more related to adaptive; is that correct?

A I would agree with that. And this is a self-report test for him, where he answers never, sometimes, often. One of the questions will be, you know: “Do you have problems starting something and finishing it?”

So it gets at a number of self-reports and perceptions of him and his own executive functioning, such as managing, organizing materials, self-control, empathy, and he identified a number of problems related to significant impairments in his ability to self-monitor, appreciate how his behavior affects others, making transitions or tolerating changes in his environment, as well as working memory. So manipulating mental

information and mind, such as telephone numbers, information he learns, he stores, can he retrieve it utilize it?

Plan and organize was also a problem. And, you know, he has difficulties really organizing his tasks, thinking about goals, thinking about the process of completing a particular [195] task, as well as task monitoring. And when he does a project he may have difficulties organizing his thoughts about how I'm going to achieve this goal and keeping track of his mistakes, for example.

So the executive functioning would be more adaptive in a number of areas based on his self-reporting and self-perception. This is not a test that I administer to him to do functionally in front of me. It's more self-report.

Q All right. The Social Cognition Test, is that more related to adaptive or intellectual functioning?

A I would say it's like the emotional perception test. And this test is, again, going to focus on really social perception and really being able to process not only affect and emotion to pictures and faces, but it gets more difficult, where they have to select a photograph, then interacting pairs of people, they listen to a statement made by a person and they have to decide which person or which couple, group of people, that statement went to. So you have to really look at the context of what is said and then look at intended meanings, which gets a little bit more difficult when you're getting that sarcasm, for example.

And so I think as the test got more complicated, he had more difficulties. So there were – I would say at times he had average performance and then it was mildly impaired and severely impaired. I would say

that it's pretty consistent [196] with his emotional perception test above and it would really go to the social functioning prong of intellectual disability.

Q Okay. Now, that Delis-Kaplan Executive Functioning System –

A Yes?

Q – is that more towards intellectual or adaptive functioning?

A You know, I would probably say that it would be a bit of both, but more intelligence. And that's, again, executive functioning. And that's going to be related to his ability to solve problems in a tower test, where I have rules and he's got different disks and he's got to put them in a tower appropriately, focusing on perceptual spatial reasoning, impulse control. And he engaged in a lot of perseverate, I think, responding. He was very impulsive on this test.

Similarly, processing that information on what we call a Color-Word Interference Test, he did not have much problem processing colors of red, green, blue, reading the words of "red," "green," "blue." But when I gave him a piece of paper where the word "red" was colored in blue ink and I told him: "Hey, I want you to tell me the color of the word, do not read the word," he had a tendency to really not be able to inhibit himself and he would continue telling me – reading me the word instead of telling me the color of the word. So that's really more about inhibition, impulse control there.

[197] So there we're starting to see, you know, some consistent evidence of executive functioning impairments and that really is going to be more higher order frontal executive part of your brain functioning, where I will

emphasize that part of the brain is going to be more utilized more so at the time where he's stressful, things get more complicated.

Dr. Reschly mentioned about abstract reasoning. You get into geometry, you get into precalc, you get into algebra and he's going to have difficulties with that type of reasoning.

Q The next thing Repeatable Battery for the Assessment of Neuropsychological Status –

A Yes, that's more of a neuropsychological screening test. His overall score was below average, around 13th percentile. And, you know, he had some strengths. These are really – it's really a screen with significant immediate memory deficits. But then he scored in the average range, for the most part, I think, in language, visual-spatial perception, and attention, but he faltered in memory. So there are some memory deficits. The overall score's a bit above expectation, given his IQ.

Q And what did those results indicate to you in regard to Mr. Smith?

A You know, they are part of – you know this is a screening battery. You know, it would also tell me that, you know, we've got an individual who has an attentional problem, I'd say an [198] auditory attentional problem which affects his ability to learn verbal and auditory – and verbal learning.

Q The Test of Premorbid Functioning?

A That test is a simple word reading test where he has to read single words. Your ability to read words gives an estimate of intelligence based on – you know, individuals who have, let's say, head injuries or dementia, stroke, are more resilient with their ability

to read words, which estimated at least his ability to read words in the below-average range, which would probably be consistent with my word reading score on the Woodcock-Johnson, which was around the seventh-grade level reading single words.

Q Is that Test of Premorbid Functioning, is that normed on an intellectually disabled population?

A I believe it is. But I don't think there's a significant normative sample on that.

Q And what about the Woodcock-Johnson Test?

A Yes, that's going to be academic achievement, kind of the counterpart to the Wide Range Achievement Test, or the WRAT. And I gave him several subtests of this and I used the older edition because I think it was before the new one came out, or right around that time. Overall his ability to read single words such as – I'll just – you know, "cat" to "menagerie," let's say, would be 7.5 grade equivalent.

Reading passage comprehension was above expectation, [199] eleventh grade on that test. Math computation was 5.9 grade equivalent, spelling at sixth grade, and applied mathematics, which is more mathematic word problems, at the seventh-grade level.

Overall his – I would tend to say, you know, his testing was somewhere around the seventh-grade level, if I'm going to, you know, broad stroke that, and a bit above expectation.

Q Based on – going back to your results on the Stanford-Binet 5 and in consideration of the other IQ scores that have been given to him previously in school, and Dr. Chudy's as well as Dr. King's after yours, is it your professional opinion that Mr. Smith

meets the intellectual deficit prong of the intellectual disability definition?

A I would agree with that, yes. And I really cite to the consistencies of the scores. I grant it that they are, you know, above 70 when you do consider, you know, the Flynn effect and the standard error of measurement, they are right around that area, some below, some above. But I think that when we look at, you know, these intellectual disability cases, I also kind of need to consider those IQ scores with the other areas of functioning. And cognitively he's impaired in a number of areas where we see those in pyramids globally with folks with intellectual disability.

Q In what type of areas?

[200] A Well, I'm looking at executive functioning, some of his attentional skills, you know, so, you know, depending – his academic achievement scores with me were above, you know, many of the ones he had in the past, especially developmentally. So, but to answer your question, these scores in total can be considered consistent with significant limitations in intellectual disability.

Q Okay.

A Or intellectual functioning rather.

Q Considering your test score, Dr. King's test score, and these other tests that you've just discussed, where does Mr. Smith fall in regard to the intellectual functioning prong currently?

A I would say when we're looking at, you know, Dr. King's score of 74, when considering the Flynn effect and standard of measurement, he's below 70, and approximately about a 68. But again, standard error of measurement can be considered three points above

and below his score. With my Stanford-Binet, I would say he's right at around 70 when you do consider the Flynn effect and the standard error of measurement.

Q And you also reviewed school records and testing of Mr. Smith; correct?

A I did.

Q Based on your review of those records, where did Mr. Smith fall in regard to intellectual functioning prong pre-18?

[201] A Sure. So when we look at age eight, he had a score of 75; age 12, 74. And again, if you consider the Flynn effect and standard error of measurement issues, his scores would be within the intellectually disabled range. And so, you know, they would be totally considered in that ID range.

Q And you also reviewed Dr. Chudy's report and his raw data; correct?

A Yes.

Q And his testimony from the trial?

A I did, I did, yes.

Q Based on Dr. Chudy's testing, where would you estimate Mr. Smith falls in regard to the intellectual functioning prong at the time of the crime?

A Well, I think he administered the WAIS-R at age 28, 1998. I'd have to look when the WAIS-III was published. But he had a score of 72. And I think that there was an updated WAIS-III that should have been administered. But when you consider that Flynn effect, there would be – it easily fits into the intellectually disabled range.

Q Dr. Fabian, Dr. Reschly talked about adaptive functioning and the three areas: conceptual, practical, and social. After your review of testing, interviews with Mr. Smith, and interviews with others, do you have an opinion as to whether Mr. Smith has a substantial deficit in any one of those areas?

A I do.

[202] Q And what is that?

A Well, I would say, you know, there's significant limitations in the three of them. I would focus more on social and conceptual.

Q And I want to go back to one of the tests that you mentioned, that you gave the Independent Living Scales test.

A Yes.

Q That you said particularly went to adaptive behavior.

A Yes.

Q What are some of the things that you observed Mr. Smith really struggle on in those and what area of adaptive functioning does that relate to?

A One moment. So I'm looking more at page 13 of my report. And he had difficulties with memory orientation, giving him some different information that he had to recall over time. His ability to use money, to understand how money works was impaired. I mean, he had, I mean, deficits in every area. So we look at the areas of memory orientation, money management, managing home transportation, those questions, you know, that home and transportation would be related to, you know, how he gets things fixed

in his home versus using a map, you know, to drive from point A to point B.

Health and safety really gets into taking care of his hygiene and communicating with doctors, for example. Now, he scored well on that. And I think, by my experience [203] interviewing him, he's been knocking out his hygiene pretty well in prison.

He also had significant difficulties or deficits with social adjustment. This is more how he feels about himself, his emotional perception of himself. Granted, he's on death row and his relationships and interpersonal functioning is, you know, altered. But some of these questions had to do with values of self/others, for example.

So when we look at this score, he had a standard score of 59. You know, it was closer to the ID or MR range than it was in the, I think, borderline range of intelligence. So, you know, some of the norms on this test aren't the greatest as far as, you know, how they have their clinical groups separated. But I think that this test does assess relevant function when we get into whether someone can live independently or not or whether they are ID or not.

Q And on the Independent Living Scales test, what is the average mean score for those that fall in the mild, mild – I'm sorry –

A Mentally retarded group?

Q – mild intellectually disabled group?

A I think 57.4 is in the manual where the borderline was 78.4 and he was right at 59. So he's pretty much in tune with the mild intellectually disabled group.

Q I believe you mentioned – I think we talked about the [204] social – I think the Behavior Rating Inventory of Executive Functioning.

A Yeah.

Q And that was more also related to adaptive functioning?

A You know, I would agree so. But, you know, we're looking at executive functioning. And, you know, the test is not, I'd say, designed to assess, you know, one's adaptive functioning bottom line point in an Atkins or in an ID assessment clinically or forensically. But it does give me some more information as to how he perceives his own, I guess, behaviors and function within the community or within his institution currently.

Q And what were his results on that one?

A Yeah, I had gone over that before. But, I mean, just to emphasize, he had perceptions of significant problems with, I guess, monitoring his own behavior, organization, working memory and, I'd say, task monitoring, also shifting attention and focus concentration from activity to activity.

Q And you relied on other sources outside of your own testing in assessing Mr. Smith's level of adaptive functioning; correct?

A I did, yes.

Q And those are the documents that we talked about in some additional interviews; correct?

A Yes, yes. So – yeah, go ahead.

[205] Q Specifically Exhibit 1, which was the Social Security earnings report, what information if any from

that do you consider significant to a diagnosis of intellectual disability?

A It doesn't look like he earned much money. I'll start there.

Q And with lower income –

A So there, I mean, we are well within the range of poverty. He doesn't – you know, he didn't make much money at all when he was in the community.

Q And during your interview with Mr. Smith, did you discuss any jobs that he's held?

A I did, yes.

Q And could you describe what he told you?

A Yeah. On page four of my report I do cite that he worked primarily at a landscaping business, painting, roofing, shrimp boat type of work, menial jobs. They were, I think, short-lived. But he did state his longest job was landscaping for a few years. In my opinion, he would go out and he did have some initiative to get lawn-mowing jobs, for example.

Q Did you have available any other information concerning Mr. Smith's jobs and job performance?

A I think it was gleaned more from, I think, his mother and some family members. And I interviewed some of those folks and they provided information about that and other adaptive functioning.

[206] Q And what did his mother specifically inform you of?

A Page six – well, as far as just working, that he never worked a regular job, did not have a bank account, drove illegally without insurance, for

example. Do you want me to comment in total what she said?

Q No. I'm looking more towards the job. When she said that he never had a regular job, did she suggest that the amount of time he would stay at a particular job when he did have one?

A Well, I don't remember exactly how long, but she said that he was not always employed. So there is intermittent employment.

Q And based on your review of the DOC records and Mr. Smith's time incarcerated, would you also agree that he had limited time to be working?

A In the prison or community?

Q Outside, in the community.

A Oh, yes, yeah. I mean, we had talked about that in terms of incarceration and his age at incarceration. He was not in the community all that long.

Q Do you attach any psychological significance to Mr. Smith's ability to function in the kind of jobs you discussed with him?

A Well, they are not complicated. And his testing indicates that he's not a complex thinker. So they would be consistent with his intellectual and some of the adaptive and other neurocognitive testing and functioning that we found [207] historically and currently.

Q Going to school records, which are Exhibits 2, 3, and 4, what information if any from those school records do you consider significant to adaptive functioning?

A Well, you had, you know, gone over some of this, I think, with Dr. Reschly. But I can pull out a couple of

them. You know, on page, I think, one we talked about underachiever emotional factors. He was not ready for second grade – or he was marked ready for second grade, made no progress, and he needed help to function in grade-one level.

So, you know, sometimes when we see these cases clinically or forensically, you know, folks start off grade-level equivalent but then they don't keep propelling. And so he was having difficulties, you know, and placed more at the first-grade equivalencies and third grade. So, you know, that suggests to me that he's, you know, a couple of grades behind at that point.

We look at page 10. That was brought up before, Walker Problem Identification Checklist.

Your Honor, it's my understanding there's not been a formal adaptive functioning test such as the ABAS or Vineland given or administered by family or a mother or teacher in the developmental period. This does give you some information, though, as to, you know, behavioral problems which really relate – emotional handicap, which relate to the first page, [208] which, you know, we're starting to see global impairment, where he's academically behind two years, he's acting out, low frustration tolerance, aggression, behavioral problems, and that's often consistent when someone has those adaptive behavioral deficits and the intellectual functioning deficits. So that would be consistent with intellectual disability.

Turning to page 12, we have more evidence of emotional handicap, emotional conflicts. You know, he, you know, has a consistent history of acting out. And that's consistent with page 29, behavioral management problems.

I think if we look on page 35, you know, we do have some intellectual – or academic achievement testing on the WRAT that is quite deficient or on the fourth, fifth, and tenth percentiles. So we have these academic achievement tests.

And then when we turn to page 63, where we have a Stanford Achievement Test, Otis-Lennon School Ability Test. I honor Dr. Reschly's point that we don't put a lot of emphasis in the Otis-Lennon IQ. It's group-administered. And we shy away by really utilizing these in Atkins hearings as being as significant as, let's say, a WAIS test. But they do tell you in that graph that he's below average in basically every area of academic functioning.

Counselor, when I see this and everything that's on that side of the page below average on that graph, that tells me that that is more evidence of intellectual disability than a [209] learning disorder. This is not a learning disability case. Okay? We can talk about that more later.

But he is shattered in all areas here academically and behaviorally. When you throw in ability, then we have intellectual disability.

The page 73, seldom brings supplies, self-concept – that's another area that he had difficulty with my Independent Living Scales, self-concept, self-esteem, understanding self, self-direction, self-awareness – that was, I think, a problem.

Or needs supervision, encouragement, problems with attention, few friends. So we have, you know, again, emotional behavioral characteristics.

The next page is aggression, hostile behavior. So socially just even in that prong he is really struggling.

We had highlighted, I think, here page 81. You know, Dr. Reschly laid a foundation of EMR and what that means, you know, decades ago. But it's, from my understanding, pretty consistent with modern day intellectual disability mild. And that's saying he has that condition, which all of these points that I'm talking about are going to be markers to my overall opinion. And this is all adaptive – you know, developmental adaptive dysfunction and disability.

Q And you mentioned there about intellectual disability versus learning disability.

A Right.

[210] Q In his school records did you find any evidence that there was ever a diagnosis or an indication of learning disability?

A I did not.

Q I apologize. I believe it's page 81 of his school records. Is that –

A Yes.

Q And on that page – I misplaced my school records. It is page 81. There on that chart where they mark EMR, there were other options on that list; correct?

A That is correct.

Q And is one of those – what are those options?

A Trainable mentally retarded, learning disability, speech impaired, emotional conflict, visually impaired, hearing impaired, orthopedically impaired, multi-handicapped and gifted/talented.

Q So the people diagnosing him and testing him at that time, the educators that were around him daily,

found him to be EMR and not learning disabled; is that correct?

A That is correct.

Q Did you see any other – in your review of the school records – any other place where there was a learning disabled diagnosis?

A Not to my recollection, I don't believe so.

Q Would you say that his performance in school overall was consistent with mild intellectual disability?

[211] A Yes.

Q And would you say, in your review of the records, was his performance consistent throughout his schooling?

A Yes.

Q Was there anything in particular in Dr. Chudy's report or testing that you consider significant as to adaptive functioning?

A One moment. On page three, I don't – I'm looking at it – he was cut and stabbed on one occasion. There's another problem. He continually uses it as a means of getting to the medical clinic. So page three, bottom paragraph.

Q And you're referring to Exhibit 8 –

A Yeah, 8.

Q – page numbers?

A I'm sorry. Page three of his report. Oh, I'm sorry. The Bates, the stamp would be three for Chudy's report. It is page three on his report, bottom paragraph. I don't really follow exactly, but it seems to me that he was not sophisticated in trying to get medical

care when needed. Has emotional problems in prison, but that could be due to a number of issues obviously.

Q I also believe you discussed this some in your report, pages 24 and 25.

A Yeah. I have – go ahead. Well, I'm looking at page seven, where his WRAT, Wide Range Achievement Test, scores were [212] reading, second percentile, fourth-grade equivalent; spelling, first and third; arithmetic, less than first and kindergarten grade level. So there were, you know, conceptual adaptive functioning deficits that were observed at that time.

I think there were some – also concerns about emotional problems. Now, a lot of people do not have intellectual disabilities or emotional problems – but he has difficulties coping with them, takes little notice of things around him unless it's intended to protect him from potential harm. Does not think through things. This mindset provides little basis for acting in a consistently sensible manner or learning from experience. He did not seem to learn from experience even when it involves bringing pain to himself or those closest to him. In essence, his thinking is vague, he's easily confused or is easily confused, he's often overwhelmed with incomprehensible feelings or impulses that he does not understand. And I would have to agree completely with those points.

The personality functioning, he did, I think, do an MMPI test. But he talks about emotional personality functioning as being equally dysfunctional.

So, you know, these points, you know, albeit it can be related to other disorders potentially, but also would be consistent with intellectual disability.

Q You also interviewed some other reporters; his mother and, [213] I believe, Melissa Espinal?

A I did, yes.

Q Melanie and Melissa. What information if any from those interviews that you conducted do you consider significant to adaptive functioning?

A Well, I remember they knew each other in their mid-teenage years and Mr. Smith was about 10 years older. So they described him as acting like a kid – this is quoting Melissa – even though he was, I think, dating her sister Melanie. So they both had commented that they weren't, you know, used to having someone in their mid-twenties hang out with them when they were about 14 or 15. They described him as being easily led, wanting to fit in. He really was not thinking about, you know, what he wanted to do in the future. He was more impulsive, living day by day, not a lot of goals, living in a hotel. He would, you know, really be gullible, naive, wasn't really self-sufficient or independent in living. Didn't seem to cook food, buy groceries, was often hanging around them. And I think Melanie was somewhat consistent with these statements as well. Acted very young for his age. "Was a grown man trying to impress me, as a kid," which I think was a bit confusing for her. And that he had difficulties understanding things, which would lead to his understanding was limited.

So they described him overall as being immature for [214] his age and having difficulty living independently, being very naive and immature.

Q Was that also consistent with the report from Mr. Smith's mother?

A Yeah. She had stated he was a follower. She again highlighted that he was not working consistently, had difficulties in school, was in special education classes, did not have insurance or medical insurance or a bank account and, you know, had a number of symptoms consistent as well as ADHD, problems with frustration tolerance, attentional problems, never really took good care of himself. I think he had dental problems, lost his teeth. So these were factors that she had noted.

Q From your testing and review of records and these interviews, did you note substantial deficits in adaptive functioning?

A I did, yes.

Q And I believe earlier you said that you felt that those were more noted in the social and conceptual areas?

A Well, when I'm looking and we're looking at AAIDD criteria, I look at, you know, communication; reading, writing, functional academics were impaired; self-direction; some of the statements even they made about, you know, him living day to day, living in hotels, not having a plan in life. Socially more gullible, naive, being easily led, having low self-esteem, [215] poor self-awareness. You know, he also had difficulties, you know, following laws, with reckless behaviors that were impulsive and not thought-out well.

And then when we look at practical, I mean, he was not in the community very long to demonstrate, you know, significant and steadfast independent living skills. But he did not seem to be able to do that, from a practical or adaptive domain perspective.

Q Considering your testing and evaluation and work that you've done, where does Mr. Smith fall in regard to the adaptive functioning prong currently?

A I'd say, well, currently would be in the mild intellectually disabled range.

Q In reviewing your school records and testing from that time, where did Mr. Smith fall in regard to the adaptive functioning prong pre-18?

A The same. It would be mild intellectual disability.

Q Based on Dr. Chudy's testing and the interviews that you conducted, where did Mr. Smith fall in regard to the adaptive functioning prong at the time of the crime?

A Either with significant limitation – as far as the conceptual domain on the WRAT, Wide Range Achievement Test, they would be consistent with significant limitations in at least conceptual domain, without reviewing any type of formal adaptive functioning instrument administered.

[216] Q In regard to the interviews, does that suggest anything to you in regard to intellectual adaptive functioning at that time?

A Oh, yeah. I mean, they would be consistent with, you know, impairments and limitations in adaptive functioning, yes.

Q In the conceptual area?

A I would look more at the social area, I think, from what I read.

Q Based on your observations, interviews, testing, and records you reviewed, is it your professional opinion that Mr. Smith does or does not meet the

adaptive functioning prong and the intellectual functioning prong of the definition of intellectual disability?

A It's my opinion that he does.

Q And the pre-18 qualifier?

A Absolutely, yes.

Q The DOC records that you reviewed that's Exhibit 17, do you consider those records helpful to you in making a determination of whether or not Mr. Smith is intellectually disabled?

A Not so much.

Q Why?

A It's just a structured setting where a lot is provided for him. He doesn't need to go get health insurance, buy a car, pay for a cell-phone bill, pay for rent, get a job, fill out applications, see a doctor, pay for medical insurance. I mean, [217] a lot of this is controlled and structured for the individual.

Q Did you note any other issues with the DOC records as to why or why not you would find them reliable?

A What kind of issues? Like that they were less reliable or –

Q Well, I think you just spoke to less reliable. But, for instance, page 232 of Exhibit 17 states that Mr. Smith was processed out on 11/21/97, but it gives a site assessment that notes he could benefit from ABE, which I believe is adaptive behavior education or special education?

A Oh, I understand. Yes. Well, I think that that points to some concern about his ability to learn or

understand and maybe some of the needs. So someone with an intellectual disability, you know, has – I guess we'll call it needs and supports. So maybe that was a support they thought that he needed. So that could be relevant.

Q I want to – have you reviewed Dr. King's report?

A Yeah, I have.

Q I want to ask you about some items in that report.

A Okay.

THE COURT: Let's save that till tomorrow morning, shall we?

MS. KEETON: Okay.

THE COURT: How much longer do you intend to be on direct with him?

[218] MS. KEETON: Maybe 30 minutes.

THE COURT: Okay.

MS. KEETON: Potentially longer.

THE COURT: Do y'all think that –

MR. JOHNSON: Your Honor, I probably need 30 minutes for cross or so.

THE COURT: My question to you, though, is do you think you'll be able to conclude all the testimony in this hearing tomorrow?

MS. KEETON: Yes, Your Honor.

MR. JOHNSON: Yes, Your Honor.

MS. HUGHES: Yes, Your Honor.

THE COURT: All right. Well, we'll be in recess for the evening, then. We will start again at 9 o'clock tomorrow morning.

MS. KEETON: Thank Your Honor.

(This hearing adjourned at approximately 4:58 p.m.)

[219] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

Case No. CV05-0474

JOSEPH CLIFTON SMITH,
Petitioner,

v.

JEFFERSON S. DUNN, Commissioner,
Alabama Department of Corrections,
Respondent.

COURTROOM 2B
MOBILE, ALABAMA
WEDNESDAY, MAY 17, 2017

DAY 2 OF EVIDENTIARY HEARING
BEFORE THE HONORABLE CALLIE V. S. GRANADE,
SENIOR UNITED STATES DISTRICT JUDGE

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[220] (Continued)

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Proceedings recorded by OFFICIAL COURT
REPORTER Qualified pursuant to 28 U.S.C. 753(a) &
Guide to Judiciary Policies and Procedures Vol. VI,
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computerized stenotype.

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[223] (Morning session, 9 a.m., in open court, Petitioner present.)

THE COURT: Good morning.

MS. KEETON: Good morning, Your Honor.

MS. HUGHES: Good morning.

THE COURT: You may continue.

JOHN MATTHEW FABIAN, Psy.D., J.D., ABPP,
previously sworn, testified further, as follows:

DIRECT EXAMINATION CONTINUED

BY MS. KEETON:

Q Dr. Fabian, I believe when we left off yesterday, I had just asked you if you had reviewed Dr. King's report.

A Yes, I did.

Q And I want to ask you just a few things about his report. Do you consider Dr. King's IQ scoring of Mr. Smith to be consistent with other scores obtained from Mr. Smith?

A Yes.

Q Do you consider Dr. King's IQ score to qualify Mr. Smith for the intellectual functioning deficit prong of the intellectual disability definition?

A Yes, considering the Flynn effect and the standard of measurement, I do.

Q Would Dr. King's test score, the WAIS-IV that Mr. King administered to Mr. Smith, do you believe that the Flynn effect needs to be applied to make it consistent with intellectual [224] disability definition?

A Yes, especially according to AAIDD criteria.

Q However, a 74 is still within the 70 to 75 range; correct? A Correct.

Q So a 74 on the IQ score would still put Mr. Smith within the intellectual disability definition; correct?

A Yes. The previous red manual, the 10th edition, focused more on that than the green edition. But typically 70 to 75 has been acknowledged by the DSM and the AAIDD as fitting in with intellectual disability or mild mentally retarded diagnoses.

Q In Dr. King's report he concludes there are no records that suggest the onset of intellectual disability pre-18. Would you agree with that?

A No, I would not.

Q Why?

A Well, we had testified yesterday, both Dr. Reschly and I, that there's records stating that he was EMR, educable mentally retarded, early on, at least by age 13 or 14. Further, there's a number of records outlining intellectual and academic achievement as

well as adaptive functioning deficits in the developmental years. (Coughing.) Excuse me.

Q Dr. King also states that Mr. Smith was diagnosed with learning disability in school. Would you agree with that? A No, I would not. I have not seen that in the school [225] records as being diagnosed.

Q And Dr. King in his report noted that Mr. Smith managed his own money. Would you agree with that?

A I would not agree with that.

Q Why?

A Well, I did some interviews and did talk with Mr. Smith. I mean, there's a lot of information that goes in with that question, as far as how much money he was making. He had told me in my examination, I think on page four, that he really did not, you know, think much about the current, he was impulsive with spending, never had a checking account, savings account, credit card. He in my opinion did not have much money actually to handle or manage.

His adaptive informants that I talked with, such as his mother, had made similar comments, that he did not have, you know, much money. During my examination, as I recall, in the Independent Living Scales, you know, he never saved any money. It seemed to me once he got it, he would spend it. So I think there are some questions as to how proficient he was with handling money. Excuse me.

Q Dr. King also noted that Mr. Smith worked many jobs and that he held at least one for a year or more. Would you agree with that?

A Not particularly. What I would say is that he probably did landscaping under the table for a year or more. But he would [226] probably just, you know,

knock on doors and cut lawns but did not have a full-time job where there was taxes being paid. And along those lines he emphasized, you know, that he would not, you know, take a job that paid taxes. I think he even said that yesterday on the witness stand, as he did not appreciate the need for taxes to build roads, to, you know, support the community, et cetera.

Q Did his mother talk to you at all about Mr. Smith and his work abilities?

A Yes, on page, I'd say, six she talked about the fact that he did not work full time and did not have a bank account and was not self-sufficient or having demonstrated independent living skills in those areas.

Q Are you familiar with the ABAS-3?

A I am.

Q Have you administered ABAS-3 before?

A Only as with informants, not self-report.

Q Okay. And why not with a self-report?

A It seemed to me that the AAIDD will discuss – in my opinion it's the last resort when there are, you know, no other collateral informants or the individual cannot be assessed one-on-one with other means. In this case I did not utilize collateral informants other than interview because they were from years in the past and I didn't sense that they were going to be able to answer a lot of the questions probably [227] appropriately. Not due to motive or anything, but just due to abilities to recall information and as a retrospective administration.

But with that said, there are concerns where, you know, individuals with intellectual disability will engage in masking, they over-exaggerate. We call it the

cloak of competence, where they will exaggerate their abilities. Mr. Smith throughout my examinations has not wanted to be found intellectually disabled. He, in my opinion, is embarrassed/ offended by this. And in my opinion that places him at risk for exaggerating his skills, abilities, independent, you know, skills regarding these types of instruments. So getting a valid protocol from a self-report is difficult, especially in these types of proceedings. In my opinion they are at risk to over exaggerate their abilities because they don't have insight and they don't want to look deficient.

Q You reviewed Dr. King's raw data as well; correct?

A Yeah, I've been – I've looked through the ABAS-3 of the form.

Q In reviewing the results on the ABAS-3, do you believe through your own observation of Mr. Smith and giving him the independent scales, and your interviews with collateral informants – including his mother and, I believe, Melanie and Melissa and his cousin Judy – do you believe that comparing those to the results on the ABAS-3 administered by Dr. King [228] that there are some significant differences?

A Yes. Your Honor, I'm looking at different data points, I'm looking at school records, I'm looking at reports by informants, I am looking at his testimony yesterday with that scale, I'm looking at Dr. King's evaluation, and my own evaluation of Mr. Smith. And this is not a perfect world; you're not going to have every consistent data point. But there are a number of areas that were scored in three that I really doubt that he had scores of three. Okay? So we can, if you want to, go through some of these. But I don't believe that that

ABAS score is really representative of how he was interacting in the community 20 years ago.

Q And I do want to ask you about some specific ones on that, on the ABAS-3.

I'm sorry. I lost my place.

On the community use section, which is page five of the ABAS-3, number 19, Dr. King scored Mr. Smith a three, which is "always (or almost always) when needed," to number 19, which is: "Is responsible for his or her personal finances, such as bank account, credit card, or utility bill."

Would you agree with a score of three for that response?

A No. On that response, absolutely not. I mean, every – even Mr. Smith stated he did not have a bank account, at least to me, and the people I interviewed had stated that. I don't [229] think there's really any question that Joseph Smith did not have a bank account in the community.

Q What about just responsible for his own personal finances, a credit card or a utility bill, in regard to that one?

A I would have the same answer to that, that there's no data supporting that he was able to apply for, receive a credit card, had a credit card, or really manage his finances on that sophisticated level.

Q Going to page six of the ABAS-3, Dr. King scored Mr. Smith a three on number 21, which is: "Reads important documents (for example, credit card applications or rental agreements)." And again, a three is "always (or almost always) when needed." Would you agree with a three as to number 21, reads important documents?

A No. It's my understanding that, you know, he was living in hotels, motels, boats. I didn't see anything in the records suggesting that he was filling out applications for rental properties or having business documents, especially with his limited employment, which I didn't think was contractual in nature.

Q Home Living, which is page seven of the ABAS-3, which is Exhibit 19, Dr. King scored Mr. Smith a three on – where's the number – number 20: "Pays his bills on time (for example, electricity or telephone bills)." Would you agree with a three, which again is "always (or almost always) when needed"?

[230] A I would not agree with that. He has told me he's run out of money. You know, when I asked him if he had enough money to pay his bills, he said: "I ran out of money."

I think it's very likely that he would be giving people money to pay some of his bills. I would doubt that he had bills in his name. I don't have specific proof of that.

Q Again, in Home Living, number 23, Dr. King scored Mr. Smith a three for "obtaining home rental or car insurance for himself or herself." Again, a three is "always (or almost always) when needed." Would you agree with that in regard to Mr. Smith, based on your observations and interviews?

A No. At page four I don't agree with that. He had stated that he had never had insurance, he lacked the ability to accurately describe and appreciate how auto insurance would work or why it was important. You know, Mr. Smith, when we talked, again, did not believe in or understand really why we needed to pay taxes, have insurance. It was more of immediate gratification and "we need to pay for this right now," but couldn't think of the future.

Q Did your interview with his mother indicate anything in regard to maintaining insurance?

A She had stated that he did not have insurance and would drive, you know, illegally without it, did not have medical or dental insurance.

Q I want to go to the Self-Direction section of the ABAS, [231] which is on page 11 of Exhibit 19. Dr. King scored Mr. Smith a three on number four, which is: "Avoids situations at home or in the neighborhood that are likely to result in trouble." Would you agree with that as to Mr. Smith?

A No. He has demonstrated inability to do that and some of that is outlined by his legal behaviors, I think violations of supervision in the community, for example.

Q Again, Dr. King – again on Self-Direction, page 11, number five – Dr. King scored Mr. Smith a three as to "resists pressure from others to do things that could endanger him or her." Would you agree with that?

A I would not. Some of the interviews I had I think outlined some naivete or gullibility traits to him, suggestibility, and that he was at risk to following or being involved with others, you know, who may be engaged in some, you know, not-so-good behaviors.

Q Again on Self-Direction, page 11, as to item number nine, Dr. King scored Mr. Smith a three which, again, is "always (or almost always) when needed" for controlling anger when another person breaks the rules in games and other fun activities. Would you agree with that?

A I would not. The school records are pretty profound in discussing his anger problems, his ability to handle distress, and having poor coping mechanisms.

And there are records supporting his difficulties with handling temper and anger.

[232] Q What about in collateral interviews with anyone in regard to that issue?

A One moment. I know his sister Lynn talked about him having behavioral problems early on. And I think that would also include having temper, anger, acting out issues. His mother talked about low frustration tolerance. He was in anger management classes. That was on page six of my report.

Q In talking with his mother about low frustration tolerance and things like that, was she referring to him only as a child or as an adult?

A My recollection was that she was talking about him developmentally, including, you know, even as an adult.

Q Again, on Self-Direction, which is page 11 of Exhibit 19, number 16, Dr. King scored Mr. Smith a three, which, again, is "always (or almost always) when needed," for "controls temper when disagreeing with friends." Would you agree with that?

A I would not, for the same reasons above I just mentioned.

Q Again, the very next one, number 17, Dr. King scored Mr. Smith a three for "avoids behavior that could embarrass or bring shame to self or family," would you agree with that?

A I would not agree with that insofar as, you know, Mr. Smith has engaged in behaviors that have caused him problems that would, you know, affect his family and detrimentally affect his family. And I do, you know, recall having some discussions with his mother and, I believe, sister who talked about that.

[233] Q Again, on Self-Direction, page 11, number 19, Dr. King scored Mr. Smith a three on “controls feelings when not getting his or her own way.” Would you agree with that?

A No. The school records, again, are quite descriptive of his ability to control feelings and frustration. And there were concerns, as noted by his mother, with those deficits.

Q And again on Self-Direction, page 11 of Exhibit 19, number 21, Dr. King scored Mr. Smith a three on “makes important decisions only after careful consideration, without rushing.” Would you agree with that?

A No. There was evidence, again, of impulsivity throughout the school records. And then his decision-making, you know, violations of supervision, for example, would also be related to impulsivity.

Q And I’m going to ask you generally on these, on the Self-Direction page that we’ve just talked about, is there anything in your actual testing of Mr. Smith outside of the adaptive arena that would support your finding that threes were not appropriate in regard to controlling behavior or avoiding behaviors?

A So some of the testing that I had explained yesterday that would be related to executive functioning and problems with this inhibition, frontal executive functioning, were impaired. So there is some neuropsychological brain behavior type data that would suggest he has difficulties organically in [234] controlling himself.

Q Turning to the next page, page 12 of Exhibit 19, ABAS-3, Dr. King scored Mr. Smith a three on number seven, which is – pardon me – “shows respect for

persons in authority by following their rules and directions (for example, parents, teachers, police officers).” Would you agree with that?

A No. I mean, again, the school records outline that he had difficulties with, you know, his behaviors, obligationality, behavioral dyscontrol within the school setting with teachers, with authority, and then he’s had difficulties in the community as well with, you know, his behaviors.

Q And does your testing or what you just said about regarding impulsivity, does that play with why you would not agree with three on that as well?

A Yes, I would agree that that would be relevant. Sometimes we question the ecological validity of some of the neuropsychological executive testing that we do and how it relates exactly to behavior, let’s say, in the community. But in my opinion, he does have brain behavior deficits regarding cognitive and behavioral control and emotional control.

Q And that’s also supported by your personal observations of Mr. Smith?

A I would agree. I mean, he’s prone to low frustration tolerance, you know, especially dealing with him for long hours and getting him engaged in the process.

[235] Q Is that supported by your interviews with other people about Mr. Smith?

A Yes. And his mother was, you know, talking about low frustration tolerance, absolutely.

Q Again, on the Social section of the ABAS-3, at page 12, number 12 on that page, Dr. King scored Mr. Smith a three in regard to “keeps a stable group of friends.” Would you agree with that?

A No. The school records outline that he basically had no friends. My assessment of Mr. Smith is that he would act out, you know, in order to get some type of peer acceptance or affirmation because he had poor social skills and inabilities to do that in a more adequate fashion. And so it's my understanding that he did not have peers in the community. I did interview, I think, Melanie and Melissa, who stated that he was associating with them when they were about 10 years younger, about a 25-to-14-year gap. So he did struggle with having and maintaining friends.

Q Again on the Social page, page 12 of the ABAS, Dr. King scored Mr. Smith a three on number 15, "avoids friends and social settings that may be harmful or dangerous." Would you agree with that?

A I would not agree with that insofar as he has gotten into some trouble that has been also related to, you know, connections with, I think, other codefendants or peers that [236] were engaging in, you know, illegal acts, for example.

Q And in fact, referencing Dr. King's report on page five, do you have that?

A I do.

Q The second paragraph on that page, do you think that goes to why you would not score a three on number 15?

A Yeah. His brother and some of his friends and Mr. Smith took a truck, broke in – yeah. So there was, you know, some illegal activity that was peer related.

Q Okay. Going to number 20, again on the Social section of the ABAS-3, page 12 again, Dr. King scored Mr. Smith a three on "refrains from saying or doing

things that might embarrass or hurt others.” Would you agree with that?

A No. It seems to me he was a bit reckless even early on, you know, during childhood, elementary school years, and placing himself at risk, you know, throughout his entire life and, as I recall that, I guess, reckless, impulsive behaviors, placing himself and others at risk.

Q And the last thing on that, the ABAS, page 13, under the Work section, item number six, would you agree with Dr. King in scoring Mr. Smith a three as to “follows supervisor’s instructions when completing tasks or activities”?

A Well, I would not. He demonstrated problems with that early on in elementary school where he had problems listening to directions, problems copying directions, following teachers’ [237] requests or orders and, you know, he continued to have difficulties in the community with that, you know, following authority or instruction.

Q Dr. Fabian, all those sources of information you’ve had in this case, did any of them indicate that Mr. Smith’s cognitive and adaptive functioning deficits manifested prior to age 18?

A Yes.

Q And what would that be?

A Well, I’m looking at the special education records, his standardized achievement tests, both that were group given or administered and individually administered. We’re looking at the Stanford Achievement Test, the Wide Range Achievement Test, I believe the Peabody. So academically, relevant to the conceptual prong of adaptive functioning, he also had poor

grades across the board. So academic, his school achievement was impaired.

The Walker test, albeit limited in nature, did express some deficiencies regarding social maturity, social skill development.

The teacher notes also discuss poor social skills, poor behavioral control, emotional issues consistently. There were also grade failures.

The educably mentally retarded labeling would also, you know, put a stamp on the fact that there were significant limitations in adaptive and intellectual functioning pre-age [238] 18.

Q And now, based on all the things that we have discussed this morning and yesterday, is it your professional opinion that Mr. Smith is or is not intellectually disabled currently?

A It is my opinion that he is intellectually disabled currently and developmentally.

Q Is it your professional opinion that Mr. Smith was or was not intellectually disabled at the time of the crime?

A I would – I would opine that as well, that he would be intellectually disabled.

Q And you would opine –

A Well, I think the time line with that would also turn to more – specifically Dr. Chudy's report in about 1998, which also presents some qualitative analysis I have reviewed, especially about social skill deficits. His WAIS-R – I think that was an outdated test – was within the range of intellectual disability. And certainly the WRAT-3, Wide Range Achievement Test, was also in the range of intellectual disability clearly

for reading, spelling, arithmetic – all in kindergarten or fourth-grade levels.

Q And Dr. Chudy, at that time of giving that test, did he actually find that Mr. Smith was intellectually disabled? A I don't think he did. I think he considered it. I think we talked yesterday about the potential for further testing. Q Did he testify or include in his report that Mr. Smith was [239] borderline IQ, but closer to mildly – and at the time used the MR language?

A Intellectually disabled, I think there is some testimony to that.

Q In your review of documents and your finding that Mr. Smith is currently intellectually disabled and was at the time of the crime and pre-18, what stands out most to you in support of that diagnosis?

A Before age 18?

Q No, overall.

A Oh.

Q Overall in your review what stands out in supporting your diagnosis?

A Well, again, I tend of use some diagnostic markers. So in many of these cases –

Q I'm sorry to interrupt you. When you say diagnostic markers, what do you mean?

A Markers that would lead to a diagnosis of intellectual disability.

Q Okay.

A So in many of these cases we don't have even as rich of developmental records as we do here. In many of these cases when we have current IQ scores in the

range, we don't have a formal like EDMR checkmark. So developmentally we often have to look into whether there's evidence of it or not from [240] records, history, collateral information, when there is no formal diagnosis of intellectual disability or mental retardation.

In this case, as outlined by Dr. Rush Lee, there is evidence of educable mental retardation finding. Again, I just testified to special education. There were contained classes, there was evidence of grade failures. I think, again, what's important is that he failed grades and, in my opinion, he quit school when things really got difficult. And that was around that seventh-grade to eighth-grade transition.

There were adaptive behavioral findings early on. And again, it's qualitative through reading the notes, getting at emotions and behavioral difficulties. Problems with comprehension, and understanding, listening to instructions, social maturity deficits, social skill deficits, poor grades, and then we have some of these standardized testing markers that would get into the WRAT, Wide Range Achievement Tests, the standardized testing with the Stanford, for example. And then we have some IQ tests around, I think, ages eight and 12 that outline, you know, that he was in that intellectual disability range.

So all of those, all of those markers, really tell me that he was intellectually disabled at that time. And it's okay if he has a 72 IQ and it's not a 68, I mean, because we're looking at mental retardation/ intellectual disability outside [241] just a score.

And then once we turn to around the time of the crime, it's consistent evidence where we're using an outdated IQ test and I believe the WAIS-III should have been used. He has another IQ score in that range

and then we have certainly evidence of deficiencies in academic achievement in the early elementary school years that Dr. Chudy also talked about.

A lot of the emotional and social difficulties that he had, problems really relating to other people, I highlighted yesterday that, you know, his adaptive deficits really focus, I think, in all three areas that we've proven here: social, practical, and conceptual. But even more, social and conceptual areas which, again, were outlined in that report.

Now, up to the present time, you know, Dr. King's report, my report, were all still in this range. My adaptive functioning test is in that range of intellectual disability. There's a lot of qualitative interviews and discussions, not only with Mr. Smith, not only witnessing his testimony, but also interviewing folks that knew him developmentally, where he was relating to people that were 10 years younger, having trouble with maturity, having problems with appreciating, you know, his behaviors, how it affects himself or others, his impulsivity, his recklessness, and then his IQ scores are within the range.

So, you know, with all of that information set [242] together, even if some of it flows outside for the moment of intellectual disability, it's my opinion overall that he qualifies for mild intellectual disability.

MS. KEETON: I have no further questions at this time, Your Honor.

THE COURT: All right. Mr. Johnson?

CROSS EXAMINATION

BY MR. JOHNSON:

Q Good morning, Dr. Fabian. My name is Henry Johnson. I represent the State.

A Good morning.

Q I believe you testified – well, first of all, of course, you were retained by Petitioner’s counsel in this case; correct?

A That is correct.

Q And I believe you testified yesterday that your fee arrangement is \$250?

A Yes.

Q And I believe you testified that you spent approximately 40 hours or a little less evaluating Mr. Smith?

A No, no. It would be 20 or less –

Q Okay.

A – on four occasions. And then extra work of reviewing records, being here.

Q So is that 40 hours, then, how much you put in in total in [243] the case? Approximately?

A Yeah, I would agree with that – with, you know, preparing the report or reviewing records, yes.

Q Do you have any idea how much you billed or approximately, you know, roughly how much you probably will bill?

A I probably will bill another 20 hours for, you know, being here.

Q You’ve testified at length about administering the Stanford-Binet, Fifth Edition –

A Yes.

Q – to Mr. Smith. And just to make sure the record is clear, he obtained a verbal IQ of 83, a nonverbal of 75, and a full scale of 78 on that?

A That is correct.

Q And if we were to apply the standard error of measurement both downwardly and upwardly, that 78, if we were doing a plus or minus three, could be an 81; isn't that true?

A Absolutely.

Q And if we were to do the plus or minus five, the 95-percent confidence interval, it could be an 83?

A That is true.

Q And turning to the Flynn effect, as we discussed yesterday with Dr. Reschly, you would agree the Stanford-Binet, Fifth Edition manual, does not expressly state or provide that clinicians should adjust the score for the Flynn effect?

[244] A It does not. I think it was published around 2003, but before a lot of this information really came to the forefront. But it does not say that; correct.

Q Thank you. I'm wondering if you agree with the following sentence. Pardon me if I read it verbatim: "It is well established that psychologists should follow the test manual instructions or risk violating the standardization." Does that make any sense to you?

A I would agree with that, or try to at least.

Q Now, you did, of course, adjust the 78 downward for the Flynn effect and I believe you came up with a 73.7; is that right?

A Yeah. I think you said yesterday it's maybe a 74.1, but it's around that area.

Q That's what I was hoping we could talk about real quick.

A Sure.

Q You did that by multiplying 13 times .333; is that correct?

A Yeah, maybe it's .31 or .3.

Q Can you help me understand why you did the .333 as opposed to applying .3?

A I thought that that's what I had seen in the literature. But it may be .3 or .31.

Q If you could turn to page 26 in your report, which is Exhibit 10?

A Sure.

[245] Q It looks like – let me know when you're there.

A I'm there.

Q Okay. It looks like you applied the .33 downward Flynn adjustment, looking under the first and the third bullet points; is that correct?

A Yeah. I think I did it for all.

Q Well, that's my other question.

A Sure.

Q The second bullet point you did, you applied .33, not .333. Is there a reason for that difference?

A Probably a typo. But I think that when I'm thinking about this clearly, more clearly, it may – I think I've seen .3 and .31 in the literature. I don't – I can't recall offhand.

Q And on that same page, that last sentence, before the heading Current IQ Testing –

A Yeah?

Q – I'd like to read it for the record. "Some of his past IQ scores were in the intellectual disability or potentially in the range, given the Flynn effect and the standard error of measurement." Did I read that correctly?

A Yeah, you did. I mean, I honor in these proceedings that we don't all agree. So I want to be objective and, you know, there's disagreements on whether there's a Flynn effect. You know, some sides say: "Hey, downward in the standard of measurement. Hey, upward."

[246] I get that. I do professionally, you know, believe in the Flynn effect – mostly because it applies to the testing I have done when I compare the WAIS-III and the WAIS-IV in my practice. But I'm just saying there's room for debate, you know.

Q Just looking again at that sentence, though –

A Sure.

Q – I mean, if you're talking about his past IQ scores and you do say – and just logically – "potentially in the range." So is it true, yes or no, that what you're saying is that some of his scores are potentially in the range only because you're both applying the Flynn effect and the SEM to those scores?

A Well, yeah. I mean, technically it's my opinion he in all of these tests –

Q Sir, that really was a yes or no. Those IQ scores are within that range only because of the SEM and the Flynn effect?

A I was about ready to say: "Counselor, then my score's the highest. And without the Flynn effect... (unintelligible)."

Q Sir, I didn't ask for a lecture. That was a yes-or-no question.

THE REPORTER: Judge? I can't –

THE COURT: Stop, please. Just answer the question yes or no. And then on redirect you can talk about your test.

A Yes, sir.

BY MR. JOHNSON:

[247] Q Then yes?

A Yes, it's outside the range.

Q Moving on, just a few more questions with the Stanford-Binet. Would you agree that it is somewhat difficult to read your handwriting –

A Yes.

Q – on the Stanford-Binet?

A Yes.

Q And help me understand this. When you're administering the Stanford-Binet, you are writing down the answers to the questions; right? You're not scoring them then and there?

A I may score it then and there and then rescore it.

Q But wouldn't it be important to write down a subject's answers legibly so that, if you do rescore it later, you will be able to remember what you wrote, what he said?

A Yeah, but I typically score it then, and then I will look at it at the end.

Q Isn't it true also that other clinicians, other psychologists, sometimes, you know, verify – like take

the Stanford-Binet you administered and maybe they rescore it to make sure you scored it correctly?

A Yeah, I have seen that before.

Q And therefore it would be important for it to be written legibly so that they can read what you wrote too?

A Yeah.

[248] Q Just very briefly, I understand you talked about a lot of the neuropsychological tests that you administered, including the Neuropsychological Assessment Battery; is that correct?

A Yes.

Q And that includes things like – I believe you talked about the category test?

A Yes.

Q You would agree with me that the category test and the other tests that we discussed were not designed to diagnose ID; right?

A Correct. I would say they were not designed to; correct.

Q And that's because – I hate to belabor the definition. But the definition is, you know, intellectual – significantly subaverage intellectual functioning and significant deficits in intellectual functioning before the age of 18 and after, and the category test, for example, doesn't answer any of that; right?

A Specifically pursuant to that definition you gave me, no. Q I'd like to move on to the Independent Living Scales –

A Yes.

Q – that you administered. Would you agree with me that the 11th edition definition manual of the AAIDD does not recognize the ILS as an appropriate test to be used in attempting to diagnose a subject with ID?

A I had the manual right here. I think initially when given [249] that question, my first thought is that it's not listed in this book. So I'm going to agree with you on that.

Q Would you agree with me the ILS originally was designed in or around 1996 to assess cognitive skills in adults with dementia?

A I would agree that it was more designed for those purposes and they had different clinical groups, including that group.

Q And it is in fact particularly useful in clients who have had a recent decline in cognitive abilities?

A Dementing factor, is that what you mean? Can you repeat that?

Q Sure. Of course. Clients or individuals who have had a recent decline in cognitive functioning?

A I would say that the test is probably more normed, so to speak, on folks that are dementing.

Q That was my next question. Isn't it the fact that the test was in fact normed on people who are 65 years and older?

A I think that there was – I thought there was different age groups. I have the manual with me. Let me look. I know there's different clinical groups, including TBI, I believe, and dementia. One moment.

I'm not sure exactly the age, stratified age samples.

Q I just have a couple of more questions with that. Would you look at question 17 under the Health and Safety section? And when you get there just let me know.

[250] A Did you say page 17?

Q That is question 17 on the Health and Safety. I believe that was your page eight.

A Page eight? What's the document? I'm looking for the document numbers in my folder.

Q It's your Independent Living Scales record form, page eight.

A Okay. I don't have it with me here.

Q Okay. Well, let me just read the question.

A Sure.

Q The question 17 under Health and Safety is, quote, "What would you do if you couldn't hear most conversations?"

Wouldn't you agree with me that question is more about determining whether a person of a certain age is hard of hearing or not?

A I would think it would be a relevant question to anybody, especially if you were talking about older people being assessed. They could be hard of hearing, like you're saying, and then what would they do, commonsensically. Ask them to speak up? Use a hearing aid? I still think it's a commonsense question.

Q We'll just state the obvious. Certainly whether a person is hard of hearing has nothing to do with ID, I would hope.

A If Joseph Smith is ID and he has problems with hearing, one of his adaptive skills may be relevant to, you know, asking for

[251] some assistance, calling a doctor, so it could be adaptively related.

Q Okay. I just have one more question on that. That's question 19. And I'll represent to you it reads as follows: "Suppose you injured your head and the doctor told you it would take much effort and months of physical therapy to be able to walk again. What would you do?"

And my question in terms of that question is: Isn't that geared, again, at determining whether an older or perhaps a disabled person needs to live at home or can live at home versus living at an assisted living facility?

A I think you may be overanalyzing the question. Folks with intellectual disability often have other medical anomalies, impairments, or disabilities. So again, their ability to say: "Hey, I've got a problem, I need help for it," would be relevant to adaptive functioning skills. But it could just be somebody who is medically impaired or older age.

Q Stepping to the side a little bit –

A Sure.

Q – you heard Mr. Smith's testimony yesterday; is that correct?

A Yeah.

Q And didn't he testify and tell us that he told nurses when he had a chest pain?

A Yeah.

[252] Q That was in connection with going to the Atmore Community Hospital?

A Yes, he did. I think he said he didn't like the hospital there.

Q Yeah, I remember that too. So is it fair to say he does know what to do, at least when he has chest papers?

A Yeah. But he doesn't seem to take care of himself. I don't think he has any teeth. So, I mean, he doesn't know how to take care of himself in general.

Q But at least he knows to tell a nurse: "My chest hurts," because we have that in the record from his testimony? Do we agree?

A I would agree with that.

Q I actually have one last question. Do you not have the ILS up there?

A No, I don't.

MR. JOHNSON: Your Honor, may I approach?

THE COURT: (Indicating.)

MR. JOHNSON: Thank you. Thank you, Kacey.

Q And my question to you, sir, is on the very first page. And the question is number four. Do you see, it says: "What city (town) are we in?"

I honestly can't read what you wrote. Can you tell me what you wrote there?

A I think it looks to me it's Woods County.

[253] Q Could it be Escambia County?

A It looks to me like it's Woods County.

Q Okay.

A But even if it was Escambia County, it would be a zero.

Q Did you hear him yesterday testify that he was – that he is in Escambia County?

A He did say that, yes.

Q Moving on, you administered the Woodcock-Johnson Test of Academic Achievement, Third; is that right?

A Yes, parts of it.

Q I may need you to help me find it in your report. But on the math calculation skills he obtained a scaled score of 84 with a grade equivalent of 5.9?

A Yes, page 10.

Q Thank you, sir. Correct. On the mathematical applied problems skills he obtained a scaled score of 86 with a grade equivalent of 7.2?

A That is correct.

Q On spelling scales, his scaled score was 86, grade equivalent of 6.3?

A Yes.

Q And finally, on reading passage comprehension skills, he had a scaled score of 96 with an 11.4 grade equivalence?

A Yes.

Q So even though he graduated from sixth grade, he's reading [254] at an 11th-grade level?

A He did that day.

Q And you on page, I guess, 29 of your report, you stated that he performed above expectation in the below-average range on the Woodcock-Johnson?

A I would say that, I mean, given his IQ and the other tests that I've seen, they were academic based.

Q And you also said that – I'm sorry – that his scores were mildly elevated when considering IQ claim; is that true?

A Yeah.

Q Does that mean that his results are really not consistent with ID at least on that day?

A Yeah, I mean, we really look at sixth grade being kind of where we level off as to academic functioning for an intellectual disability claim. Now, the Woodcock-Johnson, Third Edition, is now the fourth. He may have scored a little bit below that, the fact that was administered. But on that day I would range that to be about seventh grade. So the grade level would not be real consistent with his IQ score.

Q I'd like to turn to his school performance that you discussed at length on direct –

A Sure.

Q – if you will. Starting on page 19. Looking at your first bullet point, you would agree that he was evaluated on February 6th, 1979, at age eight, when he was in the third [255] grade; is that right?

A Yes.

Q And he was found to be functioning at a third-grade level, with the standard score of 96?

A (Nodding head affirmatively.)

Q In arithmetic?

A Sorry?

Q At that time?

A Yes.

Q And certainly there's nothing remarkable about a third-grader performing third-grade level math?

A Correct.

Q Moving on to the fifth bullet point on page 20 of your report, he was administered the KeyMath Diagnostic Arithmetic Test on October 29, 1979, when he was 10?

A Yes.

Q And I believe he was in the fourth grade; is that correct?

A Correct.

Q And his performance on that test was judged to be at the fourth-grade level; right?

A Yes.

Q If you would drop down two bullet points, he was administered the Peabody Individual Achievement Test on April 27th, 1981, and he was 10 years and nine months old at the time?

[256] A Yes.

Q And he was in the fifth grade, and his math score was judged to be at, say, 5.7-grade equivalent; correct?

A That's correct.

Q So these math scores are showing us that, at least in terms of third, fourth, fifth grade, he is performing at grade level?

A That is correct.

Q Moving to the last bullet point on page 21, it appears that he was administered the WRAT when he was in the sixth grade; is that right?

A Yeah; that's right.

Q And that was on December 2nd, 1982, when he was 12 years old; is that right?

A Yes.

Q And on the math portion of the WRAT he obtained a standard score of 76 with a grade equivalent of 3.9; is that right?

A Yes.

Q So help me understand. In just one year or less his math skills dropped from a grade level of 5.7 to a grade level of 3.9; isn't that what these seem to show us?

A That's a different test, Peabody versus the WRAT. But that is what it says.

Q I mean, certainly you don't believe that Smith suddenly forgot two years' worth of math skills, do you? Is there something else that could explain this anomaly?

[257] A The math skills would be a bit different on the Peabody versus the WRAT. So they are different tests. And then later on he's two or three years behind in a lot of these subjects. So there is a bit of confusion. But that's – that's childhood and that's one's development. And people do wax and wane. They're not always consistent.

Q I mean, is it possible that his performance of the WRAT in the sixth grade was due to a lack of effort and/or a lack of interest at that point in his schooling?

A It could be due to a lot of things.

Q Okay. Moving on to the second bullet point on page 23, he was readministered the KeyMath Diagnostic Arithmetic Test on April 16th, 1984, and his math skills were judged to be at a 5.8 grade equivalent; right?

A Yes.

Q And at that point he was 13 years old and his math skills have now gone up – have gone – strike that question.

Based on the last few questions, his math skills went from 5.7, then down to 3.9, and then up to 5.8 over the course of about two or three years; is that right?

A I would agree.

Q Isn't it possible that what could only be called the scattered scores do indeed show lack of interest or effort in school?

A Well, I hear what you're saying. But, you know, his [258] ability is not shining. So he's very impaired ability-wise. He could have had a lack of interest, but I think that's also because of a lack of success because of a lack of smarts. But that doesn't mean –

Q But doesn't that show that he is somewhat succeeding, seeing as how he went from a high fifth-grade level to a low third-grade level but then back up to a high fifth-grade level over the course of just a couple of years?

A They are inconsistent. I don't have a perfect explanation for that. And we are focusing just on math. We are acknowledging these are different tests measuring different math skills.

Q That is true, I am asking you only about math. But you answered the question. I'd like to move on to page 23. You wrote that his performance on the Otis-Lennon – L-E-N-N-O-N – School Ability Test is, quote, “consistent with an intellectual disability,” end quote.

A I'm on page 23. I see the Stanford and the Otis.

Q It's –

A Oh, where is it?

Q It's the sixth bullet point, down in the second paragraph. “It is my opinion these scores would be consistent with an intellectual disability.”

A When I was saying Stanford and the Otis-Lennon, but I'm not saying that they then diagnose him with that.

[259] Q I just wanted to clarify that, because Dr. Chudy said yesterday that you can't use the Otis-Lennon – I mean, not Dr. Chudy – Dr. Reschly – sorry – testified yesterday that you can't use the Otis-Lennon to diagnose ID. Do you agree with him on that?

A Yeah. I testified to that yesterday.

Q Okay. And is that because it's a group test?

A Yes, it's a group test. I think that's one of the flaws to it.

Q Moving on to Dr. Chudy, you were asked a bunch of questions on direct about his evaluation. He was evaluated – Mr. Smith was evaluated by Dr. Chudy on August 28th, 1998; isn't that right?

A Yes.

Q And that was after he was arrested for this incident offense but before he was tried?

A That is correct.

Q Dr. Chudy administered the third edition of the WRAT; is that correct?

A That's correct.

Q And are you aware that on the arithmetic portion of the WRAT-3 Smith obtained a score of less than 45, which placed him at the kindergarten grade level in math?

A Very low.

Q Again, on your administration of the Woodcock-Johnson – I [260] apologize for reading it, but I want to get all these scores correct – Smith generated a scaled score of 86 with a grade equivalent of 7.2?

A Correct.

Q And Dr. King administered the WRAT-4. And on that, that test, Smith obtained a standard score of 86 and a grade equivalent of 6.1; is that accurate?

A Yeah.

Q So wouldn't you agree that Smith's performance on the math part of the WRAT-3 that Dr. Chudy administered is another anomaly that we're seeing in his math skills?

A It's not consistent testing; correct.

Q And couldn't that anomaly be explained by the fact that he was in prison. Facing a death sentence?

A That could affect the performance.

Q Sticking with Dr. Chudy's performance of the WRAT-3, Smith obtained a standard score of 69 with a grade equivalent of fourth grade on the reading portion; is that right?

A Yes.

Q But on the reading portion of the WRAT-4 that Dr. King administered, Smith obtained a standard score of 83 with a grade equivalent of 8.1; is that right?

A That is correct.

Q So how do you explain a jump of almost double from the fourth-grade reading level to an eighth-grade reading level?

[261] A I don't really have an explanation. I mean, there could be issues – I mean, it's essentially probably the same test. I have – I had the WRAT-3 and the WRAT-4, and they are very similar. So I don't really have an explanation. I mean, there could be, you know, very little effort, motivational issues too.

Q And not to belabor this. I just mention it one more time. But again, on the reading passage comprehension skills portion of the Woodcock-Johnson that you administered, he was at – jumped up to an 11.4-grade level?

A That is true.

Q So you have to admit there's some inconsistency going on in these test performances?

A I would agree with that, yeah. I would agree with that, yes.

Q Finally with Dr. Chudy, I'd like to look at the spelling scores, the spelling portion. He obtained a standard score of 63 with Dr. Chudy with a third-grade equivalent; is that correct?

A That is correct.

Q But on the WRAT-4 that Dr. King administered, he jumped up to a 5.1 grade equivalency?

A Correct.

Q So not to belabor this, but the bottom line is he performed significantly better or at least somewhat better on the WAIS-IV [262] than the WAIS-III? Or I mean the WRAT-4 than the WRAT-3? A I would agree with that.

Q Now, Dr. Chudy, of course, also administered the WAIS-R, as you've mentioned, on that same occasion in 1988 and obtained a full scale IQ of 72; is that correct?

A Yes.

Q Assuming that he did have problems on the WRAT-3 for maybe the death penalty, he was depressed about facing that, is it possible that those same problems spilled over into the administration of the WAIS-R and affected that score?

A If there were emotional issues that, you know, affected his testing, then it could have affected that testing, yes.

Q Well, looking at Dr. Chudy's report, he tells us – and pardon me for quoting, but I just want to make sure the record is clear – Dr. Chudy in his report wrote, quote, "There were issues with Mr. Smith's concentration, being distractible, preoccupied, and inattentive during evaluation," end quote; is that right?

A That is true.

Q And Dr. Chudy also noted that Smith – and this is again a quote – quote: "Was indecisive and ambivalent, with poor problem solving and judgment skills," end quote?

A Correct.

Q Couldn't, again, just to sum this up, all of those problems have negatively affected his scores in both the WRAT-3 and the [263] WAIS-R?

A Yes, despite him saying he put forth his best effort on page six. So –

Q Thank you. You answered the question.

Actually, one more. Dr. Chudy also stated that, quote, "Test scores may indicate a major depression or may represent an...adjustment disorder," end quote. Not intellectual disability; right?

A What page is that?

Q Give me one second. I'll just read that statement back in to make sure I read it correctly. That the test – quote, "Test scores may indicate a major depression or may represent a severe adjustment disorder." That was the end of the quote.

A I need a page.

Q Have you found a page?

A No. Because he may have been talking about the MMPI.

Q I think the record can speak for itself, so I'll move on.

But the last thing, Dr. Chudy did diagnose Mr. Smith with borderline intellectual disability, he did not diagnose him as ID; is that correct?

A That is correct.

Q Now, I believe you testified on direct that you have published articles in the area of ID and MR. Do you recall that?

A I have.

[264] Q I have just two questions about one article that you cowrote. Do you remember writing an article for the Cleveland State Law Review?

A I do.

Q Just to read it into the record, it's called "Life, Death and IQ: It's much more than just a score. Understanding and utilizing forensic psychological and neuropsychological evaluations in Atkins intellectual disability/mental retardation cases"?

A Yes.

Q I just have two questions for you from this article. Do you need a copy of it?

A I've got it right here.

Q Okay. On page 410 which is at the top left, and page 12 which is the bottom right – I hope we can get on the same page.

A Yes.

Q I'm curious about what you and your colleagues wrote. I'm going to read the exact quote, and correct me if I get it wrong. "A defendant can grow into, out of, and back into ID/MR over time. Consequently, certain defendants will have test scores and functioning that fluctuates in and out of the ID range over time."

And my question is: Do you still believe that one can grow into, out of, and back into ID over time and could you [265] just explain your thoughts on that?

A This is a very contentious and difficult and complex issue. I would probably say yes, I still believe in this. And the reason is because I've seen cases like this where there is an MR stamp developmentally. And then we have IQ scores of 68, 74, 78, and 67, and 70. Okay. And at that moment, at that 78, you know,

there's an argument that that doesn't fit the criteria. Or there's an adaptive functioning test or a wide-range achievement test that's in or out of that range technically. But you've got to have a marker system of what this whole case conceptually stands for. And I think I've done that in this case. So I acknowledge that there are scores that go, you know, in and out of the exact, you know, lens here. But that does not mean the person isn't developmentally childhood through adulthood ID or not.

Q The last question I have for you, it's on page 413 at the top left, and page 15 at the bottom right. You write, and I quote: "While the WAIS-IV is the gold standard IQ test, the Stanford-Binet is also an acceptable IQ test"; is that correct?

A Yes.

Q And my question to you is: At the time that you tested Smith in 2014, no one had ever administered the WAIS-IV to Smith at that point; correct?

A Correct.

Q So why did you choose not to administer the gold standard [266] WAIS-IV and administer the Stanford-Binet instead?

A When I was referred the case, the lawyers requested I use that test.

MR. JOHNSON: I apologize for jumping around. I just have maybe five more minutes of questions.

Q I believe on direct you were asked some questions about whether Mr. Smith suffered head injuries – or it fit that, I believe. And assuming you were, my question was only going to be do you have any medical records to support or corroborate that?

A I'm looking at page eight of my report. He self-reported, I know that. No, I don't.

Q Okay.

A I don't believe I did.

Q I noticed on direct when you were asked whether

Dr. Chudy – when you were asked about Dr. Chudy, you mentioned that he evaluated Smith before Atkins. And my question on that is in terms of whether Smith is ID, it doesn't really matter whether Dr. Chudy evaluated him before Atkins or after, does it?

A Some – well, can I comment on that?

Q Sure.

A Given the fact that he was in this kind of range with his scores and he saw borderline, despite there being records of EMR, let's say, he should have for mitigation evaluated fully [267] for MR at that point, but did not. So since Atkins, some of these experts that did not typically go full distance with adaptive functioning assessment will do so or have it referred.

Q Moving on, I believe you testified that one or more of your neuropsychological tests had to do with auditory processing; is that correct? Or some form of auditory testing?

A Perhaps auditory comprehension. But I didn't do any hearing or auditory testing specifically.

Q So you didn't test any aspect of Mr. Smith's hearing?

A Actually, I did not, no.

Q Would you agree with me though yesterday, based on his testimony, it did appear that he was in

fact somewhat hard of hearing? Or at least that he asked multiple times counsel, both counsel, to repeat questions?

MS. KEETON: Objection. The record will stand for itself.

MR. JOHNSON: I'll move on.

THE COURT: All right.

BY MR. JOHNSON:

Q You interviewed Mr. Smith's mother, of course?

A I did.

Q And I just wanted to ask you – that's on page six. And I don't believe you mentioned this on direct. It's this quote from your report: "She reported that her son had a learning disability and had problems with comprehension," end quote.

[268] So is it not true that his mother told you that he had a learning disability?

A That's on page six.

Q Yes, sir. Of your report. It's the second –

A I see it right here. I was looking at the other paragraph. Yes, that is true, that's what she said.

Q So did you credit everything that she said except for that or how did you handle that?

A I don't think I acknowledged it. So no, I apologize. I don't – I know she said he had problems with comprehension, but that's how she labeled him.

Q Help me out. There's one other thing that I'm slightly confused about. Isn't it true that you administered the Vineland to his mother because we have that, it's pretty crystal clear that we have it, and

we were served with it by opposing counsel. So you did in fact administer –

A I tried to administer it, but she was – she had a respirator in and I couldn't get her to – it was difficult and I don't think it was a valid protocol. Because at some point we had to have her wink for different scores of one, two, or zero, one, and she I don't think could do it. And I – it was a retrospective administration and she was paralyzed, on a respirator. And she – this report here is very short, yeah. So I –

Q Thank you. You answered the question. My only reason for [269] bringing that up is you testified on direct a few minutes ago that you did not administer adaptive tests retrospect – retro – what's the word?

A Retrospectively.

Q Retrospectively? But in fact you did at least attempt to do it on one person, which would be the mother?

A She knew him best, and I tried, and it was in the hospital and she passed away.

Q Jumping around, just a couple of more questions. Did you see any records showing that his teachers and, I believe, the principal when he was in the seventh grade or the second time in seventh grade actually asked his parents to have him withdrawn because he was such a discipline problem and that they withdrew him as a result and that that's why he left school?

A I vaguely recall that. I remember there was letters to the parent for disciplinary reasons, and I don't recall that specific one.

Q In your report I notice that you conclude that, quote, it “is more likely than not” that Smith is “intellectually disabled”?

A Yes.

Q Could one question whether that’s a resounding endorsement of whether Mr. Smith is in fact intellectually disabled more likely than not?

[270] A I would say that this is a close call and I would say that it’s my opinion he’s intellectually disabled. But I think that my scores can be considered a bit high but overall, when looking at all the markers, it’s my opinion there’s clear evidence of developmental through adulthood ID.

Q This is just the last four questions I have. Do you recall evaluating and testifying at a hearing in 2005 or 2006 on behalf of a capital offender named Jerry R. Lawson, L-A-W-S-O-N, in Ohio?

A I remember that name and remember doing it. I don’t remember the content or what happened.

Q I’d like to read that into the record, State v. Lawson, 2008 Westlaw 496, 4319, Court of Appeals of Ohio, November 24, 2008. If I told you that in the course of testifying that Mr. Lawson is ID that you testified that, quote, “It is improper to consider past IQ test scores in determining intellectual functioning because of the potential for error created by practice effects,” would that refresh your memory?

A I don’t remember saying that.

Q Do you have any reason to dispute that the trial and appellate court in that case rejected your testimony on that point?

A I don’t even know.

MR. JOHNSON: That's – that's fine. You answered the question.

[271] Your Honor, I have nothing else.

THE COURT: Redirect?

MS. KEETON: Just a few items, Your Honor. If I may retrieve that?

THE COURT: Sure.

REDIRECT EXAMINATION

BY MS. KEETON:

Q I really just have a few questions. Regarding the scores from prior to you giving an IQ test to Mr. Smith, those, if I'm correct here, full scale scores of Dr. Chudy in 1998 was a 72; in 1982, when he was approximately 12 years old, a 74; and in 19 – I'm sorry – that would be a 75; and in 1982 a 74; is that correct?

A Yes.

Q And then, again, Dr. King's is a 74 this year?

A Yes.

Q Those scores, are they all in the range for intellectual disability, as defined in the AAIDD and the DSM-5, without consideration of the Flynn effect?

A Yes, where they discuss 70 to 75 as being a threshold requirement, yes.

Q Briefly – and I'm going to have to give you this copy back – because the ILS that you administered – here, I can put it up here and hope I can read it.

I understand that this is generally geared perhaps for [272] dementia and older, more normed, or an older population; is that correct?

A Yes.

Q However, are you aware of other people in the profession and psychological community utilizing the ILS to gather information regarding adaptive behavior?

A Yes. Your Honor, I would say the ILS is probably the most readily used adaptive functioning one-on-one test used nationally in forensic psychology, forensic neuropsychology.

Q And I know that Mr. Johnson read you two questions, one about hearing ability and one about a hip replacement – you know, needing a hip. But briefly looking at these other questions on the test, which consist of five or six pages of questions, in approximately – I’m unsure about how many items. Are these standard things that would be similar to what you might do in a general adaptive functioning interview?

A Yes. Many individuals with intellectual disability, as I said, have other medical problems or psychiatric disorders, which he does. So I would agree that these questions would be appropriate to ask with someone who has or is suspected to have ID.

Q For instance, question number one on this page that I have on the Elmo, what’s that first question?

A “What time does this clock show?”

Q Would that be appropriate only for an older population?

[273] A No.

Q Okay. The next one?

A “What is your telephone number?”

Q And in fact, that’s actually a question on the ABAS-3; correct?

A Yes.

Q The next question?

A “What day of the week is it today?”

Q And the next?

A “What town – what town” do you live in? Or – yeah.

Q I realize it’s hard to read on the Elmo.

A Yeah.

Q This next one, this next page, what’s that top question, if you can read it?

A Yeah, “About how much does a loaf of bread cost at the store?”

Q Okay. Skipping down, what’s that number nine?

A “Now Make out a check/money order payable to the Gas and Electric Company for this bill.”

Q Can you skip down to number 12?

A “Name one thing you can do to keep from being cheated out of your money.”

Q And those things, would you need to be an older member of the population for you to understand those questions or for it to really apply to you?

[274] A No.

Q Would you agree that the other questions on the ILS are similar in that nature?

A Yeah, they all are very relevant to intellectual disability or folks with other type of brain-based disorders.

Q Going back to the IQ test scores in Mr. Smith’s records, the 72, 74, and the 75, would you agree that those scores are consistent over time?

A Yes, and I'd say even more so than many cases I've reviewed. They are very consistent.

Q And while individual grade achievement may not be consistent over time, these IQ scores are?

A That is true.

Q In reviewing the school records – and again, I believe you mentioned in Dr. Chudy's report – were there reports regarding Mr. Smith's effort level in regard to testing?

A Yes.

Q And what were those?

A He said that he was putting – I'll look at page – you said Dr. Chudy?

Q Yes.

A Page eight. During the administration of the test, Mr. Smith maintained a fairly good attitude and seemed to put forth his best effort, showing fairly good persistence. He struggled at times understanding some of the tasks, which [275] required repeating the instructions on several occasions. In spite of that, it was determined the test results were valid.

So I would say that he did not formally measure effort, but his clinical impressions were that he had good effort and it persisted over time and he had difficulty in comprehension or comprehending tasks.

Q And again, based on the school records that you've reviewed for Mr. Smith, those individuals preparing those records would have obviously been the best judges in regard to his abilities and the results on which they rated him; correct?

A Yes.

Q And what was the determination there in regard to Mr. Smith overall through his school records?

A You mean by the folks during the school years?

Q Yes.

A Well, that they – you know, by age 14 he was labeled as EDMR, educably mentally regarded.

MS. KEETON: That's all the questions I have, Your Honor.

THE COURT: All right. Thank you. You may step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: Do you have further witnesses?

MS. KEETON: Your Honor, we have no further witnesses at this time, but we reserve the right to recall Dr. Reschly as a rebuttal witness.

[276] MS. HUGHES: Judge, I couldn't hear.

MS. KEETON: We have no further witnesses at this time, but reserve the right to recall Dr. Reschly as a rebuttal witness.

THE COURT: We're going to go ahead and take our morning break at this time. We will be in recess for 15 minutes.

MS. KEETON: Thank you, Your Honor.

(A recess was taken at approximately 10:25 a.m.)

(In open court, 10:42 a.m., Petitioner present.)

THE COURT: Ms. Hughes?

MS. HUGHES: Yes, ma'am. We call Dr. Susan Ford.

SUSAN K. FORD, Ph.D.,
was sworn and testified as follows:

THE WITNESS: I do.

THE CLERK: Thank you, ma'am. Please be seated.

DIRECT EXAMINATION

BY MS. HUGHES:

Q Dr. Ford, will you state your name for the record, please?

A Susan K. Ford.

Q And what is your educational background?

A I have a bachelor's degree in psychology from the University of Alabama in Huntsville, a master's degree from Alabama A&M in clinical psychology, and I have a Ph.D. in applied developmental psychology from University of New [277] Orleans. I also have post grad work in behavior analysis from the University of Southern Illinois.

Q Are you currently employed?

A I'm retired as of January 1 of this year.

Q And where was your last employment?

A With the Alabama Department of Mental Health, the Developmental Disabilities Division.

Q How long did you work for the Alabama Department of Mental Health and Mental Retardation?

A I began work there in 1983 and I left in '91 to go work on my Ph.D., and then I came back in '97 and worked until January 1st.

Q What was your position when you retired from the Alabama Department of Public – of Mental Health?

A I was the director of psychology and behavioral services for the DD division.

Q And what is the DD division?

A Division of developmental disabilities.

Q And as part of your position there, did y'all perform IQ tests on people who were attempting to get services?

A Yes, we did at times if they did not have one.

Q Did you review IQ scores from education records?

A Yes.

Q Did you apply the Flynn effect to any IQ scores that were given by your department?

[278] A No.

Q And did your division apply the Flynn effect to IQ scores obtained from educational records of people who were attempting to obtain services?

A No.

MS. HUGHES: That's all the questions I have.

THE COURT: Any cross?

MS. KEETON: Yes, Your Honor. Just a few.

Your Honor, if I could approach?

THE COURT: All right.

CROSS EXAMINATION

BY MS. KEETON:

Q Dr. Ford, when did you retire again? I'm sorry.

A January 1st of this year.

Q And you testified that you did not apply the Flynn effect while employed with the Alabama Department of Mental Health?

A Correct.

Q Is there actually a policy by the Alabama Department of Mental Health?

A I don't believe there's a written policy, no. It was a practice.

Q And are you familiar with the AAIDD?

A Yes.

Q And it's an interdisciplinary organization focused on intellectual development disabilities; is that correct?

[279] A Yes, I'm a member.

Q And you're aware that the AAIDD publishes the manual that's in front of you, the Intellectual Disabilities: Definition, Classification, and Systems of Supports?

A Yes.

Q This manual provides a definition of intellectual disability that's widely accepted and utilized in the field; correct?

A Yes.

Q And it's associated with a users manual?

A Yes.

Q Are you familiar with that manual as well?

A Yes.

Q And you're familiar with the American Psychiatric Association?

A I am.

Q Are you familiar with the diagnostic manual it publishes?

A Yes.

Q And the most recent version is the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition; correct?

A Yes.

Q Does the Alabama Department of Mental Health – when you were employed there – look to those manuals as guidelines in creating regulations for determining eligibility for benefits for intellectually disabled people?

[280] A Yes.

Q The AAIDD and its manual recommends as part of its best practices that in scoring an IQ test practitioners consider the standard error of measurement; correct?

A Yes.

Q And the DSM-5 instructs practitioners to consider a margin of measurement error as well; correct?

A Yes.

Q Creators of the WAIS and the Stanford-Binet IQ test also advise that there's a standard error of measurement for their tests; correct?

A Correct.

Q In your time at the Alabama Department of Mental Health, did you utilize the standard error of measure in considering eligibility tests?

A May I make additional comments rather than yes or no?

Q Yes.

A In general, yes. However, for eligibility beyond determining whether they met the diagnostic criteria, we also had a cutoff in place as part of the eligibility, like a second step.

Q Okay. The AAIDD also recommends as part of its best practices that, in performing intellectual testing, practitioners should use the most recently normed testing; correct?

[281] A Yes.

Q Creators of the WAIS and the Stanford-Binet IQ tests also advise using the most recently normed version of their test; correct?

A Yes.

Q To the extent the Alabama Department of Mental Health does testing or reviews testing, does it make it a practice or policy to consider the most recently normed tests?

A We try to, yes.

Q And if you're using the most recently normed tests, the Flynn effect does not come into play as much; correct?

A Correct.

MS. KEETON: No further questions, Your Honor.

THE COURT: Any redirect?

MS. HUGHES: Just one.

REDIRECT EXAMINATION

BY MS. HUGHES:

Q Why doesn't the Department of Mental Health apply the Flynn effect?

MS. KEETON: Objection. Foundation. There's nothing that says that she's part of policy making at the Alabama Department of Mental Health.

THE COURT: Overruled.

A The reason that it was determined that we would not use the Flynn effect is because when we researched the issue, we found [282] that there were conflicts within the research, there was also no recommendation from the American Psychological Association saying that it should be a standard practice, and it is not a general standard practice when doing assessments to apply the Flynn effect.

MS. HUGHES: That's all, Judge.

THE COURT: All right. You may step down,

Dr. Ford. Thank you.

THE WITNESS: Thank you.

MS. HUGHES: Call Dr. Glen King.

GLEN DAVID KING, Ph.D.,
was sworn and testified as follows:

THE WITNESS: I do.

THE CLERK: Thank you, sir. Please be seated.

DIRECT EXAMINATION

BY MS. HUGHES:

Q Dr. King, would you state your name for the record, please?

A Glen, with one N, David King, K-I-N-G.

Q And would you tell the Court what your educational background is, please?

A Sure. I earned my bachelor's degree from the University of Minnesota in 1968. I then completed a master of Science degree in clinical psychology at Florida State University in 1970, and a doctoral degree from that same institution in clinical psychology in 1972.

[283] As part of the requirements for the doctoral degree, I completed a one-year full-time residency at Mayo Hospital, University of Minnesota Medical School, in the Department of Psychiatry.

Upon the conclusion of that, I went to Auburn university, where I served on faculty for 12 years, rising to the rank of full professor. My main duties there were to train doctoral clinical psychology students, to conduct a research program, and also I directed the outpatient clinic for the psychology department in the local community.

I started private practice part time in 1973, and that's the time that I was licensed first to practice psychology in Alabama.

In 1983 I started a full-time private practice and have continued in that since that time.

I am board certified by the American Board of Professional Psychology as a clinical psychologist, and I'm also licensed to practice psychology in the state of Alabama.

In 1996 I entered law school, completed my J.D. degree in 1999. I was admitted to the bar in 2000.

In 1991 I entered training for being a certified forensic examiner for the state court system in Alabama and completed that at Taylor Hardin Secure Medical Facility.

I have then been working on contract for the court system since that time continuously for the last 25 years, [284] doing evaluations for the court system with regard to competency to stand trial, mental state at the time of the offense, competency waiver-Miranda rights.

In addition to that, I have worked under contract for the Alabama State Attorney General's Office as well as the Georgia State Attorney General's Office to do post-conviction evaluations.

Q How are you currently employed?

A I'm currently employed solely in my own practice, with a main office in Montgomery and a satellite office in Auburn, as a clinical and forensic psychologist, and I also actively practice law, primarily out of Auburn, Alabama.

Q What professional associations are you a member of?

A I'm a member of the Alabama Psychological Association, and in the past have served as its president. I am also a member of the American Psychological Association. I'm a member, of course, of the Alabama Bar Association. And in addition, I have served on the board of examiners for psychology back in 1980s and spent two years as the chairman of the board of that licensing exam board.

Q Would you tell us about your forensic experience, please?

A As indicated, I've been doing contract evaluations for the court system since 1992 continuously. Most recently I had responsibility for up to 32 counties that I was doing evaluations for. And today I've probably completed for the [285] court system about

8,000 evaluations of competency to stand trial, mental state at the time of the offense.

I've done about somewhere between 60 and 70 or maybe 80 post-conviction evaluations for Georgia and Alabama. In those cases I have had about 10 percent of the time when I've actually ended up testifying for a petitioner.

Q And do you recall any of the cases where you testified for the petitioner?

A It's been over the last 25 years, but there's – I recall Mr. Borden, I think, in Lauderdale County; Mr. Tarver here in Mobile County; and Mr. Guthrie in – I think it was Shelby or Talladega County, I can't remember which. There have been - also a case in Georgia, Mr. Colbert; that's an ongoing case right now where I'll be probably testifying in his behalf. As well as a case involving – I think it was Jerry Jones out of Cherokee County, Georgia.

Q What experience do you have in evaluating individuals with possible intellectual disability?

A I started doing intellectual evaluations while I was in graduate school back in 1969; in fact, worked for some period of time at what was then called the Sunland Training Facility at Tallahassee, Florida. That was primarily individuals with various types of developmental disabilities.

I've continued to do evaluations for intellectual disability, borderline functioning, and also learning [286] disabilities since that time.

I am currently the regional consultant for vocational rehabilitation services in Alabama and we run a team for and do the screening for learning disabilities,

intellectual disabilities, and also do continued evaluations for accommodations for learning disabilities.

Q Do you also work as a Social Security examiner?

A I do.

Q And what does that involve?

A I probably conduct about 20 of those examinations a week.

Q Does that involve intellectual disability cases?

A They do. They involve intellectual disabilities; again, learning disabilities; and also mental health issues.

Q Have you done IQ testing for admission to schools?

A I have in the past. I don't do that so much any more. Our clinic in Montgomery was typically doing lots of testing for admission to the local schools for pre-K through kindergarten. I did that for three or four years. I also, of course, do evaluations on a regular basis for admissions to colleges.

MS. HUGHES: Judge, may I approach the witness?

THE COURT: Yes.

BY MS. HUGHES:

Q Can you please identify Respondent's Exhibit 2 that I just handed you?

[287] A Yes. This is a copy of my current curriculum vitae, and I believe it's up to date.

Q I've also shown you Respondent's Exhibit 3. Can you identify Exhibit 3, please?

A That's a summary of legal cases that I've been involved in, both civil cases and post-conviction cases

since – I think the civil case is from 1984 and the post-conviction cases since about 1998-1999.

Q And is that a current copy of those documents?

A It is. It also includes, I think, some information about how many evaluations I've done, typical fees that I charge.

Q And I've also shown you Respondent's Exhibit 4. Would you identify that exhibit, please?

A This appears to be – I believe it's a copy of the raw data that I collected, my evaluation of Mr. Smith in this case.

MS. HUGHES: Judge, I move that Respondent's Exhibits 2, 3, and 4 be admitted into evidence.

THE COURT: Any objection?

MS. KEETON: No, Your Honor.

THE COURT: All right. Mark them in.

(Respondent's Exhibits 2, 3, and 4 were entered into evidence.)

MS. HUGHES: And at this time I will offer Dr. King as an expert in the field of clinical and forensic psychology.

MS. KEETON: No objection.

[288] THE COURT: All right. So designated.

BY MS. HUGHES:

Q Dr. King, what was your purpose in meeting with the petitioner in this case?

A I was asked by the Attorney General's Office in Alabama to do an evaluation of Mr. Smith regarding what's called an Atkins evaluation, which is a deter-

mination of whether Mr. Smith was suffering from any intellectual disabilities.

MS. HUGHES: Judge, may I approach?

THE COURT: Yeah.

BY MS. HUGHES:

Q What is that identified as, please?

A This is Respondent's Exhibit 1.

Q And would you identify that for the record, please?

A That's a copy of the forensic psychological report that I had completed regarding my evaluation of Mr. Smith.

Q Did you find any errors in your report?

A I did.

Q What errors did you find?

A There were two typos. The first one, I think, is on page five, first full paragraph, which starts: "Mr. Smith reports he was arrested for the first time at age 24 for truancy and criminal mischief." That should be age 14. And the other typo is on page –

Q Nine?

[289] A – nine, second sentence, where it says: "These skilled areas range from a possible scaled score of one to a high of 10." It should be "to a high of 19."

Q Did those errors affect your opinion of the petitioner's intellectual functioning?

A No, it doesn't affect any of the scoring or anything.

MS. HUGHES: Judge, I move to introduce Respondent's Exhibit 1 into the record.

MS. KEETON: No objection, Your Honor.

THE COURT: All right. Mark it in.

(Respondent's Exhibit 1 was entered into evidence.)

BY MS. HUGHES:

Q What documents did you review before you rendered your opinion concerning whether the petitioner's intellectually disabled?

A I had a copy of the scheduling order from the judge here; and also copies of two cases, Smith v. State and Smith v. Campbell; Smith's first statement to the police on November 25th, 1997; Smith's second statement to the police on November 25th, 1997; a copy of Dr. Chudy's September 6, 1998, report; a copy of Dr. Chudy's testimony during the penalty phase of the trial; educational records that were introduced during Smith's trial; a presentence investigation report; records from the Alabama Department of Corrections generally dated from 2001 through 2012; and also records from the Department of [290] Corrections generally dated November 1997 through 2001; an interview with Mr. Smith at Holman Prison on January 31st of this year; and then I conducted a number of tests, including the Wechsler – that's W-E-C-H-S-L-E-R – Adult Intelligence Test, Fourth Edition; the Adaptive Behavior Assessment System, Third Edition, better known as the ABAS-3; collateral interview with Rebecca Smith, who was the younger sister of Joseph Smith; and I think that – and I also reviewed – I had subsequently reviewed the expert reports.

Q And did you also give him the Wide Range Achievement Test-4?

A Yes, I'm sorry. I did.

Q I think you've identified the education records of Joseph Smith that were introduced at his trial, the records that you reviewed?

A Corrected.

Q And the penalty phase testimony of Dr. Chudy?

A Yes.

Q Two statements to the police?

A Yes.

Q Did you review also Mental Health Review Notes from the Alabama Department of Corrections that I subsequently sent to you?

A Those were, I believe, part of all of the records I had from the Department of Corrections, yes.

[291] Q And did you review the raw test data from Dr. Matthew Fabian?

A I'm sorry?

Q Did you review Dr. Matthew Fabian's raw test data?

A I did, as best I could.

MS. HUGHES: Judge, those are Respondent's Exhibits 5, 7, 8, 9, 10, 11, 12, 13, and 14. I would move to introduce those into evidence.

THE COURT: Any objection?

MS. KEETON: No objection.

THE COURT: All right. Mark them in.

(Respondent's Exhibit 5, 7, 8, 9, 10, 11, 12, 13, and 14 were entered into evidence.)

BY MS. HUGHES:

Q How did you begin your evaluation of the petitioner in this case?

A When I first met with Mr. Smith, the first thing I did was introduce myself and talked with him about the lack of confidentiality and privilege in terms of our interaction and any information that he provided to me would be subject to being placed in the report and possibly be used in this type of litigation. I also told him I was retained by the Alabama Attorney General's Office and that I was paid by the Alabama Attorney General's Office. So he understood who hired me and why I was there and what I was there to do.

[292] Q Did you perform a standard clinical interview on Mr. Smith?

A I did. I went through what's called a standard clinical interview, which involves observations and taking standard history from Mr. Smith followed by a mental status examination, which is a kind of standard set of questions and observations that all clinical psychologists and psychiatrists use in order to determine somebody's overall level of emotional, cognitive, and psychological functioning at the time that we're seeing them.

Q Tell me how the petitioner acted when you were conducting your clinical interview.

A Mr. Smith was very cooperative. We got along very well. We joked some and he was quite animated in his responses. But overall he was quite pleasant and, as indicated, quite cooperative and answered all the questions I had.

Q Did he have any trouble understanding your questions? A He – he occasionally would, I think, have some trouble hearing. So sometimes I'd have to repeat questions or – and I learned very quickly to speak a little bit louder and also to slow down my tempo of speech. But when I did that, he didn't seem to have any trouble understanding the questions. And if he didn't understand, he was quick to ask me to repeat or to explain.

Q Did he act silly or inappropriate?

A No, not at all.

[293] Q Was he easily distracted?

A Not during my time with him, no.

Q How was Petitioner's memory real during your clinical interview?

A He seemed to have a pretty good memory about his life events and he gave me a history of his family, for example, and also what he recalled from early childhood in terms of educational placements. That was quite cogent and coherent and detailed more than I expected that he was going to give me when I first started with him.

Q What sort of information did you obtain about his family background from him?

A He indicated to me that – I want to check with my report here. He was able to tell me that his mother was deceased recently at age 69 and he was able to tell me that she had apparently had a fall or an accident and that she had high blood pressure, back problems, indicated that – spontaneously with me – that she loved him and all of the brothers and sisters. He was able to report that his parents divorced when he was approximately age nine, that his father deceased at

approximately age 70, when he had complications from hip surgery, with a resultant cerebral vascular accident, which he referred to, I think, as a stroke.

It was also reported that his father may have lingered to some extent in terms of his stroke and that he also added [294] spontaneously that he and his father never got along very well.

He reported that when he was approximately age nine his parents divorced and he was back and forth between the two parents, but his mother remarried when he was approximately age 11 to Hollis Luker and that his mother eventually divorced Mr. Luker after Mr. Smith was incarcerated.

He reported his father had remarried when he was approximately age 11 or 12 and that he was able to identify his stepmother as Connie Dickinson; reported that they eventually divorced as well.

Q Did you have any records to support that these were correct facts that the petitioner gave you?

A I had no other records to support that other than a collateral interview I had with one of his sisters, who supported some of the information, indicating that Mr. Smith did in fact get moved back and forth between the two families on a fairly consistent basis. She was somewhat young by the time that he first left the family. But that was her recollection, along with the fact that he had a drinking problem.

Q When evaluating someone for intellectual disability, why is employment and education relevant?

A Well, one of the prongs of determining whether somebody has an intellectual disability has to do with onset indication for mental deficiency or intellectual disability before the age of [295] 18. Often school

records are the primary source of that information. So it's important to look at those records in order to see what they may indicate about the individual through a number of years of school records, which fortunately we have in this case.

Q You also have a section of your report concerning genetic history. Why is genetic history important in evaluating whether someone is intellectually disabled?

A Well, part of this is just, again, part of a standard clinical interview. And it does help me see how well Mr. Smith, in this case, is able to provide general information about his family that seems to have specific facts. His memory seemed to be reasonably good about these facts with regard to his family and he presented a cogent and coherent family history.

Q Does it help assess his memory function and memory abilities?

A It does. And, again, it gives an overall indication, based on my experience with individuals who function from high-level cognitive abilities to intellectually deficient individuals in terms of their history that they could give and how they perform in a general clinical interview.

Q I think we've gone over the tests. But would you tell me one more time what tests you performed on the petitioner?

A I administered the Wechsler Adult Intelligence Scale, [296] Fourth Edition. I also administered the Adaptive Behavior Assessment System 3 and the Wide Range Achievement Test, Fourth Edition.

Q Did you review other doctors' reports and testimony concerning –

A I did.

Q And what were those?

A I reviewed Dr. Chudy's report from his first incarceration. I think it was back in 1997. And the testing that he completed at that time as well as the testimony that he gave at trial.

Q What were the overall results of the WAIS score that you gave to Mr. Smith?

A Well, the WAIS, the Wechsler Adult Intelligence Scale, is an IQ scale that has four separate factors that are assessed. It has a verbal comprehension index which relates to vocabulary, abstract reasoning, and has a perceptual reasoning index which measures abilities in complex block designs and ability to put those together in increasingly difficult arrangements as well as what we call matrix reasoning; again, a visual perceptual kind of task and also a puzzles task where you look at six different portions of a puzzle that can be completed and you have to figure out which three to put together to make the puzzle. That's the standard. That's the perceptual reasoning index. Then there's a working memory index which is comprised simply of some memory functions, [297] ability to remember digits in increasingly long sequences, as well as being able to do arithmetic problems in your head. And then a processing speed factor, which has to do simply with how fast you can copy various designs or cancel out designs in a two-minute period of time. Each one of those gives us an index. And the core index – those are really the verbal comprehension index and perceptual reasoning index. Those comprise

what's probably closest to general IQ or whatever that is.

And we had a full scale IQ score. His overall IQ score across all of those indices when I saw him was 74.

Q What is the GAI score on the WAIS score?

A The GAI would be just a composite of the verbal comprehension and perceptual reasoning index. Those are considered to be – it excludes the processing speed and also the working memory index which are not considered to be contributory as much to overall IQ score. And we can look at a GAI Score as well as the full scale IQ score.

Q What was his GAI score in this case?

A Excuse me. For a minute.

His GAI score would have been 77.

Q And what is the significance of that score to you?

A Well, as I indicated, the GAI score is made up of just the verbal comprehension index and the perceptual reasoning index and it has a 90-percent confidence level of six. One of the [298] reasons why I looked at that was that that actually is more akin to what Dr. Fabian, I think, found on his Stanford-Binet, which does not have some of those other indices that the Wechsler does, so he scored a little bit higher in terms of his overall IQ on that particular index.

Q What is the confidence level of the WAIS score that you gave to the petitioner?

A The confidence level, according to the manual for the WAIS-IV, that I gave him was at the 91 percentile – I'm sorry – 90th percentile of 71 to 78, and the 95th percentile 70 to 79.

Q Do you have an opinion about why the petitioner had such a discrepancy in his index scores on the WAIS-IV?

A Yes, I do. It's very unusual to get a perceptual reasoning index of 86, which is what he received, what he earned on the Wechsler Intelligence Scale, and then a much lower verbal index. In fact, that perceptual reasoning index is in the low average range of functioning. That happens only about 12 to 15 percent of the time with an IQ level – full scale IQ level that he earned.

In my experience, that can be an indication of a learning disability. Learning disabilities – especially involving dyslexia, dysgraphia, mathematics – where a person has some average abilities and then is not functioning up to academic achievement expectations, that can indicate that that's the reason for that. They will typically have lower [299] verbal scores. In the work that we do, vocational services, that's a typical protocol that we see when we refer for additional testing to see if there is some indication – more indication for learning disabilities.

Q Did you see in Dr. Fabian's report that someone who is intellectually disabled could get a perceptual reasoning index of 86?

A I certainly would not expect that at all. I just said that's in the – that's in the low average range of ability. And honestly, you know, I had these previous scores. When I first started meeting with Mr. Smith and we started the intellectual exam, one of the first things we do is the block design, and he did quite well on it. It was a surprise to me and started raising issues almost immediately about his intellectual functioning being higher than other estimates had indicated.

Q And did you review the results of other IQ tests administered on the petitioner?

A Yes. And I think that there's been a lot of testimony that there have been five separate intellectual examinations done using all Wechsler tests except for Dr. Fabian's Stanford-Binet over about a 35-year period of time.

Q Did you review any DOC scores?

A I believe there was one score from DOC, what's called a Beta, which was something like 82 or 83, 84, something in that [300] neighborhood.

Q What was significant about your review of the other IQ test scores?

A Well, even if there's some argument about whether he may have a learning disability, what we have here is a very consistent pattern of intellectual quotient scores on all these tests by five different examiners over 35 years that all fall in the borderline range of intellectual functioning.

Q What's your opinion of the Beta-2 test?

A You know, I think it's one of those kinds of tests like some others, like the Naglieri and the Reynolds Assessment Test, that are – they provide some information, but honestly I don't put as much store in them because they can tend to misestimate intellectual abilities.

Q Is his performance on the Beta-2 consistent with your findings?

A It would. I mean, in terms of that, 82 or 84 would not be inconsistent with all the other intelligence test results that we've obtained over all those years.

Q What about construct validity, does it help?

A It does. Construct validity is the idea that the more information that you have, especially from intelligence tests, if you have multiple sources of IQs over a long period of time, it contributes to what we call the construct of validly indicating what a true IQ score is for an individual. So, [301] again, all of these examiners over all this period of time giving different tests, basically coming up with the same result, all of which put him in – just the IQ score puts him in the borderline range of intellectual functioning.

Q And in your opinion does the petitioner meet the first prong for an intellectual disability diagnosis?

A He does not.

Q What is your diagnosis of the petitioner's intellectual functioning?

A I diagnosed him really as having likely a learning disability. What I said is “not otherwise specified,” because I think there would have to have been additional assessment to determine the presence of that or to rule out the possibility that he really is functioning in the borderline range of ability.

Q And what did you base your opinion on?

A I based my opinion on all the data that I collected, all the records that I reviewed. In addition to – impressively, I think – all of the IQ tests that have been compiled over a lengthy period of time.

Q Is it also based on your experience and your training and your education?

A Yes, it is. I deal with people with intellectual disabilities every day and who also fall in the borderline range of functioning as well as average to above. And just his [302] presentation to me and his

ability to interact with me suggested that he does not function in that intellectual disabilities range.

Q Can you give me some examples of specific responses the petitioner gave you during your evaluation that support your opinion that he's not intellectually disabled?

A Well, I think all of the information that he gave me regarding his family was indicative of that. He also told me that he was diagnosed with learning disabilities while he was in school and that he had some special resource classes.

In addition, when I was administering some of the adaptive behavior assessment scales, he was conversant during some of those periods of time.

Q What about current events during your mental status exam?

A One of the questions I requested is: "Can you tell me something from current events?"

And his response on that particular day was: "They fired that Assistant Attorney General for refusing to implement the immigration program."

Q Was he familiar with the current and past President of the United States?

A He was. He was able to identify both of them accurately, as well as Social Security number, AIS number, his address at Holman Prison, and certainly was oriented as to person, place, and time.

[303] Q Is it possible that an intellectually disabled person might know one of these items?

A Sure.

Q How possible is it or how common is it for an intellectually disabled person to know all of those facts?

A Not as likely. And again, I put this all into context. I wouldn't rely just on those kinds of answers to either diagnose intellectual disability or rule it out.

Q And we've heard a lot of testimony about the Flynn effect. Can you tell me what the Flynn effect is?

A Well, Flynn effect is a theory. I disagree with previous testimony that's a scientific fact because, if it were a scientific fact, it would already be implemented in terms of changing IQ scores across a variety of situations, which simply is not standard practice and is not done.

The Flynn effect is a theory that there is an increase in intelligence scores – not necessarily intelligence – but intelligence scores across a period of time. And the original evaluation, or I should say meta-analysis, that was done by Professor Flynn back in the '80s was actually done primarily on assessments that were conducted in western Europe and many foreign countries. The meta-analysis looked at the administration of an IQ test at one time and then administration of another IQ test at a secondary time to see if there was any changes in those IQs.

[304] There are many problems with all of that research, in my opinion, including but not necessarily limited to the fact that many of these comparisons were intelligence tests given to children at a very young age and then at a much later age. And we know that when children are approximately age three, four, five and they are given Wechsler Prescale Intelligence Test, their IQs are quite fluid and they tend not to be very stable until approximately the age of eight, nine,

10, something like that. So you're going to get changes in that.

In addition, I'm not sure that there was necessarily a transfer of application of data from some western European countries that at that time had a much more homogenous population than we do here in the United States.

Finally, there is a comparison actually of a very different test. The main difference in terms of increase in IQ is comparing the Wechsler intelligence test to the Stanford-Binet, which indicated the .9 points per year change as opposed to the comparison of the Wechsler Intelligence Scale for Children – I think it was three to the WAIS, to the WAIS-III, which at that time – and I can be wrong exactly on those tests – but it was actually a minus .17 change, and all of those were combined together to come up with this .3. That's a group expression. It doesn't necessarily apply to a particular individual.

And, in fact, what we see in the data we have about [305] Mr. Smith is that he has all of these test scores which are consistent across all of this time and across all of these examiners and then, just basically considering the full scale IQ score, they all fall in the borderline range of ability.

Q Based on the factors that you have just talked about to the Flynn effect, in your opinion should the Flynn effect be applied to IQ scores?

A No. There's a study done in 2008 that looked at – that talked to directors of clinical training programs in psychology, American Psychological Association, and all the federal rules and regulations, and there was no recommendation by anybody that the Flynn effect be applied in any situation. The only place where I've

seen it suggested that that be applied is just in post-conviction capital cases.

Q Have you ever seen the Flynn effect applied in Social Security cases?

A No. In fact, it's not allowed.

Q And what about in vocational rehabilitation cases that you were involved in?

A No.

Q Did you apply it when you were testing for school admission?

A No.

Q What is the whole title of Flynn's article?

A I'm sorry?

[306] Q What is the whole title of Flynn's article about "Tethering the Elephant"? Do you recall what that was?

A I don't recall off the top of my head. It was basically, I think, just "Flynn Effect," something or other.

Q Do the testing manuals for the WAIS score or the Stanford-Binet 5 require the Flynn theory be applied to the administration of those tests?

A No, there are no manuals that indicate they want it applied and there's nothing on the testing sheet itself that indicates it should be applied.

Q Have you read an article, "Science Rather Than Advocacy When Reporting IQ Scores"?

A I'm sorry. I didn't hear your question.

Q Have you read – have you read an article, “Science Rather Than Advocacy When Reporting IQ Scores?”

A If that’s the one from 2008, yeah, I think that I have.

Q Is that a peer-reviewed article?

A Yes.

Q What does this article say?

A Well, it indicates that, again, there’s no standard practice to use the Flynn effect to alter IQ scores.

Q What is the Diagnostic and Statistical Manual?

A The DSM is the Diagnostic and Statistical Manual, currently Fifth Edition, that’s published by the American Psychiatric Association. And it is the nomenclature for making diagnoses [307] – actually primarily for insurance purposes.

Q Does the DSM-5 require that the Flynn effect be applied to IQ scores?

A It does not.

Q Did you read paragraph 58 of Dr. Reschly’s report where he talks about the WAIS-IV: Technical Manual?

A I did.

Q Did you find a problem in paragraph 58?

A Yes. He applied the wrong table.

Q And what is the significance?

A The table he applied was a table that’s to look at when an individual scores an IQ in the 60s. You then could look at a table about the changes in IQ. Here we

have for this individual, Mr. Smith, on the next page you look at that next table for application of individuals who have IQs as measured in the 70s and then you look at the change in IQ. So his application of that table is incorrect.

Q Have you read Flynn's article "Tethering the Elephant"?

A Yes.

Q Do you agree with his assertion that the Flynn effect is not just a group phenomenon, but must be applied to individual IQ scores?

A I do not.

Q Why not?

A Well, because it is a group effect. It's been established [308] on meta-analysis across multiple individuals over a lengthy period of time and an individual may not necessarily show the same kind of changes in IQ scores as the total group does. That's part of the reason why it's not done as a practice.

Q What is the standard error of measurement?

A The standard error of measurement is, again, a concept that when we're measuring something like human characteristics – actually even physical characteristics – there is always a possibility of error due to circumstances of the measurement. That can be environmental factors, like how hot or cold it is in the room, could be examiner factors. But the idea behind it is that when you, for example, give an IQ test and you obtain a particular score, there can be a range around that score that the individual could have earned or not earned under other circumstances.

And the idea behind the standard error of measurement on an IQ test, as we give them – and usually the Wechsler intelligence test, for example – is that that standard error of measurement is approximately 2.5 as a standard deviation.

And what I'd also like to say is that the standard error of measurement is also on a normal curve, so that you don't get five points linearly on either side of a particular score. The chances of you getting a score that's four points or more below the standard IQ score is only about two and a half percent. Chances of you being at two points below the [309] score and five points above is about 87 percent.

Q In your opinion was there any circumstance that affected the petitioner's IQ score on the tests that you administered to him?

A No. And there's been a lot of testimony about the standard error of measurement. But here we have – and usually that's applied to one specific test given one specific time. Here we have, again, five different IQ tests given over a lengthy period of time. And I think that the scores speak for themselves, they are what they are.

Q Did you hear Dr. Reschly's testimony about the standard error of measurement yesterday?

A I did.

Q Do you agree with his testimony?

A Well, I don't agree if the proposal is that you should always consider – it seems to me that the testimony is always indicated in the direction of reducing a score rather than considering the fact that you're going to get a distribution of scores around it; it could be just as – all of these scores, according to the

standard error of measurement, you could add five points to every one of them. So I don't agree with that. As I indicated earlier, all of these test scores, I think, are what they are. They all fall within the borderline range of intellectual ability, if you just look at the IQ scores themselves.

[310] Q In Flynn's "Tethering the Elephant" article he notes that the possibility of measurement error is much more reduced when more than one IQ test is given and the scores corroborate each other?

A Sure.

Q And what does that mean?

A It means that when you have five IQ tests, that your standard error of measure basically is decreased dramatically just as a matter of construct validity again. So the construct here is that we give this individual five tests over a period of time and he's basically getting the same IQ score every time.

Q What's the practice effect?

A I'm sorry?

Q What is the practice effect?

A Well, practice effect will occur if you give a test like an IQ test repeatedly so that an individual has already seen this test and then they are going to have some idea about what the answers are going to be the next time. On the Wechsler intelligence test, we consider practice effects to drop off dramatically after six months. But the recommendation is that they not be repeated less than two years apart.

Q Would the practice effect affect the petitioner's IQ score on the test that you administered?

A No.

[311] Q Did you review the results of the Stafford-Binet given by Dr. Fabian?

A I reviewed only the composite scores.

Q Were you able to check the scoring on this test?

A I was not.

Q Why not?

A I couldn't read his writing.

Q Why would someone use a neuropsychological battery or test to assess whether someone suffers from intellectual disability?

A In my opinion, they do not. It's not necessary to do that.

Q Why not?

A Because neuropsychological tests don't deal with the specific prongs of the criteria to diagnose mental disability, individual disability, for an Atkins hearing. Those prongs are simply an intellectual test result that's 70 or below and a measure of adaptive functioning usually using a standardized instrument as well as then corroborating that possibly with other historical and educational data and then an offset before the age of 18. That's the legal test for it.

Q What is the Otis-Lennon?

A It's a group-administered IQ test, IQ/ assessment – achievement test that was administered back in the '70s and '80s, usually to determine where children are functioning at the end of the school year, to give some feedback, I guess, to the school about how all the kids were doing.

[312] Q Would you rely on the results from the Otis-Lennon in determining whether the petitioner is intellectually disabled?

A No.

Q Why not?

A It's just not used for that purpose and it's not a gold standard kind of intellectual assessment device. And those group tests were affected by so much in classrooms when they were administered back in those days.

Q And you previously testified that you believe, from your testing, that the petitioner might have a learning disability?

A I believe that's a possibility, yes.

Q How would a learning disability affect his school performance?

A It would cause significant disruptions in reading, writing, and arithmetic, although lots of times people with learning disabilities tend to do poorly in all of those areas. Most of the time people with dyslexia, meaning a reading disorder, do also poorly in written expression, so they have those learning disabilities as a kind of form – almost a factor. They may or may not have an arithmetic disability. And sometimes we see people who have problems with arithmetic, but don't have problems with reading and writing.

Q Does a learning disability affect processing speed?

A No, it shouldn't. What would affect processing speed, though, would be such things as visual acuity, being able to [313] see the items.

Q How would one motivation affect school performance?

A Let me back up just a little bit. There's also – we believe there's a learning disability that involves processing speed. So sometimes people can read and do arithmetic fine and may have trouble with actually processing speed. Sometimes that can be an intentional deficit disorder, sometimes it's just a learning disability. We believe it's just a processing speed problem.

Q How does a processing speed problem affect your performance in school?

A It can dramatically affect performance in school because – well, one of the examples I use with people that I do evaluations with is that if they are taking notes in school from the blackboard or teachers, they are going to be really slow and not be able to keep up with copying all that information. Or if their reading is – if they read adequately but have a poor processing speed, everybody may be asked to read something in class, for example, and they are going to be halfway through when everybody else is finished. So they're not going to have the benefit of having completed that kind of task. So the processing speed can cause significant difficulties in school.

Q In your opinion was Mr. Smith motivated to do well in school?

[314] A It appears to me from the records that I've reviewed that he may have been motivated to do fairly well in the early grades – kindergarten, first grade, second grade maybe – and then somewhere around grade three, four, five, six, I think that he started to have significant problems which would correspond to family difficulties.

Q How would those factors affect his performance on standardized tests?

A They could adversely affect his performance in all areas of his life. And I believe when he tells me – and it is corroborated by, I think, his sister – that he was pretty physically abused for a lengthy period of time by both father and stepfather. And if you think about an eight- or nine-year-old child experiencing that and then going to school, it's certainly going to affect their performance.

Q Does poor motivation equate to limitations in adaptive functioning?

A No, it does not.

Q Did you see references in the record that led you to believe that he might also suffer from ADHD?

A There may have been some reference to that. But I'm not sure that – I'm not sure how much credibility to put in that.

Q What were the petitioner's results in the Wide Range Achievement Test 3 that you gave him?

A That particular achievement test has a number of different [315] parts to it. So I was assessing his reading, simple reading, which is just reading of words, also his spelling level, which relates to written expression. And in addition to that, then his arithmetic abilities.

On the achievement test, word reading, he was at 8.1 grade level. That standard score would be 83. His spelling score was at 5.1 grade level, standard score of 75. His math computation was at 6.1 grade level, which would be a standard score of 85.

The Wide Range Achievement Test is very similar to other psychological instruments in that it has an average of 100 and a standard deviation of 15.

So he did poorly clearly in – he did more poorly, I should say, in his spelling. He was in the mid-80s in word reading and math computation. His math computation was somewhat remarkable in that we have records from earlier in his life that he did quite poorly in that, and yet when I went through the math with him he was able to do fairly complex addition, subtraction, some fractions, accurately – again, which I did not expect.

Q Why is his performance on this test important when you were assessing whether or not he's intellectually disabled?

A Well, he seems to have some achievement scores that are well above what would be expected for individuals who would be intellectually disabled. We would expect, typically, their [316] scores would be consistently down in the second-grade level, first-grade level, third-grade level, no higher than that. We have to take into account also he really stopped his formal education at sixth grade, starting the seventh, but basically stopped at the sixth grade, so that we would expect typically that his achievement scores wouldn't be any higher than that. He had no formal education following that ever. Usually when adults stop at that particular grade level, whatever grade level they stop at, that's where their achievement functioning is usually located.

Q Are the results of the WRAT-4 test that you gave the petitioner and the results he achieved on the Woodcock-Johnson Test of Academic Achievement that Dr. Fabian performed, are they similar?

A They are. There's some variation, but I would see them as fairly similar. Actually, Dr. Fabian, he actually administered a sentence comprehension, which I think is an even more exacting kind of assessment of somebody's ability to read and understand what they read. I did not do that part of the assessment, and I think that the Woodcock-Johnson actually is a much better instrument than the Wide Range Achievement Test which I administered. So I think it's quite surprising that he would show up at an 11th-grade level with regard to sentence comprehension. I see that as totally inconsistent with intellectual disability.

[317] Q Did you review the school record and how the petitioner performed on standardized tests and on the WRAT?

A I did.

Q How did the petitioner perform on those tests?

A He seemed to do fairly well up until, again, about the fourth or fifth grade. Then his performance seemed to fall apart. And again, my own reading of that was that he probably had other influences that were operating at that time that made him not able to profit from the formal education. It may have been learning disabilities, it may have been – it may have been family structure, it may have been he was starting to use alcohol. It could be a combination of all of those things.

Q Did you examine the petitioner's results on the WRAT given by Dr. Chudy with the results you obtained from the petitioner on the WRAT?

A Yes. And Dr. Chudy's results were much lower than what I got. And I think even much lower than

what he had earned while was he was in school. That I can't explain.

Q Would it be similar to the other explanation about the standardized test and the –

A It could be due to a number of factors. It could have been the stress that Mr. Smith was operating under at the time; because he was in a capital, you know, crime litigation. I just don't – I don't know.

Q But those results are very, very low; correct?

[318] A Correct.

Q Did you see evidence in the records that you reviewed indicating that the petitioner was placed in EC classes?

A I did.

Q What are EC classes or what was your understanding of EC classes at that time?

A EC stands for emotionally conflicted. And it's usually given to children who are determined to be having a lot of behavioral problems, psychological adjustment problems, as their primary difficulty and they are placed in a class that usually it's a smaller number of children with some special resources, so that there's not as much distraction. There can be more attention paid to them on an individual basis.

Q Was he placed in EC classes because of an intellectual disability?

A Not that I saw, no.

Q Do emotional handicaps mean a person has limitations in adaptive functioning?

A I'm sorry?

Q Do emotional handicaps mean a person has limitations in his adaptive functioning?

A No.

Q Did you see a reference in the petitioner's school records that in one school he was found to be EMR?

A I did. There was like one or two pages out of the entire [319] school record that had that designation on it. And I didn't see necessarily that he was placed in a mental retardation class. But that was – it was difficult to determine what was going on at that time.

Q Could you tell from the records why this assessment was made?

A No. And it seemed to be an outlier. There have been all these records of him doing fairly well up until that fourth or fifth grade in terms of achievement scores, and then they started to go downhill and he had these IQ tests done that were both in the borderline range of functioning and all of a sudden there is this one entry on that one page that says EMR.

Q How did moving from school to school affect the petitioner, do you think?

A Well, he told me that it was the reason why he stopped going to school. There may be some contradiction about that in terms of what the real reason was that he stopped. But he indicated to me that he saw no point in going to school in the seventh grade after he had repeated a grade, because he was just going to move from one school to the next and he wasn't going to get anything out of it anyway. That tells me that he remembers an attitude of frustration and giving up, simply because of what was going on in his family at the time.

Q Do you agree with the testimony yesterday that being poorly behaved in school is a poor adaptive behavior?

[320] A No. I think – I wouldn't agree with that totally. Because poor adaptive – behaving poorly in school doesn't necessarily relate to adaptive behavior. It probably is an indication, again, of what was happening with this child at that time overall in his life.

Q Do you agree with Dr. Reschly's testimony yesterday that the school records ruled out a learning disability?

A I don't. I'm not sure that they did much assessment of whether that really was the case at the time.

Q Do the petitioner's low scores on his school achievement tests indicate to you that he is intellectually disabled?

A No. I mean, that the scores that I got on my achievement test would not indicate that, and I think Dr. Fabian's scores would not indicate that either.

Q What are adaptive functioning deficits?

A Well, the original Atkins determination of the Supreme Court, they talked about adaptive functioning as measured in eight different areas, including things like health and safety and conceptual abilities, communication. And what we're looking for also is possible – what we call composite scores, meaning we look at combinations of some of these factors to come up with composite scores that involve conceptual, practical, and social abilities. So there are some kind of tests that we can give or standardized instruments that we can use to try to assess adaptive functioning in individuals.

[321] Q And what standardized tests did you use in this case? A Well, there are only two that are really kind of recognized as appropriate. One is the Vineland Social Maturity Scale and the other is the Adaptive Behavior Assessment System, or ABAS. And I'm going to agree with some of the previous testimony; the problems associated with both of these kinds of instruments – the problem with the Vineland is that it has no self-report norms, meaning that you can't rely on an individual to report on himself and be able to look at his responses compared to a normative group.

In addition, the Vineland, If you're going to give it to a third party to rate an individual, both the Vineland and the ABAS require that an individual have regular, almost daily contact with the individual during the previous six months in order to do the rating. So that kind of rules out the Vineland right away.

There is no provision for using normative tables with a retrospective analysis with either one of these instruments. The norms were just not constructed that way. So that typically would be an inappropriate use of an adaptive functioning instrument.

So the only one that we're left with is the Adaptive Behavior Assessment System, which does have norms for self-report. So that's the one that I used, which in this case would compare his responses to other people who have given a [322] self-report and then look at their normative score in all of these areas, which would include communications, community use, functional academics, home living, health and safety, leisure, self-care.

And he had some work histories, so we could also look at self-direction, social adjustment, and also work adjustment. And then those are collapsed into General

Adaptive Composite scores. These are composite scores which involve a General Adaptive Composite and then conceptual, social, and practice, which was testified about earlier.

Q How did you administer the ABAS-3 to the petitioner?

A Well, typically the way that it's administered is that you have a person read the items and go ahead and respond on their own. In this particular case I had serious concern about his ability to read the items adequately. Not only in terms of comprehension of the items, but he seemed to have some visual acuity problems. He has asked for glasses, according to DOC records, before. He didn't have them when I saw him. And I had some concern about him being able to actually see the items.

The manual does provide for the examiner to read the items to the individual and record their scores. So I administered it and I explained what the scale system was, the rating system: "I'm going to read you a number of items and, if you do these things always or almost always, you need to [323] indicate it as a three. If you do it sometimes, you indicate it as a two. If you do it never or almost never, you indicate it as a one."

And for each item I repeated those choices each time. And unlike what was, I think, suggested earlier this morning, I did not give him a score. He gave his own score on each one of these items.

Q Were you in the courtroom yesterday when the petitioner's attorney had him read a page of the ABAS-3?

A I was.

Q Was that a proper way to score his answers on the ABAS-3 yesterday?

A Yesterday it was suggested that it would be scores from zero to three. The score zero is that it's not applicable. For example, if somebody's blind and you're asked if they can read a menu, that would be an item that would be not applicable. So the scores would be – typically, again, you ask a question. And he was – he was not given the choices again. I reminded him every time what the choice was. And actually I didn't keep track, but he gave lots of the same kinds of answers he gave with me.

Q Sometimes did he give a three, where you had not given a three?

A I think, I think he gave a three on some that he may have given a one or two on previously. But –

[324] Q In capital cases what are some of the problems in assessing someone's adaptive behavior?

A Well, as indicated, I rely on one of these standardized instruments because it's the only way we have to kind of quantify an individual's adaptive functioning. Relying on historical events can be interpreted one way or the other.

Some examiners will consider an individual who works in a menial labor job to not be adaptive. And I'll be honest; I think that it is adaptive. I think when somebody is working rather than not working, is an adaptive functioning because they are trying to support themselves, earn money to pay their bills, buy gasoline for their cars, and things like that.

So, you know, many of the things that are looked at as adaptive functioning can be, I think, interpreted one way or the other.

Q In a capital case, why is self-reporting the best way to assess adaptive behavior?

A Well, if you're referring to the Adaptive Behavior Assessment System in the self-reports, it's the only standardized instrument that we have that has norms to do that. So it's an instrument that I rely on under these circumstances. When an individual's in a capital case, nobody's really around him except for himself on a regular basis for six months and he has – he does have knowledge about his life and his life experiences and what he thinks he can do [325] and what he cannot do, and what he did and what he did not do. In this case – what I also do is I look at whether I'm getting what I would call a consistent response. In each one of these areas of evaluation it starts off very simple, like: "Do you say hello, goodbye, and things like that," which is typical of children, to very complex things. And what I'm looking for is that people, as an adult, they are going to have lots of threes to begin with and then there should be some twos and ones as you get further down the list of described behaviors.

If somebody is masking, meaning that they are trying to present themselves as better than they really are, you would expect they'd give all threes on everything.

In Mr. Smith's case, just individually with me, he was quite discerning. There were many times when he stopped and thought about what the particular question was before he gave an answer. And there are a few times when he said: "No, wait a minute. I'm going to change that." And then he'd give a lower answer or give a higher answer.

It was the kind of protocol that I would expect on this particular device.

Q And I think you just talked about masking. What is your opinion about masking?

A Well, it can occur, I mean. But masking occurs, I think, at all intellectual levels. There are a lot of people, even at [326] average and higher, each level, or even gifted levels, who say they can do things they really can't or they try to brag about their behaviors or exaggerate what they can do.

I'm not going to say it doesn't happen at the intellectual disabilities level, or borderline intellectual level. But to me it happens at all levels.

Q What is the problem with administering the Independent Living Scales in assessing adaptive behavior?

A The Independent Living Scales is not a recommended device for assessing adaptive behavior. I use it quite frequently. I use it typically when I'm asked to evaluate individuals who are in need of a conservatorship or guardianship, as an older adult, to determine whether they can manage their financial affairs and to determine whether they can manage themselves personally. That really is what the device was designed to do.

THE COURT: Ms. Hughes, is now a good time for us to break for lunch?

MS. HUGHES: (Nodding head affirmatively.)

THE COURT: All right. We will be in recess for 1 hour and 15 minutes. We will start back up at 1:15. We're in recess.

(A recess was taken at approximately 11:59 a.m.)

(Afternoon session, 1:15 p.m., in open court, Petitioner present.)

THE COURT: You may continue.

[327] BY MS. HUGHES:

Q Dr. King, we were talking about the Independent Living Scales when we broke for lunch.

A Yes.

Q Do the Independent Living Scales give any guidance as to who that assessment should be administered to?

A Not really. I mean, there are norms that are more for the elderly. But I'm not going to say that there is a lot of information in the manual itself about who you can give it to and who you can't. I'll just say that typically my own use of it has been with people who are elderly and trying to establish a guardian/conservatorship.

Q What is the AAIDD?

A That's the American Association for individual disabilities – Intellectual and Developmental Disabilities.

Q Is that an advocacy group, in your opinion?

A I think they are both an advocacy group and a group to help establish diagnoses and also ways to assess mental retardation – I'm sorry – mental disability.

Q Do you agree with Mr. Reschly's testimony that the DSM-5 follows rather than leads the AAIDD?

A I'm not sure I would agree or disagree. It's an independently developed text by the American Psychiatric Association.

Q Is there anything in the AAIDD manual that says that the [328] Independent Living Scales is a proper tool for assessing adaptive functioning in capital cases?

A Not that I know of, no.

Q Did you review the results of the Independent Living Scales given to the petitioner by Dr. Fabian?

A Again, I couldn't read all of his writing.

Q Did you see in Dr. Fabian's report that the petitioner denied being connected with the Mental Retardation Development board?

A I'm sorry. Would you repeat the question?

Q I'm sorry. Did you see in Dr. Fabian's report that the petitioner denied being connected with the Mental Retardation Development board?

A I don't recall that.

Q Is there any such board in Alabama that you know of?

A No, I don't know that.

Q Did you review any records indicating the petitioner should know what that board is?

A No.

Q Did you review the Department of Corrections records concerning the petitioner in this case?

A I did.

Q What was the significance of those records to you?

A The records contained multiple contact forms with Mr. Smith over 20 years. And what I found in those records were [329] consistent contacts within their document as indicating that he had no mental disability, no psychiatric problems, functioned normally, thought processes were normal, that he had asked for health care on numerous occasions –

including, I remember, one occasion when he wanted to have some teeth pulled because they were bothering him and he asked for glasses. But he had contact with health professionals regarding his hospitalization in Atmore. So I found nothing in any of those records indicating that anybody saw him as having any intellectual disability.

Q Did you review records from when the petitioner filed an appeal from a disciplinary?

A Yeah, there was one entry from the Department of Corrections that was a three-page appeal that apparently was written by Mr. Smith way back in 1997 or 1998. He had a disciplinary action against him. I think he got involved in a fight with another inmate and was written up for it. And he filed an appeal of that disciplinary decision which was ultimately denied, but he appeared to have written a pretty well-done document that was three-pages long.

Q What did you think was significant about that?

A Well, I think in terms of what we've been talking about, that's some indication of adaptive functioning and functioning adequately within the prison system. But it's also not consistent with what I would expect from somebody who suffers [330] from intellectual disability.

Q Is the criteria for assessing intellectual under the DSM-5, is it necessary to explore the petitioner's adaptive functioning?

A Yes.

Q And what were your findings concerning the petitioner's adaptive functioning?

A Well, I administered the assessment for adaptive functioning, the ABAS-3, and he basically gener-

ated scores that were well above the cutoff that we use typically for consideration of intellectual disability in terms of adaptive functioning. These scores range from a low of zero or one – I’m sorry – one to a high of 19. Usually we would consider a significantly subaverage score, significantly deficient score, as three or below in any area. Of those eight areas that are measured, he had no scores that were even close to three. In fact, his lowest score was a six. And then when I looked at the General Adaptive Composite, which is the GAC score, his standard score on that was 83. This, again, would be an average of a hundred, a standard deviation of 15. His average score was 83. His conceptual score was 83, his social score, which was the lowest, was 79, and his practical score was 87. So in that particular instrument he generated no scores that were even close to significantly deficient.

Q What were his scores, what were the range of his scores?

[331] A His scores ranged from a low of six to a high of 10. 10 would be average. And he had multiple scores that were sevens and eights. He actually generated, in terms of my experience with capital litigation cases like this, he generated the highest scores that I have received on this kind of instrument.

Q And there was no indication in his history that he had a serious problem in adaptive functioning; is that correct?

A You know, not to – my looking at historical data, sure, there can be argument about that. But I see his adaptive functioning – I think that one thing we have to be careful about is it’s difficult to consider adaptive functioning as looking at it from when he was in school, and then when he was adolescent, then when

he was an adult, and mixing up all of those. Current adaptive functioning appears to be in the average to low average range. He may have had some problems with adaptive functioning when he was in school, but I don't think that that was the result of intellectual deficiency. I think that it was just as easily or more easily explained by what was going on at home. Some lower, perhaps, intellectual ability and also he's starting to use alcohol at a fairly young age.

Q Were his scores on the ABAS-3 consistent with your overall impression of his adaptive functioning?

A They are actually higher than what z expected would be expected. I think if there's consideration that he functioned [332] at the borderline range of ability, his adaptive functioning scores are higher than what may be expected.

Q In your opinion, does the petitioner have substantial deficits in conceptual, practical, or social domains of adaptive functioning?

A Not to the level that's required to diagnose him with intellectual deficiency, intellectual disability.

Q Did you also consider whether the petitioner had substantial deficits in the nine domains identified by the Supreme Court in Atkins?

A Yes.

Q And what was your opinion?

A He does not, he does not show substantial deficiency in any of those areas.

Q Do you agree with the petitioner's experts that he has significant deficits in his adaptive functioning?

A No, I do not.

Q Does the petitioner have strength in his adaptive functioning?

A He does.

Q And what are those?

A He has a particular strength in what was reported as home living, also some functional academics. His scaled score there was an eight. Self-care, he appears to take pride in himself, take care of himself. Even though his work was menial, he [333] reported and – he really gave me the indication that he took a lot of pride in his work skills, his work ethic. He arrived on time, he tried to get along with his fellow workers. He told me that he worked in landscaping for over a year. It may have been at different places, but he was doing that on a regular basis. So he – you know, he didn't function at average or above in all of those areas, but he was functioning well above what we would consider to be extremely deficient.

Q Did you consider his strengths as well as weaknesses in examining adaptive functioning?

A Sure.

Q Does an IQ test being renormed affect the results in any way?

A No.

Q Is there any reason to subtract or deduct points on IQ scores?

A No. IQs are considered to be, again, what they are. And in this case, as I've said many times already, we have five IQ scores that were obtained over a lengthy period of time by different examiners under different conditions, and they are all in the borderline

range of intellectual functioning, as indicated by the manual.

Q When was the first time the petitioner was found intellectually disabled or –

A I think here.

[334] Q And I think you said five other people considered his intellectual functioning and none of them found he was intellectually disabled?

A That's correct. And even Dr. Reschly's report on page 18, where he lists the table of all of the IQs given – the last column indicates the diagnosis given in every case – it says "borderline intellectual functioning."

Q Did you assess whether the petitioner meets the third requirement for a diagnosis of intellectual disability?

A I did.

Q And what did you determine concerning that third requirement?

A That's the requirement that he shows substantial evidence of intellectual disability before the age of 18. In my opinion, there is not any evidence for that.

Q Would you make a diagnosis –

A Let me back – let me back up a little bit. There was that one page that said EMR, which does indicate emotional – I'm sorry – educably mentally retarded. Back in those days that was the term that was used. That's the only indication that I saw through all the records that were available prior to age 18 and also his report of his life at that time. So there was that indication, but I have to take that into context of everything else, all the information I've collected. And I think that the overwhelming evidence is that he was

not [335] functioning highly, but he was not functioning as an intellectually disabled individual.

Q And do you agree with the testimony yesterday that the petitioner's IQ scores as a child were in the mild intellectual disability range?

A No.

Q What range were they in?

A They were all in the borderline range of ability from childhood to adulthood.

Q Would you make a diagnosis that someone's intellectually disabled without meeting the person?

A I would not.

Q Why not?

A It's just not accepted clinical practice.

Q In your opinion has the petitioner ever been intellectually disabled?

A No.

Q And what is the overall basis of your opinion that the petitioner is not intellectually disabled?

A Well, the three prongs again, I've indicated before, is that he has no testing that indicates that he functions with an IQ of 70 or below in consistent fashion. Because we have five different instruments. They all indicate the same thing. If we just look at the IQ scores – borderline, also, functioning. I think he actually functions higher than that. But we have [336] that.

Second is his adaptive functioning. And the only standardized instrument, I think, available to help assess that is the ABAS-3. He has no score of three or

below, doesn't even come close to that. My additional assessment of his adaptive functioning, based on my interview with him and history he gave, plus all the other records I have, like from the Department of Corrections over 20 years, do not indicate any significant deficiencies in his adaptive functioning.

And I don't see any indication for the third prong other than that one page on one school record that he was ever diagnosed or considered to be intellectually disabled prior to the age of 18.

MS. HUGHES: Thank you, Dr. King. That's it.

THE COURT: All right. Ms. Keeton?

CROSS EXAMINATION

BY MS. KEETON:

Q Good afternoon, Dr. King.

A Good afternoon.

Q You are not board certified as a forensic psychologist; correct?

A No.

Q And you are not a clinical neuropsychologist; correct?

A I do neuropsychological testing, but our board doesn't recognize a specialty in that area.

[337] Q You mentioned in your CV, which is Exhibit 2, State's Exhibit 2 –

A Yes.

Q – that you've done approximately 10,000 evaluations in your career?

A Was it 10,000 or eight? Let me look. Which page are you referring to?

Q Let me go back.

A Exhibit 3?

Q I'm sorry?

A I think I see what you're referring to. This is my Exhibit 3, page 11. I think I was referring to 10,000 at least 10,000 evaluations of children or adolescents during my professional career, yeah.

Q So is that separate from –

A Forensic evaluations.

Q Okay. And so would the forensic evaluations be in addition to that 10,000?

A Sure.

Q So 18,000?

A Yeah.

Q And it's well over 300 evaluations a year during your career; is that correct?

A Probably. I probably do even more than that, yes.

Q You've not authored any publications in forensic [338] psychology; correct?

A No. That's not true.

Q And you have also not authored any publications regarding intellectual disability; correct?

A I'm sorry. Publications in what?

Q In regard to intellectual disability?

A No.

Q You mentioned earlier that you spent two years working with intellectual disability or an intellectu-

ally disabled population at Sunland in Tallahassee; correct?

A No. I said I had worked there, but it was approximately six months.

Q Six months. Okay.

A Three months actually. I think it was three months.

Q And that population is predominantly severely intellectually disabled; correct?

A Actually, when I was there, they had a range of individuals who were profoundly retarded to actually mildly retarded. "Mildly retarded," that's the terms that were used back in those days.

Q Okay. Your report – again, it's State's Exhibit 1 – you list as your data sources on page two that you reviewed educational records that were introduced during Mr. Smith's trial; is that correct?

A Yes.

[339] Q Did you review any other school records besides those that had been provided at trial?

A I only had school records. I don't know if there were any others that I had missed.

Q Okay. Well, there are additional records that we, the petitioner, submitted that were outside of those submitted at trial. I believe it's Exhibits 2, 3, and 4. So you're unsure if you reviewed those records completely?

A If they are the ones that were testified about today, or yesterday, I believe I have seen those records as well.

Q Well, you state in your testimony that Mr. Smith did not attend school beyond the sixth grade. But

records actually show him as being in the eighth grade when he left; correct?

A Yeah, that's what he had told me. That may be an error on his part.

Q Inability to control one's behavior in school, that can be an indicator of adaptive functioning; correct?

A Sure.

Q On page three of your report you note that Mr. Smith has male pattern baldness, with brown hair and hazel eyes; correct?

A Yes.

Q Is that important for diagnostic purposes?

A No. It's just descriptive.

Q It's not important regarding confidence in testing procedures; correct?

[340] A No.

Q Wouldn't an individual's difficulty in seeing, when they have to see to be able to do testing, be important for determining confidence in testing procedures?

A Could be, yes.

Q And wouldn't someone's hearing or difficulty in hearing be important for determining confidence in testing procedures? Correct?

A Could be, yes.

Q Can you tell me where in your report that you mentioned that you observed difficulties in seeing or hearing by Mr. Smith?

A I did not in the report.

Q Again on page three of your report, you note that Mr. Smith was drinking on a daily basis between the ages of 20 and 27 –

A Yes.

Q – until his arrest; correct?

A Yes.

Q And that was from self-report; correct?

A Correct.

Q However, based on your review of the DOC records, I am sure you are now aware that Mr. Smith was actually incarcerated from age 19 to 26 and then again at 27, until 27; correct?

A Yes.

Q So it would be highly unlikely that that is an accurate [341] self-report; correct?

A What it really refers to is the time that he was not incarcerated, you know, during the age range.

Q Which would be how long? About approximately one year; correct.

A Yes.

Q You mentioned in your report on page eight that it should be remembered that – I'm sorry. It's kind of this block paragraph, it's towards the end: "It should be remembered that he discontinued his education without finishing the seventh grade"?

A Yes.

Q And: "Therefore his achievement levels are in good concert with where he was functioning at that time that he discontinued his education"?

A Correct.

Q Are you saying that you cannot judge someone's IQ if they left school early?

A No, that's not what it refers to. That refers to achievement level.

MS. KEETON: Okay. I'm going to – if I may approach, Your Honor?

THE COURT: Yeah.

BY MS. KEETON:

Q And, Dr. King, I'm showing you what's been marked as [342] Exhibit 13.

A Yes.

Q Can you identify that?

A It appears to be the visitor register from Holman Prison on January 31st, 2017.

Q And is that in fact the date that you visited with Mr. Smith?

A It is.

Q Is that your signature? (Indicating.)

A It is.

Q Would you agree that that is the time that you signed in and out on that log?

A Correct.

MS. KEETON: At this time I would move to admit Exhibit 13, Your Honor.

THE COURT: All right. Mark it in.

(Petitioner's Exhibit 13 was entered into evidence.)

MS. HUGHES: No objection.

BY MS. KEETON:

Q The report – your report – I’m sorry – shows at page three that you began your evaluation at 8:30; is that correct?

A Yes.

Q And the log-in sheet shows you signing in at 8:17; correct?

A Right.

Q Now, the difference in time there would be because of [343] procedures involved getting into the visiting yard and setting up, I presume; correct?

A Right.

Q So if you signed out at 11:30, you wouldn’t have actually finished at that time, it would have been a little bit before that, probably a few minutes?

A That actually was, you know, signed at – I’m talking about maybe a couple of minutes.

Q Yeah. Well, it’s actually 13 minutes between the time you signed in and started the evaluation; right?

A Yes.

Q Would it be approximately that between the leaving and signing out?

A Not in this particular case. I can’t remember exactly what happened, but I think that the way that the sign-out works is that the petitioner, the prisoner, actually is removed first. But in this particular case, for whatever reason, it happened almost simultaneously. As soon as he left, I left.

Q Okay. So you would agree that between 8:30 and sometime short of 11:30 was the actual amount of time you spent with Mr. Smith; correct?

A It was right about three hours, yeah.

Q How long was your evaluation of Mr. Smith in regard to your interview?

A Probably about 20 minutes.

[344] Q And how long did it – was that the same thing as a mental status exam?

A Some interview and mental status examination, yes.

Q So would that be 20 minutes for both of those? Correct?

A Total time probably.

Q Total time. And approximately how long did it take for you to administer the WAIS-IV with Mr. Smith?

A I mean, I don't recall.

Q How long would be an average amount of time that one would administer the WAIS-IV?

A It can – there's no really average amount of time. Sometimes it takes 30 minutes. I have it memorized so I don't have to look in the manual a lot. Sometimes it takes an hour, but I can't recall what it was with him.

Q Okay. So an hour maximum, would you say?

A That would be pretty unusual. I mean, I just – like I said, I can't recall exactly how long it took.

Q And you also gave him the WRAT-4. Do you recall how long that took?

A That typically would take – under these circumstances it would take about 20 to 25 minutes at the

most. The majority of that time is – 15 minutes is a lot for the arithmetic portion.

Q So approximately 45 minutes for your interview, mental status exam, and the WRAT-4. How long did it take you to administer the ABAS-3?

[345] A That took the majority of the time that was left over, and it was probably an hour.

Q On the ABAS-3, which is Exhibit 19, do you have a copy up there within your raw data, I presume?

A I do.

Q Did you administer all of the ABAS-3 items?

A Yes.

Q There are, I believe, notations on some of these responses where I believe you reference observed?

A Yes.

Q Does that mean that you did not ask that question?

A No. It means I asked the question, but I also observed it at the same time.

Q Okay. Did you actually read the items to Mr. Smith?

A Yes.

Q And I want to ask you a couple of things. One, earlier you stated that part of the reason that discussing the ABAS-3 yesterday with Mr. Smith would not be an appropriate reading or testing of Mr. Smith is that zero is only an option if somebody is completely incapable, so it's not applicable; is that correct?

A Yes. If not – it says “is not able.”

Q What does next to zero on that ABAS actually say there?

A Are you talking about the individual?

Q Yes.

[346] A “Cannot perform the behavior; is too young to have tried the behavior; does not have the skill to perform the behavior; has not been taught to perform the behavior; or has some limitation that prevents performing the behavior.”

Q That does not say “not applicable”; correct?

A I’m sorry. It should have been “is not able.”

Q And “is not able” would not be only in situations of someone who is blind and cannot read a menu; is that correct?

A There might be other conditions that would make somebody not able; correct.

Q Do you agree it’s important to administer standardized tests according to the test’s publisher and authors’ requirements?

A Yes.

MS. KEETON: One moment, Your Honor. I’m sorry.

One second, Your Honor, I apologize.

Q You mentioned that the ABAS allows for self-reports; correct?

A Yes.

Q And it allows you also in certain situations to read the reports?

A Correct.

Q And what are those situations?

A If somebody does not have the ability to read or there's a question about vision, it's permissible for the examiner to [347] read the items to him.

Q And you mentioned that yours was concern about Mr. Smith's ability to see?

A Read.

Q Okay. Earlier you said see and comprehend; correct?

A It was more a concern about reading.

Q Because if it was about his ability to see, you would have mentioned it in your report; correct?

A Right.

Q You observed Mr. Smith take or at least read the ABAS yesterday; correct?

A It was my impression he had some difficulty with it, yes.

Q Okay. Do you know what grade level the ABAS was written at?

A I do not.

Q Would it be familiar to you that the ABAS is written at a sixth-grade level?

A That wouldn't surprise me. That's typical for a lot of tests.

Q Again – this is page 18 of the ABAS testing manual. Can you read that top part? I'm sorry. Well, actually you should probably read this bottom part first. Can you read that for me? (Indicating.)

A Which part? Are you talking about what's highlighted?

Q Below that. Read –

[348] A Read “another option”?

Q Yes.

A “Another option is to administer the ABAS-3 using a structured interview format. Administering the ABAS-3 in this way is consistent with the FSM-5 requirement to use both a clinical evaluation and a psychometrically sound measure when assessing a person for possible intellectual disability. (APA 2013.) A structured format may be especially useful when a respondent exhibits concerns about the individual being evaluated or about the assessment process, or when you desire additional information about the individual’s activities.” Q Okay. And so that’s what – that’s why you read the ABAS to Mr. Smith; correct?

A Yes.

Q Now, can you read this part of the manual for me that’s highlighted?

A “Note, however, that when administered in this way, ABAS-3 results are qualitative only, as the ABAS-3 may be used to generate structured clinical information on adaptive behavior but should not be scored. Alternatively, you may elect to administer the ABAS-3 in the standard manner, which may be scored, and then follow up with the respondent using a structured interview.”

Q Well, that’s part of the main instruction, if you read it in the way that you did with Mr. Smith, that it is [349] inappropriate to actually score it; correct?

A Well, I wouldn’t, I wouldn’t agree it’s actually inappropriate to score it. I mean, that’s the suggestion that it has there. But it is, as I said, an indication, before in my testimony, it’s one of the few devices that we have in order to come up with some quantification.

Q I'm sorry. Is that a suggestion there in the manual or does it say: "However, that when administered in this way, ABAS results are qualitative only"?

A That's what it says.

Q And they should not be scored?

A It says what should not be scored?

Q Okay. Should not is not a suggestion; correct?

A Yes.

Q And you did score Mr. Smith's ABAS; correct?

A I did.

Q Under the test manual, that would make that an inappropriate use of the ABAS-3; correct?

A I wouldn't say it would be inappropriate. But I did score it.

Q Okay. You talked about the GAI in regard to the WAIS-IV; correct?

A Correct.

Q Which IQ summary score does the AAIDD recommend be used in determining intellectual disability?

[350] A I think that's the full scale IQ score.

Q Okay. And that's the score that you used in regard to your determination; correct?

A Yes.

Q Not the GAI?

A No.

Q How often does a verbal and performance score differ by 15 points or more in the WAIS-IV?

A Well, it depends on the IQ score that's being considered. So you have to look at a table where that information is provided. Where there is a difference of the magnitude that I had, it's somewhere between 12 and 15 percent.

Q And that's actually table B.2; correct?

A I believe that's correct.

Q Doesn't table B.2 actually suggest a 26-percent standardization sample at differences of 15 points or more?

A If you don't mind, let me take a minute and look at the manual.

Q Absolutely.

A Were you referring to table B.4 in the manual or in the – or in the administration scoring manual?

Q Table B.2 in the administration and scoring manual.

A I'm sorry. What was your question again?

Q How often does a verbal and performance score differ by 15 points or more in the WAIS-IV?

[351] A Actually, I guess that's 17.5 percent.

Q 17.5? Is that a consideration of both when verbal is higher than the performance and the performance higher than the verbal?

A This is table B.2, where the full scale IQ score is less than 79. The difference between Mr. Smith's verbal IQ of 72 and performance of 86 is 14 points. The table has – it's the first column – the amount of

discrepancy is 14 points, so the percentage is 17.5 percent of the time.

Q What was the verbal performance difference in the WAIS-R that Mr. Smith took in 1979?

A I don't recall.

Q Do you recall the difference in 1982?

A I do not.

Q Do you recall that the verbal was higher than the performance in both of those?

A I think – I think when you mention it, I recall that that may have been an 80 or something like that.

Q You mentioned on direct about James Flynn's article "Tethering the Elephant," which was 2006 approximately? Is that correct?

A Yes.

Q Have you done significant reading or research regarding the Flynn effect since that time?

A Some, yes.

[352] Q Would you agree that there's actually substantial research that confirms the Flynn effect more recently than 2006?

A I would agree that there's research that confirms and denies it.

Q Would you agree that the AAIDD does suggest use of the Flynn effect in regarding scores?

A I'm sorry. Would I agree that it does what?

Q That the AAIDD actually does recommend use of the Flynn effect?

A It does.

Q And the DSM-5 actually speaks to the Flynn effect as well; correct?

A It mentions it, yes.

Q And, in fact, on that third paragraph there, can you read the first couple of sentences?

A What's the beginning of the paragraph?

Q "Factors that may affect."

A "Factors that may affect test scores include practice effects and the Flynn effect; i.e., overly high scores due to out-of-date test norms." Continue?

Q Yes. The second sentence.

A "Invalid scores may result from the use of brief intelligence screening tests or group tests; highly discrepant individual subtest scores may make an overall IQ score invalid. Instruments must be normed for the individual's [353] sociocultural background and native language. Co-occurring disorders that affect communication, language, and/or motor or sensory function may affect test scores. Individual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single IQ score. Such testing may identify areas of relative strength and weaknesses, an assessment important for academic and vocational planning."

Q And so that at least suggests in the DSM-5, would you agree, that that Flynn effect might result in overly high scores; correct?

A It says: "Factors that may affect test scores are practice effects and the Flynn effect." That's all it says.

Q And suggests that the Flynn effect may result in overly high scores, due to out-of-date test norms; correct?

A That's not what it says. "Invalid scores" – it goes on to say: "Invalid scores may result from the use of brief intelligence screening tests." That's not referring to these kinds of IQ tests or the Flynn effect.

Q The parenthetical next to the Flynn effect says and it defines the Flynn effect as "overly high test scores due to out-of-date test norms"; correct?

A All it says is: "i.e., overly high scores due to out-of-date test norms." That refers to the "may affect" or "may not."

[354] Q Thank you, Dr. King. And in that same paragraph that you actually just read, as well, I want to point back to one thing that you mentioned during your earlier testimony, that you have not seen or researched areas where neuropsychological assessments would be important in intellectual disability assessments; correct?

A Uh-huh (positive response). That's correct.

Q And that sentence in that third paragraph, can you reread that again? "Individual cognitive profiles."

A "Individual cognitive profiles based on neuropsychological testing are more useful in understanding intellectual abilities than a single IQ score. Such testing may identify areas of relative strengths and weaknesses in assessment important for academic and vocational planning."

Q You would agree that that does suggest that neuropsychological testing could be important in determining someone's actual intellectual functioning; correct?

A That's not what it said. Do you want to put it back up for me, please?

Q Absolutely.

A What it says is that: “Individual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single IQ score.” It doesn’t really refer to diagnosing the presence of intellectual disability. That has to do with just individual cognitive [355] profiles. It could be of all kinds. It could be high functioning, it could be traumatic brain injury, it could be from all kinds of things.

Q This paragraph would be found in the intellectual disability section of the DSM-5; correct?

A Sure. But that paragraph and all of this –

Q That’s all.

THE COURT: Are you through?

MS. KEETON: I’m sorry. No, Your Honor.

Q You noted that there is nothing – I’m sorry. Go back. You actually stated in your report that Mr. Smith, on page 10, was already diagnosed with learning disabilities in his educational career; correct?

A Yes.

Q Where did you locate that in the school records?

A I’m not sure that I – I think I saw something in the school records about that. But he also had been diagnosed with learning disabilities by a report from his mother and also his report to me. And Dr. Chudy’s report.

Q A report from his mother? Isn’t it true that in talking with general people in the public that they may say “learning disabled” just as likely as they would say “special education”?

A It's possible. But –

Q Okay. You have page 10 right there. (Indicating.)
Under Diagnostic Impressions, what does that say?

[356] A “Learning disabilities, NOS.”

Q And before that, the highlighted part?

A “DSM-5 diagnoses.”

Q Can you tell me what page in the DSM-5 there is a diagnosis for learning disabilities not otherwise specified?

A I'm not sure that there actually is. I think I may have borrowed that from the DSM-IV.

Q That's what I thought. You mentioned that you reviewed Mr. Smith's DOC records?

A Yes.

Q And I lost my page where they are. And that there was nothing in that record that suggested anyone had concerns regarding his abilities?

A Correct.

Q And I'm not sure if you have the DOC records up there with you.

A I have. I have them. They are voluminous.

Q I would definitely agree. On page 31 of the DOC records there's a question mark next to “retarded.” Is that correct?

A Are we talking about Bates stamp 31?

Q I'm not sure.

THE COURT: Can you just put the page you're talking about on the presenter? That way nobody will have to go through all their records.

MS. KEETON: It is Bates number 31.

[357] A I'm sorry. Do you have it? Are you asking me?

Q I'm saying it does have a question mark next to "retarded"; correct?

A No, that's not accurate. I think it says – a box for intellectual functioning and it has four potential boxes to check, normal, slow, borderline, or retarded. And it just has a question mark in the box. I think that they're not responding to anything.

Q Okay. Referring you to page 38 again, there's a question mark there in the intellectual functioning category; correct? A Same thing, yes. There's nothing checked. There's just a question mark in the box.

Q And again with page 39, there's a question mark regarding the intellectual functioning; correct?

A Same thing, yes.

Q And then on page 40, there is a notation that Mr. Smith has slow thought processes; correct?

A Now you're referring to the intellectual functioning where it says "normal"?

Q No, where it says "thought processes."

A Oh, "slow." But then there's this box up above it that says "intellectual functioning, normal."

Q I asked you about the thought process section. Does it say "slow"?

A Down below, "thought processes, slow," yes.

[358] Q And I believe you mentioned that one of the things you noted in Mr. Smith's record was an appeal that he filed in regard to a disciplinary; correct?

A Yes.

Q Is that, at page Bates number 126 through 128, is that what you're referencing?

A I believe that's correct.

Q And –

A My Bates stamp 126 through 128 just says “inmate requests classification security level.” So that's not it.

Q Okay. That's fine. I believe – actually I'm sorry – you're referring to page 133 through 135?

A I think we still have different numbers.

Q Is that your –

A Yes, that's it.

Q 133?

A Yeah, I have a different 133. But that's – I believe that's the – I believe that's the disciplinary appeal I saw before, yes.

Q And that's actually a typed document; correct?

A It is.

Q So you have no idea if Mr. Smith prepared that or not; correct?

A I can't tell from that whether he did or didn't, although it is indicated as his appeal.

[359] Q Actually, I just want to note that page 134 there does not actually have a signature on it; correct?

A No, there's not.

Q Going to 232, there at the bottom, can you read that last entry that looks like 2/19/99?

A “Psyche assessment, review of past” – I'll do the best I can – “review of past” – I think that's supposed

to be “psychological” – “psyche” something “inmate not seen as threat to self or major escape risk. Could benefit from ABT” – I can’t tell if that’s “ABI or special education.”

Q Would that be ABE?

A Yeah, it might be.

Q To 240 –

A Yes?

Q – and that remark down there states?

A “IQ estimated to be low average range.”

Q This is page 242. Does that have a score, a test score, on there?

A I’m sorry? What again?

Q A test score? On 242?

A I’m sorry. What are you asking me about?

Q Is this a test score on that page?

A A WRAT-4 – WRAT-4 – I’m sorry. WAIS – okay – WAIS-V, 73, verbal 73, 72, and 72.

Q And this is page 244. Do you have that page?

[360] A I’m looking at it, yes.

Q I’m sorry. I can’t get it all on there. That’s better.

THE COURT: What is it you want him to look at on that page?

MS. KEETON: Just reviewing the page.

Q Would you note that that page appears to note that Mr. Smith is easily victimized?

A Where are you referring to on the page?

Q I'm sorry. I'm pointing you at the wrong page. I apologize. That's my fault.

Down under Recommendations and Remarks, that last portion, where it recommends Mr. Smith for special education, do you see that?

A I'm trying to read it. I do see it's regarding special education, but I can't read what the first part says. Recommended for – it just says "recommended for special education, help while on death row." I don't know what that refers to.

Q And here, page 246, and I know this is hard to read on there. Would you note there that it notes Mr. Smith's diminished ability to think? I've got it a little too high. Right there, under the indicators, "other clinical indicators"?

A Yeah, it's associated with possible diagnosis of major depression.

[361] Q I want to talk a little bit about your ABAS results for Mr. Smith. And that's Exhibit 4. Correct?

Under the Home Living section – I'm sorry. On that page you give Mr. Smith – and I understand that you did not give it to him, that that was his representation to you.

A I'm sorry. Come again?

Q I was correcting myself. On the "cleans his or her room regularly," you noted – and that's number 17 – Mr. Smith indicated to you a three?

A That's what he indicated, yes.

Q Would you find that –

THE COURT: What page are you on on the exhibit?

MS. KEETON: I'm sorry. It's page seven.

Q Would you find that consistent or inconsistent with number 19's response to making his or her bed?

A I don't really make a decision about whether they are consistent or inconsistent. I just record his responses.

Q Okay. And going back to the test manual results, if it's a self-report where you read it to someone, did the manual ask you or say that you should not score it, but that you should consider it qualitatively? Correct?

A Yes.

Q And wouldn't a qualitative analysis ask you to look at these questions more as an interview format; correct?

A I don't know that that's the case. Qualitatively just [362] means looking at it as a whole. And again, I wouldn't presume to understand exactly why there might be a difference from one or the other. I just record his responses.

Q Under Social, which is page 12, number three, "stands a comfortable distance from others during conversations, not too close"?

A Okay.

Q You note that you observed that; correct?

A Yes.

Q Aren't there rules in regard to the visiting yard about where people must be placed?

A I'm talking about observing it with me and also what his response was.

Q But I'm saying your observation would be in a room where the inmates are required to sit in a particular chair.

A No, I'm talking about his observation with me. He stood at an appropriate level with me.

Q Okay. And you were standing while you were testing?

A We did – we stood at one point when I helped him – I think I got him something out of the vending machine. And certainly when we met.

Q Going to page nine, number five, on Leisure, it states that Mr. Smith gave you a response of one in regard to “plays with games or other fun items with others”; correct?

A Yes.

[363] Q And then the next is “invites others to join him or her in playing games and other fun activities,” and that is a three?

A That's correct. That's what he answered.

Q Would you consider those to be consistent or inconsistent?

A I just record his responses.

Q Number 19 on that same page, “reserves tickets in advance for activities such as concerts or sporting events,” Mr. Smith answered you with a three?

A He did.

Q Did he give you any examples of that?

A To be honest with you, I think that he did. Because those items that are down towards the bottom of each one of those are usually pretty sophisticated items. And I think he said something about how he ordered tickets to go to some game at one point.

Q Up on number three you wrote –

A I'm sorry. Are you still on page nine?

Q Yes, I'm sorry. Number Three. You wrote next to number three; correct?

A Yes.

Q And what did you write that?

A "Has TV, likes to watch westerns."

Q Is that an indication that you wrote something down when someone gave you an example?

A Yeah, I asked him a question about that one specifically.

[364] Q But you did not write it down on number 19, a more sophisticated question, when he gave you an example?

A No.

Q Again on page nine – I'm sorry – number eight and number nine, number eight, "attends fun community activities with others; for example, a movie or a concert," and Mr. Smith's response is a three?

A Correct.

Q And then number nine, "attends fun activities in another's home," number two?

A Yes.

Q Response a two. Would you consider those consistent or inconsistent?

A I just record his responses.

Q Page 10, number 14, you did not record an answer there; correct?

A I did not.

Q But it appears from my calculation that you scored it a three?

A Yeah. I think it was probably just a miss on my part.

Q But you would agree that that was a three, based on your numbers?

A Yes.

Q You don't have to do the math here.

A That's correct.

[365] Q On that same page, number 18, "keeps hair neat during the day by brushing or combing"?

A Yes.

Q And you gave him a three, or he responded a three?

A I recorded his response as a three.

Q And then just down from that, number 23, "obtains haircuts regularly on his or her own," and that's a one?

A Yes.

Q Would you consider those to be consistent or inconsistent?

A I just record his responses.

Q You also note next to number 18 that you observed that he "keeps his hair neat during the day by brushing or combing"?

A Yes.

Q Number 26, "exercises or works out at least two hours weekly" – and again, that's on the same page,

number 10. He answered with a three. Did he give you an example of that?

A No. I just recorded his response.

Q Page 11, number 13, Mr. Smith gave you a response of “refuses when another person asks him or her to do something foolish,” as a one?

A Yes.

Q However, number four, number five, number 17, and number 21, on those pages – on that page – are all scored as three. Would you consider those to be consistent or inconsistent?

[366] A Like I said, I just record his responses. He may have something going on in his own head about specific circumstances about a specific question.

Q Okay. Mr. Smith gave you a response on Social, which is page 12, number seven, “shows respect for persons in authority by following rules and directions”; correct?

A On page 12, did you say number seven?

Q Seven.

A Yes.

Q Okay. You reviewed Mr. Smith’s school records; correct?

A Correct.

Q And you reviewed Mr. Smith’s DOC records; correct?

A Yes.

Q Wouldn’t you agree that there is evidence within the school records and the DOC records to

indicate that three would not be an appropriate answer there or at least a truthful answer there?

A No.

Q You don't believe that there's anything within any school records or DOC records that demonstrate that he fails to show respect for persons in authority by following rules and directions?

A Are you asking me to respond to that?

Q I'm asking you do you agree.

A For the last 20 years while he's been in the DOC, he's had [367] no disciplinary actions, and I think he was responding to the fact that he follows rules of the prison.

Q But you would also say that there's nothing in his school records to show that he has problems with that?

A He did back when he was eight, nine, 10, 11 years old, yeah.

Q This is page 124 of the DOC records. The answer to number five there, "relationship with correctional staff," what does that say?

A "Has something to say about every comment."

Q "Command"?

A That was in 1997. I can't really read that. Is that 1997 or '90 – it's '97.

Q Would you disagree that this is something in his DOC records that suggests he has an inability, a problem, with following authority or instructions?

A From 20 years ago, yeah.

Q And page numbers 407 through 408, which I would also go ahead and agree that they are from the 1997 time period, actually, all the way back through 1990 to 1997, I believe. That's a pretty lengthy history of disciplinaries; correct? A Yeah. From – I remember his records from '91 to '97, he had a lot of disciplinary problems in them.

Q And on death row there are not as many disciplinaries, if any; correct?

[368] A I have no knowledge of that.

Q But there are several notations on mental health surveys where Mr. Smith refused to speak with psyche staff or was uncooperative or belligerent; is that correct?

A I don't recall that. I recall that he declined contacts at times.

Q Being an inmate on death row means that Mr. Smith is locked down a significant amount of time; correct?

A I would assume that, yeah.

Q You note on the ABAS and in your report that Mr. Smith always worked full time and always got along well with fellow employees and his employers; correct?

A That's what he reported, yes.

Q As he was incarcerated from age 19 to 26, and then again at age 27 for most of the year, he had very little time to actually have a job; correct?

A During that period, yes.

Q Okay. So "always works full time," you are looking at approximately one year?

A Well, I think we're also talking about the time before he was incarcerated the first time. So he may have had two or three years where he was working then.

Q Prior to age 18?

A Correct.

Q And that would have been what you reported as light lawn [369] maintenance?

A Yeah, I think among other things, but that seemed to be what he was doing mostly.

MS. KEETON: One moment, Your Honor. I think I may be through.

THE COURT: All right.

BY MS. KEETON:

Q I do have another question. You noted in your earlier testimony that looking at some of Mr. Smith's scores in school that you thought maybe there might have been times where there was little effort or not as much effort; correct?

A Are you talking about him?

Q I'm sorry?

A Are you talking about Mr. Smith?

Q Yes.

A Having little or no effort in school?

Q Yes, sir.

A I think, as I testified earlier, I think that he was showing some effort in earlier grades and then, as I indicated, I can't know exactly when, but somewhere around grades five, six, he started to have significant difficulties in school. If that's what you're referring to.

Q Yes. At grade six, on an individual intellectual assessment report the teacher or tester found that Mr. Smith was cooperative and seemed to be trying his best. Wouldn't it [370] be true that the person observing him at the time would be more accurate than a retrospective look backward?

A Sure.

MS. KEETON: I have no other questions.

THE COURT: Redirect?

MS. HUGHES: Ma'am?

THE COURT: Do you have redirect?

MS. HUGHES: Yes, ma'am.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MS. HUGHES:

Q Dr. King, do you feel confident that the results you received on the ABAS-3 are an accurate reflection of the petitioner's adaptive functioning?

A I do.

Q Does the DSM-5 require use of the Flynn effect?

A No.

Q And a minute ago you were asked about that paragraph in the DSM-5 and were not allowed to finish your remarks. Do you remember what you wanted to say about those sentences in the DSM-5?

A Well, the subsequent part of the paragraph really had to do with the administration, if I remember the particular paragraph, with administration of group tests and things like that in order to come at cognitive profiles and how they work. [371] Those

kinds of tests are not particularly useful to do that. I think that's the paragraph I was referring to.

MS. HUGHES: Judge, may I approach the witness?

THE COURT: Yes.

BY MS. HUGHES:

Q Dr. King, that's Petitioners Exhibit 12, which are some correction records.

A Yes.

Q I'm sorry. Respondent's Exhibit 12. And it's a review of segregation inmates. What do all of these notes indicate concerning the petitioner's intellectual functioning?

A Please give me a minute.

Q Okay.

A Every one of these notes indicate that his intellectual functioning was rated as normal.

Q And are the scores on the WAIS-R that you saw from the DOC records which was, I think, a full scale score of 72, is that consistent with his other IQ scores?

A It is. And if this is one that we haven't seen before, it's yet another example of an IQ score done at a different time, a different examiner, different conditions that is in the borderline range of functioning.

MS. HUGHES: No further questions.

THE COURT: All right. You may step down, thank you.

THE WITNESS: Thank you, ma'am.

[372] MS. HUGHES: The State has all the witnesses.

THE COURT: Any rebuttal witnesses?

MS. KEETON: Yes, Your Honor. May we have a brief restroom break and then call Dr. Reschly?

THE COURT: All right. We'll be in recess for about 10 minutes.

(A recess was taken at approximately 2:38 p.m.)

(In open court, 2:49 p.m., Petitioner present.)

MS. KEETON: I believe Petitioner will call Dr. Reschly.

THE COURT: All right.

Dr. Reschly, you will remember you're still under oath.

DANIEL J. RESCHLY, Ph.D., NCSP,
previously sworn, testified further, as follows:

REBUTTAL EXAMINATION

BY MS. KEETON:

Q Good afternoon, Dr. Reschly. I am correct that you, after your testimony yesterday, that you remained in the court yesterday throughout the day and have been present in court today during witness testimony; correct?

A Yes, ma'am.

Q So you were able to observe everyone's testimony generally?

A Yes, I was.

Q I want to point you – do you have State's Exhibit 1, [373] Dr. King's report, with you?

A I'm sorry. Which report?

Q Dr. King's report?

A I don't have it with me.

Q I'm going to ask you this. The highlighted portion here, that's the top part right under Test Results and Interpretation –

A Yes.

Q – where it says: “However, there is a significant index scatter, with index scores ranging from a high of 86 for perceptual reasoning, which is in the low average range of ability, to a low of 72 for verbal comprehension, which is in the borderline range of functioning,” do you see?

A Yes.

Q Dr. King concludes there that there was a standard – I'm sorry – significant discrepancy of almost one standard deviation between verbal comprehension index of 72 and the perceptual reasoning index of 86. And states that this differential is almost always associated with the presence of learning disabilities. Would you agree with that?

A No, I would not.

Q And why not?

A First of all, there's the issue of a base rate. A base rate refers to how often something happens in the general population. The base rate for verbal IQ and performance IQ [374] differences is very high. I believe Dr. King consulted table B.2 and suggested that the base rate for a performance greater than verbal in that IQ range was around 17 percent. Now, nobody believes that 17 percent of the general population has a learning disability. In fact, the incidence of learning disabilities in United States schools across the United States is 4.1 percent. So if we simply followed this assertion, we'd say that perhaps 17 or more percent of all students have learning disabilities or all adults

have learning disabilities. And that's way higher than any authoritative source has ever estimated the prevalence of learning disabilities.

There are further reasons for that. But the first is a base-rate problem. These things occur too often to be a unique characteristic of some kind of diagnosis that occurs infrequently.

The second problem is no authority in the last at least 40 years has identified performance greater than verbal as a diagnosis or a basis for diagnosing a learning disability. It did not appear in DSM published in 2000, not in the DSM-IV published in 2004, and it does not appear in DSM-5 published in 2013.

Moreover, most learning disabilities are diagnosed in a school setting. The criteria for the diagnosis of learning disabilities in a school setting, including in the state of [375] Alabama, has never used the criterion of a performance IQ score greater than a verbal IQ score. The state of Alabama and the United States generally has required that there be a significant difference between intellectual ability and actual achievement. We see that comment, we see a comment that addresses that in the school reports based on his evaluations in 1979 and 1982.

In both reports the psychometrist comments that his level of achievement is at the expected level for his ability. The idea of a learning disability – and this is further elaborated on in DSM-5 – the idea of a learning disability is unexpected low achievement. Based on Mr. Smith's intellectual ability, his achievement was never unexpectedly low. In fact, his achievement, as noted in the school reports, the word often used is "commensurate with" or "consistent with his intellectual ability." Both were low.

Q I want to point you here again. Also in Dr. King's report I put a little dot right there on the screen that starts out: "However, a single full scale IQ score needs to be additionally parsed in order to look at whether there is a subtest scatter or whether there is consistency. In this particular case, Mr. Smith had a great deal of scatter on his indexes, with his indexes ranging from a low average range to the borderline range of ability."

Wrong page. And I'm going to show you box seven, page [376] seven, of Dr. King's report. Those are the subtest scores.

A Yes.

Q Do you see the significant scatter that Dr. King references?

A Well, again, I think it's important to consider what's called the base rate. How often does scatter occur across the Wechsler subtest? The base rate for scatter of that is a difference between the highest and the lowest subtest. In this standardization sample it's seven points. That's the average amount of scatter. So most normal human beings – and we assume the vast majority of the people in the standardization sample were normal human beings – have a lot of scatter, a lot of differences across the profile of abilities. In this particular protocol that Dr. Smith – I'm sorry – that Dr. King reports, the scatter between the highest and the lowest subtest is only five points. That's actually lower than the average amount of scatter on the Wechsler Adult Intelligence Scale, Fourth Edition, subtest. So the average amount of scatter is about seven. This one shows only about five.

Moreover, there's ample research in the last 20 years that shows that scatter on a subtest profile is not

indicative of any particular disability or diagnosis. If scatter is abnormal and indicative of a disability, well, half the people, based on this profile, over half the people would be regarded [377] as having a disability. In fact, scatter is normal – at least scatter up to seven or more points is normal.

Q Dr. King noted in his testimony – and I believe it's paragraph 58 of your report – that you misapplied the table regarding the WAIS-IV. Would you agree with that statement?

A No. And I'd really like to see both of those tables simultaneously; that is, table 5.7 and table 5.8. We introduced 5.7 in a graph that I provided and the prosecution introduced table 5.8. So both, I think, have been introduced. What I would comment about those two tables is that these are two studies and that the Flynn effect is based upon the summaries of a large number of studies. Nobody argues that every single study yields the exact same degree of the Flynn effect or the exact same degree of the effect of the obsolescence of intellectual test norms.

Now, on the one table, table 5.7, the difference was 4.1 points. In table 5.8 the difference in full scale score, WAIS-III and WAIS-IV, I believe, was 2.2 points. The Flynn effect was based upon the average across a large number of studies. And if we put just these two studies together, we have the three point – a little over three point difference in a 10-year period or a little over .3 per year difference.

The Flynn effect, I want to emphasize again, is about the population average. It is the case, as Dr. King related, that the Flynn effect may or may not apply exactly to every [378] single score, but it does apply to the population when an individual score is interpreted

in terms of how much it varies from the population. So as the population changes, the score that denotes intellectual disability is not approximately 70 anymore, but it's approximately 73 over a 10-year period. That's a fact.

MS. KEETON: And just for a clarification point, Your Honor, I believe that yesterday Mr. Johnson discussed the tables, but I don't believe they were introduced into evidence. However, if Your Honor would like for those to be part of it, we can certainly submit those as an exhibit, as an additional exhibit, if there's no objections.

MR. JOHNSON: No objection.

MS. KEETON: I believe that that would be Exhibit 20, Your Honor.

THE COURT: All right. Mark it in.

(Petitioner's Exhibit 20 was entered into evidence.)

MS. KEETON: We have one copy, Your Honor, but not two.

MR. JOHNSON: Yeah, we do.

MS. KEETON: We will make sure that the Court gets an additional copy.

THE COURT: All right. That's fine.

MS. KEETON: May I approach, Your Honor?

Q Dr. Reschly, Dr. King stated that he did not believe that [379] the section in the DSM-5 recommended the use of neuropsychological assessments and evaluations of intellectual disability. Would you agree with that?

A No. And I think he read this section which the DSM-5 suggests the use of neuropsychological assess-

ments as a way to further understand the cognitive functioning of persons with intellectual disability.

Q So is it your opinion that neuropsychological assessments are helpful in an evaluation for intellectual disability?

A Yes. And I think in the sense that the DSM-5 describes it, it's helpful in understanding the underlying thinking processes that are related to intellectual ability.

Q Dr. King also testified that, while he was unsure of the page, he believed that there was a page in the school records that did diagnose Mr. Smith with a learning disability. I would ask you if you agree with that.

A I do not. There is no such page.

Q Do you believe that, based on your review of the school records, Mr. Smith's achievement test scores, grades, and IQ testing, could he have been diagnosed with a specific learning disability – obviously limited to the records you were able to review?

A The only way he could have been diagnosed with a specific learning disability during the school-age years would have been had the school team ignored or violated in their decisionmaking [380] the Alabama Department of Education rules for special education. Those rules specified throughout the entire time that Mr. Smith was in the public schools that there had to be a large difference between intellectual performance and achievement in order to meet the criteria for a learning disability.

The study that I did with my graduate student, John Hosp, suggested that the average amount of difference using the Alabama regression procedures for deter-

mining what's a reliable difference, the average amount of difference was required to be 16 points. There was never an instance when Mr. Smith's intellectual ability was 16 points above – standard score points – above his school achievement. So he would have never met those criteria.

He would also never have met nor meet today the criteria for a learning disability that are established in the Diagnostic and Statistical Manual, the 2000 or the 2004 or the 2013 versions.

Q And I believe you stated earlier, Dr. Reschly, you were in the court yesterday when Mr. Smith testified; correct?

A I was.

Q You have also reviewed Dr. King and Dr. Fabian's materials; correct?

A I did.

Q And you reviewed his raw data in regard to the ABAS-3; [381] correct?

A I did review those data.

Q And you saw his test results within his report regarding the ABAS-3?

A I did.

Q Dr. King, in regard to the testing yesterday or the review of the ABAS-3 questions with Mr. Smith, stated that he felt like the problem yesterday was that there was an improper direction in regard to zero as a possible score. He stated that that was more for not applicable. I'm going to show you that.

A I believe Dr. King also said today that the zero score indicated not applicable, and that's incorrect.

I have before me the Adaptive Behavior Assessment System technical manual at page 14, where zero is defined as, quote, "is not able," is not able to do the skill. If the individual doesn't have a chance to do the skill, or if it's somehow inapplicable to the individual situation, the appropriate score there is to indicate that you guess on it and there was a guess made on the estimate of the individual's competence with that scale.

Q Okay. But zero would be appropriate if someone is unable –

A Yes.

Q – to perform it?

A Correct.

[382] Q Because it's something that's not in their particular wheelhouse; is that correct?

A That's one way to put it, they are not able to do the skill.

Q And you observed Mr. Smith answer those questions that were on the Communication section, which is page four of the ABAS; correct?

A Yes, I did.

Q And I have up on the screen here – these are Dr. King's results from his administration of the ABAS-3, which are part of Respondent's Exhibit 4, I believe?

A Yes, this is from the Communication subdomain.

Q Based on this review of this document, as well as your observations regarding Mr. Smith's responses yesterday, would you say that there is a distinct difference between them?

A Yes, there was a distinct difference.

Q Based on your observation of Mr. Smith yesterday in his responses to those questions – which obviously the record would be the most accurate reflection of those – do you have an estimate of what a scaled score would be for Mr. Smith on the communication centers?

A Yes, I looked that up on the Adaptive Behavior Assessment System manual. And with the total raw scores, the scaled score would have been three, which is two standard deviations below the mean. I note that the way the items were administered [383] yesterday is the way that they were standardized. That's the way they were intended to be administered by the test authors, Dr. Harrison and Dr. Oakland.

Q And I want to show you here – this is Dr. King's scaled scores for the Communication section. And what would that be?

A I believe his scaled score – if I'm reading this accurately, it's the first of the subtests. The scaled score is six.

Q Which would be a significant difference from your observations yesterday; correct?

A Yes, it would.

Q Going to what the ABAS-3 test manual states in regard to what we know is the way that Dr. King administers the ABAS-3 in this case, which is reading it to the individual, when it states “when administered in this way” – by reading it to the individual – “ABAS-3 results are qualitative only”; that is, “the ABAS-3 may be used to structure clinical information on adaptive behavior, but should not be scored,” what does that mean?

A Well, when you say something shouldn't be scored, it means that you shouldn't sum up the total of the responses on the individual items and then use the sums of those scores on the individual items to transfer the scores to scaled scores and then ultimately to the adaptive behavior score scale with a mean of a hundred and standard deviation of 15. I think all [384] psychologists would agree that it's essential to administer standardized tests in the way specified by the test authors and the test publisher.

If you do your own version of a test – that is, you administer it in a way that is not approved by the test author and test publisher, and most importantly was not used in developing the standardization norms for the test – then you really cannot use those normative standards and report the kind of scores that were reported here.

Now, there's a difference between the ABAS-2 and the ABAS-3. On the ABAS-3 – the test authors and publishers allowed persons to do the tests in a self-report, to do the test by verbally administering the items, reading the items to the person. That changed with the ABAS-3, whereas I quote in this manual from page 18, it specifically forbids the use of the standardized scores – that is, the normative standards – if the items are read to the individual. I think it says this very quote.

Q If a response or results are to be considered qualitative, would that involve clinical judgment on the part of the psychologist to compare the consistency of responses within the ABAS-3?

A Yes. And I think the ABAS-3 authors, Drs. Harrison and Oakland, very clearly say that the results on the ABAS-3 need to be confirmed or

disconfirmed through consideration of a wide [385] variety of other types of information.

Q Dr. Reschly, I believe you stated in your earlier testimony that you have done intellectual disability assessments previously; correct?

A Yes, many.

Q And you have given – have you given the WAIS-IV before?

A Oh, yes.

Q How long would you estimate it would take to administer the WAIS-IV on an average?

A Well, it takes, as Dr. King said, it takes different amounts of time, depending on the individual. I would say an average to do the standard subtests, not all the supplementary subtests, but the standard subtests that are used in determining the IQ, is a minimum of 45 minutes to as much as 75 minutes. So three-quarters to one and a half hours – I'm sorry – one and a quarter hours.

Q And in regard to – you've administered the WRAT-4 before? A That one takes – first of all, there's one subtest on the WRAT-4 that requires 15 minutes for the individual to complete it. So to do the entire WRAT-4, I think, is at least 30 to 40 minutes.

Q To do a general interview and mental status exam, do you think 20 minutes is an appropriate amount of time?

A I would say 20 to 30. And it depends on how much detailed information is sought from the client. In this case there was [386] quite a bit of detailed information that Dr. King reported.

Q In regard to the ABAS-3, how long would you estimate on the average it takes to administer the ABAS-3?

A That depends somewhat on the individual's reading skills. Judging from Mr. Smith's reading the items yesterday and then responding to them, to administer it using standardized procedures specified in the manual would take at least 60, perhaps as much as 90, minutes. He was doing one subtest yesterday and I believe it took him over 15 minutes to do that one subtest, to read the items and select the responses.

Now, he was clearly able to do that. His reading wasn't fast and sometimes he had to reread an item. But he certainly indicated by his responses, and some of his discussion about how his thinking was going on how he was going to respond, that he could read the items and respond to the score scale. But it would have taken a lot longer to do the ABAS under the standardized procedures than it would to read the items and record the individual's responses.

Q And how many sections are on the ABAS-3?

A I'm thinking 10. But I would like to have my memory informed by the actual information.

Q I believe you are correct. I'm going to put this up. I would say 10.

A Yeah, there are 10, including work. And I believe the work [387] subscale was administered by Dr. King.

Q On direct examination Dr. King stated that Mr. Smith knew a few things, and I'm going to list these as I wrote them down: that Mr. Smith was aware of who the current president was and who the immediate past president was, that he was oriented to place and time, and that he was aware of his address, his Z number,

his Social Security number, he was aware that the President had just fired the Attorney General, and some family information. He stated that, while someone who was internationally disabled might know one or more of those things, someone that is intellectually disabled would not know all of those things. Would you agree with that?

A No. I've evaluated a number of persons who clearly meet the criteria for intellectual disability who have known those things generally because they are used over and over and they are memorized over time. I noted, however, though, yesterday that Mr. Smith was not able to give his full Social Security number, he was not able to give the first five digits, he was only able to remember and give the last four digits in his testimony.

Q Someone that is intellectually disabled, would they know when their teeth are bothering them and that they might need to have them pulled?

A Well, I think that's concrete physical pain. And certainly, regardless of intellectual level, people know when [388] they are in pain.

Q Would someone who is intellectually disabled be able to write a note requesting medical attention?

A Generally I would say that they could. But in my experience, with many notes that are written or attributed to inmates, they receive help writing the note or another prisoner actually writes it. I have no knowledge one way or the other whether that applies to Mr. Smith.

Q And again, your opinion in your report was limited to Mr. Smith's pre-18 time period –

A Yes, it was.

Q – in the records?

And how is your opinion in regard to Mr. Smith's pre-18 time different from Dr. King's opinion.

A Well, I think it differs in the fact that I'm applying the Alabama State Department of Education criteria to define educable mental retardation. I'm also applying the AAIDD and DSM-5 criteria, all of which refer to approximately an IQ of 70. The Alabama State Department of Education defined EMR, the criteria on the IQ criterion, who has a score of 75 or below, also associated with adaptive behavior deficits. So the school team had evidence that they could have diagnosed him with educable mental retardation from his very first evaluation in 1979 because the full scale IQ was below 75. He met the criterion for having adaptive behavior issues certainly with [389] his behavior in school, his teacher rating of his very poor peer relations, his distractibility, his problems with following rules and accepting directions and his very low academic achievement. As is often the case with school evaluations, the diagnosis of intellectual disability, or at that time EMR, is delayed until a later age when the pattern of development becomes more stable and more information is gathered.

Mr. Smith was diagnosed with EMR and spent the entire seventh grade in an EMR special classroom. I think that indicates that the school officials ultimately reached the diagnosis of educable mental retardation.

MS. KEETON: One moment, Your Honor.

(A discussion was held off the record between Petitioner's counsel.)

MS. KEETON: We're done with Dr. Reschly at this time. THE COURT: Any cross?

MS. HUGHES: Briefly.

SURREBUTTAL EXAMINATION

BY MR. JOHNSON:

Q Dr. Reschly, did you hear Dr. King change his testimony on cross-examination to admit that the ABAS .0 reflects is not able?

A He did change it. I guess what's important is what did he think it was when he was administering the ABAS itself.

[390] Q You have no idea, do you, what he was thinking when he – thank you. You answered the question.

Yesterday you heard Mr. Smith answer a bunch of the questions on the ABAS; is that correct?

A I did.

Q Is it not true that there were at least a couple where he actually rated himself higher than what he rated himself with Dr. King?

A Yes, I – yeah, I believe there were.

Q Stepping back, would you agree that there are no really appropriate perfectly approved tests of adaptive functioning for a person such as Mr. Smith who's been on death row for 20 years?

A I certainly would agree with that, yes. That adaptive behavior, as I indicated in my report and in my direct testimony, is more difficult to assess than intellectual ability. I can see that.

Q And you personally wouldn't know how long it takes to administer any test to Mr. Smith because you've never evaluated him again, just to make that clear?

A I've never evaluated Mr. Smith; that is true.

Q And you would have to agree also that we don't have all of the school records, do we?

A Well, it's hard to prove what's not there. So I cannot comment whether there are more school records without seeing [391] them.

Q Do you recall testimony yesterday about how school records in Alabama are supposed to be – special ed school records are supposed to be destroyed after a certain amount of time?

A I believe the Alabama law, at least as it was applied in another Alabama case that I know about, although that trial was in Texas, the school district told us that Alabama law requires destruction of school records after 11 years.

Q Thank you.

A After the individual's left the school program.

Q And that, of course, would have been a long time ago, since Mr. Smith is 48, I believe?

A Well, apparently it wasn't done, because we do have these school records.

Q We have some. And, of course – the last question – you have no independent knowledge, of course, as you admitted yesterday, how Monroe County teachers or administrators actually ran their schools back in the 1970s and 1980s?

A As I admitted yesterday, I was never in a Monroe County school classroom, I've never been in a Monroe County school. So I cannot give you specific information. I can only comment on what's in the school records.

MR. JOHNSON: Your Honor, that's all I have.

MS. KEETON: No redirect, Your Honor.

THE COURT: All right. Thank you. You may step down.

[392] THE WITNESS: Thank you.

THE COURT: I understand there is no further testimony to be given; is that correct?

MS. HUGHES: That's correct, Judge.

THE COURT: The scheduling order indicates the post-hearing briefing and basically the timing is off of whenever the transcript is filed. So I understand you are going to be ordering the transcript; is that correct?

MS. KEETON: Yes, Your Honor.

THE COURT: Okay. Well, as soon as the transcript is filed, the time will begin running for the filing of post-trial briefs. Is there anything else we need to discuss today?

MS. KEETON: Not for the petitioner, Your Honor.

MS. HUGHES: Not from the respondent, Your Honor.

THE COURT: All right. Well, thank y'all very much.

MS. KEETON: Thank you.

MS. HUGHES: Thank you, Judge.

MR. JOHNSON: Thank you.

(This hearing concluded at approximately 3:24 p.m.)

[393] CERTIFICATE

STATE OF ALABAMA) COUNTY OF BALDWIN)

I do hereby certify that the foregoing proceedings were taken down by me and transcribed using computer-aided transcription and that the foregoing is a true and correct transcript of said proceedings.

I further certify that I am neither of counsel nor of kin to any of the parties, nor am I in anywise interested in the result of said cause.

I further certify that I am duly licensed by the Alabama Board of Court Reporting as a Certified Court Reporter as evidenced by the ACCR number following my name found below.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
ALABAMA SOUTHERN DIVISION

Case No. 1:05-cv-00474-CG-M

JOSEPH CLIFTON SMITH,
Petitioner,
v.

JEFFERSON S. DUNN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

VOLUME 5

State Court — Trial Transcript

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[770] THE COURT: Dr. Chudy.

MR. HUGHES: Judge, can she -- are you going to call her back?

MS. DAVIS: No.

MR. HUGHES: Can she remain in Court and be excused from the rule?

THE COURT: Yes, she can.

(Pause.)

THE COURT: Good morning, Doctor.

THE WITNESS: Hi.

THE COURT: How you been doing?

THE WITNESS: Fine.

THE COURT: Would you raise your right hand.

THE WITNESS: Sure.

JAMES F. CHUDY

the witness was sworn and testified as follows:

MR. BYRD: Greg --

THE COURT: Mr. Hughes, why don't you step out for a while, but you can come back.

MR. BYRD: Greg, these are these corrected ones.

MR. HUGHES: Yeah.

MR. BYRD: Judge --

(An off the record discussion was held.)

MR. BYRD: Your Honor, if it please the Court, I have items marked Defendant's Exhibit 1, 2

[771] and 3 that I have previously shown to counsel and we agree that these can come in. It is -- 2 and 3 are records from Baldwin County Schools, Mobile County Schools. The other one is medical records from the prison system.

THE COURT: All right. They're in by agreement. (Defendant's Exhibit Numbers 1, 2 and 3 were received and marked into evidence.)

MR. HUGHES: We call Dr. Chudy.

JAMES F. CHUDY

the witness, was sworn and testified as follows:

DIRECT EXAMINATION

BY MR. HUGHES:

Q State your name, please, sir.

A James F. Chudy.

Q And what is your profession?

A I am a clinical psychologist.

Q Can you explain to the jury briefly what that is?

A A clinical psychologist is a psychologist who works with people that have some type of disorder, like an emotional problem or depression, anxiety, a mental problem of some sort and we try to help them with that problem.

[772] Q And what sort of training do you have in this field? Four years of undergraduate at the University of Wisconsin --

MR. CHERRY: If it please the Court, we would be glad to stipulate that Dr. Chudy is an expert in this field.

THE COURT: He's accepted as an expert in the field of clinical psychology.

By Mr. Hughes:

Q Doctor, you maintain a private practice in the field of clinical psychology?

A Yes, I do.

Q And I believe in jury selection some lady said that they refer children to you for counseling from one of the schools in Mobile. Do you do that sort of work?

A Yes, I do.

Q You're not just a witness, Doctor, are you?

A Oh, not at all, no.

Q You have testified before in Courts as an expert witness?

A Yes, yes, I have.

Q Have you testified for the prosecution as well as defense?

A Yes, I have.

Q Have you testified in Federal Court for the [773] prosecution?

A Yes.

Q Now, in your profession or practice have you had an occasion to evaluate Jody Smith?

A Yes, I have.

Q And is that the young man at the end of the table here?

A Yes, it is.

Q Now, can you explain to this jury what a psychological evaluation is?

A Well, I was asked to do a complete evaluation. And what that involves is doing a very comprehensive history and we try to begin right with the mother's pregnancy and work all the way up through early childhood, all the way through their school years, their adjustment during that period of time. And so we get every bit of information we can when we do a clinical interview in which we ask them a lot of questions pertaining to their mental stability. You know, if they're oriented, alert, whether they're psychotic, hearing voices, delusional, that sort of thing. And then we give them a large battery of tests. I think with me we gave him probably about six or eight different tests that covered intelligence, organic problems, achievement and personality.

Q You said you get a lot of background information on [774] them.

A Yes.

Q Why is that important?

A That's just part of what we do. We never try to – we never really try to write up an evaluation without knowing as much as you can about the person. So you try to get as much information as possible and it also helps to get information from second and third parties and whoever else. It just helps to give you a much more rounded picture.

Q In doing the evaluation for Jody, did you get some background information?

A Yes, I did.

Q Did you talk to family members?

A Yes. The only one I could really get in touch with was his mother. I think her name is Glenda Smith.

Q And you spoke with her?

A Yes, I did.

Q Did you have an occasion to review records?

A Yes, I did. I was provided a lot of his school records and jail records.

Q Let me show you what's been marked as Defendant's Exhibits 2 and 3. Are these the school records that you saw?

A Yes, they are.

[775] Q Let me show you what's been marked as Defendant's Exhibit 1. Are those -- do those appear to be the records you have?

A Yes, they are.

Q And the original batch I gave you, they have some records mixed in from the prison system of other people, did they not?

A Yeah, they sure did. Uh-huh.

Q And those were extracted out and you just used Jody's records?

A Right.

Q In going through Jody's family background and his early childhood years was there anything remarkable about that?

A Well, of course, this is based on him and his -- him and what his mother told me. But, yeah, there was a lot of remarkable things. I would describe it as,

at the least, a very abusive, probably tormenting at times, extremely unstable and under socialized.

Q How, given that circumstance he came out of, how would you expect that to impact on Jody going through what you've told us about?

A Well, the earlier --

MS. DAVIS: Judge, we're going to object to that question. It calls for speculation.

[776] THE COURT: Sustained.

By Mr. Hughes:

Q Do you have an opinion as to how these factors that you've told us about would impact upon Jody?

A Yes, I do.

Q And what is that opinion?

MS. DAVIS: Judge --

MR. CHERRY: Judge, again, that has not been shown. The proper predicate has not been laid.

MR. HUGHES: Judge, he said -- Okay. I'll --

THE COURT: All right. I sustain -- I mean, I don't know, and maybe the Doctor can answer this, to what extent, you know, he can predict or project into the future based on the history given by --

MR. HUGHES: Judge, I'm not talking about the future, now. I'm talking about where he is now.

THE COURT: Yeah.

By Mr. Hughes:

Q Okay. Doctor, can you -- based upon these factors that you have testified -- you have talked to his mother about his early childhood?

A Did I talk to his mother about his early childhood?

[777] Q Yes.

A Yes, I most definitely did.

Q And you've talked to him?

A Yes, I did.

Q And were you given information about an alcoholic and abusive father?

A Yes, I was.

Q And an alcoholic and abusive stepfather?

A Yes, I was.

Q And moving around?

A Numerous times.

Q And given those -- that information and -- you did evaluate Jody?

A Yes, I did.

Q You spoke with him?

A Yes, I did.

Q You administered tests to him?

A Yes.

Q Can you state with a reasonable degree of certainty in the field of clinical psychology as to what impact those factors had on -- have -- had on Jody Smith? MR. CHERRY: And, Your Honor, again, I respectfully object. None of those factors have been testified to and are not in evidence.

[778] MR. HUGHES: Judge, the mama testified about those factors.

MR. CHERRY: Well, he included the testing of that as well, Judge.

MR. HUGHES: Well, I'll go to that then.

THE COURT: No, no. I'm going to overrule the objection and allow Dr. Chudy to answer, but would remind the jury that it is their determination as to what weight, what credibility to give the testimony of each and every witness. It is further the law, as you heard yesterday, that though you must consider expert testimony and the opinions given by an expert it is in your discretion to either accept or reject those opinions.

Now, go ahead.

By Mr. Hughes:

Q Go ahead, Doctor.

A Okay. Certainly the earlier the abuse and instability starts the worse the results and his started at a very young age, at a time which we refer to as the formative years. From between the age of one and eight or nine. And when you get the kind of instability and non-predictability that occurs during that period of time it has a major negative impact on personality [779] development usually. And, you know, working with a lot of kids like this, it usually ends up to them having problems primarily with trusting others. But, also, they do not end up feeling like they are real competent or that they are really a master of their fate, that they are really a victim of circumstances. And so they end up with a poor sense of confidence, a real weak --what we call self-identity. Their identity is poorly defined. They don't know -- they're not clear about who they are and where they're going. And then the most important thing,

their ego strength. What we refer to as ego strength is really weak. And by ego strength we mean their ability to handle day-to-day normal problems that you and I would, you know, kind of go through and sluff off would affect these sorts of kids more intensely.

Q And would those problems follow someone on through their adult years?

A Once they began in the formative years, you know, it's been my experience that it is extremely hard to change them.

Q Did you find that result in Jody?

A Yes, I did.

Q Did you -- let me ask you, what is a clinical interview. You said you interviewed him. Is that what [780] you were talking about?

A What I just told you?

Q When you spoke with Jody, interviewed him.

A Yeah. Our clinical interview is when I sat down across the table from him and talked with him for a couple of hours, yeah.

Q And you testified earlier that there were some tests administered.

A Yes, there were.

Q And what were those?

A He was given a Wechsler, that's W-e-c-h-s-l-e-r, Adult Intelligence Scale, which is for IQ, or intelligence. He was given the Wide Range Achievement test, which was for scholastic ability. The Bender Gestalt, which is for organic, real gross organic assessment. We were asked -- we gave him some

projective tests, like the Rorschach. We had him fill out the Incomplete Sentences Blank and the Mooney Problem Check List. He did the Minnesota Multiphasic Personality Inventory Number II, the Millon Clinical Multiaxial Inventory Number III, the Subtle Alcohol Screening Survey Number II and the Jesness Criminal Inventory.

Q Are those standard tests that are given in your field to perform an evaluation?

A Yes.

[781] Q And after reviewing these tests did you come to form any opinion about Jody's IQ level?

A Yes, I did.

Q And what was that, please, sir?

A He was found to a full scale IQ of 72, which placed him at the third percentile in comparison to the general population.

Q Out of a hundred people where would that put him?

A Third. If you had normally distributed a hundred people in this room, ninety-seven would function higher than he would.

Q And did you make any findings about a borderline intelligence situation with him?

A Well, there -- there actually is what we call a standard error of measurement of about three or four points. So, you know, taking that into account you could -- on the one hand he could be as high as maybe a 75. On the other hand he could be as low as a 69. 69 is considered clearly mentally retarded.

Q Would an individual suffering under that particular handicap, would that be considered a substantial handicap?

MR. CHERRY: Object to the form of the question, Judge.

MR. HUGHES: Strike that.

[782] By Mr. Hughes:

Q Do you have an opinion as to whether or not a person functioning with that IQ level would be operating under a substantial handicap?

A Yes, that is defined as a handicap.

Q How does a person, and particular how would Jody, while suffering under that handicap deal with other people? I mean -- when I'm talking of other people, I mean in relation with. Would he be more of a leader type or a follower type or what sort of relationship would he have with most people?

A Most -- You know, almost all the time people at this level of IQ, and with Jody in particular, what I saw in this testing, he does not look like much of a planner. He's more of a reactor. And I would see him more as a follower than a leader.

Q With this evaluation you made, would he be somebody that would be more likely influenced by others?

A Based on my findings and interview, yes. The one thing he experienced, he had a lot of rejection from his -- of course, his father, both his father and stepfather, and then he had a lot of pain and problems in school. And then he moved through, I think, six or seven different schools and by the time he was fifteen years old, as he put it, he just felt

basically alone. And [783] feeling that way he would just randomly attach on to who was ever available to him and would show an interest in him.

Q The findings that you have made about his intellect and all, is that consistent with the school records you have looked at?

A Yes, all the scores are very much the same.

Q That's from -- He's had that problem. Okay. Would those findings, would they be consistent with whatever work history -- or did he give you a work history?

A Let me go back and make sure. The only -- what he said in -- when he was about thirteen or fourteen he started drinking and he spent a lot of time doing that because that made him feel good, calmed his insides. Around that time he quit school and he briefly tried to work with his -- his stepfather, the one that was abusive, but that lasted very, very shortly because they couldn't get along. And then it was right after that that he started getting into his first legal problems, so that he never really did hold on any long term job that would bring him any sense of accomplishment in that area either.

Q He was -- I believe he was, in the information you had, he was in emotionally conflicted classes. What does that mean?

[784] A Emotionally conflicted is a special education class for kids that are not adjusting to regular classroom. And typically what they are doing is they are being disruptive to the point that it's affecting the ability of the other kids to learn. Quite often it comes down to fighting.

Q Is that consistent with the other findings you have?

A Yes, uh-huh.

Q Now, after completing all of this evaluation and all, did you make a diagnosis of his condition or his situation?

A Yes, I did.

Q And I believe you listed six --

A Six diagnoses, yes.

Q Right. The first one is what?

A Major depression, severe without psychotic features.

Q Can you tell the jury what that means?

A Basically, major depression, it means that -- it's someone who has a lack of energy or interest in things, doesn't see much hope for the future, crying spells, disturbed sleep, worries about things continually and pretty regularly thinks about suicide.

Q The second diagnosis you made --

A Yes.

Q That's post-traumatic stress disorder, chronic due to [785] early childhood trauma.

A Yes.

Q Can you explain to the jury what that means?

A That means ongoing traumatic effects from that very abusive early childhood and that it's chronic.

Q And what does that mean?

A That meaning -- there is two forms, acute and chronic. Acute would be you would get in a car accident and you wouldn't want to get in a car for a while and then after two or three weeks you finally would and it would pass. Chronic, though, is something that wouldn't pass. The affects of the trauma would go on and on and would affect your perception of situations, relationships in the world.

Q You had alcohol dependence.

A Yes.

Q What does that mean?

A Alcohol dependence, the way he described it, he didn't say this for the short time that he got right out of prison, but prior to that he told me from very early on in adolescence that he would drink as often and as much as he could.

Q You have the diagnosis of a learning disorder. Explain that, please.

A Yes. Even in spite of his IQ of 72, he -- he did [786] arithmetic at the kindergarten level, which is a standard score of 45. And in the State of Alabama what meets the criteria for a learning disability is a fifteen point difference between your IQ and your standard score. So he would have a learning disability, particularly in math.

Q And is that on top of the low IQ, or is that the same thing?

A Well, that's on top of it. That's in addition to a low IQ. He's even more limited in math than you would expect.

Q And the next diagnosis you have is personality disorder with some features to it. What is that?

A Schizo-typal or an anti-social.

Q Yes, sir. What does that mean?

A Schizo typal features is an individual who is not really psychotic, although at times they might have brief episodes where they lose touch with reality. They might blur reality with fantasy in their mind. But, basically, their thinking is different. It's eccentric, it's vague, it's not really goal oriented. It's not the kind of thinking you would see in most people who have regular close relationships. It's odd. And the anti-social is just based on his history. I mean, he's been in a lot of legal problems.

[787] Q The next diagnosis is borderline intellectual function. What is that?

A Right. That's the 72 IQ places him in the borderline range.

Q Does an individual, and particularly does Jody, functioning in this borderline range that you've spoken about, does that affect his ability to reason abstractly?

A Oh, yes. Most definitely. Uh-huh.

Q And would a person suffering from that disability, does that hinder his ability to appreciate the consequences of his actions?

A It would minimize it considerably. It wouldn't take it away completely, but it would minimize his ability to appreciate.

Q All right. I understand. You're not in any wise coming in here and saying he's insane or anything.

A No.

Q And you're not saying he doesn't know right from wrong.

A No.

Q So how, then, does this impact, this ability or hindering his ability to appreciate the consequences of his actions; how does that play out? If you would, explain that to the jury.

A Simply put, he wouldn't learn very well or profit much [788] from experience. You know, he could go out and get himself in a situation and, in fact, even go to jail and come back out and without thinking repeat some of the same things not having learned a whole lot. Not having generalized from the experiences.

Q Has -- did the problems that you diagnosed, can any of those be treated?

A The depression -- the depression can be treated, the alcohol dependence can be treated. His learning disorder would -- somehow it could be brought up to a little bit higher level of functioning. The rest of it, I would have to say the prognosis for any change in the rest would be really poor.

Q Does he have any -- did he have any control in bringing these conditions to himself?

A No, they started at such a young age, what happened.

Q Based upon your testing, evaluation, your training and experience, do you have an opinion as to whether or not Jody would be able to adapt to prison life?

MR. CHERRY: Judge, I'm just not sure it's relevant to the question of -- as to how he should be sentenced.

THE COURT: Would you approach, please?

(At the sidebar:)

THE COURT: You can ask him if he's got an opinion [789] to a reasonable scientific certainty.

(In open court:)

By Mr. Hughes:

Q Doctor, based upon the factors that I have mentioned, do you have an opinion to a reasonable degree of certainty in the field of psychology -- clinical psychology as to whether or not Jody would be able to adapt to prison life?

A Yes, I do.

Q And what is that?

A Well, could I qualify it a little bit based on what I've already seen? In looking through his records from the State prison system and listening to him during the interview I think he would adapt very poorly. I think he would quickly become a victim of sorts. And I did put in my report I saw him as a high suicide risk.

Q Would he be -- pose a threat of violence himself?

A I think it's potential in that he could be violent, but I don't think he would be an instigator. I think it would be a protective sort of thing.

MR. HUGHES: That's all, Judge.

THE COURT: Cross examination of Dr. Chudy.

MR. CHERRY: Thank you.

(Pause.)

CROSS EXAMINATION

[790] BY MR. CHERRY:

Q Dr. Chudy, first of all, just a few background questions, if I could. First of all, how old is Mr. Smith, according to the records you have?

A I've got his date of birth, [REDACTED], which would make him twenty-eight.

Q Twenty-eight now, so he would have been twenty-seven back in November of last year, is that correct?

A Yes.

Q All right, sir. And how long was it after this crime occurred, which was November 23rd, by the way, of last year; how long after that was it that you interviewed him?

A I just interviewed him a couple of weeks ago. So we're talking six, seven months.

Q All right, sir. And could you tell the folks on the jury about how many times you actually visited with him yourself?

A I think I visited with him twice and my examiner spent time with him giving him the tests.

Q And could you tell the folks, please, sir, just how long you actually spent with Mr. Smith in your evaluations with him?

A Probably five hours, six hours, somewhere in that vicinity.

[791] Q Now, when you said that the family history -- the history of the abuse and all that came from the Defendant himself and from his mother?

A Yes, uh-huh.

Q Based upon your examinations of him, the background, the reports from the prison, the facts of this case as given to you, the school records and all of your examination, in your professional opinion does he have the ability to lie?

A Yes, uh-huh.

Q And how many times would you say you have been to either prison settings or jail settings where you've interviewed folks -- I know you've been in practice for a long time, but how many times would you say or estimate that you have interviewed folks who are in jail or in prison? Ball park.

A A hundred.

Q Would it be safe to say that someone who has been sitting in prison for, or jail for that matter, the Metro Jail -- you've been there?

A Uh-huh.

Q Is it safe to say, to a reasonable medical certainty at least, that people who sit in prison, who sit in jail, who are confined that way, if they have any mental or emotional problems, can that sometimes be compounded by [792] their surroundings?

A Yes.

Q And if a person was already carrying, say, some of these feelings of anger or suspicion which you talked about him having, they could in fact be compounded some by those surroundings of all these people around him and the confinement?

A Yes.

Q All right, sir. Now, based upon your examination, if I understand what you're telling us correctly, he has some problems.

A Yes.

Q But he does not suffer from what we refer to in the law as any severe mental disease or defect, does he?

A Define severe for me.

Q Well, the statutes, the law of Alabama requires that for him to even bring up the defense --

MR. HUGHES: Your Honor, if it please the Court, we've never raised the defense that he's insane.

THE COURT: Sustained.

By Mr. Cherry:

Q All right, sir. In your report I think you said -- if I've got this right, you said he does not think things through.

[793] A Right.

Q Making him impulsive.

A Right.

Q And there are a lot of folks who have higher IQ's and don't have all of this so-called baggage who are impulsive, is that correct?

A Yes.

Q Now, you said he has the potential to be violent. You are aware of the facts of this particular case?

A Yes.

Q And these folks have found him guilty of the violent act of capital murder.

A Yes, I believe I was told that. Yes, uh-huh.

Q In your report also, I believe you said at the time he took part or at the time of this incident back in November of 1997, he could in fact appreciate the wrongfulness of his acts. Is that correct?

A What page are you looking at? The only thing I'm saying is I don't know if he said the wrongfulness of his act or of the situation.

Q All right, sir. Then he appreciated -- from your own report there what you're saying is he could appreciate the wrongfulness of the acts, no matter who committed those acts. Is that correct?

A Right. Right. I don't know if I said that it was his [794] or the situation's, but, yes. Uh-huh.

Q Well, I'm reading from your report. His responses showed not only that he knows right from wrong, but at the time that these events occurred he was competent and in control of his faculties.

A Yes, that's what he told me.

Q All right, sir.

A I asked him about drinking and about other things that might have been affecting his faculties and he consistently said that he had not been drinking that much and he was aware of where he was and -- and what was happening.

Q Yes, sir. And I believe, according from your report again, he said he had had several beers in the afternoon, but he states that he was not intoxicated and was in full control of his faculties. And this is what he related to you, is that correct?

A That's what he related to me, yes.

Q Now, you talked about the problems that he had, but kind of intertwined in here are some other comments, and I'm trying to get to some of those. In your interviews with him you state that his thinking was coherent and for the most part logical.

A Yeah. For the most part, yeah.

Q All right, sir.

[795] Q But there were times he wasn't. I had to repeat questions at times and make them more elementary and that sort of thing. But, I mean, for the most part I understood what he was trying to tell me.

Q Well, for the most part he was thinking logically. And then someone who goes out and beats and kills someone is not thinking entirely logical, are they?

A I wouldn't -- doesn't make much logical sense to me, nope.

Q And I believe you said that during the course of your interviews and the test administrations there were no signs of psychotic behavior or any deviations from reality. Now, this is while you're talking to him and during the course of the testing?

A That's correct.

Q Doctor, you mentioned in your report that this is someone who's had anger in his life, anger about being rejected. And the quote you've got here is that he was getting a raw deal in life.

A Yes.

Q And that anger has been a major part of his life.

A Yes.

Q Is this someone who has the ability or has such anger that he could in fact kick, stomp, beat someone to death?

[796] MR. HUGHES: I respectfully object, Your Honor. I don't believe that's relevant here.

THE COURT: Sustained.

MR. CHERRY: All right, sir.

THE COURT: It calls for a speculative response.

By Mr. Cherry:

Q Well, you did say in your report that sooner or later when his anger builds up it will come out and it will probably come out explosively.

A Yes.

Q And we're talking about Mr. Smith sitting over here?

A Yes. What I described him as is a person who -- somewhat of a loner, detached, disconnected, angry about life and probably has a lot of feelings stuffed inside that when they do come out they probably come out pretty intensely at times.

Q I believe you said in your report as well, Doctor, that there are no organic problems. Would you tell the folks what that means?

A On the gross estimate we used, which it was a Bender Gestalt, along with the Wechsler, we did not find a pattern that would show that he had major

neurological problems that would be inconsistent with a 72 IQ.

Q Speaking of the IQ, you have examined how many folks over the years; thousands, probably?

[797] A Probably.

Q Many of them with low IQ's?

A Oh, I guess it covers them all, yeah.

Q All right, sir. There are people with low IQ's who are what we call "streetwise," aren't there?

A Yes.

Q And folks who can survive in places where you and I couldn't even survive?

A Right.

Q Let me just ask you this. Back on November 23rd, 1997, when this event occurred and this man was beaten to death or kicked to death, whatever, would this man have taken part in any of that at all if there had been a policeman standing by his side in full uniform?

MR. HUGHES: Your Honor, if it please the Court, I would object. We're now back to his sanity.

We still never raised the defense of insanity.

MR. CHERRY: Now, Judge, he's talking about his abilities to --

THE COURT: I overrule that objection, which means -- yeah, the question stands. If you want to rephrase it or -- Doctor, did you understand the question?

A I guess you're saying if a policeman were standing [798] right next to him --

MR. CHERRY: Yes, sir.

A -- and he were doing what he is accused of having done would he do that same thing; in my opinion, no.

MR. CHERRY: Judge, that's all I have.

THE COURT: Mr. Hughes.

(Pause.)

MR. HUGHES: That's all from him, Judge.

THE COURT: Thank you, Doctor.

THE WITNESS: Am I dismissed?

THE COURT: Yes, sir. Take care.

(The witness left the stand.)

MR. HUGHES: This is Rebecca Smith, Judge.

THE COURT: Rebecca, or Ms. Smith, would you come around here, please. Would you raise your right hand, please, ma'am.

REBECCA CHARLENE SMITH

the witness, was sworn and testified as follows:

DIRECT EXAMINATION

BY MR. HUGHES:

Q Would you state your name, please?

A My name is Rebecca Charlene Smith.

Q And, Ms. Smith, are you related to Jody Smith? Is that the young man over here?

A Yes, sir.

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-10721

D.C. Docket No. 1:05-cv-00474-CG-M

JOSEPH CLIFTON SMITH,

Petitioner-Appellant,

versus

DONAL CAMPBELL,

COMMISSIONER KIM TOBIAS THOMAS,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

(August 3, 2015)

Before TJOFLAT, HULL and WILSON, Circuit
Judges. HULL, Circuit Judge:

Petitioner Joseph Clifton Smith, a death-row inmate, appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. This appeal involves only Smith's *Atkins* claim—that he is intellectually disabled and cannot be executed under the Eighth and Fourteenth Amendments to the United States Constitution.¹ *See Atkins v. Virginia*,

¹ Although courts formerly employed the term “mental retardation,” we now use the term “intellectual disability” to describe the same condition. *Accord Brumfield v. Cain*, 576 U.S. ___, __

536 U.S. 304, 122 S. Ct. 2242 (2002). The Alabama state courts denied Smith’s *Atkins* claim without an evidentiary hearing, as did the district court. We review the history of Smith’s case and then the narrow issue in this appeal.

I. FACTUAL BACKGROUND

A. Murder of Durk Van Dam

On Friday, November 21, 1997, Smith was released from a state prison and transferred to a community-custody program to complete the remainder of his 10-year sentence for his burglary and theft convictions. *Smith v. State* (“*Smith I*”), 795 So. 2d 788, 796, 797 n.1 (Ala. Crim. App. 2000). Two days after his release from prison, Smith murdered the victim Durk Van Dam on November 23, 1997.

Police discovered Van Dam’s body near his pick-up truck in an isolated area in southern Mobile County. Van Dam suffered approximately 35 separate, distinct exterior injuries. His head, face, and torso were beaten; his corpse revealed a number of blunt force injuries; and his body was mutilated by a saw or a saw-like device. Van Dam was robbed of \$150 in cash and the boots off his feet. His tools were stolen from his pickup truck, which was mired in mud.

B. Smith’s Statements to Police

On the day Van Dam’s body was discovered, two police officers interviewed Smith, who confessed. In his first statement to the police, Smith admitted that

n.1, 135 S. Ct. 2269, 2274 n.1 (2015). However, we sometimes use the terms “mental retardation” and “mentally retarded” when quoting or discussing earlier judicial opinions, court orders, trial testimony, or other items that used those terms at the time.

he was at the scene when Van Dam was beaten and robbed but claimed that he was merely a bystander as Larry Reid beat Van Dam. *See id.* at 796.

When police questioned Reid, Smith repeatedly knocked on the interrogation-room door and requested to speak with the officer who took his first statement. *Id.* Smith gave a second statement, admitting he participated in the homicide but denying an intent to kill Van Dam. *See id.*

In his second statement, Smith said that he, Reid, and Van Dam left a motel in Van Dam's red pick-up truck on the evening of November 23, 1997. *Id.* Van Dam was drinking and driving the truck, and Reid directed Van Dam to an isolated location. *Id.* Smith asserted that, once they arrived at the location, Reid began hitting Van Dam. Reid kicked Van Dam in the face, at which point Smith thought Van Dam was dead. *Id.* However, Van Dam got up, and Smith hit him on the head with his fist, kicked him in the ribs several times, threw a handsaw at him, and might have hit him with a hammer. *Id.* Smith wasn't entirely sure if he hit Van Dam with a hammer because he suffers from blackouts. *Id.*

Smith stated that Reid got a power saw from Van Dam's truck and ran the saw against Van Dam's neck. *Id.* Smith said he held down Van Dam while Reid took money from Van Dam's pockets. *Id.* Reid kept \$100, and Smith kept \$40. *Id.* Toward the end, Smith kicked Van Dam in the ribs several times. Van Dam was alive at that point, Smith said, but Reid subsequently hit the victim in the head several times with boards and sticks and dragged a mattress on top of him. Smith and Reid left, and Smith thought Van Dam was alive as they walked away.

Smith and Reid attempted to steal Van Dam's truck, but it was stuck in the mud. *Id.* Smith admitted to taking Van Dam's boots and tools. *Id.* Smith and Reid discussed what to do with Van Dam's body. *Id.* Smith suggested taking it to a nearby lake, but they left the body under a mattress near Van Dam's truck. *Id.*

II. SMITH'S TRIAL AND VERDICT

On May 22, 1998, a Mobile County grand jury indicted Smith for capital murder, charging that Smith intentionally killed Van Dam during a first-degree robbery. The case went to trial.

At trial, Dr. Julia Goodin, a forensic pathologist, testified that Van Dam died as a result of 35 different blunt-force injuries to his body. *Id.* Dr. Goodin found marks on Van Dam's neck, shoulder, and back that were consistent with Van Dam being cut by a saw. *Id.* Van Dam had a large hemorrhage beneath his scalp, brain swelling, multiple rib fractures, a collapsed lung, abrasions to his head and knees, and defensive wounds on his hands. *Id.* The most immediate cause of death was probably Van Dam's multiple rib fractures, which caused one lung to collapse. *Id.*

The prosecution introduced Smith's two statements to police and called Russell Harmon, who saw Smith on the day of the murder at a motel in Mobile County. *See id.* at 796–97. Harmon testified that Smith told him that Smith and Reid were going to rob Van Dam, and Smith asked if Harmon wanted to join them. *See id.* at 797. Harmon declined. *Id.* When Smith returned to the motel later that night, Smith admitted to Harmon that he participated in the beating of Van Dam and cut Van Dam with a saw before fleeing the crime scene—and leaving Van Dam

for dead. *Id.* Smith told Harmon that he hid Van Dam's tools on the side of a road, and Smith asked Harmon to retrieve them. Harmon did. Smith sold the tools for \$200. *Id.*

Joey Warner, an employee of a pawnshop, testified that (1) on November 23, 1997, Smith pawned several tools, including saws, drills, and a router; (2) Smith was given \$200 for the tools; and (3) Smith showed his Alabama Department of Corrections identification card to complete the transaction. *Id.*

Another witness, Melissa Arthurs, testified that she saw Smith on the night Van Dam disappeared and noticed blood on Smith's shirt. *Id.* Smith told Arthurs that he hit, cut, and stabbed Van Dam in the back; he and Reid robbed Van Dam; and Smith would have taken Van Dam's truck had it not been stuck in the mud.² *See id.*

On September 16, 1998, the jury found Smith guilty of capital murder. The penalty phase began the next day.

III. PENALTY PHASE BEFORE THE JURY

A. The State's Evidence

In the penalty phase, the State presented evidence that established three statutory aggravating factors:

(1) Smith committed the capital offense while under a sentence of imprisonment, *see* Ala. Code § 13A-5-49(1);

(2) Smith committed the capital offense while engaged in the commission of a robbery, *see id.* § 13A-5-49(4); and (3) the murder of Van Dam was

² Smith chose not to testify, and the defense rested without calling any witnesses

especially heinous, atrocious, or cruel, *see id.* § 13A-5-49(8).

As to the first aggravating factor, the State called Betty Teague, the director of the Alabama Department of Corrections' central records office. Teague testified that Smith was in the custody of the Alabama Department of Corrections and placed on "prediscretionary leave" on November 21, 1997—two days before Van Dam's murder. Smith was still under a sentence of imprisonment during that leave, including the date of Van Dam's murder.

As to the second aggravating factor, the trial judge noted the jury's verdict established that the capital offense was committed during the course of a robbery.

As to the third aggravating factor of a heinous murder, the State recounted the trial evidence, including (1) Smith's own statements to the police; (2) Smith's actions kicking and beating the victim; and (3) Dr. Goodin's testimony about the victim's injuries, including eight broken ribs and many internal and external injuries caused by 35 to 45 blows. The State then rested.

B. Defense Evidence

As part of his penalty-phase defense, Smith called a number of witnesses to establish mitigating circumstances, including that the "offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." *See id.* § 13A-5-51(2).

Smith first called his mother, Glenda Kay Smith ("Glenda Kay"). Glenda Kay testified that Smith's father, Leo Charles Smith ("Leo Charles") got drunk

almost every day and verbally and physically abused Smith. Leo Charles would “try to whoop” Smith and his brothers “with fan belts or water hoses.”

When Smith was about 10 years old, Glenda Kay divorced Leo Charles, and she subsequently married Hollis Luker (“Luker”). Luker got drunk three or four times a week and drank with Smith when Smith was about 16 years old. Smith and Luker would fight, and Luker once injured Smith’s ear by hitting him in the head with a bat-like object.

According to Glenda Kay, Smith had educational problems, including dyslexia. Smith was in special education classes and classes for students with “emotional conflicts.”³

Smith next called Dr. James F. Chudy (“Dr. Chudy”), a clinical psychologist who met with Smith three times, reviewed his school and jail records, and evaluated Smith. Dr. Chudy described Smith’s childhood as “at the least, . . . very abusive, probably tormenting at times, [and] extremely unstable.”

After administering a Wechsler Adult Intelligence Scale-Revised (WAIS-R) test,⁴ Dr. Chudy found Smith had a “full scale IQ of 72, which placed him at the third percentile in comparison to the general population.” Dr. Chudy testified that “there actually is what we call a standard error of measurement of

³ The State did not cross-examine Glenda Kay.

⁴ Dr. Chudy also assessed Smith using these diagnostic tools: (1) the Wide Range Achievement Test-Revised 3; (2) the Bender Gestalt Visual-Motor Integration Test; (3) a Rorschach test; (4) the Mooney Problem Checklist; (5) the Minnesota Multiphasic Personality Inventory-2; (6) the Millon Clinical Multiaxial Inventory-III; (7) the Subtle Alcohol Screening Survey Inventory-2; and (8) the Jesness Inventory.

about three or four points. So, you know, taking that into account you could—on the one hand he could be as high as maybe a 75. On the other hand[, Smith] could be as low as a 69. [Sixty-nine] is considered clearly mentally retarded.” Dr. Chudy testified that his findings about Smith’s intellect were consistent with the school records Dr. Chudy examined and that “all the scores are very much the same.” The defense introduced school records, which indicated Smith at age 12 obtained IQ scores of 74 and 75.

Dr. Chudy also testified that “almost all the time people at this level of IQ, and with [Smith] in particular, what I saw in this testing, he does not look like much of a planner. He’s more of a reactor. And I would see him more as a follower than a leader.”

As to his learning disorder diagnosis, Dr. Chudy testified that, “in spite of his IQ of 72,” Smith “did arithmetic at the kindergarten level, which is a standard score of 45. And in the State of Alabama what meets the criteria for a learning disability is a fifteen point difference between your IQ and your standard score.” Accordingly, Smith was “even more limited in math than you would expect,” given his IQ score of 72.

Based on Smith’s full-scale IQ score of 72, Dr. Chudy diagnosed Smith as having “borderline intellectual functioning.” Dr. Chudy stated that an individual functioning in this borderline range has the ability to appreciate the consequences of his actions, though the functioning limitation would “minimize” the appreciation “considerably.”⁵

⁵ Dr. Chudy testified that Smith was not “insane” and that his level of intellectual functioning did not prevent Smith from knowing “right from wrong.” Rather, Smith’s level of functioning

Dr. Chudy testified that the “emotionally conflicted” classes in which Smith enrolled were special education classes “for kids that are not adjusting to regular classroom[s].”

Based on his evaluation, Dr. Chudy made these six diagnoses of Smith: (1) major depression, severe without psychotic features; (2) post-traumatic stress disorder; (3) alcohol dependence; (4) learning disorder; (5) schizotypal or anti-social personality disorder; and (6) borderline intellectual function.

On cross-examination, Dr. Chudy testified that Smith did not “think things through” and was “impulsive.” When the State’s prosecutor asked whether “there are a lot of folks who have higher IQ’s [sic] and don’t have all this so-called baggage who are impulsive,” Dr. Chudy said there were. Dr. Chudy testified that his evaluation “did not find a pattern that would show that he had major neurological problems that would be inconsistent with a 72 IQ.” When asked whether “[t]here are people with low IQ’s [sic] who are what we call ‘streetwise,’” Dr. Chudy assented.

Smith called three more witnesses: two sisters and a neighbor. His sister, Rebecca Charlene Smith (“Rebecca Charlene”), testified that their step-father Luker drank “all the time” and getting drunk “was an everyday routine for him.” Luker treated the members of her family “[l]ike dirt.” Luker hit Smith on the side of the head with a baseball bat, beat Smith’s brother Jason with a 2-by-4 piece of wood, and physically abused their mother Glenda Kay.

resulted in Smith not “learn[ing] very well or profit[ing] much from experience.”

Shirley Stacey (“Stacey”) was a former neighbor of the Smith family during Glenda Kay’s marriage to Luker. Stacey testified that Luker was drunk “just about every day.” Stacey saw Luker beat the Smith children “with water hoses or whatever he could grab.” On multiple occasions, Glenda Kay brought the Smith children to Stacey’s house to escape or avoid Luker. On one occasion, Glenda Kay ran to Stacey’s house with the Smith children because Luker “had beat [Glenda Kay] and ripped her clothes and she . . . had to get away from him.”

Another sister, Lynn Harrison, testified that their father Leo Charles got drunk “a lot” and was physically abusive toward her brothers. Leo Charles once chased Smith with a garden hose and, on another occasion, tried to hit Smith with a fan belt. Harrison saw Luker abuse Smith in ways similar to those that Leo Charles abused Smith. The Smith children had to “run several times just to get away” from Luker’s beatings of Glenda Kay.⁶

C. The Jury’s Advisory Sentence of Death

The jury returned an advisory verdict recommending that Smith be sentenced to death by electrocution. Eleven jurors voted for a death sentence; one voted for life imprisonment without the possibility of parole.

⁶ Smith’s two sisters and neighbor Stacey did not testify about Smith’s intellectual functioning, adaptive abilities, or performance in school. The State did not cross-examine them.

IV. PENALTY HEARING BEFORE THE TRIAL COURT

A. Evidence in Penalty Hearing

On October 16, 1998, the trial court held a penalty hearing. The trial court admitted evidence of:

- (1) Smith's 1990 convictions for burglary and theft,
- (2) a pre-sentence report from the Alabama Board of Pardons and Paroles (the "Alabama Report"), and
- (3) Dr. Chudy's 1998 report, labeled a "psychological evaluation" of Smith.

For his 1990 convictions, Smith was sentenced to 10 years in prison, released on parole in 1996, and sent back to prison in 1997 when he violated his parole terms. According to the Alabama Report, Smith was arrested nine times between 1986 and 1997 for suspicion of minor crimes, including harassment (three times), menacing (twice), and disorderly conduct (once).

As to Smith's personal and social history, the Alabama Report stated that Smith "dropped out of school in the eighth grade" when Glenda Kay "withdrew him from school on the recommendation of his teachers who described [Smith] as being disrespectful and disruptive in class." According to the Alabama Report, Smith "was a slow learner and was placed in special education classes." Smith "failed both the seventh and eighth grades[,] and all of his grades, with the exception of physical education, were below

average.” Smith “has had no further education or training since that time.”⁷

Dr. Chudy’s 1998 report included the following conclusions about Smith’s mental health.

*Evidence of Competency.*⁸ The report stated that, during Dr. Chudy’s interviews, Smith “was alert and oriented,” was “able to recount the charges against him and ultimately what could happen to him if he were found guilty,” and “accurately define[d] the role and purposes of all the parties involved in the trial proceedings.” Dr. Chudy concluded Smith was mentally competent and capable of assisting his defense attorney.

Evidence of Subaverage Intellectual Functioning. The report stated that Smith took the WAIS-R IQ test, and that he earned a verbal IQ score of 73, a performance IQ score of 72, and a full-scale IQ score of 72. According to Dr. Chudy’s report, those full-scale scores “place[d Smith] at the 3rd percentile in comparison to the general population.” These scores placed him “in the Borderline range of intelligence[,] which means that he operates between the Low Average and Mentally Retarded range.” According to Dr. Chudy, “[a]ctually[,] these scores place him at a level closer to those individuals who would be considered mentally retarded.”

⁷ In a section titled “Evaluation of Offender,” the Alabama Report stated that several people at the motel, where Smith stayed prior to Van Dam’s murder, “stated they believe [Smith] has a mental problem.” According to the Alabama Report, in early 1997, Smith got into a fight with an elderly man and bit off the tip of one of the elderly man’s fingers.

⁸ These subheadings are not included in Dr. Chudy’s report itself but are created to organize the information in his report.

Evidence of Communication Limitations. Dr. Chudy's report indicated that Smith had some communication problems, but was generally coherent. The report stated that (1) at times, it "was necessary to re-state questions in more elementary forms so that [Smith] could understand them," (2) Smith's "comprehension is limited," and (3) Smith "lacks much insight or awareness into his behavior."

Evidence of Limitations in Daily Functioning. Dr. Chudy's report noted that Smith had "emotional problems, which seem to be largely due to an extremely dysfunctional life . . . [and] compounded by his mental dullness." The report stated that Smith's emotional problems limit his "ability to deal with everyday stresses and demands." Dr. Chudy characterized Smith's state of mind as "indifferent and ineffectual," and concluded that Smith's "thinking [was] not real clear" and that Smith "lacks any direction or goal in life." Dr. Chudy concluded that Smith generally "takes little notice of things around him" and "does not think through things."

Evidence of Deficits in Learning from Experience. Dr. Chudy concluded that Smith's "indifferent and ineffectual" mindset "provides little basis for [Smith] [to act] in a consistently sensible manner or learn[] from experience . . . even when it involves bringing on pain to himself or those closest to him." Smith's "thinking is vague" and "easily confused," and he "is often over-whelmed with incomprehensible feelings or impulses that he does not understand." Smith "possesses extremely limited insight and judgment."

Evidence of Social Deficits. Dr. Chudy's report indicated that Smith's "personality functioning is equally dysfunctional." As a result of his emotional problems, Dr. Chudy found, Smith often "withdraws

from others” and only “[o]ccasionally . . . will become desperate enough that he will set out to find people to be with.” But “poor judgment causes [Smith] to end up with the wrong people.” Dr. Chudy found that Smith had “anger about being rejected and ‘getting a raw deal in life.’” “Fortunately, [Smith] has been successful at repressing his anger[,] but there is a down side to that. Sooner or later when his anger builds up, it will come out and it will probably come out explosively.” Dr. Chudy concluded that Smith “fails to use good judgment because he never learned how to incorporate successfully into societies [sic] norms.”

Evidence of Varied Deficits. Dr. Chudy’s report examined the particulars of Smith’s WAIS-R test results. The report stated that (1) “Smith displayed major deficiencies in areas related to academic skills”; (2) he “functioned well below average in his recall of learned and acquired information (Information)”; and (3) he “was also quite weak in word knowledge and usage (Vocabulary) and mental mathematical computation (Arithmetic).”

Other areas of weakness noted by Dr. Chudy had to do with Smith’s social skills. Smith “scored well below average in skills having to do with social reasoning and learning how to respond effectively in social situations (Comprehension).” Smith “also showed a major deficiency in his ability to predict social sequences of action (Picture Arrangement).” Dr. Chudy stated that Smith is “ineffective in problem-solving.”

B. Imposition of a Death Sentence

After considering the evidence and arguments, the state trial judge found that the aggravating circum-

stances outweighed the mitigating circumstances in this case, accepted the jury's advisory death sentence, and ordered that Smith be put to death by electrocution.⁹

The state trial court found these three aggravating circumstances: (1) Smith committed the capital offense while under a sentence of imprisonment at the time of the offense, Ala. Code § 13A-5-49(1); (2) Smith committed the murder while engaged in the commission of a robbery, *id.* § 13A-5-49(4); and (3) the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses, *id.* § 13A-5-49(8).

The state trial court found that no statutory or non-statutory mitigating circumstances existed. Specifically, the trial court found (1) the capital offense was not committed while Smith was under the influence of extreme mental or emotional disturbance and (2) Smith "was not mentally or emotionally disturbed" to an "extreme extent" or "to the extent that this mitigating circumstance exists." *See id.* § 13A-5-51(2). The trial court reached this conclusion after "carefully review[ing] and weigh[ing] both the report and testimony of Doctor James Chudy, a clinical psychologist, in the context of the facts underlying the offense charged and proven."

C. Smith's Direct Appeal

⁹ In 2002, the Alabama Legislature changed the State's standard method of execution from electrocution to lethal injection. *See* Ala. Code § 15-18-82.1 (2006 Cumulative Supp.). Those inmates who were sentenced to death and whose certificates of judgment were issued after July 1, 2002, had a time-limited option to elect electrocution instead of death by lethal injection. *Id.* § 15-18-82.1(b). At oral argument, it was confirmed that Smith did not so choose.

The Alabama Court of Criminal Appeals affirmed Smith's conviction and death sentence. *Smith I*, 795 So. 2d at 842. The Alabama Supreme Court denied Smith's petition for a writ of certiorari. *Ex parte Joseph Clifton Smith*, 795 So. 2d 842 (Ala. 2001) (mem.). The United States Supreme Court denied Smith's petition for a writ of certiorari. *Smith v. Alabama*, 534 U.S. 872, 122 S. Ct. 166 (2001).

V. POST-CONVICTION PROCEEDINGS IN STATE COURT

A. 2002 Rule 32 Petition

In 2002, Smith filed a *pro se* petition in the state trial court, seeking post-conviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. After the State objected on timeliness grounds, the state trial court dismissed Smith's Rule 32 petition as untimely. The Alabama Court of Criminal Appeals affirmed, *Smith v. State*, 897 So. 2d 1246 (Ala. Crim. App. 2003) (table), and denied rehearing, *Smith v. State*, 910 So. 2d 831 (Ala. Crim. App. 2004) (table).

In 2004, the Alabama Supreme Court reversed and remanded, holding that Smith's Rule 32 petition was timely. *Ex Parte Joseph Clifton Smith*, 891 So. 2d 286 (Ala. 2004). The Alabama Court of Criminal Appeals remanded the case to the state trial court for further proceedings. *Smith v. State*, 891 So. 2d 287 (Ala. Crim. App. 2004).

B. 2004 Second Amended Rule 32 Petition

In 2004, Smith filed an amended Rule 32 petition for post-conviction relief. After the State moved to dismiss, Smith filed a second amended Rule 32 petition. Both petitions alleged that Smith was intellectually disabled and his death sentence

violated the Eighth and Fourteenth Amendments. Smith requested “a full evidentiary hearing” and funds to present witnesses, experts, and other evidence.

C. 2005 Dismissal of Second Amended Rule 32 Petition

The State moved to dismiss again. In 2005, the state trial court dismissed Smith’s second amended Rule 32 petition. The court rejected Smith’s *Atkins* claim without an evidentiary hearing. The court reviewed the Alabama Supreme Court’s decision in *Ex parte Perkins*, 851 So. 2d 453 (Ala. 2002), which identified three requirements to establish mental retardation “under the broadest definition” of that term: (1) “significantly subaverage intellectual functioning (an IQ of 70 or below),” (2) “significant or substantial deficits in adaptive behavior,” and (3) manifestation of the first two elements “during the developmental period (i.e., before the defendant reached age 18).” *Id.* at 456.

As to Smith’s intellectual functioning, the state trial court concluded that (1) “[t]he evidence admitted at Smith’s trial refutes any assertion that Smith’s intellectual functioning is significantly subaverage,” and (2) “Smith proffer[ed] no facts in his second amended Rule 32 petition that would in any way dispute the facts contained in the record.” As to Smith’s adaptive behavior, the state trial court concluded that the record “indicates [few], if any, deficits in Smith’s adaptive functioning.”

The state trial court found that Smith was not mentally retarded, rejected his *Atkins* and other claims, and denied his second amended Rule 32 petition in full.

D. Appeal of Dismissal of Second Amended
Rule 32 Petition

In 2008, the Alabama Court of Criminal Appeals affirmed the dismissal of Smith's second amended Rule 32 petition, including his *Atkins* claim. *Smith v. State* ("*Smith II*"), 71 So. 3d 12 (Ala. Crim. App. 2008). As to mental retardation, the Alabama appellate court discussed *Atkins*; how *Atkins* left it to the states to define "mental retardation"; and Alabama's three requirements for "mental retardation," identified in *Perkins*. *Id.* at 17.

Turning to Smith's *Atkins* claim, the Alabama Court of Criminal Appeals concluded that Smith failed to meet his burden of pleading the facts relied upon in seeking relief, as required by Rule 32.6(b) of the Alabama Rules of Criminal Procedure. *See id.* at 18–19. The Alabama appellate court found that "[t]he only grounds offered in support" of Smith's claim were his conclusory allegations that he met the three requirements of mental retardation under *Atkins* and *Perkins*. *Id.* at 19.

Alternatively, the Alabama appellate court turned to the merits of Smith's *Atkins* claim based on the trial evidence. The Alabama appellate court concluded that Smith's mental retardation claim failed on the merits because the trial record shows "Smith does not meet the broadest definition of mentally retarded adopted by the Alabama Supreme Court." *Id.* The Alabama appellate court reviewed the evidence of Smith's full-scale IQ scores of 74 at age 12 and 72 before trial. *Id.* at 19–20. The Alabama appellate court noted that Dr. Chudy testified "that[,] because of the margin of error in IQ testing[,] Smith's

IQ score could be as high as 75 or as low as 69.”¹⁰ *Id.* at 19. The Alabama appellate court did not apply a “margin of error” to Smith’s above-70 IQ scores. *Id.* at 20.

As to Smith’s adaptive behavior, the Alabama appellate court concluded that there was “no indication that Smith had significant defects in adaptive behavior.” *Id.* at 20. The Alabama appellate court recounted evidence of Smith’s participation in the murder and other evidence relevant to Smith’s adaptive behavior, including his ability to communicate with police and his having a girlfriend.¹¹ *Id.*

The Alabama Supreme Court denied Smith’s petition for a writ of certiorari.¹²

VI. SECTION 2254 PETITION IN FEDERAL COURT

A. 2005 Petition

In 2005, Smith filed this petition for a writ of habeas corpus in the United States District Court for the Southern District of Alabama, pursuant to 28 U.S.C. § 2254. In 2006, the district court stayed the § 2254 proceedings pending the Alabama state courts’ resolution of Smith’s Rule 32 petitions. In 2011, the district court lifted the stay and granted

¹⁰ The Alabama Court of Criminal Appeals referred to the standard error of measurement as a “margin of error.”

¹¹ In 2009, the Alabama appellate court also denied Smith’s application for rehearing.

¹² The Alabama Supreme Court initially granted the writ as to Smith’s ineffective-counsel claims, but it denied the writ as to all other claims. Following more briefing, the Alabama Supreme Court quashed the writ.

Smith's motion to amend his § 2254 petition. Smith filed an amended petition on July 25, 2011.

B. 2011 Amended Petition

Smith's amended § 2254 petition alleged, *inter alia*, that he is intellectually disabled and his execution would violate the Eighth and Fourteenth Amendments. Smith requested discovery and an evidentiary hearing.

In the district court, Smith argued that the Alabama Court of Criminal Appeals' decision—rejecting his *Atkins* claim—was both an unreasonable application of clearly established federal law, *see* 28 U.S.C. § 2254(d)(1), and an unreasonable determination of the facts, *see id.* § 2254(d)(2).

C. 2013 Order Denying Amended § 2254 Petition

On September 30, 2013, the district court denied Smith's amended § 2254 petition without discovery or an evidentiary hearing. *Smith v. Thomas* ("*Smith III*"), No. CIV.A.05-0474-CG-M, 2013 WL 5446032, at *38 (S.D. Ala. Sept. 30, 2013). The district court concluded that Smith's *Atkins* claim was not procedurally defaulted and was properly before the federal habeas court because Smith raised it in his second amended Rule 32 petition. *Id.* at *27. The district court examined the reasonableness of the Alabama appellate court's rejection of Smith's *Atkins* claim based upon Smith's allegations in his first and second amended Rule 32 petitions and the trial record considered by the state courts. *Id.* at *27–29.

The district court concluded that the only evidence of Smith's IQ presented to the state trial court was Dr. Chudy's testimony that Smith's full-scale IQ

score was 72 in 1998, and the school records indicating that Smith's IQ scores were 74 and 75 in grade school. *Id.* at *28. The district court agreed with the State's position that Dr. Chudy's finding—that Smith is “in the Borderline range of intelligence[,] which means that he operates between the Low Average and Mentally Retarded range”—establishes that Smith is not mentally retarded and not exempt from the death penalty. *Id.*

The district court acknowledged (1) that Dr. Chudy's testified “that, in Smith's case, ‘a standard error of measurement of about three or four points’ could result in an IQ ‘as high as maybe a 75 [or] . . . as low as a 69,’” and (2) the “Flynn effect,” which artificially inflates IQ scores.¹³ *Id.* The district court, however, observed that the Alabama appellate court had refused to downwardly modify Smith's most recent IQ score of 72 to produce an adjusted score within the mental retardation range of 70 or below. *Id.* at *28–29. The district court concluded that the Alabama appellate court did not unreasonably refuse to apply a “margin of error” to Smith's IQ score of 72 such that his score would be reduced and fall within the “mental retardation range.” *Id.* at *29.

Because the district court concluded Smith “failed to prove that his intellectual functioning was or is significantly subaverage,” it did “not explore whether Smith suffers from deficits in adaptive behavior and whether any such deficits manifested themselves be-

¹³ The “Flynn effect” is the phenomenon by which “IQ test scores have been increasing over time” because, “as an intelligence test ages, or moves farther from the date on which it was standardized, or normed, the mean score of the population as a whole on that assessment instrument increases.” *Thomas v. Allen*, 607 F.3d 749, 753 (11th Cir. 2010).

fore Smith reached the age of 18.” *Id.* at *29 n.26. The district court denied Smith’s § 2254 petition as to all claims, *id.* at *6–26, *29–38, denied Smith a certificate of appealability, *id.* at *38, and later denied Smith’s motion to reconsider, *Smith v. Thomas* (“*Smith IV*”), No. CIV.A.05-0474-CG-M, 2014 WL 217771, at *5 (S.D. Ala. Jan. 21, 2014).

D. Smith’s Certificate of Appealability

In 2014, this Court granted Smith a certificate of appealability as to these three issues:

1. Whether the Alabama state courts’ procedural ruling—that in his Rule 32 post-conviction pleadings as to his mental retardation claim, Smith failed to comply with the specificity pleading requirements in Rule 32.6(b) of the Alabama Rules of Criminal Procedure—was contrary to or an unreasonable application of *Atkins v. Virginia*, 536 U.S. 304 (2002)?
2. Whether the Alabama state courts’ merits determination—that Smith did not show significant deficits in adaptive behavior manifested before age 18—is an unreasonable determination of the facts or an unreasonable application of *Atkins*?
3. Whether the Alabama state courts’ merits determination—that Smith did not show sub-average intellectual functioning—is an unreasonable determination of the facts or an unreasonable application of *Atkins*?¹⁴

¹⁴ With the benefit of the parties’ briefs, oral argument, and our examination of the record, it has become clear that the first issue is also properly a question of whether the Alabama Court

VII. STANDARD OF REVIEW

We review *de novo* a district court’s ultimate decision to deny a habeas corpus petition brought by a state prisoner. *McNair v. Campbell*, 416 F.3d 1291, 1297 (11th Cir. 2005). As part of that task, we review the district court’s factual findings for clear error, and we review mixed questions of fact and law *de novo*. *Id.*

VIII. AEDPA

A. AEDPA Deference

A state prisoner’s habeas petition is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). “AEDPA recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights.” *Burt v. Titlow*, 571 U.S. ___, ___, 134 S. Ct. 10, 15 (2013). AEDPA thus “erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.” *Id.* at ___, 134 S. Ct. at 16. Indeed, the purpose of AEDPA’s amendments to § 2254 “is to

of Criminal Appeals’ procedural ruling is an unreasonable determination of the facts or an unreasonable application of *Atkins*. Accordingly, we *sua sponte* expand the certificate of appealability (“COA”) to address whether the Alabama appellate court’s decision, including its Rule 32.6(b) ruling, was based on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2). *See Dell v. United States*, 710 F.3d 1267, 1272 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 1508 (2014) (noting this Court has “expanded a COA *sua sponte* on exceptional occasions, even after oral argument”); *see also* 11th Cir. R. 27-1(g) (“A ruling on a motion or other interlocutory matter, whether entered by a single judge or a panel, is not binding upon the panel to which the appeal is assigned on the merits, and the merits panel may alter, amend, or vacate it.”).

ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction.” *Greene v. Fisher*, 565 U.S. ___, ___, 132 S. Ct. 38, 43 (2011) (quotation marks omitted).

Accordingly, federal review of final state court decisions under § 2254 is “greatly circumscribed” and “highly deferential.” *Hill v. Humphrey*, 662 F.3d 1335, 1343 (11th Cir. 2011) (en banc) (quotation marks omitted). Where a state court denied a petitioner relief on alternative grounds, AEDPA precludes the petitioner from obtaining federal habeas relief unless he establishes that each and every ground upon which the state courts relied is not entitled to AEDPA deference. *See Wetzel v. Lambert*, 565 U.S. ___, ___, 132 S. Ct. 1195, 1199 (2012) (stating § 2254 petition at issue should not be granted “unless each ground supporting the state court decision is examined and found to be unreasonable under AEDPA”).

B. Section 2254(d)(1) & (2)

As a general rule, a § 2254 state petitioner may not obtain federal habeas relief “with respect to any claim that was adjudicated on the merits” by a state court. 28 U.S.C. § 2254(d). However, a petitioner may avoid that general rule if one of two conditions exist: either (1) that the state court’s adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” *id.* § 2254(d)(1); or (2) that the state court’s adjudication “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,” *id.* § 2254(d)(2). The petitioner carries

the burden of proof under § 2254(d)(1) & (2), and our review is limited to the record before the state court. *Cullen v. Pinholster*, 563 U.S. ___, ___, 131 S. Ct. 1388, 1398 (2011).

Pursuant to § 2254(d)(1), the phrase “clearly established Federal law” means “the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions as of the time of the relevant state-court decision.” *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S. Ct. 1166, 1172 (2003) (quotation marks omitted). A state court’s application of federal law is not unreasonable under § 2254(d)(1) “so long as fair-minded jurists could disagree on the correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 786 (2011) (quotation marks omitted).

As to § 2254(d)(2), “a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding.” *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 1041 (2003). “We may not characterize . . . state-court factual determinations as unreasonable merely because we would have reached a different conclusion in the first instance.” *Brumfield v. Cain*, 576 U.S. ___, ___, 135 S. Ct. 2269, 2277 (2015) (quotation marks omitted). The Supreme Court has found a state court’s factual finding to be unreasonable where the record before the state court did not support the factual finding. See *Wiggins v. Smith*, 539 U.S. 510, 528–29, 123 S. Ct. 2527, 2539 (2003).

IX. ALABAMA’S APPLICATION OF *ATKINS*

In 2002, the United States Supreme Court held in *Atkins* that the execution of “mentally retarded”

individuals violates the Eighth Amendment of the Constitution. 536 U.S. at 321, 122 S. Ct. at 2252.¹⁵ The Supreme Court pointed out that, “[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded.” *Id.* at 317, 122 S. Ct. at 2250. The *Atkins* Court, however, left “to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences.” *Id.* (quotation marks omitted and alterations adopted).

As recounted above, the Alabama Supreme Court in *Perkins* identified three requirements to establish intellectual disability “under the broadest definition” of mental retardation: (1) “significantly subaverage intellectual functioning (an IQ of 70 or below),” (2) “significant or substantial deficits in adaptive behavior,” and (3) manifestation of “these problems . . . during the developmental period (i.e., before the defendant reached age 18).” *Perkins*, 851 So. 2d at 456.¹⁶

¹⁵ Prior to *Atkins*, Alabama, along with most other states, had not outlawed the execution of intellectually disabled individuals. See *Atkins*, 536 U.S. at 314–15 & n.20, 122 S. Ct. at 2248– 49 & n.20; *id.* at 342, 122 S. Ct. at 2261–62 (Scalia, J., dissenting).

¹⁶ In *Perkins*, decided shortly after *Atkins*, the Alabama Supreme Court noted that Alabama lacked statutorily-prescribed procedures for identifying intellectually disabled individuals and “urge[d] the Legislature to expeditiously develop procedures for determining whether a capital defendant is mentally retarded and thus ineligible for execution.” *Perkins*, 851 So. 2d at 457 n.1. In the absence of a legislative definition, the Alabama Supreme Court continued to apply “the ‘most common’ or ‘broadest’ definition of mental retardation, as represented by the clinical definitions considered in *Atkins* and the definitions set forth in the statutes of other states that prohibit the

Neither the Alabama legislature nor the Alabama Supreme Court has defined what constitutes “significant or substantial deficits in adaptive behavior.” *See id.* But the Alabama Supreme Court has applied generally the “most common” or “broadest” definition of mental retardation, which reflects “the clinical definitions considered in *Atkins*.” *In re Jerry Jerome Smith v. State*, No. 1060427, 2007 WL 1519869, at *7 (Ala. May 25, 2007). And “significant or substantial deficits in adaptive behavior” means, under the clinical definitions considered in *Atkins*, a petitioner must show limitations in two or more of the following applicable adaptive-skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, health and safety, functional academics, leisure, and work.” *Atkins*, 536 U.S. at 308 n.3, 122 S. Ct. at 2245 n.3 (citing the American Association on Mental Retardation and American Psychiatric Association’s definitions of mental retardation).¹⁷ Thus, we use that common clinical definition in considering this case. *Cf. Lane v. State*, __ So.3d __, __ No. CR-10-1343, 2013 WL 5966905, at *5 (Ala. Crim. App. Nov. 8, 2013) (“In order for an individual to have significant or substantial deficits in adaptive behavior, he must have concurrent deficits or impairments in . . . at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional

imposition of the death sentence when the defendant is mentally retarded.” *In re Jerry Jerome Smith v. State*, No. 1060427, 2007 WL 1519869, at *7 (Ala. May 25, 2007).

¹⁷ The American Association on Mental Retardation is now known as the American Association on Intellectual and Developmental Disabilities.

academic skills, work, leisure, health and safety.” (quotation marks omitted)).

X. ANALYSIS OF SMITH’S CLAIMS A. Rule 32.6(b) Determination

Our first task is to review the Alabama Court of Criminal Appeals’ procedural ruling—that Smith failed to meet the pleading requirements of Rule 32.6(b).¹⁸ The Alabama Court of Criminal Appeals’ Rule 32.6(b) ruling was based on its underlying factual determination that “[t]he only grounds offered in support” of Smith’s claim were his conclusory allegations that he met the three requirements of intellectual disability under *Atkins* and *Perkins*. See *Smith II*, 71 So. 3d at 19.

Here, we do not examine whether the petition was sufficient to meet Alabama’s pleading requirement.¹⁹ Rather, our narrow review is only the underlying factual determination about whether Smith’s second amended petition recounted any facts at all or only conclusory allegations.

Smith’s second amended Rule 32 petition included at least seven factual grounds that support his *Atkins* claim: (1) there “was testimony at trial that Mr. Smith functioned intellectually at the bottom 3rd percentile of all adults”; (2) “[s]chool records indicate

¹⁸ The parties agree that we should review the decision of the Alabama Court of Criminal Appeals on Smith’s *Atkins* claim.

¹⁹ Under Rule 32.6(b), each claim in a petition for post-conviction relief “must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds.” Ala. R. Crim. P. 32.6(b). “A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings.” *Id.*

that Mr. Smith never progressed beyond the 5th grade”; (3) when Smith enrolled in a junior high school in Monroe County, “the county board of education classified Mr. Smith as ‘Educable Mentally Retarded’ (EMR), based on his ‘psychological and educational evaluations, academic history, and other pertinent information’”; (4) “even though he was in EMR classes while in the Monroe County school system, [Smith] either failed or performed at the ‘D’ level in all subjects”; and “testimony at sentencing . . . showed [Smith’s] inability to adapt because” (5) “he often acts out impulsively,” (6) he “lacks the ability to formulate a pre-meditated plan,” and (7) he “acts as a follower in groups” (alterations adopted). These factual allegations relate to the three requirements of intellectual disability under *Perkins*: significantly subaverage intellectual functioning, significant or substantial deficits in adaptive behavior, and manifestation before age 18.

In short, the Alabama appellate court’s factual determination—that the “only grounds” Smith pled were conclusory allegations that he met each of the three requirements—is unsupported by the record and therefore unreasonable.²⁰ See *Wiggins*, 539 U.S.

²⁰ We reach this conclusion based on our review of the state court’s factual determination about what was alleged in Smith’s second amended Rule 32 petition; by contrast, where a state court accurately identifies what allegations were included in a petition and concludes that those allegations failed to meet a pleading requirement, that is a legal conclusion, which is subject to review under § 2254(d)(1). See *Brumfield*, 576 U.S. at ___ n.3, 135 S. Ct. at 2277 n.3 (“[W]e subject these determinations to review under § 2254(d)(2) instead of § 2254(d)(1) because we are concerned here not with the adequacy of the procedures and standards the state court applied in rejecting [the petitioner’s] *Atkins* claim, but with the underlying factual conclusions. . .”).

at 528–29, 123 S. Ct. at 2539; *cf. Brumfield*, 576 U.S. at ___, 135 S. Ct. at 2276–77 (reviewing under § 2254(d)(2) a state court’s factual determination that the record included “no evidence” of adaptive impairment).²¹ Thus, the Alabama Court of Criminal Appeals’ conclusion that Smith failed to meet Rule

²¹ Although not squarely on point, *Brumfield* is instructive. Following *Atkins*, the death-sentenced Brumfield amended his state post-conviction petition to raise a mental-retardation claim. 576 U.S. at ___, 135 S. Ct. at 2274. Brumfield alleged that he read at a fourth-grade level and obtained an IQ score of 75. *Id.* at ___, 135 S. Ct. at 2274–75. The state court dismissed his petition. *Id.* at ___, 135 S. Ct. at 2275.

Later, the district court granted Brumfield’s § 2254 petition, holding, *inter alia*, the state court’s dismissal was based on an unreasonable determination of the facts. *Id.* Reversing, the Fifth Circuit held that the state court’s dismissal decision did not rest on an unreasonable determination of the facts. *Id.* at ___, 135 S. Ct. at 2276.

The United States Supreme Court vacated the Fifth Circuit’s opinion and concluded that the state court’s dismissal decision was based on two separate factual determinations that were unreasonable. *Id.* at ___, 135 S. Ct. at 2276–77. First, the state court unreasonably determined that Brumfield’s evidence of intellectual functioning precluded him from obtaining an *Atkins* hearing under Louisiana law. *Id.* at ___, 135 S. Ct. at 2277–79. Contrary to the state court’s decision, Brumfield’s proffered IQ score of 75 “was squarely in the range of potential intellectual disability” after accounting for the standard error of measurement. *Id.* at ___, 135 S. Ct. at 2278.

Second, the state court unreasonably concluded that Brumfield “presented no evidence of adaptive impairment.” *Id.* at ___, 135 S. Ct. at 2277, 2279. The Supreme Court concluded that the state court’s factual determination—that the record failed to raise any question as to Brumfield’s impairment in adaptive skills was unreasonable because “the evidence in the state-court record provided substantial grounds to question Brumfield’s adaptive functioning.” *Id.* at ___, 135 S. Ct. at 2280.

32.6(b) was based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(2).

B. Merits Determination

We must also consider the alternative basis the Alabama appellate court used for its affirmance of the dismissal of Smith’s Rule 32 petition: its merits determination that the trial evidence conclusively showed that Smith is not “mentally retarded” and thus his *Atkins* claim fails.²² *See Crawford*, 311 F.3d at 1326. That merits determination was a finding of fact. *See Fults v. GDCP Warden*, 764 F.3d 1311, 1319 (11th Cir. 2014) (“A determination as to whether a person is mentally retarded is a finding of fact.”). We review the Alabama appellate court’s merits ruling first on Smith’s intellectual functioning and then on Smith’s adaptive behavior.

As to Smith’s intellectual functioning, we agree with the State that Alabama law generally does not contain a strict IQ cut-off of 70 to establish intellectual disability. *See Thomas v. Allen*, 607 F.3d 749, 757 (11th Cir. 2010) (“There is no Alabama case law stating that a single IQ raw score, or even multiple IQ raw scores, above 70 automatically defeats an *Atkins* claim when the totality of the evidence (scores) indicates that a capital offender suffers subaverage intellectual functioning.”).

But the problem for the State here is that the trial evidence showed that Smith’s IQ score could be as low as 69 given a standard error of measurement of

²² In reviewing Smith’s intellectual functioning and adaptive behavior, the Alabama Court of Criminal Appeals considered both Smith’s first and second amended Rule 32 petitions and the evidentiary record from Smith’s trial. Accordingly, we do the same. *See Pinholster*, 563 U.S. at ___, 131 S. Ct. at 1398.

plus-or-minus three points. There was also other trial evidence of deficits in intellectual functioning, including that Smith (1) did arithmetic at a kindergarten level, which was consistent with an IQ of 45; (2) suffered from dyslexia; (3) failed seventh grade and dropped out of school in the eighth grade;²³ (4) struggled to recall learned and acquired information; and (5) was “quite weak in word knowledge and usage.”

Despite this trial evidence pointing to significant deficits in Smith’s intellectual functioning, and even though the state trial court had not conducted an evidentiary hearing, the Alabama Court of Criminal Appeals held that the record conclusively established Smith was not mentally retarded and could never meet *Perkins’s* intellectual-functioning requirement. Considering the record evidence before the Alabama Court of Criminal Appeals and the fact that Alabama does not employ a strict IQ cut-off score of 70, the factual determination that Smith conclusively did not possess significantly subaverage intellectual functioning was an unreasonable determination of the facts. See *Burgess v. Comm’r, Alabama Dep’t of Corr.*, 723 F.3d 1308, 1319 (11th Cir. 2013) (“We hold that the state court’s determination that [the petitioner] is not mentally retarded is an unreasonable determination of fact because it was based upon a combination of erroneous factual findings directly contradicted by the record and a record that was insufficient to support its conclusions.”); cf. *Brumfield*, 576 U.S. at ___, 135 S. Ct. at 2278 (“To conclude, as the state trial court did, that [the petitioner’s] reported IQ

²³ In Smith’s second amended Rule 32 petition, he also alleged that school records show he never successfully completed any grade beyond the fifth grade.

score of 75 somehow demonstrated that he could not possess subaverage intelligence . . . reflected an unreasonable determination of the facts.”).

The Alabama Court of Criminal Appeals also determined conclusively that Smith did not suffer from significant or substantial deficits in adaptive behavior. *See Smith II*, 71 So. 3d at 20. This conclusion was similarly based wholly on the Alabama appellate court’s factual determination that there was “no indication” from the trial record “that Smith had significant defects in adaptive behavior.” *See id.*; *cf. Brumfield*, 576 U.S. at ___, 135 S. Ct. at 2276–77 (reviewing under § 2254(d)(2) a state court’s factual determination that the record included “no evidence” of adaptive impairment). In other words, there was no record evidence at all of adaptive-behavior impairment.

Even assuming that a petitioner must show deficits areas that are identified in *both* of the clinical definitions in *Atkins*, the Alabama Court of Criminal Appeals’ conclusion that the record provided “no indication” that Smith had significant deficits in adaptive behavior was an objectively unreasonable determination of the facts. *See Miller-El*, 537 U.S. at 340, 123 S. Ct. at 1041. Indeed, the record affirmatively contradicts this conclusion that there was “no indication” of significant deficits in Smith’s adaptive behavior. There was evidence in the record before the Alabama Court of Criminal Appeals that would support a fact finding that Smith had significant limitations in at least two of the adaptive skills identified by both clinical definitions: (1) social/interpersonal skills and (2) self-direction.

First, as to social/interpersonal skills, Dr. Chudy concluded that Smith “never learned how to incorpo-

rate successfully into [society's] norms." Dr. Chudy classified Smith's "personality functioning" as "dysfunctional," noted that Smith "scored well below average in skills having to do with social reasoning and learning how to respond effectively in social situations," and stated that Smith "showed a major deficiency in his ability to predict social sequences of action." Also relevant to this social-skills inquiry, Dr. Chudy found that Smith's emotional problems limited

his "ability to deal with everyday stresses and demands" and caused him to "withdraw[] from others." Furthermore, Dr. Chudy concluded that Smith "takes little notice of things around him" and "does not think through things."

Second, as to self-direction, Dr. Chudy concluded that Smith "lacks any direction or goal in life." Dr. Chudy found that Smith's "indifferent and ineffectual" mindset provided "little basis for [Smith] acting in a consistently sensible manner or learning from experience . . . even when it involves bringing on pain to himself or those closest to him." Dr. Chudy also concluded that Smith "is often overwhelmed with incomprehensible feelings or impulses that he does not understand" and "possesses extremely limited insight and judgment." In addition, Smith's Rule 32 petition alleged that Smith (1) is prone to impulsive behaviors, (2) lacks the ability to formulate premeditated plans, and (3) acts as a follower in groups.

Considering all the foregoing, the Alabama Court of Criminal Appeals' finding that there was "no indication that Smith had significant defects in adaptive behavior," *Smith II*, 71 So. 3d at 20, is unsupported (and, in fact, contradicted) by the record

and therefore unreasonable, *see Wiggins*, 539 U.S. at 528–29, 123 S. Ct. at 2539; *cf. Brumfield*, 576 U.S. at ___, 135 S. Ct. at 2279–82 (holding a state court’s “conclusion that the [trial] record failed to raise any question” as to the petitioner’s adaptive behavior was an unreasonable determination of the facts). Accordingly, its merits determination (at the early dismissal stage) as to Smith’s adaptive behavior functioning was based on an unreasonable determination of the facts.

C. Evidentiary Hearing

Smith requests that we reverse and remand this case to allow Smith on his own to present an expert witness on his behalf. Smith should be allowed to do that.

Smith also included in his prayer for relief a request for discovery and an evidentiary hearing. Neither he nor the State has fully briefed the propriety or usefulness of discovery or of an evidentiary hearing at this stage of the litigation. Accordingly, we do not decide whether the district court should order discovery or an evidentiary hearing, and we leave that issue for the district court to decide in the first instance.

However, in considering whether to grant Smith discovery or an evidentiary hearing, the district court should note that Dr. Chudy’s diagnosis of “borderline intellectual functioning” does not *ipso facto* preclude Smith from attempting to establish that he is intellectually disabled, especially given Dr. Chudy’s testimony about the standard error of measurement applicable to Smith’s IQ score of 72. *See Burgess*, 723 F.3d at 1313, 1322 (ordering the district court to conduct an evidentiary hearing to determine whether

the petitioner, who had been diagnosed as “borderline mentally retarded,” was intellectually disabled under Alabama law).

XI. CONCLUSION

In conclusion, we reverse and remand for further proceedings consistent with this opinion. In doing so, we express no opinion as to whether Smith is intellectually disabled. Upon remand, the district court should consider in the first instance Smith’s requests for discovery and an evidentiary hearing.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 05-0474-CG-M

JOSEPH CLIFTON SMITH,
Petitioner,

vs.

KIM T. THOMAS, Commissioner,
Alabama Department of Corrections,
Respondent.

Filed Jan. 21, 2014

ORDER

This matter is before the court on the motion of Petitioner Joseph Clifton Smith (“Petitioner” or “Smith”) to stay (Doc. 61), Petitioner’s motion for reconsideration pursuant to Rule 59(e) (Doc. 60), Respondent’s response (Doc. 63) and Petitioner’s reply (Doc. 64). For the reasons explained below, the court finds that both motions should be denied.

I. Background

Smith initiated this action on August 15, 2005 by filing a Petition for Writ of Habeas Corpus (Doc. 1) pursuant to 28 U.S.C. § 2254. Smith filed an Amended Petition on July 25, 2011. (Doc. 52). Smith’s petition *challenges* a 1998 Alabama state court judgment of conviction and death sentence for capital

murder. This court denied Smith's petition on September 30, 2013. (Doc. 59). On October 28, 2013, Smith moved for recon-sideration pursuant to Rule 59(e) asserting that the court's order dismissing his petition contains substantial factual errors and manifest errors of law with regard to his claim that he is mentally retarded and entitled to *Atkins* relief. Smith further asserts that this court should stay the proceedings in this case pending the decision of the Supreme Court of the United States in *Hall v. Florida*, No 12-10882 (2012).

II. Motion to Stay

Smith contends that the Supreme Court's decision in *Hall v. Florida* will have a direct impact on the determination in this case. The issue before the court in *Hall* is whether the Florida scheme for identifying mentally retarded defendants in capital cases violates *Atkins v. Virginia*. In *Hall*, the petitioner claims that Florida Courts have conflicted with *Atkins* "by inventing a new definition of mental retardation which re-quires a non-existent 'bright line' standardized IQ score of 70 or below which is contrary to the recommendations of the inventors and developers of the very IQ tests the Florida Retardation Statute relies upon by ignoring the scientifically accepted and essential standard error of measurement and use of confidence intervals." *Hall*, 12-10882, petition for writ of certiorari pp. 5-6.

However, Smith did not properly support his *Atkins* claim in state court.¹ Smith attempted to assert

¹ The court notes that Smith raised other issues in state court relating to his IQ. For instance Smith argued that comments made in closing argument about his low IQ implied that he should be sentenced to death because he is mentally retarded.

that he was mentally retarded and that his execution would violate the Eighth Amendment as interpreted by *Atkins*, but failed to plead sufficient facts to show that he suffered from subaverage intellectual functioning or deficit adaptive functioning and did not even plead his IQ score. The Court of Criminal Appeals of Alabama agreed with the Circuit Court that “Smith failed to meet his burden of pleading in regard to this claim.” *Smith v. State*, 71 So.3d 12, 18 (Ala.Crim.App. 2008). As stated by the Criminal Appeals Court:

Smith pleads only conclusions concerning his mental health and does not even indicate his IQ score in his pleading. The only grounds offered in support of this claim were the following:

“Mr. Smith has deficiencies in all three of these adaptive areas and clearly meets the mental retardation set forth in *Atkins*.

In closing, the prosecution had included the following statement:

“The Doctor said that this Defendant has a low IQ and I asked him this question because from your own common sense, from your own experience you know it to be true, there are folks out there with marginal IQs who are streetwise. They get along they get by, they survive sometimes better than the rest of us in certain situations. This man’s been in prison, this man’s been around, this man is streetwise. He knew what he was doing.” (R. 831).

Smith also argued on appeal that because there was testimony that he was borderline retarded, the trial court should have found that his commission of the act while under the influence of extreme mental or emotional disturbance was a mitigating circumstance. None of the IQ related issues raised by Smith provide any additional support for his *Atkins* claim.

“As evidenced by his school records and the testimony at trial, both his subaverage intellectual functioning and inability to adapt manifested themselves before Mr. Smith turned 18. Therefore, Mr. Smith meets the three requirements under the *Atkins* test for mental retardation and imposition of the death penalty on him violates the Eighth and Fourteenth Amendments to the United States Constitution, the Alabama Constitution and Alabama law.”

(C.R. 75.) Clearly Smith failed to satisfy the pleading requirements of Rule 32.6(b), ALA.R.CRIM.P.

Id. at 19. The Criminal Appeals Court further found that even if the claim had been properly plead, the record supports the Circuit Court’s conclusion that Smith does not meet the broadest definition of mentally retarded. *Id.* The Court discussed Smith’s argument that it should adopt a margin of error when examining a defendant’s IQ. *Id.* at 19-21. However, the Court reasoned that such a conclusion would in essence expand the definition of mentally retarded adopted by the Alabama Supreme Court in *Ex parte Perkins*, 851 So.2d 453 (Ala. 2002) and conflict with federal regulations. *Id.* at 20-21.

As this court stated in the order denying Smith’s petition (Doc. 59, pp. 57-58), the *Atkins* claim is properly before this court because it was raised in Smith’s First and Second Amended Rule 32 petitions, but many of the facts now alleged in support of that claim were not contained in Smith’s state court submissions. This court can only look to the allegations stated in Smith’s Rule 32 petitions. *Borden v. Allen*,

646 F.3d 785, 816 (11th Cir. 2011). As the *Borden* Court explained:

Logically, that court could only undertake an “adjudication of the claim” that was presented to it; we believe that a review of a state court adjudication on the merits in light of allegations not presented to the state court—for ex-ample, by examining additional facts or claims presented for the first time in a petitioner’s federal habeas petition—would insufficiently respect the “historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts.”

Id. (quoting *Michael Williams v. Taylor*, 529 U.S. 420, 436, 120 S.Ct. 1479, 1490, 146 L.Ed.2d 435 (2000)). Although this court and the state court discussed the merits of Smith’s claim and whether it would be appropriate to apply a margin of error to his IQ, this court finds that even if a margin of error should have been applied to such determinations, the state court’s finding that Smith’s *Atkins* claim fails because he did not support such a claim, was not unreasonable or contrary to clearly established federal law.

In Smith’s Rule 32 petitions, he raised an *Atkins* claim, arguing that he was mentally retarded and that application of the death penalty to a mentally retarded person violates the Eighth and Fourteenth Amendments. However, in support of this claim, Smith only submitted the following argument:

112. Application of the death penalty to, and execution of, a mentally retarded person violates the Eighth and Fourteenth Amend-

ments to the United States Constitution, the Alabama Constitution and Alabama law. *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Atkins*, the Supreme Court set out a three prong test to identify mental retardation sufficient to prohibit application of the death penalty. That test requires (1) subaverage intellectual functioning, (2) “significant limitations in adaptive skills,” and (3) the manifestation of the first two requirements occurred before the age of 19 *Atkins*, 536 U.S. at 318. Smith meets all of these requirements.

113. Smith suffers from sub-average intellectual function. When Smith was transferred to the Monroe County Excel Junior high school, the county board of education classified Smith as “Educably Mentally Retarded” (EMR), based on his “psychological and educational evaluations, academic history, and other pertinent information.” In addition, there was testimony at trial that Smith functioned intellectually at the bottom 3rd percentile of all adults. (R. 781).

114. Smith also suffers from significant limitations in adaptive skills. *Atkins* defines adaptive skills as ‘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).” *Atkins*, at 308 n. 3. Smith has deficiencies in all of these areas. There was testimony at sentenc-

ing which showed his inability to adapt because he often acts out impulsively, lacks the ability to formulate a pre-meditated plan and acts as a follower in groups. See *Atkins*, 536 U.S. at 318 (“ . . . there is abundant evidence that they of-ten act on impulses rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.”)

115. In addition, those with mild mental retardation, generally do not academically progress beyond the 6th grade. Diagnostic and Statistical Manual of Mental Disorders (4th Ed., 2000, Text Revision). School records indicate that Smith never progressed beyond the 5th grade. Additionally, even though he was in EMR classes while in the Monroe County school system, he either failed or performed at the “D” level in all subjects.

116. As evidenced by his school records and the testimony at trial, both his sub-average intellectual functioning and inability to adapt manifested themselves before Smith turned 18. Therefore, Smith meets the three requirements under the *Atkins* test for mental retardation and imposition of the death penalty on him violates the Eighth and Fourteenth Amendments to the United States Constitution, the Alabama Constitution and Alabama law.

R-52, ¶¶ 113-116. Most of the Smith’s state court *Atkins* claim consisted of factual conclusions and statements of law. Smith’s only citation to the record was to page 781 of the trial record which includes the following testimony by Dr. Chudy:

Q. And after reviewing these tests did you come to form any opinion about Jody's IQ level?

A. Yes, I did.

Q. And what was that, please, sir?

A. He was found to a full scale IQ of 72, which placed him at the third percentile in comparison to the general population.

Q. Out of a hundred people where would that put him?

A. Third. If you had normally distributed a hundred people in this room, ninety-seven would function higher than he would.

Q. And did you make any findings about a borderline intelligence situation with him?

A. Well, there – there actually is what we call a standard error of measurement of about three or four points. So, you know, taking that into account you could – on the one hand he could be as low as a 69. 69 is considered clearly mentally retarded.

TR 781. The above testimony was cited to support petitioner's statement that "there was testimony at trial that Smith functioned intellectually at the bottom 3rd percentile of all adults." The above evidence does not support a finding that Smith had both significantly subaverage intellectual functioning and significant deficits in adaptive functioning. As this court stated in the order denying Smith's petition, all three of the following must be shown for mental retardation to rise to the level of prohibiting execution:

(1) significantly subaverage intellectual functioning (i.e., an IQ of 70 or below); (2) significant or substantial deficits in adaptive behavior; and (3) the manifestation of these problems during the defendant's developmental period (i.e., before the defendant reached age eighteen).

Holladay v. Allen, 555 F.3d 1346, 1353 (11th Cir. 2009); *see also Smith v. State (Jerry Smith)*, 2007 WL 1519869, at *8 (Ala. May 25, 2007) (stating that “All three factors must be met in order for a person to be classified as mentally retarded for purposes of an *Atkins* claim.”).

Additionally, it is not clear that Alabama courts have required a bright line standardized IQ score of 70 or below as the *Hall* case alleges exists in Florida. As this court stated in the order denying Smith's petition, the Eleventh Circuit has held that a federal habeas court has discretion to consider the standard error of measurement and the Flynn effect. (Doc. 59, p. 61, citing *Thomas v. Allen*, 607 F.3d 749, 753 (11th Cir. 2010)). Thus, when there is evidence to suggest a petitioner's IQ should be adjusted downward, a court may consider applying a standard error of measurement and the Flynn effect. However, Smith failed to provide sufficient evidence to persuade the court that Smith's IQ should be adjusted downward. There was testimony that if a standard error of measurement was applied Smith's IQ could be as low as 69. But considering that same standard error of measurement would also suggest that Smith's IQ could be as high as 75. Where, as here, there was little or no evidence to point towards a downward adjustment, the state Court was not wrong to refuse to apply a

standard error of measurement and adjust Smith's IQ downward.²

For the reasons discussed above, the court does not find that the Supreme Court's decision in *Hall v. Florida* will have a direct impact on the determination in this case.

III. Motion to Reconsider

Smith has moved for reconsideration pursuant to Rule 59(e). For the reasons discussed above with regard to Smith's motion to stay, the court also finds that reconsideration should be denied.

The only grounds for granting a Rule 59 motion are newly-discovered evidence or manifest errors of law or fact. A Rule 59(e) motion cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment.

Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1344 (11th Cir. 2010). Smith has failed to identify any newly discovered evidence or any manifest errors of law or fact.

² As this court previously explained the instant case can be distinguished from the Thomas case. (Doc. 59, p. 61, n. 24). Unlike the Court in Thomas, this court must give deference to the state court's conclusion. Additionally, unlike the circumstances in Thomas, the parties here did not stipulate that a standard error of measurement was appropriate and there was no evidence that any intelligence assessment ever yielded an IQ score for Smith that was below 70. (Doc. 59, p. 61, n. 24).

CONCLUSION

For the reasons set forth above, the motions of Petitioner Joseph Clifton Smith to stay (Doc. 61) and for reconsideration pursuant to Rule 59(e) (Doc. 60), are **DENIED**.

DONE and **ORDERED** this 21st day of January, 2014

/s/ Callie V. S. Granade
UNITED STATES DISTRICT JUDGE

Notice: This opinion is subject to formal revision before publication in the advance sheets of ***Southern Reporter***. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in ***Southern Reporter***.

ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 2007-2008

CR-05-0561

JOSEPH CLIFTON SMITH

v.

STATE OF ALABAMA

Appeal from Mobile Circuit Court
(CC-98-2064.60)

(Filed Sep. 26, 2008)

WISE, Judge.

The appellant, Joseph Clifton Smith, appeals the summary dismissal of his petition for postconviction relief filed pursuant to Rule 32, Ala.R.Crim.P. In 1998, Smith was convicted of murdering Durk Van Dam during the course of a robbery, an offense defined as capital by § 13A-5-40(a)(2), Ala. Code 1975. The jury, by a vote of 11 to 1, recommended that Smith be sentenced to death, and the circuit

court sentenced Smith to death. Smith's conviction and his sentence of death were affirmed on direct appeal. *Smith v. State*, 795 So. 2d 788 (Ala.Crim.App. 2000), cert. denied, 795 So. 2d 842 (Ala.), cert. denied, 534 U.S. 872 (2001). We issued the certificate of judgment on March 16, 2001.

In September 2002, Smith filed a Rule 32 petition. The circuit court summarily dismissed the petition after finding that it was untimely filed.¹ We affirmed the circuit court's dismissal without an opinion. *Smith v. State*, 897 So. 2d 1246 (Ala. Crim. App. 2003) (table). On certiorari review the Alabama Supreme Court reversed this Court's judgment and held that Smith's postconviction petition was timely filed. See *Ex parte Smith*, 891 So. 2d 286 (Ala. 2004). The case was remanded to the circuit court and Smith was allowed to amend his petition.

On remand, Smith filed amended petitions in June 2004 and again in January 2005. In March 2005, the circuit court granted the State's motion to dismiss. Smith filed a notice of appeal. We dismissed the appeal after finding that the notice of appeal was not timely filed. *Smith v. State*, 926 So. 2d 1095 (Ala. Crim. App. 2005) (table). Smith then filed a second Rule 32 petition seeking an out-of-time appeal from the denial of his first Rule 32 petition. That Rule 32 petition was granted, and this appeal is an out-of-time appeal from the denial of Smith's first Rule 32 petition.

We stated the following facts surrounding the murder in our opinion on direct appeal:

¹ Rule 32.2(c), Ala.R.Crim.P., was amended effective March 22, 2002, to change the limitations period within which to file a Rule 32 petition from two years to one year.

“The State’s evidence tended to show the following. On November 25, 1997, police discovered the badly beaten body of Durk Van Dam in his mud-bound Ford Ranger truck in a wooded area near Shipyard Road in Mobile County. Dr. Julia Goodin, a forensic pathologist for the Alabama Department of Forensic Sciences, testified that Van Dam died as a result of 35 different blunt-force injuries to his body. Van Dam had marks consistent with marks made by a saw on his neck, shoulder, and back; he also had a large hemorrhage beneath his scalp, brain swelling, multiple rib fractures, a collapsed lung, multiple abrasions to his head and knees, and defensive wounds on his hands. Dr. Goodin testified that the multiple rib fractures that caused one lung to collapse were probably the most immediate cause of death.

“Smith gave two statements to the police. In the first statement he denied any involvement in the robbery-murder but said that he was with Larry Reid when Reid beat and robbed Van Dam. Smith denied taking anything from the victim. When police were questioning Reid, Smith repeatedly knocked on the interrogation room door and requested to talk to the officer who had taken his first statement. In his second statement Smith admitted that he and Reid had planned to rob Van Dam because they had been told that Van Dam was carrying \$1,500 in cash. Smith said that he, Reid, and Van Dam left the Highway Host motel in Van Dam’s red truck on November 23, 1997. Van

Dam was driving. Reid directed Van Dam, who had been drinking, to an isolated location. Once there, Reid began hitting Van Dam. He said that when Reid kicked Van Dam in the face he thought Van Dam was dead. Smith said that Van Dam then got up and Smith hit him on the head with his fist, kicked him in the ribs several times, threw a handsaw at him, and may have hit him with a hammer but he wasn't entirely sure because he suffers from blackouts. Reid then got a power saw from the back of Van Dam's truck, Smith said, and ran the saw against Van Dam's neck. Smith held Van Dam down while Reid took the money from his pockets. Smith and Reid then attempted to move the truck, because they had planned to steal it, but it got stuck in the mud. Smith also admitted that he took the victim's boots, because his shoes were wet, and that he took the victim's tools. The two discussed where to take Van Dam's body and Smith suggested that they take it to a nearby lake. However, they left the body, Smith said, under a mattress near Van Dam's truck. Smith said that when they divided the money he got only \$40 and Reid kept the rest, approximately \$100. Smith also told police that he had just been released from custody on Friday – two days before the robbery-murder on Sunday.

“Russell Harmon testified that on November 23, 1997, he went to the Highway Host motel and saw Reid and Smith. He said that Smith told him that they were going to rob Van Dam and asked if he wanted to join them.

Harmon declined and left the motel. Later that day he went back to the motel to see if the two had been successful with their plans. He said that Smith told him that he had beaten the victim on the head and that he had cut him with a saw. On cross-examination he admitted that he could not swear that Smith was the one who said he had cut Van Dam in the back but that it could have been Reid who made this statement. However, on cross-examination Harmon reiterated that Smith told him that he “hit the man, beat the man-hit the man in the head and cut him.” (R. 340.) Harmon testified that Smith asked him to go with him to get the tools from where he had left them in the woods. He said that he went with Smith and that they got the tools and took them to a pawnshop-Smith received \$200 for the tools. Harmon testified that he was currently in the county jail because his probation had been revoked.

“M.A. testified that she was living at Highway Host motel with her mother and sister at the time of Van Dam’s murder. She said that her sister, M., was dating Smith. M.A. testified that on November 23, 1997, she saw Smith, Reid, and Van Dam drive away from the motel in a red truck. She said that when Smith and Reid returned sometime later they were in a black car, Van Dam was not with them, and Smith had blood on his clothes. M.A. testified that Smith told her that he had hit, cut, and stabbed Van Dam in the back.”

Smith, 795 So. 2d at 796-97.

Standard of Review

This is an appeal from the denial of a post-conviction petition – a proceeding initiated by Smith. Rule 32.3, Ala.R.Crim.P., states, in part: “The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.”

In the direct-appeal proceedings we reviewed Smith’s capital-murder trial and sentencing proceedings for plain error. See Rule 45A, Ala.R.App.P. However, the plain-error standard of review does not apply to the review of postconviction proceedings challenging a death sentence. See *Ex parte Dobyne*, 805 So. 2d 763 (Ala. 2001). We review the denial of a postconviction petition under an abuse-of-discretion standard. See *Elliott v. State*, 601 So. 2d 1118 (Ala.Crim.App. 1992). “Abuse of discretion” has been defined as: “An appellate court’s standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence.” *Black’s Law Dictionary* 11 (8th ed. 2004).

Also, the procedural bars contained in Rule 32 apply to all cases, even those challenging a capital-murder conviction and death sentence. See *Hunt v. State*, 940 So. 2d 1041 (Ala.Crim.App. 2005); *Hooks v. State*, 822 So. 2d 476 (Ala.Crim.App. 2000); *State v. Tarver*, 629 So. 2d 14 (Ala.Crim.App. 1993).

I.

Smith first argues that the circuit court erred in summarily dismissing his claim that he is mentally retarded. He asserts that he is mentally retarded and that his sentence of death violates the United States Supreme Court’s holding in *Atkins v. Virginia*, 536

U.S. 304 (2002). Smith further contends that he is entitled to an evidentiary hearing on this issue because, he says, the circuit court erroneously relied on evidence presented at his trial concerning his IQ score. Smith asserts that a clinical psychologist testified at his sentencing hearing that Smith's IQ placed him in the bottom 2% of all adults and that the "margin of error" in IQ testing would place his IQ below 70.

The State argues that Smith failed to plead sufficient facts showing that his mental functioning was consistent with the definition of mental retardation adopted by the Alabama Supreme Court in *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002). Specifically, it asserts that Smith failed to plead any facts to show that he suffered from "subaverage intellectual functioning" or "deficit adaptive functioning." Neither, it asserts, did Smith "plead any facts showing his IQ was 70 or less." Indeed, it contends that Smith did not even plead his IQ score in his second amended petition.

In *Atkins v. Virginia*, the United States Supreme Court held that it was cruel and unusual punishment in violation of the Eighth Amendment to execute a mentally retarded individual.² However, the Supreme Court left it to the individual states to define mental retardation. Though Alabama has yet to enact legislation addressing this issue, the Alabama Supreme Court in *Perkins* held that a defendant is mentally retarded if he or she: (1) has significantly subaverage intellectual functioning (an IQ of 70 or below); (2) has

² *Atkins* applies retroactively to all cases, even those on collateral review. See *Schriro v. Summerlin*, 542 U.S. 348 (2004); *Clemons v. State*, [Ms. CR-01-1355, August 29, 2003] So. 2d (Ala.Crim.App. 2003).

significant defects in adaptive behavior; and (3) these two deficiencies manifested themselves before the defendant attained the age of 18.

In addressing this claim, the circuit court made the following findings:

“Smith contends that he is mentally retarded and, thus, his execution would violate the Eighth Amendment as interpreted by *Atkins v. Virginia*, [536 U.S. 304] (2002). . . . In his first and second amended Rule 32 petitions, Smith attempts to support this contention by pointing out that in junior high school he was classified as ‘Educable Mentally Retarded.’ Smith also contends, without any citations to the trial record, that ‘[t]here was testimony at sentencing showing his inability to adapt.’ The only difference in the *Atkins* claim in Smith’s first amended petition and the *Atkins* claim in his second amended petition is the addition of one paragraph. . . . Smith argues that he is mentally retarded as it is defined by ‘the AAMR publication Mental Retardation: Definition, Classification, and Systems of Support ([10]th Ed. [2002]).’ The Court finds, however, that the *Atkins* claim . . . is no more factually specific than that *Atkins* claim in Part III of his first amended Rule 32 petition.

“

“Smith’s school records indicate he had a full scale IQ of 74 at age 12. (S.R. 383) Before trial Dr. [James] Chudy administered the WAIS-R on Smith to assess his intellectual

abilities. Chudy indicated in his report that '[o]n the WAIS-R [Smith] earned a Verbal IQ of 73, a Performance IQ of 72, and a Full Scale IQ of 72.' (C.R. 400) Chudy also testified during the penalty phase of Smith's trial that he 'did not find a pattern that would show that [Smith] had major neurological problems that would be inconsistent with a 72 IQ.' (R. 796) The evidence admitted at Smith's trial refutes any assertion that Smith's intellectual functioning is significantly subaverage. Smith proffers no facts in his second amended Rule 32 petition that would in any way dispute the facts contained in the record.

"Likewise, the record indicates little, if any, deficits in Smith's adaptive functioning.

While reviewing the evidence of flight on direct appeal, the Alabama Court of Criminal Appeals found that:

"[T]he evidence indicated that Smith and Reid attempted to hide the body under a mattress, and tried to steal [the victim's] truck but it got stuck in the mud and they left it behind, and that Smith went back to the Highway Host motel to shower and to change clothes. [Smith] admitted to police that he tried to wipe his fingerprints off the truck and also told police that he had washed the clothes he was wearing at the time of the robbery-murder. Also, when [Smith] was first questioned about the murder he denied any involvement and placed the blame for the robbery-murder on

Reid. . . . All of the conduct evidences a ‘consciousness of guilt’ on the part of Smith.’

“*Smith v. State*, 795 So. 2d at 829 (emphasis added). Smith’s actions after the murder ‘indicate that [Smith] does not suffer from deficits in his adaptive behavior.’ *Ex parte Smith*, [[Ms. 1010267, March 14, 2003] ___ So. 2d ___ (Ala. 2003)]. Based on Smith’s complete failure to proffer any new facts in his second amended Rule 32 petition to dispute the facts presented at his trial, the Court finds ‘that [Smith], even under the broadest definition of mental retardation, is not mentally retarded.’ *Ex part Perkins*, 851 So. 2d at 456. The Court finds that the allegation in Part II of Smith’s second amended Rule 32 petition is without merit; therefore, it is denied. Rule 32.7(d), Ala.R.Crim.P.” (C.R. 427-30.)

First, we agree with the circuit court that Smith failed to meet his burden of pleading in regard to this claim. In *Boyd v. State*, 913 So. 2d 1113 (Ala. Crim.App. 2003), we stated the following concerning a Rule 32 petitioner’s burden of pleading:

“Rule 32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief.’ *Boyd v. State*, 746 So. 2d 364, 406 (Ala.Crim.App. 1999). In other words, it is not the pleading of a conclusion ‘which, if true, entitle[s] the petitioner to relief.’ *Lancaster v. State*, 638 So. 2d 1370, 1373 (Ala.Crim.App. 1993). It is the allegation of facts in pleading which, if true, entitles a petitioner to relief. After facts are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9,

Ala.R.Crim.P., to present evidence proving those alleged facts.”

913 So. 2d at 1125. “The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis must be included in the petition itself.” *Hyde v. State*, 950 So. 2d 344, 356 (Ala.Crim.App. 2006). Rule 32.6(b), Ala.R.Crim.P., states:

“The petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings.”

Smith pleads only conclusions concerning his mental health and does not even indicate his IQ score in his pleading. The only grounds offered in support of this claim were the following:

“Mr. Smith has deficiencies in all three of these adaptive areas and clearly meets the mental retardation set forth in *Atkins*.

“As evidenced by his school records and the testimony at trial, both his subaverage intellectual functioning and inability to adapt manifested themselves before Mr. Smith turned 18. Therefore, Mr. Smith meets the three requirements under the *Atkins* test for mental retardation and imposition of the death penalty on him violates the Eighth and Fourteenth Amend-

ments to the United States Constitution, the Alabama Constitution and Alabama law.”

(C.R. 75.) Clearly Smith failed to satisfy the pleading requirements of Rule 32.6(b), Ala.R.Crim.P.

Moreover, the record in Smith’s direct appeal supports the circuit court’s conclusion that Smith does not meet the broadest definition of mentally retarded adopted by the Alabama Supreme Court in *Ex parte Perkins*, 851 So. 2d 453 (Ala. 2002).³

Intellectual functioning. The record shows that before Smith’s trial he was evaluated by Dr. James Chudy, a clinical psychologist. Dr. Chudy performed IQ tests on Smith and determined that Smith’s verbal IQ was 73, his performance IQ was 72, and his full-scale IQ was 72. Dr. Chudy diagnosed Smith as suffering from the following disorders: major depression, post-traumatic stress disorder, alcohol dependence, learning disorder, personality disorder, and borderline intellectual functioning. Dr. Chudy also testified that because of the margin of error in IQ testing Smith’s IQ score could be as high as 75 or as low as 69. Smith’s mother, Glenda Smith, also testified that Smith has dyslexia.⁴

Smith’s school records were also introduced at his sentencing hearing. These records show that Smith was administered an IQ test when he was 12 years of age. At that time Smith’s verbal IQ was 80, his

³ We may take judicial notice of our previous records involving Smith’s direct appeal. See *Hull v. State*, 607 So. 2d 369 (Ala.Crim.App. 1992).

⁴ Dyslexia is defined as “the inability to read, spell, and write words, despite the ability to recognize letters.” *Dorland’s Illustrated Medical Dictionary* 516 (W.B. Saunders Co. 28th ed. 1994).

performance IQ was 72, and his full-scale IQ was 74. The school recommended that Smith participate in regular classes. However, the records show that the next year another school recommended that Smith be placed in special-education classes after he was classified as “educable mentally retarded.” Smith had also been administered an IQ test in 1979 when he was eight years of age. At that time, Smith scored a verbal IQ of 80, a performance IQ of 73, and a full-scale IQ of 75. (Trial record, supp. C.R. 393.)

Adaptive behavior. “Adaptive skills are those skills that one applies to the everyday demands of independent living, such as taking care of oneself and interacting with others.” *State v. White*, 118 Ohio St. 3d 12, 885 N.E.2d 905, 908 (2008). The American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 39 (4th ed. 2000), defines adaptive functioning as “how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.”

Smith and Larry Reid committed the robbery/murder on November 25, 1997. Just days before the murder Smith had been released from prison on pre-discretionary leave – a program that allowed him to live at home and to work in the community. Smith had been living with his mother in a trailer park. The manager of the trailer park told the probation officer who conducted the presentence investigation that Smith did odd jobs for her around the trailer park, that he was a hard worker, and that she had never had any complaints about him. In Smith’s statement to police he referenced his girlfriend. Also, M.A., a

State's witness at Smith's trial, testified that at the time of the robbery/murder Smith was dating her sister. Smith also told police that both he and his codefendant, Larry Reid, planned to rob the victim, and that, after the victim was killed, he suggested that they dispose of the body in a nearby lake and that he pawn the tools that he had taken from the victim. Smith's prison records showed that he frequently went to the infirmary to obtain medical attention for different ailments. Also, a review of Smith's statement to police does not indicate that Smith lacked the ability to communicate or to interact with others. There is no indication that Smith had significant defects in adaptive behavior. The record does not show that Smith meets the broadest definition of mentally retarded adopted by the Alabama Supreme Court in *Perkins*, and Smith pleaded no new evidence in support of this claim.

In summary, Smith urges this Court to adopt a "margin of error" when examining a defendant's IQ score and then to apply that margin of error to conclude that because Smith's IQ was 72 he is mentally retarded. The Alabama Supreme Court in *Perkins* did not adopt any "margin of error" when examining a defendant's IQ score. If this Court were to adopt a "margin of error" it would, in essence, be expanding the definition of mental retarded adopted by the Alabama Supreme Court in *Perkins*. This Court is bound by the decisions of the Alabama Supreme Court. See § 12-3 16, Ala. Code 1975. As one court noted concerning the margin of error in IQ tests as it related to a federal regulation:

"We find the reasoning in *Bendt [v. Chater*, 940 F.Supp. 1427 (S.D.Iowa 1996)], and its reliance on *Cockerham v. Sullivan*, 895 F.2d

492, 495 (8th Cir. 1990), to be most persuasive. *Ellison v. Sullivan*, 929 F.2d 534 (10th Cir. 1990). In *Bendt*, the district court noted that ‘incorporating a 5 point measurement error into a claimant’s IQ test results would effectively expand the requisite IQ under listing 12.05(C) from test scores of 60 to 70 to test scores of 60 to 75.’ *Bendt*, 940 F.Supp. at 1431. The Court concluded that this would alter the range of IQ’s which satisfy the Listing of Impairments for Mental Retardation and Autism in contradiction of the federal regulations interpreting the Act.”

Colavito v. Apfel, 75 F.Supp. 2d 385, 403 (E.D.Pa. 1999). The circuit court did not abuse its discretion in dismissing this claim.

II.

Smith next argues that he was denied the effective assistance of counsel at both phases of his capital-murder trial. He asserts that the circuit court erroneously confused the burden of pleading with the burden of proof and that he is entitled to an evidentiary hearing on his claims because, he argues, he met his burden of pleading “a clear and specific statement of the grounds upon which relief is sought.”⁵

To prevail on a claim of ineffective assistance of counsel the petitioner must show: (1) that counsel’s performance was deficient and (2) that the petitioner

⁵ It appears that Smith’s brief on these claims is identical to the pleadings in his second amended petition concerning ineffective assistance of counsel.

was prejudiced by the deficient performance. See *Strickland v. Washington*, 466 U.S. 668 (1984).

“Judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’ There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.”

Strickland, 466 U.S. at 689.

“This court must avoid using ‘hindsight’ to evaluate the performance of counsel. We must evaluate all the circumstances surrounding the case at the time of counsel’s actions before determining whether counsel

rendered ineffective assistance.” *Lawhorn v. State*, 756 So.2d 971, 979 (Ala.Crim.App. 1999), quoting *Hall-ford v. State*, 629 So.2d 6, 9 (Ala.Crim.App. 1992). ‘[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’ *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.”

A.G. v. State, [Ms. CR-05-2241, November 2, 2007] ___ So. 2d ___, ___ (Ala.Crim.App. 2007).

In *Hyde v. State*, 950 So. 2d 344 (Ala.Crim.App. 2006), we stated the following concerning a petitioner’s burden of pleading claims of ineffective assistance of counsel:

“The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b). See *Bracknell v. State*, 883 So. 2d 724 (Ala.Crim.App. 2003). To sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner not only must ‘identify the [specific] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,’ *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), but also must plead specific facts

indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating ‘that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ 466 U.S. at 694, 104 S.Ct. 2052. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient.”

950 So. 2d at 355-56.

First, we note that when addressing several of Smith’s claims of ineffective assistance the circuit court stated in its order that a finding of no plain error on direct appeal foreclosed a finding of prejudice under *Strickland v. Washington*. However, the cases relied on by the circuit court – *Woods v. State*, 957 So. 2d 492 (Ala.Crim.App. 2004), and *Taylor v. State*, [Ms. CR-02-0706, August 27, 2004] ___ So. 2d ___ (Ala.Crim.App. 2004) – were subsequently overruled and reversed, respectively, by the Alabama Supreme Court in *Ex parte Taylor*, [Ms. 1040186, September 30, 2005] ___ So. 2d ___ (Ala. 2005). In *Taylor*, the Supreme Court held:

“[a]lthough it may be the rare case in which the application of the plain-error test and the prejudice prong of the *Strickland* [*v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] test will result in different outcomes, a determination on direct appeal that there has been no plain error does not automatically foreclose a determination of the existence of the prejudice required under *Strickland* to sustain a claim of ineffective assistance of counsel.”

Taylor, ___ So.2d at ___. The circuit court issued its order before the Alabama Supreme Court released its opinion in *Taylor*. Also, the circuit court gave alternative reasons for denying relief on the majority of the claims. Moreover, we may affirm the circuit court's ruling denying a Rule 32 petition if it is correct for any reason. *McNabb v. State*, [Ms.CR-05-0509, August 31, 2007] ___ So.2d ___ (Ala.Crim.App. 2007); *Hall v. State*, 979 So. 2d 125 (Ala.Crim.App. 2007).

A.

Smith first argues that his trial counsel was ineffective, in part, because of the “grossly inadequate compensation” paid to appointed attorneys who represent indigent capital-murder defendants in Alabama. See § 15-12-21, Ala. Code 1975.⁶

Smith made only a general claim in his second amended petition that counsel was ineffective because of the inadequate compensation paid to court-appointed attorneys in capital cases. Smith cited no specific instance where counsel's performance was ineffective based on the statutory cap. “The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis must be included in the petition itself.” *Hyde v. State*, 950 So. 2d 344, 356 (Ala.Crim.App. 2006). Thus, Smith failed to meet his burden of pleading in regard to this claim. See Rule 32.6(b), Ala.R.Crim.P. As we stated in *McNabb v.*

⁶ In 1999, § 15-12-21 was amended to remove the cap on fees an attorney appointed to represent an indigent defendant in a capital-murder case could receive.

State, [Ms. CR-05-0509, August 31, 2007] ___ So. 2d ___, ___. (Ala.Crim.App. 2007):

“[S]ummary denial of this claim was proper because, as the circuit court found, McNabb failed to meet his burden of pleading sufficiently or with specificity facts to support his claim. *See, e.g., Duncan v. State*, 925 So. 2d 245 (Ala.Crim.App. 2005) (summary denial of claim that counsel was ineffective as a result of inadequate compensation was proper where petitioner failed to allege how counsel’s performance would have been different had the statutory compensation scheme been different).”

Also, on direct appeal this Court specifically addressed the substantive issue underlying this claim and found no error. We addressed the issue under the preserved-error standard of review. Counsel cannot be held ineffective for failing to raise an issue that has no merit. *See Davis v. State*, [Ms. CR-03-2086, April 4, 2008] ___ So. 2d ___ (Ala.Crim.App. 2008) (opinion on remand from the Alabama Supreme Court).

B.

Smith next argues that his trial counsel’s investigation was deficient because the cap the circuit court placed on funds for the investigator counsel retained was too low.

The circuit court made the following findings:

“This is not a case where a defense attorney’s request for funds to hire an investigator was denied. The trial court granted Smith’s. trial counsel up to \$1000 to hire an

investigator. Nothing in the record on appeal indicates the trial court limited trial counsel from requesting additional funds if they thought they were necessary. In addition to receiving funds for a private investigator, Smith's trial counsel also requested and received \$1500 for a mental health expert who testified during the penalty phase of trial. Further, the Court finds that Smith's trial counsel did, in fact, present the testimony and evidence proffered in Part I.K(1) of Smith's second amended petition during the penalty phase of his trial. Smith fails to proffer in Part I.B of his second amended Rule 32 petition any specific beneficial mitigating evidence his trial counsel could have discovered and presented if they had requested and received more funds for a private investigator. See *Thomas v. State*, 766 So. 2d 860, 892 (Ala.Crim.App. 1998) (holding that 'claims of failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible, its admission would have produced a different result') (emphasis added). The Court finds that the allegation in Part I.B of Smith's second amended Rule 32 petition is without merit; therefore, it is denied. Rule 32.7(d), Ala.R.Crim.P."

(Supp. C.R. 388-90.)

First, Smith failed to meet his burden of pleading in regard to this claim. Smith merely states in his petition that "[i]f trial counsel had been given the funds necessary to hire someone to conduct a

complete mitigation investigation, they would have uncovered a wealth of mitigating evidence, which the jury never heard.” (C.R. 23.) Smith does not plead what mitigating evidence was not discovered because of the alleged cap on fees. Smith failed to comply with the pleading requirements of Rule 32.6(b), Ala.R.Crim.P.

Second, the record of Smith’s trial supports the circuit court’s findings. The record shows that Smith filed a pretrial motion for funds to hire an investigator and a psychologist. That motion was granted. The circuit court allowed \$1,000 for an investigator and \$1,500 for a psychologist. There is no indication that Smith was foreclosed from filing a request for additional funds for the investigator he retained. This claim is not supported by the record.

C.

Smith next argues that counsel’s assistance was ineffective because counsel failed to adequately investigate the capital-murder charges against him. Smith lists many grounds in support of this claim.

“A review of a claim of ineffective counsel is not triggered until the petitioner has identified specific acts or omissions. *Strickland*. See, e.g., *Nelson v. Hargett*, 989 F.2d 847, 850 (5th Cir. 1993) (claims of failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible, its admission would have produced a different result).”

Thomas v. State, 766 So. 2d 860, 892 (Ala.Crim.App. 1998), overruled on other grounds, *Ex parte Taylor*, [Ms. 1040186, September 30, 2005] ____ So. 2d ____

(Ala. 2005). “[A] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial.” *State v. Flynn*, 190 Wis.2d 31, 48, 527 N.W.2d 343 (Ct.App. 1994).” *State v. Hickles*, 296 Wis.2d 417, 722 N.W.2d 399 (2006).

1.

Smith first argues that counsel was ineffective for not interviewing his family members and presenting their testimony at the penalty phase of his trial.

When denying relief on this claim, the circuit court made the following findings:

“In *Thomas v. State*, 766 So. 2d 860, 892 (Ala.Crim.App. 1998), the Alabama Court of Criminal Appeals held that ‘claims of failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible, its admission would have produced a different result.’ In *Woods v. State*, [957 So. 2d 492 (Ala.Crim.App. 2004)], the Alabama Court of Criminal Appeals reviewed the circuit court’s summary dismissal of Woods’s post-conviction claim that his defense counsel were ineffective for failing to interview member of his family. The Alabama Court of Criminal Appeals held that the circuit court’s holding that Woods’s allegation did not meet the specificity and full factual pleading requirements of Rule 32.6(b) was correct and adopted the circuit court’s findings that ‘Woods fail[ed] to identify any

family member by name, proffer what their testimony would have been at trial, or argue why such testimony would have caused a different result at the penalty phase or at sentencing.’ *Id.*

“If the specificity and factual pleading requirements of Rule 32.6(b) mean anything, certainly they would require a postconviction petitioner, or his counsel, to identify for a court reviewing a Rule 32 petition (sic) to name the witnesses a defense attorney should have interviewed and proffer what beneficial information the specific witnesses could have provided at trial. Smith fails to identify in Part I.C(1) of his second amended petition a single member of his family by name or proffer to the Court with any specificity what they would have testified about at trial. The Court finds that the allegation in Part I.C(1) fails to meet the specificity and full factual pleading requirements of Rule 32.6(b), Ala.R.Crim.P. See *Coral v. State*, [900 So. 2d 1274 (Ala. Crim.App. 2004)] (holding that ‘[e]ach subcategory [of ineffective assistance of counsel] is an independent claim that must be sufficiently pleaded’). Therefore, this allegation is summarily dismissed.”

(Supp. C.R. 391-93.) We agree with the circuit court. Smith failed to meet his burden of pleading in regard to this claim. Smith does not plead the name of any specific family member who failed to testify or plead what their specific omitted testimony would have consisted of. Rule 32.6(b), Ala.R.Crim.P.

Furthermore, the record of Smith's trial shows that three of Smith's family members testified at the sentencing hearing – Smith's mother and his two sisters. They all testified that Smith's father was an alcoholic and that he was very abusive to Smith. It is clear that counsel did talk to Smith's family members. This claim is not supported by the record.

Moreover, "Prejudicial ineffective assistance of counsel under *Strickland* cannot be established on the general claim that additional witnesses should have been called in mitigation. See *Briley v. Bass*, 750 F.2d 1238, 1248 (4th Cir. 1984); see also *Bassette v. Thompson*, 915 F.2d 932, 941 (4th Cir. 1990). Rather, the deciding factor is whether additional witnesses would have made any difference in the mitigation phase of the trial.' *Smith v. Anderson*, 104 F.Supp.2d 773, 809 (S.D.Ohio 2000), *aff'd*, 348 F.3d 177 (6th Cir. 2003). 'There has never been a case where additional witnesses could not have been called.' *State v. Tarver*, 629 So. 2d 14, 21 (Ala.Crim.App. 1993)."

McWilliams v. State, 897 So. 2d 437, 453 (Ala. Crim.App. 2004), *rev'd* on other grounds in *Ex parte Jenkins*, 972 So. 2d 159 (Ala. 2005). "We cannot say that trial counsel's performance was deficient simply because he did not call every witness who conceivably may have been willing to testify at the sentencing phase of the trial." *Bui v. State*, 717 So. 2d 6, 22 (Ala.Crim.App. 1997).

2.

Smith next argues that counsel was ineffective for failing to locate two critical eyewitnesses. Specific-

ally, he asserts that counsel failed to locate a unknown male who drove Smith and his codefendant to their hotel after the murder and failed to locate a clerk of a convenience store who allegedly sold Smith cigarettes immediately after the robbery/murder.

When denying relief on this claim, the circuit court stated:

“In *Thomas v. State*, 766 So. 2d [860] at 893 [(Ala.Crim.App. 1998)], the Alabama Court of Criminal Appeals held that ‘[a] claim of failure to call witnesses is deficient if it does not show what the witnesses would have testified to and how that testimony might have changed the outcome.’ Smith’s use of the term ‘eyewitness’ in his second amended petition is misleading. There is nothing in the trial record, and Smith proffers no facts in his second amended Rule 32 petition, that would raise any inference anyone other than Smith and his codefendant were eyewitnesses to the victim being beaten to death. Further, Smith fails to identify in his second amended Rule 32 petition either of these individuals by name or proffer to the Court with any specificity what these unnamed witnesses would have testified about[;] instead Smith makes the completely conclusory argument that these witnesses ‘could have substantiated his statements to the police.’ *Id.* Because Smith fails to proffer any specific facts to support these allegations, the Court finds that Part I.C(2) of Smith’s second amended Rule 32 petition fails to meet the specificity and full factual pleading

requirements of Rule 32.6(b). Therefore, these allegations are summarily dismissed.”

(Supp. C.R. 393-94.)

We agree with the circuit court. Smith failed to plead any facts in support of this claim. Smith did not plead the identity of the alleged omitted witnesses, what their testimony would have consisted of, or how he was prejudiced by their failure to testify. Thus, Smith failed to meet the pleading requirements of Rule 32.6(b), Ala.R.Crim.P.

3.

Smith next argues that counsel was ineffective for failing to introduce evidence that one of the State’s witnesses, M.A.,⁷ was incarcerated at the time of his trial. He asserts that this was proof of the witness’s bias in favor of the State and that his counsel was ineffective for failing to introduce this evidence during M.A.’s testimony.

Initially, we note that the record shows that counsel did attempt to question M.A. about where she was residing at the time of trial, but the circuit court granted the State’s motion to exclude this evidence. Smith’s claim is not supported by the record.

Also, on direct appeal we devoted a great portion of our opinion to addressing the issue of whether the circuit court erred in not allowing Smith’s attorney to cross-examine M.A. about where she was living at the time of Smith’s trial.⁸ When addressing the merits of this claim we stated: “[W]e emphasize that our

⁷ M.A. was a juvenile when she testified at Smith’s trial; thus, we are using initials to protect her anonymity.

⁸ M.A. was in a juvenile detention facility at the time of Smith’s trial.

affirmance of this issue is not dependent on application of the plain-error doctrine. The trial court's ruling was not error, much less, plain error." 795 So. 2d at 817. Specifically we held that "the failure to allow M.A. to be questioned about the fact that her juvenile probation had been revoked was harmless." 795 So. 2d at 821. Because we found that the substantive issue underlying this claim was at best harmless, Smith cannot meet the prejudice prong of the *Strickland* test. As this Court stated in *Gaddy v. State*, 952 So. 2d 1149 (Ala.Crim.App. 2006):

"Harmless error does not rise to the level of the prejudice required to satisfy the *Strickland* test. As a Florida Court of Appeals aptly explained in *Johnson v. State*, 855 So. 2d 1157 (Fla.Dist. Ct.App. 2003):

"If the harmless error test . . . has been satisfied, then it follows that there can be no prejudice under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This is because of the fundamental difference between the harmless error test that is applied on direct appeal and the prejudice prong of *Strickland*. As the first district has explained:

"Significantly, the test for prejudicial error in conjunction with a direct appeal is very different from the test for prejudice in conjunction with a collateral claim of ineffective assistance. There are different tests because, once a conviction becomes final, a presumption of finality attaches to the conviction. Thus, as *Goodwin [v. State]*, 751 So. 2d 537, 546 (Fla. 1999)] explains, the test for pre-

judice on direct appeal is the harmless error test of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), under which trial court error will result in reversal unless the prosecution can prove ‘beyond a reasonable doubt’ that the error did not contribute to the verdict obtained. Conversely, however, as explained in *Strickland*, prejudice may be found in a collateral proceeding in which ineffective assistance of counsel is claimed only upon a showing by the defendant that there is a ‘reasonable probability’ that counsel’s deficient performance affected the outcome of the proceeding.”

“855 So. 2d at 1159, quoting in part *Sanders v. State*, 847 So. 2d 504, 506 (Fla.Dist.Ct.App. 2003). See also *Commonwealth v. Howard*, 538 Pa. 86, 645 A.2d 1300(1994). Because the Supreme Court specifically held that the erroneous jury instruction was harmless error, Gaddy cannot show prejudice under *Strickland*. Relief was correctly denied on this claim.” 952 So. 2d at 1160. Accordingly, Smith failed to allege any facts that would entitle him to relief. See Rule 32.7(d), Ala.R.Crim.P.

4.

Smith next argues that counsel was ineffective during jury selection in failing to ensure that the jurors who were chosen for his trial were impartial. Specifically, he asserts that counsel failed to question the venire about possible mitigation, mental retardation, or child abuse.

The circuit court found that this claim was insufficiently pleaded. We agree. Smith failed to plead any specific questions that could have been asked of the venire-members or how he was prejudiced by the failure to ask those questions. Smith failed to comply with the pleading requirements of Rule 32.6(b), Ala.R.Crim.P.

5.

Smith next argues that counsel was ineffective for failing to object to the admission of his confession. Specifically, he asserts that his confession should have been suppressed because his low IQ rendered him unable to make such a statement knowingly and intelligently.

The circuit court found that the underlying claim had no merit because we addressed the issue on direct appeal and found no error. On direct appeal we stated:

“Mental subnormality is but one factor to consider when reviewing the totality of the circumstances surrounding a confession.

“Here, ‘[e]ven considering evidence of the defendant’s mental subnormality[,] which was not before the trial judge when he ruled on the admissibility of the statements, the defense testimony “does not show that [the defendant] was so mentally deficient that he was incapable of being able to make a knowing and intelligent waiver.”’ *Whittle v. State*, 518 So. 2d [793] at 797 [(Ala. Crim. App. 1987)], quoting *Sasser [v. State]*, 497 So. 2d [1131] at 1134 [(Ala. Crim. App. 1986)].”

Smith v. State, 795 So. 2d at 810. Because the substantive issue has no merit, Smith's counsel was not ineffective for failing to raise the issue at trial. See *Davis*, *supra*.⁹

6.

Smith argues that counsel was ineffective for failing to formulate and argue any theories of defense. Specifically, he asserts that counsel failed to argue that Smith lacked the "intent and ability to formulate the plan which led to Mr. Van Dam's death" and failed to argue any viable theory of defense in his opening and closing statements.

The circuit court made the following findings on this claim:

"Smith fails to cite in paragraph 48 of his second amended petition to any specific portion of Dr. Chudy's report in which Chudy opined Smith lacked the ability to formulate a plan to rob and murder the victim. Further, on direct appeal, the Alabama Court of Criminal Appeals held that:

"[T]he evidence indicated that Smith and Reid attempted to hide the body under a mattress, and tried to steal [the victim's] truck but it got stuck in the mud and they left it behind, and that Smith went back to the Highway Host motel to shower and to change clothes. [Smith] admitted to police that he tried to wipe his fingerprints off the truck and also told police that he had washed the clothes he was wearing at the time of the robbery-murder. Also, when

⁹ The trial record also shows that counsel vigorously argued many grounds in support of suppressing Smith's confession.

[Smith] was first questioned about the murder he denied any involvement and placed the blame for the robbery-murder on Reid. . . . All of the conduct evidences a “consciousness of guilt” on the part of Smith.’

“Smith v. State, 795 So. 2d at 829 (emphasis added). When reviewing the trial court’s finding that Smith did not act under the domination of his codefendant, the Alabama Court of Criminal Appeals held that:

“The trial court stated that the “record is devoid that [Smith] on November 23, 1997, acted under the domination of Larry Reid or anyone else.” This finding is also supported by Smith’s admissions to police. Smith said that both he and Reid planned to rob [the victim], that [Smith] suggested that they dispose of the body in a nearby lake, and that [Smith] took the tools to the pawnshop. Smith did not state in his statements that Reid threatened him if he told anyone about the robbery-murder. The court’s failure to find this as a mitigating circumstance is supported by the record.’

“Id. at 839 (emphasis added). Based on the findings of the trial court and the Alabama Court of Criminal Appeals, this Court finds that the allegation in paragraph 48 of Smith’s second amended Rule 32 petition is without merit. Rule 32.7(d), Ala.R.Crim.P.

“

“Smith’s entire argument in Part I.G(1) of his second amended Rule 32 petition consists of the allegation his trial counsel did not set forth or

argue a ‘viable theory of defense’ in his opening statement or closing argument. Smith fails, however, to state in his second amended petition with any specificity what viable theory his defense trial counsel could have presented during his guilt phase opening statement or in his guilt phase closing arguments that would have been so compelling it might have change the outcome of the guilt phase. Smith proffers no facts in Part I.G(1) of his second amended petition that, if true, would establish ‘if trial counsel had presented a different opening statement [or closing argument], the result of the trial would have been different.’ *Callahan v. State*, 767 So. 2d 380, 397 (Ala.Crim.App. 1999) Smith does not even point to one example of inconsistent testimony by State witnesses that would support Part I.G(1). The Court finds that the allegations in Part I.G(1) of Smith’s second amended petition fail to meet the specificity and full factual pleading requirements of Rule 32.6(b), Ala.R.Crim.P.; therefore, they are summarily dismissed.”

(Supp. C.R. 402-04.) The circuit court’s findings as to this issue are supported by the record, and we adopt them as part of this opinion.

Moreover, counsel argued at Smith’s trial that Smith had no specific intent to commit capital murder and that, at most, Smith intended to commit only a robbery. This theory was consistent with Smith’s statement to police. “[T]he mere existence of a potential alternative defense theory is not enough to establish ineffective assistance based on counsel’s failure to present that theory.’ *Rosario-Dominquez v. United States*, 353 F.Supp.2d [500] at 513 [(S.D.N.Y.

2005)].” *Hunt v. State*, 940 So. 2d 1041, 1067 (Ala.Crim.App. 2005).

7.

Smith argues that counsel was ineffective for failing to move that Judge Chris Galanos recuse himself from presiding over his trial. Specifically, he asserts that Judge Galanos was the district attorney when Smith pleaded guilty to a separate burglary offense in 1990 and that he therefore should not have presided over his 1998 capital-murder trial.

The circuit court found that the underlying issue had been addressed on direct appeal and determined adversely to Smith. This Court stated: “It was held in *Ray v. State*, 398 So. 2d [774 at] 766–777 [(Ala.Crim.App. 1981)], that the fact that the trial judge, before he was a judge and while he was district attorney of the particular circuit, had prosecuted the defendant in another case presented no valid ground for a motion that he recuse himself.” *Smith*, 795 So. 2d at 804, quoting *James v. State*, 423 So. 2d 339, 341 (Ala.Crim.App. 1982). Thus, Smith failed to state a claim upon relief could be granted. See Rule 32.7(d), Ala.R.Crim.P.

8.

Smith next argues that counsel failed to object to numerous instances of prosecutorial misconduct. Specifically, he asserts that counsel failed to object when the prosecutor commented on a statement made by his codefendant, Larry Reid, and that counsel failed to object when the prosecutor called Smith a liar and a thief.

On direct appeal we addressed the underlying issues supporting this claim. We held that the

prosecutor's reference to Smith's codefendant was an inadvertent slip of the tongue:

"A review of the remark, together with the evidence presented at trial, shows that the prosecutor inadvertently misstated the name. The prosecutor said Larry instead of Jody. The contents of the remark reflect that the prosecutor was referring to Smith's statement – not to any statement that his codefendant may have made to police. Clearly, this was an inadvertent slip of the tongue. We find no error, much less plain error, here."

Smith, 795 So. 2d at 825. Also, we found no error in the prosecutor calling Smith a thief and a liar because the references were supported by the record: "Smith told police that he stole Van Dam's tools and pawned them. By his own admission, he was a thief in November 1997 as the prosecutor said in his argument." *Smith*, 795 So. 2d at 826. As for the reference that Smith was a liar, we stated that Smith denied any involvement in the murder in his first statement to police and then in his second statement admitted his participation in the robbery/murder. The references to Smith as a thief and a liar were in accord with the evidence admitted at trial and did not constitute improper arguments.

Because the underlying issues have no merit, counsel was not ineffective for failing to object. See *Davis*, *supra*.

Moreover, "[e]ffectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made.

Effectiveness of counsel is not measured by whether counsel objected to every question and moved to strike every answer.”

Brooks v. State, 456 So. 2d 1142, 1145 (Ala.Crim.App. 1984).

9.

Smith argues that counsel was ineffective for failing to make a *Batson v. Kentucky*, 476 U.S. 79 (1986), objection after the prospective jurors were struck.

In *Batson*, the United States Supreme Court held that it was a violation of the Equal Protection Clause to exclude black veniremembers from a black defendant’s trial based solely on race. In 1991, this holding was extended to white defendants in *Powers v. Ohio*, 499 U.S. 400 (1991). Smith is white and was tried in 1998.

We note that when denying relief on this claim the circuit court stated:

“Smith raised the underlying substantive issue on direct appeal. On direct appeal Smith contended that ‘the strike list supports his motion to remand for a *Batson* hearing because it shows that 8 of the State’s 13 strikes were used to remove prospective black jurors.’ *Smith v. State*, 795 So. 2d at 803. In rejecting Smith’s *Batson* claim, the Alabama Court of Criminal Appeals held that ‘[t]he record fails to raise an inference of racial discrimination.’ *Id.* Smith proffers no additional facts in his second amended Rule 32 petition that were not before the trial court and considered by

the Alabama Court of Criminal Appeals when it addressed this issue on direct appeal.”

(Supp. C.R. 413.)

The only ground that Smith pleaded in his petition was that the number of strikes the State used to remove black prospective jurors showed racial discrimination. In *Hinton v. State*, [Ms. CR-04-0940, April 28, 2006] ___ So. 2d ___ (Ala.Crim.App. 2006), we quoted with approval a circuit court’s order denying relief:

“[Also], this claim is dismissed for lack of specificity in accordance with Alabama Rule of Criminal Procedure 32.6(b) because Hinton fails to allege facts necessary to show that counsel could have proved a *prima facie* case in support of a *Batson* motion. The only specific allegation offered in support of what counsel could have stated in a *Batson* motion is that the State removed nine of the fourteen African-American veniremembers; however, Hinton presents no evidence in support of this allegation. Even so, a *Batson* motion based solely on the number of African-Americans removed from the venire will not prove a *prima facie* case of discrimination. See *Ex parte Pressley*, 770 So. 2d 143, 147 (Ala. 2000).”

___ So. 2d at ___. Thus, this claim was properly dismissed pursuant to Rule 32.6(b), Ala.R.Crim.P.

10.

Smith next argues that counsel was ineffective in inadequately investigating for the penalty phase of

his capital trial. He raises several grounds in support of this claim.

As we stated above:

“A review of a claim of ineffective counsel is not triggered until the petitioner has identified specific acts or omissions. *Strickland*. See, e.g., *Nelson v. Hargett*, 989 F.2d 847, 850 (5th Cir. 1993) (claims of failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible, its admission would have produced a different result).”

Thomas v. State, 766 So. 2d 860, 892 (Ala.Crim.App. 1998), overruled on other grounds, *Ex parte Taylor*, [Ms. 1040186, September 30, 2005] ___ So. 2d ___ (Ala. 2005).

a.

First, Smith argues that his trial counsel failed to adequately investigate the mitigation evidence that was critical to his penalty-phase defense. Smith provides a laundry list of individuals whom he claims counsel should have interviewed. However, Smith did not plead the substance of each of the named individual’s alleged omitted testimony. Smith merely makes generalized assertions that counsel should have presented Smith’s “family and social history, employment history, educational history, and community and cultural influences.” (C.R. 56.)

The circuit court made the following findings of fact on this claim:

“Smith contends that ‘numerous [] family members, neighbors, and acquaintances

were available to provide the mitigating information which was not included in the testimony presented.’ Smith then proffers to the Court a laundry list of individuals that, he contends, his trial counsel should have interviewed. In paragraph 87 of his first amended Rule 32 petition, Smith listed 10 individuals that, he contends, his trial counsel should have interviewed and presented during the penalty phase. In paragraph 87 of his second amended Rule 32 petition, Smith lists 26 individuals. Despite listing 16 more individuals, Smith proffers the identical ‘facts’ in paragraphs 88-103 of his second amended petition as he proffered in paragraph 88-103 of his first amended petition.

“In *Waters v. Thomas*, 46 F. 3d 1506, 1514 (11th Cir. 1995) (en banc), the Eleventh Circuit held that ‘[t]he mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove, ineffectiveness of counsel.’ Further, in *Thomas v. State*, 766 So. 2d 860, 893 (Ala.Crim.App. 1998), the Alabama Court of Criminal Appeals held that ‘[a] claim of failure to call witnesses, is deficient if it does not show what the witnesses would have testified to and how that testimony might have changed the outcome’ (emphasis added). Smith fails to proffer in his first amended Rule 32 petition or in his second amended Rule 32 petition what a particular witness would have testified about or argue how such testimony might have changed the

outcome of the penalty phase of trial. Smith's contention that his trial counsel were ineffective for failing to interview and present certain individuals without informing the Court what those individuals would have said or arguing how their testimony might have changed the outcome of trial is the epitome of a bare allegation. See *Bold v. State*, 746 So. 2d 364, 406 (Ala.Crim.App. 1999) (holding that 'Rule 32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief') (emphasis in original); see also *Coral v. State*, [900 So. 2d 1274 (Ala.Crim.App. 2004)] (holding that '[e]ach subcategory [of an ineffective assistance of counsel claim] is an independent claim that must be sufficiently pleaded.'")

(Supp. C.R. 414-16.) The circuit court's findings are supported by the record.

We have thoroughly reviewed the record of Smith's trial. At the penalty phase, counsel presented the testimony of Smith's mother, his two sisters, a longtime family friend, and a clinical psychologist who had evaluated Smith before trial. Smith's mother, Glenda Smith, testified that Smith's natural father, Leo Smith, drank heavily, that he was abusive to the whole family, and that he frequently beat Smith with any item he had near him. She said that after she divorced Smith's father she married Hollis Luker. She testified that Luker was more abusive than Smith's father and that at one time he hit Smith with a baseball bat and severely damaged one of Smith's ears. Glenda Smith testified that she left Luker after he beat her with an axe handle. She said that Smith attended many schools, that he had a

learning disability and was in special-education classes, and that he is dyslexic.

Dr. James Chudy, a clinical psychologist, testified that he evaluated Smith before trial. He said that Smith's verbal IQ was 73, his performance IQ was 72, and his full-scale IQ was 72. He said that it was his opinion that Smith suffered from depression, post-traumatic stress disorder, alcohol dependency, a learning disorder, and a personality disorder and that he had borderline intellectual functioning. He said that Smith was a follower and not a leader. It was his opinion that there was no evidence indicating that Smith's mental health was related to any major neurological problems.

Smith's sister, Rebecca Smith, testified to the abuse the family suffered at the hands of Leo Smith and Hollis Luker and Smith's frequent beatings. Lynn Harrison, Smith's sister, also testified to the abuse the family suffered and that Luker was more abusive to her brothers.

Shirley Stacey testified that she had known Smith and his family for 18 years. She said that she lived next to them when Glenda Smith was married to Hollis Luker. She testified that Luker frequently beat the children and that she witnessed some of the beatings. She also said that Smith was a "respectful child."

At the end of trial, the circuit judge stated for the record: "I would like to say that I applaud Mr. [Greg] Hughes and Mr. [Jim] Byrd for their diligence, professionalism and skill in defending Mr. Smith. What I asked you two gentlemen to do was not easy, but you have performed to the very best of your

ability and I am grateful to you both.” (Trial record, R-21.)

The record of the penalty phase shows that the alleged omitted evidence concerning Smith’s family history and education was presented in the penalty phase. Thus, the circuit court did not abuse its discretion in denying relief on this claim.

b.

Smith asserts that his trial counsel was ineffective for not obtaining the assistance of a neuropsychologist to conduct neurological testing on Smith.

The circuit court made the following findings on this claim:

“Nothing in [Dr. James] Chudy’s written report or in his trial testimony raises any inference that Smith would have been entitled to additional expert assistance or that his trial counsel were ineffective for failing to secure additional, expert assistance. See *Ex parte Dubose*, 662 So. 2d 1189, 1192 (Ala. 1995) (holding that to be entitled to funds for expert assistance ‘[a] defendant must show a reasonable probability that an expert would aid in his defense and that at trial would result in a fundamentally unfair trial’); see also *Chandler v. United States*, 218 F. 3d [1305] at 1315 [(11th Cir. 2000)] (holding that ‘for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take’). The Court finds that the allegations in Part I.K(2) of Smith’s amended Rule 32 petition are based entirely on speculation

and conjecture and fail to meet the specificity and full factual pleading requirements of Rule 32.6(b), Ala.R.Crim.P.; therefore, they are summarily dismissed.”

(Supp. C.R. 423-24.)

Dr. Chudy testified that there was no evidence indicating that Smith’s mental health was related to any major neurological problems. Counsel is not ineffective for relying on an expert’s opinion. “Counsel is not ineffective for failing to shop around for additional experts.’ *Smulls v. State*, 71 S.W.3d 138, 156 (Mo. 2002). ‘Counsel is not required to “continue looking for experts just because the one he has consulted gave an unfavorable opinion.” *Sidebottom v. Delo*, 46 F.3d 744, 753 (8th Cir. 1995).’ *Walls v. Bowersox*, 151 F.3d 827, 835 (8th Cir. 1998).” *Waldrop v. State*, [Ms. CR-05-1370, August 31, 2007] ___ So. 2d ___, ___ (Ala.Crim.App. 2007). Thus, Smith is due no relief on this claim.

c.

Smith next argues that counsel was ineffective for failing to obtain the assistance of other experts. Smith argues that counsel should have obtained the services of a “substance-toxicologist, a psychopharmacologist, an expert in environmental exposure, and an expert in post-traumatic stress disorder.”

The circuit court, in denying relief on this claim, stated:

“Smith fails to identify for the Court in his second amended Rule 32 petition any individuals in the fields of expertise listed in Part I.K(3) or proffers to the Court what beneficial testimony these unnamed indi-

viduals would have provided at the penalty phase of Smith's trial. The Court finds that the allegation in Part I.K(3) of Smith's second amended Rule 32 petition fails to meet the specificity and full factual pleading requirements of Rule 32.6(b), Ala.R.Crim.P. See *Boyd v. State*, 746 So. 2d 364, 406 (Ala.Crim.App. 1999) (holding that Rule 32.6(b) requires that the petition itself disclose the facts relief upon in seeking relief)."

(Supp. C.R. 424-25.)

We have held that a petitioner fails to meet the specificity requirements of Rule 32.6(b), Ala. R.Crim.P., when the petitioner fails to identify an expert by name or plead the contents of that expert's expected testimony. See *McNabb v. State*, [Ms. CR-05-0509, August 31, 2007] ___ So. 2d ___ (Ala. Crim.App. 2007); *Duncan v. State*, 925 So. 2d 245 (Ala.Crim.App. 2005). Smith failed to plead sufficient facts to satisfy the requirements of Rule 32.6(b), Ala.R.Crim.P.

d.

Smith argues that counsel was ineffective for failing to object to an improper jury instruction in the penalty phase concerning the weighing of the aggravating circumstances and the mitigating circumstances.

The circuit court stated the following, when denying relief on this claim:

"The record on appeal, however, establishes that trial counsel did, in fact, object to the above quoted instruction. . . . As a result of

trial counsel's objection, the trial court recharged the jury concerning the burden of proof. After the trial court recharged the jury, trial counsel again logged an objection. The Court finds that the allegation . . . is without merit because it is directly refuted by the record; therefore, it is denied."

(Supp. C.R. 425-26.) Smith's claim is disputed by the record; thus, Smith is due no relief.

III.

Smith next argues that the circuit court erred in dismissing several of his claims after finding that those claims were procedurally barred by Rule 32.2, Ala.R.Crim.P.

A.

Smith asserts that the circuit court erred in dismissing his *Batson v. Kentucky*, 479 U.S. 79 (1986), claim and his sufficiency claim because they could have been, but were not, raised at trial or on direct appeal.

The circuit court correctly found that Smith's *Batson* claim was procedurally barred in this postconviction proceeding. See *Boyd v. State*, 746 So. 2d 364 (Ala.Crim.App. 1999). Moreover, Smith's sufficiency claim is procedurally barred in this postconviction proceeding. See *Bass v. State*, 810 So. 2d 802 (Ala.Crim.App. 2001).

B.

Smith next argues that the circuit court erred in dismissing his *Rinq v. Arizona*, 536 U.S. 584 (2002), claim.

The United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held that any fact which increases a punishment above the statutory maximum must be presented to a jury and proven beyond a reasonable doubt. This holding was extended to death-penalty cases in *Ring*.

The circuit court stated the following concerning this claim:

“Smith acknowledges in his second Smith acknowledges in his second amended Rule 32 petition that in the Alabama Supreme Court’s holding in *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002), the Court ‘interpreted *Ring* as not affecting Alabama’s capital sentencing statute.’ Further, on June 24, 2004, the United States Supreme Court specifically held that ‘Ring announced a new procedural rule that does not apply retroactively to case already final on direct review.’ *Schriro v. Summerlin*, [542 U.S. 348 (2004)]. Thus, in addition to being procedurally barred from postconviction review, the Court finds that the allegation in Part V. (i) of Smith’s second amended Rule 32 petition is without merit.”

(Supp. C.R. 433-34.) Smith’s *Ring* claim was procedurally barred in this postconviction proceeding. See *Hodges v. State*, [Ms. CR-04-1226, March 23, 2007] ___ So. 2d ___ (Ala.Crim.App. 2007).

Moreover, Smith was convicted of murdering the victim during the course of a robbery. The fact that increased Smith’s possible punishment to death, the robbery, was found by a jury to exist beyond a

reasonable doubt. There was no *Ring* violation. See *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002).

C.

Smith also argues that the circuit court erred in finding that his *Brady v. Maryland*, 373 U.S. 83 (1963), claim was procedurally barred because Smith failed to assert in his Rule 32 petition that the claim was based on newly discovered evidence. Specifically, he asserts only one ground in support of this claim. He contends that the State failed to disclose that one of its main witnesses, M.A., received favorable treatment for her testimony at Smith's trial.

In *Williams v. State*, 782 So. 2d 811, 818 (Ala.Crim.App. 2000), we stated:

“The appellant's first argument is that the State withheld exculpatory information in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). . . . The appellant did not assert that this claim was based on newly discovered evidence. Therefore, it is procedurally barred because he could have raised it at trial and on direct appeal, but did not. See Rule 32.2(a) (3) and (a) (5), Ala.R.Crim.P.; *Boyd v. State*, 746 So. 2d 364 (Ala.Cr.App. 1999); *Matthews v. State*, 654 So. 2d 66 (Ala.Cr.App. 1994); *Lundy v. State*, 568 So. 2d 399 (Ala.Cr.App. 1990).”

Likewise, Smith did not assert in his petition that this claim was based on newly discovered evidence; thus, it is procedurally barred in this postconviction proceeding.

Moreover, the record shows that M.A. testified that she had no agreement with the State in exchange for her testimony at Smith's trial. The prosecutor also stated for the record that M.A. had no agreement with the State. This contention is not supported by the record.

D.

Smith next asserts that the circuit court erroneously dismissed his juror-misconduct claims. Smith alleged that jurors failed to truthfully answer questions during voir dire and that the jury considered extraneous information during deliberations.

The circuit court found that Smith failed to name a single juror by name, failed to identify a single question a juror did not truthfully answer, failed to plead what juror or jurors failed to answer what question, and failed to identify any allegedly extraneous evidence that the jurors considered during deliberations. It further held that Smith failed to allege any facts as to why this claim could have not have been raised at trial or on direct appeal.

In *Ex parte Pierce*, 851 So. 2d 606 (Ala. 2000), the Alabama Supreme Court stated the following in regard to juror-misconduct claims:

"Pierce was not required to prove that this information meets the elements of 'newly discovered material facts' under Rule 32.1(e). While the information about Sheriff Whittle's contacts with the jury may be 'newly discovered,' Pierce does not seek relief under Rule 32.1(e). Pierce does not contend that '[n]ewly discovered material facts exist which require that the conviction or sentence be vacated by the court.' Rule 32.1(e).

Instead, Pierce's claim fits under Rule 32.1(a): 'The constitution of the United States or of the State of Alabama requires a new trial. . . .' Rule 32.1(a) states a ground for relief distinct from that stated in Rule 32.1(e). . . .

"Although Rule 32.1(e) does not preclude Pierce's claim, Rule 32.2(a)(3) and (5) would preclude Pierce's claim if it could have been raised at trial or on appeal."

851 So. 2d at 613-14. Under *Pierce*, this claim was procedurally barred because Smith failed to allege in his petition that the claim could have been raised at trial or on direct appeal.

For the foregoing reasons, we hold that the circuit court did not abuse its discretion in summarily dismissing Smith's Rule 32 petition and we affirm the circuit court's ruling. AFFIRMED.

McMillan and Welch, JJ., concur. Baschab, P.J., and Shaw, J., concur in the result.