
**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

The Supreme Court of Ohio

FILED

JUL -5 2017

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

v.

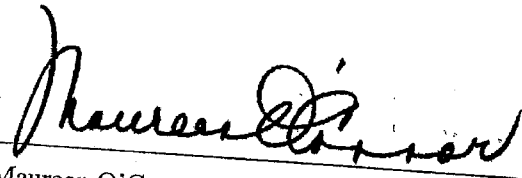
Warren Waddy

Case No. 2016-1263

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Franklin County Court of Appeals; No. 15AP-397)



Maureen O'Connor
Chief Justice

The Official Case Announcement can be found at <http://www.supremecourt.ohio.gov/ROD/docs/>

IN THE COURT OF APPEALS
TENTH APPELLATE DISTRICT OF OHIO
FRANKLIN COUNTY

STATE OF OHIO,

Appellee,

- vs -

WARREN WADDY,

Appellant.

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:

CASE NO. 15AP-397

OPINION

CRIMINAL APPEAL FROM FRANKLIN COUNTY COURT OF COMMON PLEAS
Case No. 86CR-3182

Ron O'Brien, Franklin County Prosecuting Attorney, Steven L. Taylor, 373 South High Street,
Columbus, Ohio 43215, for appellee

Vicki R.A. Werneke, Assistant Federal Public Defender, 1660 West Second Street, #750,
Cleveland, Ohio 44113, for appellant

M. POWELL, P.J.

{¶ 1} Appellant, Warren Waddy, appeals a judgment of the Franklin County Court of
Common Pleas denying his motion for leave to file a motion for new trial.

I. FACTUAL AND PROCEDURAL BACKGROUND

{¶ 2} In 1987, appellant was sentenced to death following his conviction by a jury of
aggravated murder and several other crimes. This court affirmed appellant's sentence and

conviction on appeal. *State v. Waddy*, 10th Dist. Franklin Nos. 87AP-1159 and 87AP-1160, 1989 WL 133508 (Nov. 2, 1989) (*Waddy I*). Subsequently, the Ohio Supreme Court affirmed this court's decision. *State v. Waddy*, 63 Ohio St.3d 424 (1992) (*Waddy II*).

{¶ 3} On June 6, 1995, appellant filed a petition for post-conviction relief pursuant to R.C. 2953.21.¹ Appellant raised numerous claims for relief, including a claim he was mentally retarded.² The trial court dismissed appellant's petition without an evidentiary hearing, holding that res judicata barred appellant's mental retardation claim because it could have been raised on direct appeal. This court affirmed the trial court's decision. *State v. Waddy*, 10th Dist. Franklin No. 96APA07-863, 1997 WL 318032 (June 10, 1997) (*Waddy III*).

{¶ 4} Subsequently, the United States Supreme Court held that the execution of mentally retarded criminals violates the Eighth Amendment's ban on cruel and unusual punishment. *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242 (2002). *Atkins*, however, did not establish procedures for determining whether a person is mentally retarded. Rather, the Supreme Court left it to the states to develop appropriate ways to implement *Atkins*. Consequently, in December 2002, the Ohio Supreme Court set forth the procedures Ohio now follows in adjudicating a capital defendant's *Atkins* claim. *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625.

{¶ 5} *Lott* set forth a three-prong test for determining a defendant's mental retardation claim under *Atkins*. Whether asserting the claim in a post-conviction context or during the original trial, a defendant must demonstrate "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication,

1. The record does not explain why this post-conviction relief petition was filed under R.C. 2953.21, and not under R.C. 2953.23, as it was clearly untimely filed.

2. This court notes that the United States Supreme Court has recently chosen to substitute the term "intellectual disability" for "mental retardation." *Hall v. Florida*, 134 S.Ct. 1866, 1886 (2014). While this court agrees that sensitivity is due in any discussion of mental disabilities, the Ohio Revised Code and the records in this case use the term "retarded." Thus, for clarity, this court shall do so also, but no pejorative connotation from such use is

self-care, and self-direction, and (3) onset before the age of 18." *Lott* at ¶ 12. The Ohio Supreme Court held that "[w]hile IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination." *Id.* Further, "there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70." *Id.*

{¶ 6} On May 30, 2003, appellant filed a second petition for post-conviction relief, alleging once again he was mentally retarded and thus, ineligible for the death penalty pursuant to *Atkins* and *Lott*. The trial court dismissed appellant's petition without an evidentiary hearing. On appeal, this court reversed and remanded, finding appellant was "entitled to an evidentiary hearing and funding for an expert to develop his *Atkins* claim." *State v. Waddy*, 10th Dist. Franklin No. 05AP-866, 2006-Ohio-2828, ¶ 48 (*Waddy IV*). This court also noted that pursuant to *Lott*, a petition for post-conviction relief asserting an *Atkins* claim for the first time must be treated as a first petition for post-conviction relief pursuant to R.C. 2953.21, and not as a successive petition pursuant to R.C. 2953.23. *Id.* at ¶ 25; *Lott*, 2002-Ohio-6625 at ¶ 17.

{¶ 7} On remand, the trial court appointed two attorneys to represent appellant with regard to his *Atkins* claim. The trial court also approved funding for appellant's counsel to hire a firm to investigate appellant's *Atkins* claim, and for Dr. Daniel Grant to conduct a psychological evaluation of appellant. In January 2009, the trial court held a two-day evidentiary hearing ("2009 *Atkins* hearing"). The sole witness at the hearing was Dr. Jeffrey L. Smalldon, a psychologist called as a court's witness upon appellant's motion. Dr. Smalldon discussed IQ testing and scoring techniques as well as common indicators of mental retardation. Based upon his 1995 evaluation of appellant and a review of appellant's history of IQ testing, which included the full scale IQ of 83 Dr. Smalldon obtained from his

intended by the appellate court. *State v. Nelson*, 10th Dist. Franklin No. 14AP-229, 2014-Ohio-5757, ¶ 3, fn.1.

own testing, Dr. Smalldon ultimately opined that although appellant functions at a sub-average level, he "is not mentally retarded."

{¶ 8} On November 25, 2009, the trial court denied appellant's *Atkins* post-conviction relief petition ("*Atkins* PCR petition"), finding that appellant had failed to prove, by a preponderance of the evidence, that he was mentally retarded. On appeal, this court affirmed the trial court's decision. *State v. Waddy*, 10th Dist. Franklin No. 09AP-1197, 2011-Ohio-3154 (*Waddy V*). The Ohio Supreme Court declined jurisdiction. *State v. Waddy*, 133 Ohio St.3d 1422, 2012-Ohio-4902.

{¶ 9} On July 18, 2013, appellant filed a motion for leave to file a motion for a new trial under Crim.R. 33(B) ("Crim.R. 33(B) motion"). Appellant alleged that newly discovered evidence supports his claim he is mentally retarded and thus ineligible for the death penalty. Appellant further alleged that the evidence was not previously discovered due to the ineffective assistance of his prior attorneys. Specifically, appellant asserted his appointed *Atkins* counsel was ineffective at the 2009 *Atkins* hearing for failing to provide the trial court "with an in-depth understanding of the principles applicable to a proper retroactive determination of an *Atkins* claim." That is, his appointed *Atkins* counsel was ineffective for failing to call an expert witness. As a result, the trial court's prior decisions "were based on a woefully incomplete record," because the WAIS-IV, "which is considered to be the gold standard for IQ tests," was never administered to appellant by Dr. Smalldon, and prior evaluations of appellant failed to both assess his adaptive functioning and interview his relatives for that purpose. Appellant also asserted his 1987 trial counsel was ineffective for failing to uncover the physical and sexual abuse that occurred at appellant's home during his childhood, and was thus ineffective for failing to present such "critical" mitigating evidence at the trial.

{¶ 10} Appellant's Crim.R. 33(B) motion was supported by a 2012 psychological report

from Dr. Cynthia Hartung, a 2013 affidavit from Dr. Smalldon, affidavits from appellant's siblings, and a 2013 affidavit from Dr. Grant. In her report, Dr. Hartung opined that based upon appellant's "historical information, IQ testing, and adaptive behavior testing [which included the administration of the ABA-II test, an adaptive behavior test, and Dr. Hartung's interview of two of appellant's siblings], * * * the majority of the available evidence indicates that Mr. Waddy is functioning in the mild mental retardation range and has been performing at this level since childhood." Dr. Hartung further stated that she had administered the WAIS-IV on appellant which resulted in a full scale IQ of 73.

{¶ 11} In his affidavit, Dr. Smalldon generally stated he would not testify today in the same way he testified at the 2009 *Atkins* hearing. Dr. Smalldon noted he was not asked to and did not assess appellant for mental retardation during the 1995 evaluation, nor did he administer any adaptive behavior test to determine appellant's adaptive functioning skills. Dr. Smalldon stated that upon reviewing additional materials regarding appellant, including Dr. Hartung's report, and the evolving psychological study of mental retardation, especially since 2002, he agrees with Dr. Hartung that "the most weight should be given to" the full scale IQ of 73 resulting from the WAIS-IV because this test is considered superior to the older IQ tests. Dr. Smalldon further stated, "I would cite the strong likelihood that, all things considered, Mr. Waddy would have met" the three-prong test under *Lott*.

{¶ 12} In his affidavit, Dr. Grant indicates he administered two IQ tests to appellant, including the WAIS-IV, after he was retained by appellant's appointed *Atkins* counsel in preparation for the 2009 *Atkins* hearing. Both tests resulted in a full scale IQ of 76. The affidavits of appellant's four siblings detail the physical abuse suffered by appellant and his siblings as a result of their father's beatings. The affidavit of appellant's sister also indicates her suspicions their father may have attempted to molest her daughters during overnight visits.

{¶ 13} On March 13, 2015, the trial court denied appellant's Crim.R. 33(B) motion, finding that appellant had failed to prove, by clear and convincing evidence, that he "was unavoidably prevented from filing a new trial motion within the time constraints based on ineffective assistance of counsel." With regard to the 2009 *Atkins* hearing, the trial court found that appellant had failed to establish that his appointed *Atkins* counsel's performance was deficient. The trial court found that given Dr. Grant's affidavit, "it was both reasonable and strategic for counsel to forego calling Dr. Grant to testify" at the hearing. Further, while appellant "has now located an expert who supports his position, there is no indication that his counsel acted unreasonably. Effectiveness standards do not mandate that counsel consult multiple experts until they find one who supports their conclusion." With regard to the 1987 trial, the trial court found that appellant's claim of ineffective assistance of counsel was barred by res judicata because the claim could have been raised in his 1995 petition for post-conviction relief and/or his 2003 *Atkins* PCR petition.

{¶ 14} Appellant appeals, raising one assignment of error:

{¶ 15} THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S DUE PROCESS RIGHTS WHEN IT DENIED APPELLANT'S MOTION FOR LEAVE TO FILE A MOTION FOR A NEW TRIAL UNDER CRIMINAL RULE 33(B) WITHOUT HOLDING A HEARING ON THE MOTION OR PERMITTING ANY FACT DEVELOPMENT TO SUPPORT THE MOTION FOR LEAVE.

II. ANALYSIS

{¶ 16} Appellant argues the trial court abused its discretion in denying his Crim.R. 33(B) motion without a hearing. Appellant generally asserts he was unavoidably prevented from timely discovering the evidence he now seeks to introduce because of the ineffective assistance of both his 1987 trial counsel and his appointed *Atkins* counsel.

A. Crim.R. 33(B); Preliminary Issues

{¶ 17} Crim.R. 33(B) provides that a motion for new trial based on newly discovered evidence must be filed

within one hundred twenty days after the day upon which the verdict was rendered. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

Because appellant's motion was filed well outside the 120-day period, he was required to obtain leave of court to file his motion for new trial. *State v. Hoover-Moore*, 10th Dist. Franklin No. 14AP-1049, 2015-Ohio-4863, ¶ 13.

{¶ 18} "To obtain such leave, the defendant must demonstrate by clear and convincing proof that he or she was unavoidably prevented from discovering the evidence within the 120 days." *Id.* A party is "unavoidably prevented" from filing a motion for a new trial if the party had no knowledge of the existence of the ground supporting the motion and could not have learned of that existence within the time prescribed for filing the motion in the exercise of reasonable diligence. *Id.*; *State v. Walden*, 19 Ohio App.3d 141, 145-146 (10th Dist.1984).

{¶ 19} "Clear and convincing proof that the defendant was 'unavoidably prevented' from filing 'requires more than a mere allegation that a defendant has been unavoidably prevented from discovering the evidence he seeks to introduce as support for a new trial.'" *State v. Lee*, 10th Dist. Franklin No. 05AP-229, 2005-Ohio-6374, ¶ 9. The requirement of clear and convincing evidence puts the burden on the defendant to prove he was unavoidably prevented from discovering the evidence in a timely manner. *State v. Rodriguez-Baron*, 7th Dist. Mahoning No. 12-MA-44, 2012-Ohio-5360, ¶ 11.

{¶ 20} An appellate court applies an abuse-of-discretion standard in reviewing a trial court's denial of a motion for leave to file a motion for new trial. *State v. Anderson*, 10th Dist. No. 12AP-133, 2012-Ohio-4733, ¶ 9. A trial court's decision whether to conduct an

evidentiary hearing on a motion for leave to file a motion for new trial is also discretionary.

Hoover-Moore, 2015-Ohio-4863 at ¶ 14.

1. Is Crim.R. 33(B) An Appropriate Remedy?

{¶ 21} As an initial matter, the state argues that Crim.R. 33 is "the wrong vehicle in which to relitigate [appellant's *Atkins*] claim." The state asserts that appellant "should have been proceeding, if at all, under the suitable post-conviction framework in R.C. 2953.21 et seq." The state cites R.C. 2953.21(J), *Lott*, and *State v. Reynolds*, 79 Ohio St.3d 158 (1997), in support of its assertion.

{¶ 22} In *Lott*, the Ohio Supreme Court recognized that a petition for post-conviction relief is the appropriate remedy within which to raise a first-time *Atkins* claim. *Lott*, 2002-Ohio-6625 at ¶ 13 (the procedures for postconviction relief outlined in R.C. 2953.21 et seq. provide a suitable statutory framework for reviewing *Lott*'s *Atkins* claim). The supreme court further held that for defendants who have been sentenced to death, any petition for post-conviction relief specifically raising an *Atkins* claim and filed more than 180 days after *Lott* "must meet the statutory standards for untimely and successive petitions for postconviction relief," that is, R.C. 2953.23. *Id.* at ¶ 24.

{¶ 23} In *Reynolds*, the Ohio Supreme Court held that "[w]here a criminal defendant, subsequent to [his] direct appeal, files a motion seeking vacation or correction of [his] sentence on the basis [his] constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21." *Reynolds*, 79 Ohio St.3d at syllabus. In turn, R.C. 2953.21(J) provides that a petition for post-conviction relief "is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case[.]" Neither *Lott* nor *Reynolds* address the interplay between R.C. 2953.21 et seq., and Crim.R. 33(B).

{¶ 24} Notwithstanding R.C. 2953.21(J), and "with or without a constitutional claim, this court [has] at least implicitly found that the Crim.R. 33(B) procedure for new trial motions exists independently from the R.C. 2953.21 procedure for post-conviction petitions." *Lee*, 2005-Ohio-6374 at ¶ 13; *State v. Burke*, 10th Dist. No. 06AP-656, 2006-Ohio-4597, ¶ 10; and *State v. Caulley*, 10th Dist. Franklin No. 12AP-100, 2012-Ohio-2649, ¶ 18 (rejecting the state's argument that the defendant's motion for new trial based upon newly discovered evidence and raising a claim of ineffective assistance of counsel should be treated as a petition for post-conviction relief).

{¶ 25} In ruling upon appellant's Crim.R. 33(B) motion, the trial court ignored the state's argument that R.C. 2953.21 was appellant's exclusive remedy and denied appellant's motion on the ground appellant had failed to meet the requirements under Crim.R. 33(B).

{¶ 26} Had the trial court treated appellant's Crim.R. 33(B) motion as a post-conviction relief petition, the motion would have been a successive and untimely petition pursuant to R.C. 2953.23. As pertinent here, a trial court may not entertain an untimely and second or successive petition for post-conviction relief "unless the petitioner initially demonstrates * * * he was unavoidably prevented from discovering the facts necessary for the claim for relief[.]" *State v. Tolliver*, 10th Dist. Franklin No. 14AP-170, 2014-Ohio-4824, ¶ 18; R.C. 2953.23(A)(1)(a).

{¶ 27} Similarly, within the context of this case, proceedings under Crim.R. 33(B) upon grounds of newly discovered evidence would require appellant to demonstrate he was unavoidably prevented from discovering the evidence within the requisite time. Thus, in order to obtain relief pursuant to Crim.R. 33(B) or R.C. 2953.23, a movant/petitioner must satisfy the threshold requirement of unavoidable prevention.

{¶ 28} "The phrase 'unavoidably prevented' in R.C. 2953.23(A)(1)(a) means that a defendant was unaware of those facts and was unable to learn of them through reasonable

diligence." *State v. Howard*, 10th Dist. Franklin No. 15AP-161, 2016-Ohio-504, ¶ 21. This court notes that the "unavoidably prevented" requirement in Crim.R. 33(B) mirrors the "unavoidably prevented" requirement in R.C. 2953.23(A)(1). *Id.* at ¶ 55; see also *State v. Keenan*, 8th Dist. Cuyahoga No. 77480, 2001 WL 91129, *2 (Feb. 1, 2001) (the exception stated in Crim.R. 33[B] for evidence that a defendant was unavoidably prevented from timely presenting is consistent with the standard for untimely or successive postconviction relief petitions stated in R.C. 2953.23).

{¶ 29} Because appellant's burden to establish unavoidable prevention is the same under Crim.R. 33(B) and R.C. 2953.23(A)(1), we need not determine whether the latter is appellant's exclusive remedy, as we find that the trial court did not err in denying appellant's Crim.R. 33(B) motion.

2. Did the Trial Court Apply the Proper Standard of Review in Denying Appellant's Crim.R. 33(B) Motion?

{¶ 30} Appellant initially argues the trial court abused its discretion in denying his Crim.R. 33(B) motion because the court applied the wrong standard when it considered appellant's motion. Specifically, appellant asserts the trial court incorrectly focused on the merits of his ineffective assistance of counsel claim, instead of whether appellant had clearly and convincingly established he was unavoidably prevented from discovering the evidence. In support of his assertion, appellant cites the trial court's following statement made at the outset of the court's analysis:

Before the Court may grant Defendant leave to file his Motion for New Trial, Defendant must establish by clear and convincing evidence that his counsel's representation at the [2009] hearing was constitutionally deficient.

{¶ 31} However, the foregoing quote omits the trial court's very next sentence which states, "Defendant must further establish that that deficiency precluded Defendant's discovery of relevant evidence until now." Given the fact appellant claims he was

unavoidably prevented from discovering the evidence precisely because of ineffective assistance of both his trial counsel and his appointed *Atkins* counsel, it would have been impossible for the trial court to consider appellant's claim of being "unavoidably prevented" without concurrently considering whether counsel was ineffective.

{¶ 32} Ultimately, the trial court denied appellant's Crim.R. 33(B) motion on the ground appellant failed to demonstrate he was unavoidably prevented from discovering the evidence relied upon in the motion, and hence from timely filing the motion: "The Court does not find clear and convincing evidence that Defendant was unavoidably prevented from filing a new trial motion within the time constraints based on ineffective assistance of counsel." See *State v. Mosley*, 10th Dist. Franklin No. 07AP-860, 2008-Ohio-951 (trial court's denial of Crim.R. 33[B] motion for leave presumes trial court found defendant failed to show he was unavoidably prevented from discovering the evidence relied upon in the motion). Accordingly, the trial court applied the proper standard when it considered appellant's Crim.R. 33(B) motion.

3. Was Appellant Entitled to a Hearing Upon His Crim.R. 33(B) Motion?

{¶ 33} Appellant also suggests he was entitled to a hearing on his Crim.R. 33(B) motion given Dr. Smalldon's recantation in his 2013 affidavit. Appellant cites *State v. Alexander*, 11th Dist. Trumbull No. 2011-T-0120, 2012-Ohio-4468, in support of his argument. This court finds that *Alexander* is not applicable in the case at bar.

{¶ 34} In *Alexander*, the trial court denied the defendant's motion for leave to file a motion for new trial as untimely, and without holding a hearing to inquire into the circumstances of a state witness' recantation. The Eleventh Appellate District held that, had the trial court's denial of the motion for leave not been harmless, the denial of the motion without a hearing "would have been an abuse of discretion [because] such a procedural requirement is necessary so that a genuine recantation that could be outcome determinative

is not foreclosed only because the recanting witness decides to 'do the right thing' belatedly." *Alexander* at ¶ 21.

{¶ 35} Contrary to appellant's suggestion, Dr. Smalldon's 2013 affidavit is not a recantation of his testimony at the 2009 *Atkins* hearing. "A witness recants *** by formally or publicly withdrawing or repudiating earlier testimony." *State v. Covender*, 9th Dist. Lorain No. 07CA009228, 2008-Ohio-1453, ¶ 21 (Dickinson, J., concurring in part and dissenting in part), citing Black's Law Dictionary (7th Ed.1999) 1274. Dr. Smalldon testified at the 2009 *Atkins* hearing that appellant's full scale IQ was 83 based upon his 1995 IQ testing of appellant. Dr. Smalldon's 2013 affidavit does state he would now apply the Flynn effect which would result in a "lowering of the Full Scale IQ estimate from 83 to 79."³ However, a full scale IQ of 79, even after applying an additional downward adjustment of five points reflecting the standard deviation, would result in a full scale IQ score of 74.⁴ Pursuant to *Lott*, a full scale IQ score of 74 raises a rebuttable presumption that appellant is not mentally retarded, consistent with Dr. Smalldon's ultimate conclusion in 2009.

{¶ 36} As opposed to a recantation, a review of Dr. Smalldon's 2013 affidavit simply

3. In general, the Flynn effect, a theory published by political scientist James R. Flynn, "argues that IQ scores have gone up over the years, and that when a test is administered years after its publication, the results should be adjusted downward to account for the lapse in time between publication and its administration." *State v. Waddy*, 10th Dist. Franklin No. 09AP-1197, 2011-Ohio-3154, ¶ 20, quoting *Thomas v. Quarterman*, 335 Fed.Appx. 386, 390 (5th Cir.2009). See also *Wiley v. Epps*, 625 F.3d 199, 214 (5th Cir.2010) ("the Flynn effect provides a reduction in IQ scores to account for inflation in the score based on the number of years since the test was normalized"). The theory "attributes the general rise of I.Q. scores of a population over time to the use of outdated testing procedures, emphasizing the need for the repeated renormalization of I.Q.-test standard deviations over time." *In re Salazar*, 443 F.3d 430, 433 (5th Cir.2006). This court, in addressing the theory in the context of an *Atkins-Lott* claim, has held that "a trial court must consider evidence presented on the Flynn effect, but, consistent with its prerogative to determine the persuasiveness of the evidence, the trial court is not bound to, but may, conclude the Flynn effect is a factor in a defendant's IQ score." *State v. Burke*, 10th Dist. Franklin No. 04AP-1234, 2005-Ohio-7020, ¶ 51.

4. As this court explained in *Waddy V*, "IQ tests typically have a five point standard error of measurement, which means that any score actually represents a score that could be five points higher or lower." 2011-Ohio-3154 at ¶ 32, quoting *Wilson v. Quarterman*, E.D.Texas No. 6:06-cv-140, 2009 WL 900807, *4 (March 31, 2009). "The standard of measurement is an interpretative tool that reflects the idea that I.Q. scores have a ninety-five percent confidence interval, and thus an individual's true score is somewhat within a five-point range of the reported score." *Waddy V* at *id*.

shows that based upon the evolving psychological study of mental retardation, especially since 2002, he now believes it is appropriate to apply the Flynn effect in capital cases where IQ results were obtained using older IQ tests, which would include his 1995 IQ testing of appellant. In his affidavit, Dr. Smalldon also agrees with Dr. Hartung that the most weight should be given to appellant's 2012 IQ test results following Dr. Hartung's administration of the WAIS-IV test. Dr. Smalldon's 2013 affidavit plainly explains the timing and reasons for his change of opinion and is not a recantation of his earlier testimony.

B. Unavoidable Prevention As a Result of Ineffective Assistance of Counsel

{¶ 37} Appellant argues it was an abuse of discretion for the trial court to deny his Crim.R. 33(B) motion because appellant was unavoidably prevented from discovering and timely presenting evidence of his mental retardation and abusive childhood due to the ineffective assistance of both his 1987 trial counsel and his appointed *Atkins* counsel.⁵ Appellant asserts he was entitled to effective assistance of counsel both during the mitigation phase of his 1987 trial and in connection with his *Atkins* litigation, but was deprived of that right, and consequently seeks a new mitigation phase of his trial.

1. Was 1987 Trial Counsel Ineffective For Failing to Present Evidence of Appellant's Abusive Childhood At Trial?

{¶ 38} Appellant first argues he was unavoidably prevented from discovering and timely presenting evidence of his abusive childhood at his 1987 trial due to the ineffective assistance of trial counsel. As a result, the trial court abused its discretion in denying his Crim.R. 33(B) motion.

{¶ 39} The record shows that during the mitigation phase of appellant's 1987 trial, only one of appellant's siblings testified on behalf of appellant. The sibling testified regarding the

5. Appellant's argument seemingly creates a "Catch 22" situation. In order for counsel to have been ineffective in presenting evidence, the evidence would have had to be discoverable. If the evidence was undiscoverable, as required by Crim.R. 33(B), then counsel could not have been ineffective in failing to present it.

circumstances under which appellant grew up, and stated that appellant and his siblings were punished for misbehaving by receiving beatings by their father. When appellant filed his Crim.R. 33(B) motion, he attached the affidavits of four other siblings. As stated earlier, those affidavits detail the physical abuse suffered by appellant and his siblings as a result of their father's beatings. The affidavit of appellant's sister also indicates her suspicions their father may have attempted to molest her daughters during overnight visits.

{¶ 40} The trial court denied appellant's Crim.R. 33(B) motion on the ground his claim of ineffective assistance of trial counsel for failure to present evidence of his abusive childhood was barred by res judicata. As the trial court aptly stated, appellant "raised a claim alleging ineffective assistance of trial counsel" in his first petition for post-conviction relief in 1995 "and had the opportunity to raise the issue again in 2003" when he filed his *Atkins* PCR petition. Appellant does not explain why or how he was prevented from raising the issue in either prior petition for post-conviction relief. Because appellant could have raised the issue in his 1995 and 2003 petitions for post-conviction relief, it is barred by res judicata. See *State v. Russell*, 10th Dist. Franklin No. 04AP-1149, 2005-Ohio-4063; *State v. Petrone*, 5th Dist. Stark No. 2013 CA 00213, 2014-Ohio-3395 (res judicata bars a defendant from raising the issue of ineffective assistance of trial counsel via an appeal from the denial of a motion for leave to file a motion for new trial where the issue could have been, but was not, raised in earlier proceedings).

2. Was Appointed *Atkins* Counsel Ineffective at the 2009 *Atkins* Hearing?

{¶ 41} Appellant next argues he was unavoidably prevented from discovering and timely presenting evidence of his abusive childhood and mental retardation at the 2009 *Atkins* hearing due to the ineffective assistance of his appointed *Atkins* counsel.

a. The Right to Counsel in Post-Conviction Relief Proceedings

{¶ 42} The Sixth Amendment to the United States Constitution provides a right to the

effective assistance of counsel in criminal proceedings. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). However, the United States Supreme Court has held that there is no federal constitutional right to counsel in state post-conviction proceedings. Rather, "the right to appointed counsel extends to the first appeal of right, and no further." *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990 (1987). Subsequently, the Supreme Court held that because there is no constitutional right to an attorney in state post-conviction proceedings, there is no federal constitutional right to the effective assistance of counsel in such proceedings. *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546 (1991) ("a petitioner cannot claim constitutionally ineffective assistance of counsel in [state post-conviction] proceedings"). That same year, the Ohio Supreme Court held that a post-conviction indigent petitioner has neither a state nor a federal constitutional right to counsel. *State v. Crowder*, 60 Ohio St.3d 151, 152 (1991).

{¶ 43} This court has generally held that the right to appointed counsel does not apply to post-conviction relief proceedings because such proceedings are civil in nature. *State v. Scudder*, 131 Ohio App.3d 470, 473-474 (10th Dist.1998). As this court explained in *Scudder*,

The right to appointed counsel extends to only the first appeal of right, and since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, * * * he has no such right when attacking, in post-conviction proceedings, a conviction that has become final upon exhaustion of the appellate process.

Id. This court continued, "[e]xcept as noted above, a civil litigant does not have a right to the effective assistance of appointed counsel. Unlike a criminal defendant, a civil litigant has no constitutional right to the effective assistance of counsel." (Internal citation omitted.) *Id.* at 474. "Accordingly, although the General Assembly felt it appropriate to grant indigent postconviction petitioners access to appointed counsel, it was not required to do so, nor was

it required to guarantee the effective assistance of counsel." *Id.* This court then held that because post-conviction relief proceedings in Ohio are civil in nature, a "defendant has no Sixth Amendment right to the effective assistance of" post-conviction counsel. *Id.*

{¶ 44} Other appellate courts have reached the same conclusion. See *State v. Sheppard*, 1st Dist. Hamilton No. C-000665, 2001 WL 331936 (Apr. 6, 2001) (a civil litigant in a post-conviction proceeding has no due-process right to the effective assistance of counsel, even in a death-penalty case); *State v. D'Ambrosio*, 8th Dist. Cuyahoga No. 75076, 2000 WL 283079 (Mar. 16, 2000) (same); *In re Scharf*, 6th Dist. Ottawa No. OT-01-044, 2002-Ohio-5204 (because post-conviction relief proceedings are civil in nature, a petitioner has no Sixth Amendment right to the effective assistance of counsel); *State v. Brown*, 7th Dist. Mahoning No. 01CA229, 2003-Ohio-3551 (holding that while appointed counsel must be qualified to file a capital post-conviction petition, there is no requirement that they be effective); and *State v. McKelton*, 12th Dist. Butler No. CA2015-10-183, 2016-Ohio-3216 (the Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief proceedings).

{¶ 45} Although R.C. 2953.21(l)(1) allows an indigent petitioner sentenced to death to have appointed counsel in a first post-conviction relief proceeding, R.C. 2953.21(l)(2) expressly prohibits the petitioner from collaterally challenging counsel's effectiveness in pursuit of post-conviction relief: "The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal." R.C. 2953.21(l)(2); see also *Scudder*, 131 Ohio App.3d at 474; *Brown* at ¶ 13-14.

{¶ 46} This court recognizes that while the decisions cited above involved petitions for post-conviction relief filed pursuant to R.C. 2953.21, none of the cases involved post-

conviction *Atkins* proceedings. Nevertheless, whether a defendant has a constitutional right to effective assistance of counsel in connection with his post-conviction *Atkins* petition is debatable. See *State v. Bays*, 2d Dist. Greene No. 2014-CA-24, 2015-Ohio-1935; *Waddy v. Robinson*, S.D. Ohio No. 3:98-CV-084, 2014 WL 4674291 (Sept. 18, 2014) (there is no constitutional right to effective assistance of counsel in post-*Atkins* proceedings); and *Waddy v. Robinson*, S.D. Ohio No. 3:98-CV-084, 2015 WL 46209 (Jan. 2, 2015) (holding that "[p]rospectively, this Court has always assured that capital habeas petitioners with *Atkins* claims had death-certified counsel to represent them in those post-*Atkins* Ohio Revised Code § 2953.21 proceedings. But that is far different from recognizing a constitutional right to effective assistance in a post-*Atkins* post-conviction proceeding. Such a right can be recognized only by the United States Supreme Court").⁶

{¶ 47} In the case at bar, following this court's decision in *Waddy IV*, 2006-Ohio-2828, the trial court appointed two attorneys to represent appellant with regard to his *Atkins* claim. This was in accord with this court's decision in *Burke* where we held, "an indigent capital defendant raising an *Atkins* claim for the first time in a post-conviction proceeding is entitled to be represented by two certified attorneys." *Burke*, 2005-Ohio-7020 at ¶ 46; R.C. 2953.21(I).

{¶ 48} Because appellant was provided with two certified attorneys to prosecute his

6. In *Bays*, the defendant initially filed a petition for post-conviction relief seeking to vacate his death sentence pursuant to *Atkins* and *Lott*. He subsequently filed a Civ.R. 41(A)(1) notice of voluntary dismissal of his *Atkins* PCR petition which the trial court denied. The case sat dormant for over five years until the defendant moved to withdraw his notice of voluntary dismissal and to supplement or amend his *Atkins* PCR petition with additional evidence regarding his mental retardation. The trial court denied both motions. In a split decision, the Second Appellate District upheld the trial court's denial of both motions but remanded the case for the trial court to consider the defendant's pending *Atkins* PCR petition. The concurring judge agreed with the authoring judge's decision to remand the case for the trial court to consider the *Atkins* PCR petition. "At the same time," the concurring judge also agreed with the dissenting judge that the defendant had a constitutional right to effective assistance of counsel in pursuing post-conviction relief based on *Atkins* and *Lott*. The dissenting judge's position was based on a decision of the Tenth Circuit, *Hooks v. Workman*, 689 F.3d 1148 (10th Cir.2012), which held that "defendants in *Atkins* proceedings have the right to effective counsel," and that such right was "clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* at 1885. In both of its *Waddy* decisions, the federal district court declined to follow *Hooks* and noted that no federal courts have

Atkins claim, and because we agree with the trial court that his appointed *Atkins* counsel was not ineffective, we find that the trial court did not err in denying his Crim.R. 33(B) motion.

b. Failure to Present Evidence of Appellant's Abusive Childhood at the 2009 *Atkins* Hearing

{¶ 49} On appeal, appellant ostensibly argues he was unavoidably prevented at the 2009 *Atkins* hearing from presenting evidence of his abusive childhood and mental retardation due to the ineffectiveness of his appointed *Atkins* counsel. However, in his Crim.R. 33(B) motion, appellant did not argue he was unavoidably prevented from discovering evidence of his abusive childhood and presenting such evidence at the hearing due to the ineffectiveness of his appointed *Atkins* counsel. Rather, appellant only argued he was unavoidably prevented from discovering evidence of his mental retardation because until Dr. Hartung, "no expert ever performed an adaptive functioning evaluation" on appellant, "nor did anyone attempt to interview [appellant's] family members in person." By contrast, Dr. Hartung had assessed appellant's adaptive functioning by administering the ABAS-II test and by interviewing two of appellant's siblings. In its decision denying appellant's Crim.R. 33(B) motion, the trial court only addressed the alleged ineffectiveness of appellant's appointed *Atkins* counsel for failing to call an expert willing to testify that appellant suffers from mental retardation.

{¶ 50} In any event, assuming appellant argues on appeal that he was unavoidably prevented from discovering evidence of his abusive childhood and presenting such evidence at the 2009 *Atkins* hearing, we find appellant cannot demonstrate he was unavoidably prevented from discovering the evidence before the *Atkins* hearing or in a timely manner thereafter. Appellant cannot demonstrate under Crim.R. 33(B) that he had no knowledge of his abusive childhood. Indeed, the fact he presented some evidence of his abusive

followed *Hooks*.

childhood at the mitigation phase of his 1987 trial plainly indicates he was aware of this evidence. Therefore, at the time of the 2009 *Atkins* hearing, appellant was aware of the facts upon which he now bases his claim for relief.

{¶ 51} Furthermore, while appellant's *Atkins* PCR petition is considered a first and timely petition for post-conviction relief under R.C. 2953.21 with regard to the *Atkins* claim, it is a successive and untimely petition under R.C. 2953.23 with regard to the abusive childhood evidence. In *Lott*, the Ohio Supreme Court created an allowance for capital defendants to raise an *Atkins* claim under R.C. 2953.21 within 180 days from the release of the *Lott* opinion. *Lott*, 2002-Ohio-6625 at ¶ 24. *Lott*, however, did not provide that non-*Atkins* issues would enjoy the same special dispensation. The significance of this is that the R.C. 2953.21(l)(1) statutory right to counsel of capital defendants in post-conviction relief proceedings is limited to first and timely petitions under R.C. 2953.21. Because appellant's *Atkins* PCR petition was a successive and untimely petition under R.C. 2953.23 with regard to the abusive childhood evidence, there was no right to counsel and therefore, no right to the effective assistance of counsel.

c. Failure to Present *Atkins* Evidence at the 2009 *Atkins* Hearing

{¶ 52} Appellant argues he was unavoidably prevented from discovering evidence of his mental retardation and presenting such evidence at the 2009 *Atkins* hearing because of the failure of his appointed *Atkins* counsel to call an expert such as Dr. Hartung. We agree with the trial court that appellant failed to establish that counsel's performance at the hearing was deficient. As the trial court properly found:

The Court appointed two knowledgeable and experienced attorneys to represent defendant at his 2009 evidentiary hearing. The Court approved counsel's request for expert funding for an investigator and for psychologist, Dr. Daniel Grant. At the evidentiary hearing, counsel confirmed that they were electing not to call Dr. Grant as a defense witness. Rather, counsel chose to rely on their cross-examination of Dr. Smalldon.

Defendant argues that counsel was ineffective for failing to call an expert willing to testify that Defendant suffers from MR [mental retardation]. Defendant submits Dr. Cynthia Hartung's * * Report in support of his argument, wherein Dr. Hartung opines that Defendant suffers from a mild form of MR.

The Court finds that Defendant has failed to establish by clear and convincing evidence that counsel's performance at his 2009 evidentiary hearing was deficient. Defendant submitted an affidavit from Dr. Grant in support of his Motion for New Trial. In his affidavit, Dr. Grant concedes that he administered two IQ tests on Defendant which resulted in a full scale IQ of 76. As such, it was both reasonable and strategic for counsel to forego calling Dr. Grant to testify at the evidentiary hearing. Although Defendant has now located an expert who supports his position, there is no indication that his counsel acted unreasonably.

{¶ 53} Counsel's decision whether to call a witness generally falls within the rubric of trial strategy and will not be second-guessed by a reviewing court. See *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, ¶ 222. In hiring experts, "[a]ttorneys need not pursue every conceivable avenue; they are entitled to be selective." *State v. Murphy*, 91 Ohio St.3d 516, 542 (2001); *State v. Drummond*, 7th Dist. Mahoning No. 05 MA 197, 2006-Ohio-7078, ¶ 61. As the trial court properly found, "[e]ffectiveness standards do not mandate that counsel consult multiple experts until they find one who supports their conclusion."

{¶ 54} We therefore find that the trial court did not err in denying appellant's Crim.R. 33(B) motion with regard to his post-conviction *Atkins* proceedings.

d. Applicability of *Martinez v. Ryan*, and *Maples v. Thomas*

{¶ 55} Appellant asserts, however, that the ability of his appointed *Atkins* counsel to discover evidence of appellant's abusive childhood and mental retardation and present it at the 2009 *Atkins* hearing cannot be held against him and does not preclude him from asserting he was unavoidably prevented from discovering such evidence because he was essentially abandoned by his counsel. Appellant also asserts that given his imprisonment and mental retardation, he was "in 'no position' to develop evidence in support of an

ineffectiveness claim." In support of his assertions, appellant cites two decisions from the United States Supreme Court, *Martinez v. Ryan*, __U.S.__, 132 S.Ct. 1309 (2012), and *Maples v. Thomas*, __U.S.__, 132 S.Ct. 912 (2012). Both decisions address what may constitute cause to excuse a procedural default in federal habeas proceedings.⁷

{¶ 56} It is well-established that "[a] lawyer is an agent for his client and a party is deemed bound by the acts of his lawyer and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *State v. Mayle*, 10th Dist. Franklin No. 01AP-978, 2002 WL 756864, *2 (Apr. 30, 2002), quoting *GTE Automatic Electric v. ARC Industries*, 47 Ohio St.2d 146, 152 (1976).

{¶ 57} *Martinez* involved a petition for habeas corpus and originated in Arizona where state law only permits ineffective assistance of counsel claims to be brought in state collateral proceedings rather than on direct appeal. *Martinez's* post-conviction counsel filed a direct appeal and initiated a state collateral proceeding, but failed to present a claim of ineffective assistance of trial counsel in the state collateral proceeding. On federal habeas review, *Martinez* argued he could overcome procedural default as he had cause for the default, to wit, his first post-conviction counsel was ineffective for failing to raise any claims in the first notice of post-conviction relief. Both the District Court for the District of Arizona and the Ninth Circuit Court of Appeals held that *Martinez* had not shown cause to excuse the procedural default because, under *Coleman*, 111 S.Ct. 2546, prisoners have no federal constitutional right to the effective assistance of counsel in post-conviction proceedings.

{¶ 58} In addressing *Martinez's* claim, the Supreme Court acknowledged its holding in *Coleman* that under well-settled principles of agency law, "[n]egligence on the part of a

7. A prisoner must litigate federal law challenges to his conviction in state court before bringing them to federal court. As the Eighth Appellate District explained, "the failure to assert claims in state court bars a prisoner from later litigating those claims in federal habeas proceedings because the prisoner failed to exhaust available state remedies. This concept is known as 'procedural default.' However, a petitioner may overcome a 'procedural

prisoner's postconviction attorney does not qualify as 'cause.'" *Martinez*, 132 S.Ct. at 1316. The Supreme Court also acknowledged that in cases where the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim and thus, the prisoner's "one and only appeal" as to the claim. *Id.* at 1315-1316. As a result, "when an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim," and since a procedural default would preclude any habeas claim, "no court will review the prisoner's claim." *Id.* at 1314-1316.

{¶ 59} Consequently, the Supreme Court qualified its holding in *Coleman* and held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance of counsel." *Id.* at 1315. The Supreme Court further held that under state law, where claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default "will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* at 1320. In other words, if the post-conviction proceeding was the defendant's first opportunity to argue an error in his conviction, then the defendant, whether unrepresented or whose counsel was ineffective in the "initial-review collateral proceeding," is not precluded by the procedural default doctrine from raising the trial error in federal habeas proceedings.

{¶ 60} Appellant ostensibly parallels his case to *Martinez's* case in that "an incarcerated prisoner like [appellant] is in 'no position' to develop evidence in support of an

default' by demonstrating 'cause' and 'prejudice.'" *State v. Glover*, 8th Dist. Cuyahoga Nos. 100330 and 100331, 2014-Ohio-3228, ¶ 22.

ineffectiveness claim." See *Martinez*, 132 S.Ct. at 1317 ("While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record").

{¶ 61} *Martinez*, however, does not recognize a constitutional right to counsel or effective assistance of counsel in post-conviction proceedings. Nor does it find any particular state procedural or substantive rules akin to Ohio's post-conviction relief scheme to be unconstitutional. *State v. Glover*, 8th Dist. Cuyahoga Nos. 100330 and 100331, 2014-Ohio-3228, ¶ 28 (*Martinez* "does not provide a free-standing constitutional right to the appointment of counsel in postconviction proceedings"). Rather, *Martinez* simply "established an equitable doctrine for overcoming procedural default in certain limited circumstances." *Id.* Indeed, the Supreme Court was careful to point out it was only recognizing a "narrow exception" to its holding in *Coleman*:

The rule of *Coleman* governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts. It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons.

(Internal citations omitted.) *Martinez*, 132 S.Ct. at 1320. That is, the Court made clear that *Martinez* applies only to cases where defendants have been denied the effective assistance of counsel at the "initial review" stage of the litigation. *Id.* at 1315. The Court expressly stated that its holding does not apply to successive collateral proceedings. *Id.* at 1320. Claims of newly discovered evidence may be brought, and often are brought, in successive collateral proceedings, which the *Martinez* court expressly excluded from its holding. *Id.*; *Glover* at ¶ 30.

{¶ 62} Appellant argues that in *Martinez*, the Supreme Court observed that incarcerated defendants claiming ineffective of counsel or denial of the right to counsel in initial-review collateral proceedings "are generally ill equipped to represent themselves' because they do not have a brief from counsel or an opinion of the court addressing their claim of error." *Martinez* at 1317. Such was not the case here. The record shows there were substantial briefing and courts' decisions regarding appellant's mental retardation claim from his 2003 Atkins PCR petition.

{¶ 63} Appellant spends considerable effort likening the cause for procedural default aspect of *Martinez* to this case. Specifically, appellant claims that his 2009 *Atkins* hearing is an initial review collateral proceeding with regard to his *Atkins* claim, and that the alleged ineffectiveness of his appointed *Atkins* counsel at the hearing is cause to excuse procedural default at that hearing. This court finds that the exception to the application of the procedural default doctrine recognized in *Martinez* has no relevancy to our analysis of appellant's Crim.R. 33(B) claim. First, the procedural default doctrine, while applicable to federal habeas corpus proceedings, does not apply to state post-conviction relief proceedings. Furthermore, the mere fact that a claim may be subject to the *Martinez* exception to the procedural default doctrine does not mean that the claim has merit or that a state court is required to afford a subsequent merit review on the claim.

{¶ 64} Appellant also cites the Supreme Court's decision in *Maples* in support of his claim he was abandoned by his prior counsels and thus cannot be bound by their ineffective assistance.

{¶ 65} *Maples* addressed whether an habeas corpus petitioner was bound by his post-conviction attorneys' failure to timely file a notice of appeal or whether cause for a procedural default existed. The Supreme Court generally held that "under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor

can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him." *Maples*, 132 S.Ct. at 923.

{¶ 66} In reaching its holding, the Supreme Court explained that "[n]egligence on the part of a prisoner's postconviction attorney does not qualify as 'cause' * * * because the attorney is the prisoner's agent, and under 'well-settled principles of agency law,' the principal bears the risk of negligent conduct on the part of his agent." (Internal citation omitted.) *Id.* at 922. "Thus, when a petitioner's postconviction attorney misses a filing deadline, the petitioner is bound by the oversight and cannot rely on it to establish cause. We do not disturb that general rule." (Internal citation omitted). *Id.* "A markedly different situation is presented, however, when an attorney abandons his client without notice, and thereby occasions the default. Having severed the principal agent relationship, an attorney no longer acts, or fails to act, as the client's representative." *Id.* at 922-923. As a result, the attorney's acts or omissions "cannot fairly be attributed to [the client]." *Id.* at 923. The Supreme Court further observed that there was an "essential difference between a claim of attorney error, however egregious, and a claim that an attorney ha[s] essentially abandoned his client." *Id.*

{¶ 67} In *Maples*, the defendant's attorneys had failed to timely file a notice of appeal. In finding that *Maples*' attorneys had abandoned their representation of him, as opposed to merely being negligent, the Supreme Court noted that two of the attorneys had left the law firm, taken jobs that precluded their further representation of *Maples*, and failed to file motions to withdraw, thus providing no notice to the court as to where notices, orders, and the like were to be directed. In addition, *Maples*' third attorney never undertook to represent him, and was involved in the case only so that the other two attorneys could appear pro hac vice.

{¶ 68} By contrast here, the record is clear that appellant's prior attorneys did not abandon him, but instead were actively engaged in representing him both at trial and with

regard to his *Atkins* claim. Unlike in *Maples*, there is no evidence in the case at bar that appellant's prior attorneys had severed the principal-agent relationship. At most, appellant's claim only raises an issue of negligence, not abandonment. Accordingly, under the well-settled principles of agency law, appellant is bound by the acts and/or omissions of his prior attorneys.

III. CONCLUSION

{¶ 69} In light of all of the foregoing, this court finds that the trial court did not abuse its discretion in denying appellant's Crim.R. 33(B) motion for leave to file a motion for new trial based on newly discovered evidence. Appellant's assignment of error is accordingly overruled.

{¶ 70} Judgment affirmed.

HENDRICKSON and PIPER, JJ., concur.

M. Powell, P.J., of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), Article IV of the Ohio Constitution.

Hendrickson, J., of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), Article IV of the Ohio Constitution.

Piper, J., of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), Article IV of the Ohio Constitution.

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,	:	
	:	
Plaintiff,	:	
	:	CASE NO. 86CR-3182
vs.	:	
	:	JUDGE BROWN
WARREN WADDY,	:	
	:	(CAPITAL CASE)
Defendant.	:	

DECISION & ENTRY

Rendered this 10th day of March, 2015

This matter is before the Court upon Defendant Warren Waddy's (hereinafter "Defendant") Motion for Leave to File a Motion for New Trial Pursuant to Ohio Crim. R. 33(B), filed on July 18, 2013. On July 31, 2013, Plaintiff State of Ohio (hereinafter "the State") filed its Memorandum in Opposition. Defendant filed a Reply in Support on August 7, 2013.

On August 7, 2013, Defendant filed a Request for an Oral Hearing. The State filed its Opposition on August 9, 2013. Defendant filed a Reply on August 14, 2013.

On September 9, 2013, Defendant filed a Motion to Supplement his Motion for New Trial. The State filed its Memorandum in Opposition on September 23, 2013. Defendant filed his Reply in Support on September 25, 2013.

The motions are ripe for consideration by the Court.

STATEMENT OF FACTS

In 1987, Defendant was convicted of the aggravated murder of Paula Mason and sentenced to death. He was also convicted of numerous other crimes, including rape, burglary, and extortion, against three other victims. The Tenth District Court of Appeals

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and the Ohio Supreme Court affirmed Defendant's convictions and sentence. *State v. Waddy*, 10th Dist. Nos. 87AP-1159 and 87AP-1160; *State v. Waddy*, 63 Ohio St.3d 424, 588 N.E.2d 819 (1992).

Defendant filed his first petition for post-conviction relief in 1995, raising claims alleging that he is ineligible for the death penalty due to mental retardation (hereinafter "MR") and alleging ineffective assistance of counsel for failing to properly investigate and present relevant mitigating evidence at the penalty phase of his capital trial. (Dkt. 6/15/95). Defendant supported his petition with an affidavit from psychologist, Dr. Jeffrey Smalldon. (*Id.*) After due consideration, the Court granted the State's motion to dismiss Defendant's petition. (Dkt. 6/10/96). The Tenth District Court of Appeals affirmed the Court's ruling and the Ohio Supreme Court declined to exercise its jurisdiction to consider the matter. *State v. Waddy*, 10th Dist. No. 96AP-863 (1997); *State v. Waddy*, 80 Ohio St.3d 1423, 685 N.E.2d 237 (1997).

In 2002, the United States Supreme Court ruled that capital punishment is an unconstitutional punishment for individuals who suffer from MR. *Atkins v. Virginia*, 536 U.S. 304 (2002). Resultantly, on May 30, 2003, Defendant filed his second petition for post-conviction relief based on the holding in *Atkins*. (Dkt. 5/30/03). Defendant reiterated his position that he suffers from MR and is therefore ineligible for the death penalty. (*Id.*) The State argued that Defendant's claim was barred by res judicata and moved to dismiss Defendant's successive petition. (Dkt. 6/23/03). The Court granted the State's motion and dismissed the petition. (Dkt. 7/20/05). Upon review, the Tenth District Court of Appeals remanded the case to afford Defendant an evidentiary hearing and funding for an expert to develop his *Atkins* claim. *State v. Waddy*, 10th Dist. No. 05AP-866, 2006-Ohio-2828.

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On September 28, 2007, the Court appointed attorneys Kort Gatterdam and Joe Edwards to represent Defendant in the investigation and presentation of evidence at his evidentiary hearing. (Dkt. 9/28/07). The Court approved funding for Defendant's counsel to retain Koch & Associates to investigate Defendant's *Atkins* claim and Dr. Daniel Grant to conduct a psychological evaluation of Defendant. (Dkts. 11/27/07; 3/7/08; 3/10/10).

In January 2009, the Court held Defendant's evidentiary hearing over the course of two days. (Dkt. 2/1/10). The Court called Dr. Jeffrey Smalldon to testify and allowed both parties to cross-examine him. (*Id.* at p. 11). Dr. Smalldon discussed IQ testing and scoring techniques as well as common MR indicators. (*Id.* at 20-27). Based on his 1995 evaluation of Defendant, Dr. Smalldon ultimately opined that although Defendant functions at a sub average level, he does not meet the qualifications for MR. (*Id.*) The Court considered Dr. Smalldon's testimony regarding his evaluation of Defendant, the standard margin of error, and the possibility of the Flynn Effect, ultimately rejecting Defendant's *Atkins* claim. (Dkt. 11/25/09). The Court's decision was affirmed by the Tenth District Court of Appeals, and the Ohio Supreme Court again declined to exercise its jurisdiction. *State v. Waddy*, 10th Dist. No. 09AP-1197, 2011-Ohio-3154; *State v. Waddy*, 133 Ohio St.3d 1422, 976 N.E.2d 914, 2012-Ohio-4902.

Defendant now moves the Court for leave to file a motion for a new trial pursuant to Crim. R. 33(B). Defendant asserts that newly discovered evidence supports his claim that he suffers from MR and is therefore ineligible for the death penalty. He submits that he was unavoidably prevented from discovering said evidence due to ineffective assistance of counsel at his 2009 evidentiary hearing. He also submits that newly discovered evidence demonstrates that his counsel was ineffective at his 1987 trial.

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The State counters that Defendant is not mentally retarded and is procedurally barred from the relief requested.

LAW & ANALYSIS

Procedurally, any motion for new trial on account of newly discovered evidence must be filed within one hundred twenty days after the day upon which the verdict was rendered. Ohio Crim. R. 33(B). However, if Defendant demonstrates by clear and convincing evidence that he was unavoidably prevented from the discovery of the evidence, he may be granted leave to file his motion. *Id.*

Defendant submits that he was unavoidably prevented from discovering new evidence due to ineffective assistance of counsel. Specifically, Defendant submits that due to counsel's ineffectiveness, he was prevented from discovering and presenting new and relevant evidence regarding his MR at the 2009 evidentiary hearing and from discovering mitigating evidence that could have been presented at the penalty phase of his 1987 capital trial.

Ineffective Assistance of Counsel at the 2009 Hearing

Before the Court may grant Defendant leave to file his Motion for New Trial, Defendant must establish by clear and convincing evidence that his counsel's representation at the hearing was constitutionally deficient. Defendant must further establish that that deficiency precluded Defendant's discovery of relevant evidence until now. Ohio Crim. R. 33(B).

To demonstrate ineffective assistance of counsel, Defendant must show: (1) that his counsel's performance fell below an objective standard of reasonableness; and (2) that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668 (1984). The Court appointed two knowledgeable and experienced attorneys to represent Defendant

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at his 2009 evidentiary hearing. The Court approved counsel's request for expert funding for an investigator and for psychologist, Dr. Daniel Grant. At the evidentiary hearing, counsel confirmed that they were electing not to call Dr. Grant as a defense witness. (Dkt. 2/1/10, p. 7). Rather, counsel chose to rely on their cross-examination of Dr. Smalldon. Defendant argues that counsel was ineffective for failing to call an expert willing to testify that Defendant suffers from MR. Defendant submits Dr. Cynthia Hartung's CV and Report in support of his argument, wherein Dr. Hartung opines that Defendant suffers from a mild form of MR. (MNT, Exs. 1, 2).

The Court finds that Defendant has failed to establish by clear and convincing evidence that counsel's performance at his 2009 evidentiary hearing was deficient. Defendant submitted an affidavit from Dr. Grant in support of his Motion for New Trial. (MNT, Ex. 15). In his affidavit, Dr. Grant concedes that he administered two IQ tests on Defendant which resulted in a full scale IQ of 76. (*Id.*) As such, it was both reasonable and strategic for counsel to forego calling Dr. Grant to testify at the evidentiary hearing. Although Defendant has now located an expert who supports his position, there is no indication that his counsel acted unreasonably. Effectiveness standards do not mandate that counsel consult multiple experts until they find one who supports their conclusion. See *State v. Gapen*, 2nd Dist. No. 21822, 2007-Ohio-4333 ("Attorneys are not required to pursue every conceivable avenue; they are entitled to be selective.").

The State asserts that Defendant's claim is procedurally barred because there is no entitlement to effective assistance of counsel during post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551 (1987). However, the Court notes that the 2009 *Atkins* hearing was not a typical post-conviction hearing. Ultimately, the Court need not address whether Defendant was entitled to effective assistance of counsel as Defendant

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has failed to establish by clear and convincing evidence that counsel's performance fell below an objective standard of reasonableness.

Ineffective Assistance of Counsel at Trial

Defendant submits that his trial counsel was ineffective for failing to uncover allegations of physical and sexual abuse that occurred at his family home. In support of his argument, Defendant submits various affidavits from his siblings, which detail physical abuse suffered by Defendant and his siblings as a result of their father's beatings. (MNT, Exs. 8, 9, 10, 11). Defendant's sister details her suspicions that their father may have attempted to molest her daughters. (*Id.* at Ex. 10).

The State argues that Defendant's claim is barred by res judicata. The Court agrees that Defendant's claim is procedurally barred. As a collateral attack on his sentence, Defendant's claim is more appropriate for a post-conviction petition. See R.C. 2953.21. However, as the State notes, Defendant has already filed two post-conviction petitions with this Court. In his first petition in 1995, he raised a claim alleging ineffective assistance of trial counsel and had the opportunity to raise the issue again in 2003. Res judicata bars the consideration of a claim that was or could have been raised in Defendant's first two petitions. *State v. Russell*, 10th Dist. No 04AP-1149, 2005-Ohio-4063, ¶¶ 6-7; *State v. Szefcyk*, 77 Ohio St.3d 93, 95; *State v. Perry*, 10 Ohio St.2d 175 (1967).

CONCLUSION

The Court does not find clear and convincing evidence that Defendant was unavoidably prevented from filing a new trial motion within the time constraints based on ineffective assistance of counsel. Accordingly, Defendant's Request for Leave, filed July 18, 2013, is hereby **DENIED**. Defendant's Request for Oral Argument, filed August 7,

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2013, is hereby **DENIED**. Defendant's Request to Supplement his Motion for New Trial, filed September 9, 2013, is hereby **MOOT**.

IT IS SO ORDERED.

KIM BROWN, JUDGE

Franklin County Court of Common Pleas

Date: 03-13-2015
Case Title: STATE OF OHIO -VS- WARREN WADDY
Case Number: 86CR003182
Type: ENTRY/ORDER

It Is So Ordered.

The image shows a handwritten signature in black ink, which appears to be "K. Brown", written over a circular official seal. The seal contains the text "FRANKLIN COUNTY COURT OF COMMON PLEAS" around the perimeter and "JULY 1818" at the bottom. The signature is fluid and cursive.

/s/ Judge Kim Brown

Electronically signed on 2015-Mar-13 page 8 of 8

Cynthia M. Hartung, Ph.D.
Licensed Clinical Psychologist
507 South 4th Street, Suite A
Laramie, WY 82070
307-460-0119

**Confidential Psychological Report
For Professional Use Only**

Name: Warren Waddy	Education: 4 th grade
Date of Birth: 12-19-1953	Age: 58 years, 8 months
Date of Evaluation: 09-07-2012	Date of Report: 10-19-2012
Examiner: Cynthia M. Hartung, Ph.D.	Licensure: Wyoming #457

Referral and Background Information:

Warren Waddy is a 58-year-old African American male who was convicted of aggravated murder and sentenced to death in 1987. Mr. Waddy has been on death row for 25 years and he is currently housed at the Chillicothe Correctional Institute in Chillicothe, Ohio. An assessment for mental retardation was requested by his attorney, Ms. Vicki Werneke, Federal Public Defender, given the *Atkins v. Virginia* ruling which determined that it is unconstitutional to execute an individual who has mental retardation.

The legal definition of mental retardation in Ohio includes three parts: (1) significantly sub-average intellectual functioning; (2) significant limitations in two or more adaptive skills such as communication, self-care, and self-direction and (3) onset before the age of 18. This definition is based on, and therefore consistent with, the definitions that are typically used in professional practice provided by the American Association for Intellectual Disabilities (AAIDD, formerly AAMR) and the American Psychiatric Association (APA) in the *Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition (DSM-IV; APA, 1994)*.

Relevant Background Information:

Previous Intelligence Testing. With regard to significantly sub-average intellectual functioning, this is typically defined as a full scale IQ below 70, which is two standard deviations below the average score of 100, on an individually administered IQ test. Given a confidence interval, or margin of error, of approximately five points, individuals with IQs as high as 75 may be considered for an MR diagnosis. Records indicated that Mr. Waddy's IQ has been evaluated on three previous occasions. When Mr. Waddy was 12-years-old his IQ was apparently in the "slow learner range" of 80 to 89. However, it was unclear which test was used and, most importantly, for an MR diagnosis, whether it was an individually administered IQ test. When Mr. Waddy was 14-years-old, the Wechsler Intelligence Scale for Children (WISC) was administered and he achieved a full-scale IQ score of 72. This score resulted in a confidence interval of 67 to 77 meaning that we could be 95% certain that Mr. Waddy's true IQ is between 67 and 77. This score addresses Mr. Waddy's functioning prior to the age of 18. When Mr. Waddy was 42-years-old he was evaluated with the WAIS-R. The resulting IQ score was an 83 with a confidence interval of 78 to 88.

Adaptive Behavior History. During the review of Mr. Waddy's records, information that might help us to understand his level of adaptive functioning was noted.

1. Records indicated that Mr. Waddy received services from the Educational Therapy Center which was a facility for children who were eligible for special education due to mental retardation.
2. Records from the Educational Therapy Center indicate that the director and resident psychiatrist made a referral in 1969 for Mr. Waddy to be sent to the Petersburg Training School. The Petersburg Training School was a residential care facility for mentally retarded African-American boys.
3. A social history report written by Ms. Susan Shackelford from the Educational Therapy Center, based on an interview with Warren's parents in 1969 when Warren was 15-years-old, provided the following information:

- a. Warren is the 6th of 9 children. All the children were real slow. All the children rocked all of the time.
 - b. He "was sent home from school at least six times for banging his head against his desk."
 - c. As "a young child, he liked to sit in a chair and hit his head on the back of the chair."
 - d. Warren still bumps his head when he goes to sleep.
 - e. Warren is a bed wetter...Warren is still wetting the bed one or two times per week.
 - f. A church member "recommended that Warren go to a special school...for retarded children."
 - g. His father's "intelligence is below average, and he remembers very little about the past." His mother's "intelligence seems lower than that of her husband."
4. Mr. Waddy enrolled at the Mansfield Business College in Columbus in October of 1984. Apparently, a high school diploma or GED was not required for admission. He was withdrawn from this school in April of 1985 due to absenteeism. Records indicated that he completed courses in Language Skills (grade of F), Semantics (grade of F), General Recordkeeping (grade of A), Basic Filing (grade of B), Office Systems (grade of C), and Typing (grades of B, C and D). It is difficult to interpret the relevance of these grades for adaptive functioning given that we do not know what was required to achieve As or Bs in these classes. It is relevant that he failed Language Skills and Semantics which we would expect based on his IQ scores. It may not require an average IQ to do well in General Recordkeeping and Basic Filing since many individuals with Mild Mental Retardation are capable of filing.
 5. A psychological report written by Dr. Jeffrey Smalldon, based on an evaluation conducted 1995 when Warren was 42-years-old, provided the following information:
 - a. "He tends to become frustrated quickly when he bumps up against his own limitations, at such times he exhibits an emotional maturity that I would liken to that of an elementary school-age child."
 - b. "Warren recalls...feeling as though he might have been responsible for his grandfather's death. He reportedly knocked over some scalding water which ended up burning his grandfather, and his grandfather never completely recovered."
 - c. "School records suggest that he was 11 or 12 and not yet in 5th grade when his expulsion occurred."
 - d. "Warren reported feeling stigmatized as a child when he was expelled from elementary school and then subsequently sent to a 'special' school that he understood as a place for 'retarded' children...It was his impression at the time that he had been diagnosed as mentally retarded."
 - e. "Progress reports (from the Beaumont School) highlight his quarrelsome and often resistant attitude; his often poor peer relationships...his extreme impulsivity; and his emotional immaturity."
 - f. When describing his relationship with a girlfriend at age 19, he related, "She was fine...she basically took care of me, my every need."

Tests Administered:

1. Test of Memory Malingering (TOMM)
2. Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV)
3. Adaptive Behavior Assessment System – Second Edition (ABAS-II)

Testing Procedures and Behavioral Observations:

When Ms. Werneke and Dr. Hartung arrived in the visiting cell where Mr. Waddy was waiting, he stood up and hugged Ms. Werneke. He was clearly glad to see her as evidenced by his warm greeting. When Ms. Werneke introduced Dr. Hartung to Mr. Waddy, he shook Dr. Hartung's hand. Ms. Werneke explained to Mr. Waddy that Dr. Hartung would be conducting a psychological evaluation which would include a mental retardation assessment. Although Mr. Waddy had previously stated that he does not believe he has mental retardation, he appeared comfortable with Ms. Werneke's explanation and agreed to put forth his best effort. After Ms. Werneke departed, Dr. Hartung began the assessment session. Mr. Waddy worked for approximately two hours and was then given a 15 minute break. Following the break, Mr. Waddy worked for another one and a half hours before testing was completed.

Mr. Waddy was friendly and cooperative throughout the evaluation. Dr. Hartung administered the WAIS-IV, ABAS-II and the TOMM. Mr. Waddy attempted to answer all questions presented by the examiner and when he appeared not to know an answer he often contemplated the question and then guessed. Mr. Waddy

appeared comfortable throughout the evaluation as evidenced by talkativeness, smiling and laughing with the examiner. Specifically, he told a number of stories to Dr. Hartung during the testing. He was so talkative that it was occasionally necessary to redirect him to the current task. At one point during the testing, Mr. Waddy inquired as to whether the IQ test was the "most recent test." Apparently, he was aware that the test administered by Dr. Smalldon in 1995 had older norms. During the Digit Span subtest, Mr. Waddy related that he "was never taught how to study or how to remember."

There was no indication of distorted thought processes or memory problems. Mr. Waddy's verbalizations, although sometimes lengthy, were task-related and typically contained relevant content. Mr. Waddy made eye contact with the examiner when answering questions and showed an appropriate range of affect including laughing and smiling on a number of occasions. Based on these observations, the results of the WAIS-IV are believed to be an accurate reflection of Mr. Waddy's cognitive functioning.

TOMM Results:

The TOMM is a 50-item recognition test for adults designed to detect malingering on tests of memory. The TOMM was administered to rule out the possibility that Mr. Waddy was malingering or purposely attempting to appear mentally or psychologically impaired. The minimum score on each of the two recognition trials is 0 (no correct answers) and the maximum score is 50 (all answers correct). A score of 25 represents a chance level of responding. Therefore, a score of 25 or below on Trial 1 or Trial 2 suggests malingering. In addition, 95% of adults obtain a score of 49 or 50 on Trial 2. Therefore, a score of 45 or below on Trial 2 also suggests malingering. Mr. Waddy's score on Trial 1 was 50 and his score on Trial 2 was 50. These scores indicate that Mr. Waddy was not malingering.

WAIS-IV Results:

The WAIS-IV was used to assess Mr. Waddy's general intellectual functioning. WAIS-IV scores can be interpreted in relation to an average score of 100. The Average range includes scores between 90 and 110, the Low Average range includes scores between 80 and 89 and the Borderline or Very Low range includes scores between 70 and 79. Finally, scores of approximately 70 and below are considered to be in the Extremely Low range. Confidence intervals provide a range of scores and should be considered when using the above categories to describe IQ scores. The 95% confidence interval is provided below and should be interpreted to mean that there is a 95% chance that the true IQ score, if it could be measured without error, would fall in this range. The following results were obtained for Mr. Waddy:

WAIS-IV Index and Subscale Scores	Score	Percentile	Confidence Interval (95%)	Descriptive Category	Age Equivalent*
Verbal Comprehension (VCI)	78	7 th	73-85	Very Low	
Similarities	5				8:6
Vocabulary	7				8:6
Information	6				<6:2
Perceptual Reasoning (PRI)	79	8 th	74-86	Very Low	
Block Design	6				7:6
Matrix Reasoning	6				<6:2
Visual Puzzles	7				n/a**
Working Memory (WMI)	86	18 th	80-94	Low Average	
Digit Span	8				n/a**
Arithmetic	7				6:2
Processing Speed (PSI)	68	2 nd	63-80	Extremely Low	
Symbol Search	3				<6:2
Coding	5				6:2
Full Scale IQ (FSIQ)	73	4 th	69-78	Very Low	

*This represents the age at which an individual with a FSIQ of 100 would be expected to achieve this level of performance. Age-equivalent scores provide a developmental context for understanding test performance. However, they are psychometrically impure and it is not possible to obtain a confidence interval. Therefore, an age-equivalent should not be interpreted as an exact statistic.

**An age equivalent was not available for Visual Puzzles since there is not a parallel subtest on the WISC-IV. The age equivalent for Digit Span was not interpretable due to significant variability between Digits Forward and Digits Backward.

Mr. Waddy obtained a Verbal Comprehension Index (VCI) score of 78. There is a 95% chance that his true VCI score is between 73 and 85. The VCI is comprised of three subtests—Similarities, Vocabulary, and Information—that collectively measure an individual's ability to apply verbal skills toward comprehending and solving new problems. Individuals must demonstrate the ability to transition between orally presented concepts by drawing upon school-based information and relevant mental images to aid in their verbal response. Mr. Waddy's performance on this index was at the 7th percentile which means that he scored lower than 93% of individuals his age. Mr. Waddy's verbal comprehension performance was similar to that of a 6- to 8-year-old with a FSIQ of 100.

Mr. Waddy obtained a Perceptual Reasoning Index (PRI) score of 79. There is a 95% chance that his true PRI score is between 74 and 86. The PRI is comprised of three subtests—Block Design, Matrix Reasoning, and Visual Puzzles—that collectively measure an individual's ability to mentally manipulate visual patterns to construct abstract concepts while being timed. Individuals must demonstrate the ability to transition between tasks that require them to look at an abstract design, and mentally construct the solution given a set of choice items; their response may require differentiating between choice items, or replicating an abstract design using blocks. Mr. Waddy's performance on this index was at the 8th percentile which means that he scored lower than 92% of individuals his age. Mr. Waddy's perceptual reasoning performance was similar to that of a 6- to 7-year-old with a FSIQ of 100.

Mr. Waddy obtained a Working Memory Index (WMI) score of 86. There is a 95% chance that his true WMI is between 80 and 94. The WMI is comprised of two subtests—Digit Span and Arithmetic—that collectively measure an individual's ability to focus their attention on organizing and remembering information given by the examiner, to either repeat or analyze the information from memory. Individuals must demonstrate an ability to draw upon short-term memory and mathematical skills, to solve word problems and repeat number sequences according to the oral information given by the examiner. Mr. Waddy's performance on this index was at the 18th percentile which means that he scored lower than 82% of individuals his age. The age equivalent for Digit Span was not interpretable due to significant variability between Digits Forward and Digits Backward.

Mr. Waddy obtained a Processing Speed Index (PSI) score of 68. There is a 95% chance that his true PSI score is between 63 and 80. The PSI is comprised of two subtests—Coding and Symbol Search—that collectively measure an individual's ability to differentiate abstract symbols and properly assess where they belong given a set of rules from the examiner. Individuals must demonstrate an ability to scan symbols and concentrate on their pencil marking skills to quickly distinguish or replicate the symbols while being timed. Mr. Waddy's performance on this index was at the 2nd percentile which means that he scored lower than 98% of individuals his age. Mr. Waddy's processing speed performance was similar to that of a 6-year-old with a FSIQ of 100.

Mr. Waddy's performance resulted in a Full Scale IQ (FSIQ) score of 73. There is a 95% chance that his true FSIQ is between 69 and 78. Mr. Waddy's overall performance was at the 4th percentile which means that he scored lower than 96% of individuals his age.

Adaptive Functioning Results:

The ABAS-II is typically administered to a parent or family member who is familiar with the client's current skills as well as those displayed during childhood. However, research has shown that individuals with mild to moderate levels of mental retardation (MR) can provide useful self-report information whereas those with severe MR generally provide unreliable responses. The ABAS-II was administered to Mr. Waddy during the evaluation on 09-07-12. Mr. Waddy attended well during this interview and answered all questions that were presented to him. Mr. Waddy's older sister, Barbara Burrell, was interviewed by phone on 09-25-12 and his younger brother, Anthony Waddy, was interviewed on 09-26-12. All three reporters attempted to answer the questions to the best of their ability.

The Adaptive Behavior Assessment Scale-Second Edition (ABAS-II) is a standardized, comprehensive measure of adaptive skills that measures functional independence and adaptive skills in home, work, and community settings. The ABAS provides three composite scores and a global summary score. The Conceptual Composite assesses communication, functional academics, and self-direction. The Social Composite assesses social interaction skills and use of leisure time. The Practical Composite assesses community use, home living, health and safety and self-care. The Global Composite Score reflects the individual's overall level of adaptive behavior functioning.

ABAS subtest scores have a mean of 10 and the composite scores have a mean of 100 with a standard deviation of 15. The following results were obtained:

Skill Areas	Self-Report		Sister Report		Brother Report	
	Standard Scores	Percentile	Standard Scores	Percentile	Standard Scores	Percentile
Conceptual composite	81	10 th	65	1 st	67	1 st
Communication	7		3		3	
Functional academics	5		5		5	
Self-direction	6		3		4	
Social composite	68	2 nd	70	2 nd	66	1 st
Leisure	2		4		4	
Social	5		5		3	
Practical composite	82	12 th	70	2 nd	75	5 th
Community use	8		4		6	
Home living	7		7		7	
Health & safety	4		3		4	
Self-care	7		5		6	
Global Composite Score	75	5 th	61	<1 st	62	1 st

Mr. Waddy's self-report appeared to overestimate his abilities in comparison to the reports from his siblings. According to both siblings, Mr. Waddy experienced difficulty performing skills necessary to function effectively in a variety of domains. His Global Composite Score ranged from 61 to 75 (confidence intervals ranged from 58 to 78) and indicated that his adaptive skills are lower than 95 to 99% of adults. Examples of Mr. Waddy's reported skills in the various areas of adaptive functioning are provided below.

Conceptual Composite. In terms of **communication**, Ms. Burrell reported that Warren was not able to state his own telephone number or address. In addition, Mr. Anthony Waddy related that his brother had difficulty looking at others' faces when they were talking and ending conversations appropriately. Both siblings noted that Warren "stayed to himself" when he was living at home he was often "distant" and sat in his chair most of the time. In terms of **functional academics**, Ms. Burrell reported that Warren would not have been able to find a phone number in a telephone book nor would he have been able to count his change after making a purchase. Warren indicated that he did not know how to complete a form to obtain a lease, read classified ads

to find a job or balance a checkbook. In terms of **self-direction**, Ms. Burrell and Warren related that he did not avoid situations at home or in the neighborhood that were likely to result in trouble. In addition, Mr. Anthony Waddy related that Warren did not complete simple household chores and allowed other family members to take on these responsibilities.

Social Composite. In terms of **leisure skills**, all three reporters agreed that Warren never looked at books or magazines and never played with them. In terms of **social skills**, Mr. Anthony Waddy indicated that his brother was not able to keep a stable group of friends. Further, Warren reported that he did not show good judgment in selecting friends nor was he able to listen to friends or family members who needed to talk about their problems.

Practical Composite. In terms of **community use**, Mr. Anthony Waddy reported that Warren was not able to order his own meal when eating out. In addition, Ms. Burrell indicated that Warren was not able to follow another's directions to nearby places nor was he able to call a doctor or hospital when ill or hurt. Warren related that he never called a repairperson if something needed to be fixed and that he relied on his girlfriend, Kay, to do these types of things. In terms of **home living**, Ms. Burrell reported that her Warren did not help with cleaning projects at home and that when other family members were engaged in these types of tasks Warren would be "sitting in his chair, bumping his head." Mr. Anthony Waddy indicated that Warren did not clean his room or the bathroom and, in general, did not do any chores at home. Warren related that he never folded his clothes or made his bed. In terms of **health and safety**, Ms. Burrell and Warren agreed that he never followed safety rules at home or in public nor was he capable of taking medications on his own. Ms. Burrell also reported that Warren never bought medication when he was sick and Warren related that he would "send a girl." In terms of **self-care**, Ms. Burrell and Mr. Anthony Waddy agreed that Warren never got out of bed on time by himself and Ms. Burrell related that their mother usually helped Warren pick out correct clothes for the weather and cut his fingernails.

Summary:

Warren Waddy is a 58-year-old African American male who is currently on death row at the Chillicothe Correctional Institute. An assessment for mental retardation was requested by his attorney, Ms. Vicki Werneke, Federal Public Defender. Historical information suggests an IQ in the mild mental retardation range that was documented at age 14. Further, Mr. Waddy attended a residential school for children with behavior problems and mental retardation (i.e., Beaumont) and a professional at this school recommended that he be sent to a school for African-American boys with mental retardation (i.e., Petersburg). His childhood history is also positive for a number of behaviors that are common in children with mental retardation including head-banging, rocking and nocturnal enuresis. Further, as an adult, Dr. Smalldon noted that "he exhibits an emotional maturity that I would liken to that of an elementary school-age child."

With regard to the adaptive behavior assessment, all of the data collected is consistent with adaptive functioning in the mild mental retardation range. However, my confidence in this data is limited by not having an opportunity to interview a family member who lived with Mr. Waddy as an adult. Nonetheless, the majority of the available evidence suggests that his adaptive functioning was significantly limited.

Cognitive testing conducted by this examiner using the WAIS-IV resulted in a FSIQ score of 73. The confidence interval (CI) for this score ranges from 69 to 78 suggesting that Mr. Waddy's IQ is in the extremely low to very low range. In addition, Mr. Waddy's performance resulted in age equivalents ranging from less than 6-years to 8.5-years of age. These current results are considered to be an accurate reflection of Mr. Waddy's current cognitive functioning. These results are consistent with previous testing from 1968 (FSIQ = 72, CI = 67-77). Although both the current results and the 1968 results are lower than the results from 1995 (FSIQ = 83, CI = 78-88), the current results have overlapping confidence intervals with the 1968 and 1995 results. The Flynn effect may also be a factor.

The Flynn effect was documented by a political scientist, James Flynn (1984; 1987; 1998), and results in normative data for IQ tests becoming obsolete as people perform better on the test over time. IQ tests are typically re-normed every 15 to 20 years (Kanaya, Scullin & Ceci, 2003) so that a score of 100 will again correspond with the 50th percentile. As a result, an individual would be expected to score lower on a test with new norms as compared to a test with older norms. To determine if the Flynn effect will help us understand the variability across Mr. Waddy's scores, adjusted FSIQ scores were calculated based on the formula of deducting 0.3 points per year since norming (Frumkin, 2003; Flynn, 2006; Trowbridge, 2003). The following table shows the scores achieved by Mr. Waddy and adjusted scores based on this formula:

Test	FSIQ Score (CI)	Year published	Year administered	Years since norming	Adjustment (Years x 0.3)	Adjusted FSIQ (CI)
WISC	72 (67-77)	1949	1968	19	5.7	66 (61-71)
WAIS-R	83 (78-88)	1981	1995	14	4.2	79 (74-84)
WAIS-IV	73 (69-78)	2008	2012	4	1.2	72 (68-77)

It should be noted that in all three administrations, the most recent test available was used. Specifically, the WISC-R was not released until 1974 which was six years after the 1968 administration. Similarly, the WAIS-III was not released until 1997 which was two years after the 1995 administration. Although these tests were the best available at the time of administration, the inconsistency in time since norming might have contributed to the variability in scores. Although the magnitude of the discrepancy among the adjusted FSIQ scores is not smaller than the magnitude of the discrepancy among the original FSIQ scores, the adjusted FSIQ scores as a group are lower than the original FSIQ scores.

Even after accounting for the Flynn effect, there is a discrepancy among the three IQ scores with the WAIS-R being higher than the other two. In an attempt to explain this discrepancy, Dr. Hartung reviewed the raw data from Dr. Smalldon's WAIS-R administration. No errors in scoring were identified that could explain this discrepancy. Next, Dr. Hartung consulted the literature to determine if there are any documented differences between WAIS-R scores and more recent versions of the Wechsler tests (i.e., WAIS-III and WAIS-IV). There is evidence suggesting that it is not unusual for different IQ tests, consisting of different subtests, to result in significantly different scores (Floyd, Clark & Shadish, 2008). Floyd et al. reported that 25% of individuals who have been administered multiple test batteries will have at least one IQ scores that differs from the others by 10 points or more. It is notable that all of Mr. Waddy's scores have overlapping confidence intervals. Therefore, we can assume that all three tests are valid. Nonetheless, the most weight should be given to the WAIS-IV because it is considered superior to the older Wechsler tests. Specifically, it correlates more strongly with the concept of general intelligence than previous versions (Floyd et al., 2008).

When historical information, IQ testing, and adaptive behavior testing are considered, the majority of the available evidence indicates that Mr. Waddy is functioning in the mild mental retardation range and has been performing at this level since childhood. Therefore, with a reasonable degree of psychological certainty, I conclude that Mr. Waddy has mild mental retardation.

Please feel free to contact me at 307-460-0119 or chartung@uwyo.edu regarding this report.



Cynthia M. Hartung, Ph.D.
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Relevant Credentials:

Dr. Cynthia Hartung is an Associate Professor of Psychology at the University of Wyoming. She earned her Ph.D. in Clinical Psychology from the University of Kentucky in Lexington, and subsequently completed her internship at the University of Chicago Medical Center. Dr. Hartung then completed postdoctoral fellowships at the Oregon Health Sciences University in Portland and at the University of Denver in Colorado. Dr. Hartung is licensed as a clinical psychologist in three states and has 23 years of clinical experience. Her clinical interests include: (1) assessment and treatment of childhood disruptive behavior disorders and (2) assessment of learning disorders and developmental disabilities including mental retardation. For the last seven years, Dr. Hartung has taught a graduate seminar in psychological assessment to clinical psychology doctoral students with an emphasis on the assessment of ADHD, learning disorders and mental retardation. This facilitates staying current with the literature on psychological assessment and psychometrics. Dr. Hartung is the author or co-author of 30 publications and manuscripts on child psychopathology, and has made numerous presentations nationally and internationally. In addition, Dr. Hartung is a member of multiple professional organizations including the Association for Behavioral and Cognitive Therapies, American Association for Intellectual and Developmental Disabilities, the International Society for Research in Child and Adolescent Psychopathology and the Society for Clinical Child and Adolescent Psychology.

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Professional Positions & Education

Associate Professor , Department of Psychology University of Wyoming, Laramie, Wyoming	2010-present
Adjunct Professor , Gender and Women's Studies Program University of Wyoming, Laramie, Wyoming	2010-present
Assistant Professor , Department of Psychology University of Wyoming, Laramie, Wyoming	2007-2010
Assistant Professor , Department of Psychology Oklahoma State University, Stillwater, Oklahoma	2002-2007
Postdoctoral Research Fellow , Departments of Psychology and Psychiatry University of Denver and University of Colorado Health Sciences Center	1999-2002
Postdoctoral Clinical Fellow , Child Development & Rehabilitation Center Oregon Health Sciences University, Portland, Oregon	1998-1999
Psychology Intern , The University of Chicago Medical Center APA Approved Clinical Psychology Internship, Child Track	1997-1998
Doctor of Philosophy , University of Kentucky-Lexington APA Approved Clinical Psychology Program	1993-1998
Master of Arts , University of Kentucky-Lexington APA Approved Clinical Psychology Program	1991-1993
Bachelor of Science , University of Wisconsin-Madison, Major: Psychology	1986-1990

Honors, Awards, and Internal Grant Funding

Psi Chi International Honor Society in Psychology, Faculty Advisor Research Grant (\$2,000), 2011
University of Wyoming, Faculty Grant-In-Aid (\$7,500), 2008-2009
University of Wyoming, College of Arts & Sciences, Basic Research Grant (\$2,000), 2007-2008
National Institutes of Health, Clinical Research Loan Repayment Program (\$28,382), 2002-2008
Oklahoma State University, College of Arts & Sciences, Summer Research Award (\$5,000), 2006
Oklahoma State University, Big XII Faculty Fellowship, Faculty Development Award (\$2,000), 2003-2004
Oklahoma State University, College of Arts & Sciences, Summer Research Award (\$5,000), 2003
University of Kentucky, Graduate School Visiting Scholar Award (\$2,000), 1998
University of Kentucky, Graduate School Dissertation Year Fellowship (\$14,000), 1995-1996
University of Kentucky, Department of Psychology, Jesse G. Harris Dissertation Award (\$1,000), 1995
University of Kentucky, Haggin Graduate School Fellowship (\$10,000), 1991-1992

External Grant Funding

National Institute of Child Health and Human Development, F32 for \$23,096, 2002
The Role of Inhibition in Disruptive Behavior Disorders (1 F32 HD40717-01A1)
National Institute of Mental Health, Dissertation Grant, RO3 for \$25,000, 1995-1997
Understanding Disinhibition in Adolescents with ADHD and CD (1 R03 MH54859-01)

Grant Proposal to be Submitted

National Institute of Mental Health, Academic Research Enhancement Award (R15). Establishing Developmentally-Sensitive Criteria for ADHD in Emerging Adulthood. Will resubmit on 10-25-12.

Publications

- Wilkowski, B. M., **Hartung, C. M.**, Crowe, S. E., & Chai, C. A. (in press). Men don't just get mad, they get even: Revenge but not anger mediates gender differences in physical aggression. *Journal of Research in Personality*.
- Lefler, E. K., **Hartung, C. M.**, & Fedele, D. A. (2012). Predictive validity of a primary care mental health screener in a pediatric sample. *Children's Health Care*, 41, 1-17.
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- Bartgis, J., Lefler, E. K., **Hartung, C. M.**, & Thomas, D. G. (2009). Contrast sensitivity in children with and without attention-deficit/hyperactivity disorder symptoms. *Developmental Neuropsychology*, 34, 663-681.
- Lefler, E. K., **Hartung, C. M.**, Scambler, D. J., Page, M. C., Sullivan, M. A., Armendariz, M. L., Isenberg, J. C., & Warner, C. (2009). Effects of a social skills intervention for children with peer relationship problems. *NHSA Dialog: A Research-to-Practice Journal for the Early Intervention Field*, 12, 18-32.
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- Hartung, C. M.** & Scambler, D. J. (2007). Approaches to measuring, preventing, and decreasing bullying and victimization in schools. In S. W. Evans, M. D. Weist & Z. N. Serpell (Eds.), *Advances in school-based mental health interventions* (Vol. 2, pp. 13:1-13:17). New York: Civic Research Institute.
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- Lefler, E. K., **Hartung, C. M.**, Bartgis, J., & Thomas, D. G. Sex differences in ADHD in American Indian children.
- Sigel, B. A., **Hartung, C. M.** & Allen, E. K. Video-based parenting education in college students: Program effectiveness and sex differences
- Willcutt, E. G., Barnard, H., **Hartung, C. M.**, Santerre-Lemmon, L., Bidwell, L. C., Chhabildas, N. A., Banich, M. T., DeFries, J. C., Lefler, E. K., & Pennington, B. F. The neuropsychology of ADHD: A comparison of five competing theories.

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- Jaconis, M., **Hartung, C. M.**, McCrea, S. M., Boyd, S., Lefler, E. K. & Canu, W.H. Relations among ADHD, sex and self-handicapping.
- Hartung, C. M.** & Canu, W. H. A comparison of the *DSM-IV* and proposed *DSM-V* cutoffs for ADHD in adults in a college student sample.
- Wolf, K. L. H., **Hartung, C. M.**, Cleveland, C. S. & Wilkowski, B. M. Sex and grade differences in self-reported bullying and victimization: Implications for intervention.
- Hartung, C. M.**, Lefler, E. K., & McBurnett, K. Sex differences in children with behavior problems as rated by teachers.
- Mileviciute, I., Scott, W. D. & Hartung, C. M. The role of self-efficacy, depression, externalizing problems,

- and gender in alcohol use among American Indian youth of Northern Plains tribe.
- Lefler, E. K., **Hartung, C. M.**, Scott, W. D., Hipol, L. J. & Leigh, A. Parent mental health screening tool in an American Indian school predicting discipline problems for K through 8th graders.
- Canu, W. H., Broman-Fulks, J. J., Orlando, C. A., Stevens, A. E., Steele, E. H., Nieman, D. C., Fedele, D. A. & **Hartung, C. M.** A taxometric analysis of ADHD symptomatology in college and community adult samples.

Presentations

- Canu, W. H., **Hartung, C. M.** & Lefler, E. K. (November, 2012). Recruitment of representative adult ADHD samples. Panel discussion submitted to the 44th meeting of the Association for Behavioral and Cognitive Therapies, National Harbor, Maryland.
- Hartung, C. M.**, Lefler, E. K. & Canu, W. H. (November, 2012). Evidence-based assessment of ADHD in college students. Panel discussion submitted to the 44th meeting of the Association for Behavioral and Cognitive Therapies, National Harbor, Maryland.
- Lefler, E. K., **Hartung, C. M.** & Canu, W. H. (November, 2012). Evidence-based treatment of ADHD in emerging adults. Panel discussion submitted to the 44th meeting of the Association for Behavioral and Cognitive Therapies, National Harbor, Maryland.
- Egan, T. E., Canu, W. H., **Hartung, C. M.** & Lefler, E. K. (November, 2012). An examination of differences associated with age of diagnosis in adults with ADHD. Poster submitted to the 44th meeting of the Association for Behavioral and Cognitive Therapies, National Harbor, Maryland.
- Jaconis, M., **Hartung, C. M.**, & McCrea, S. M. (2011). Relations among ADHD, sex and self-handicapping. Poster presented at the 43rd meeting of the Association for Behavioral and Cognitive Therapies, Toronto, Ontario, Canada.
- Hartung, C. M.** (2011). Gender differences in the clinical presentation, treatment and outcome of children with ADHD. Symposium discussant at the 43rd meeting of the Association for Behavioral and Cognitive Therapies, Toronto, Ontario, Canada.
- Lefler, E. K., **Hartung, C. M.**, Fedele, D.A., Willcutt, E. G., & Pennington, B. F. (2011). Assessment of developmental psychopathology: Comparison of mother, father, and teacher ratings. Poster presented at the 15th meeting of the International Society for Research in Child and Adolescent Psychopathology, Chicago, Illinois.
- Allen, E. K., **Hartung, C. M.**, Lefler, E. K., & Scott, W. D. (2010). Mental health screening in an American Indian school: Parent report data for K through 8th graders. Poster presented at the 42nd meeting of the Association for Behavioral and Cognitive Therapies, San Francisco, California.
- Angiola, J. E., **Hartung, C. M.**, Allen, E. K., & McKay, W. (2010). Psychometric properties of a parent-report mental health screener used with incoming kindergartners. Poster presented at the 42nd meeting of the Association for Behavioral and Cognitive Therapies, San Francisco, California.
- Allen, E. K. & **Hartung, C. M.** (2010). Understanding parental help-seeking for childhood behavior problems. Poster presented at the 9th biennial Kansas Conference in Clinical Child Psychology, Lawrence, Kansas.
- Lefler, E. K., Fedele, D. A., **Hartung, C. M.**, Willcutt, E. G. & Pennington, B. F. (2010). Sex differences in a community sample of children and adolescents with and without ADHD: Analyses by ADHD subtype and age. Poster presented at the 9th biennial Kansas Conference in Clinical Child and Adolescent Psychology, Lawrence, Kansas.
- Little, C. S., **Hartung, C. M.**, Allen, E. K. & Jaconis, M. (2010). Secondary school reports of bullying and victimization: When "doing nothing" is "doing something." Poster presented at the 9th biennial Kansas Conference in Clinical Child Psychology, Lawrence, Kansas.
- Allen, E. K., **Hartung, C. M.**, Lefler, E. K., Little, C. S., Deacon, B. J. & McKibbin, C. L. (2009). Primary care screening for psychopathology in women. Poster presented at the 41st meeting of the Association for Behavioral and Cognitive Therapies, New York, New York.
- Fedele, D. A., **Hartung, C. M.**, Canu, W. H., Lefler, E. K., & Little, C. S. (2009). Sex differences in inattention, hyperactivity, and impairment in emerging adults with ADHD. Poster presented at the 41st meeting of the Association for Behavioral and Cognitive Therapies, New York, New York.

- Little, C. S., Fedele, D. A., Mignogna, M. J., **Hartung, C. M.**, Leffingwell, T., Correia, C., Canu, W. H., & Allen, E. K. (2009). Correlates of prescription stimulant abuse in a college population. Poster presented at the 41st meeting of the Association for Behavioral and Cognitive Therapies, New York.
- Hartung, C. M.** & McKay, B. (2009). Evidence-based treatments for disruptive behavior disorders. Invited address at the Dual RtI Conference, Wyoming Department of Education, Laramie, Wyoming.
- Hartung, C. M.** (2009). Evidence-based assessment for ADHD and learning disorders. Invited address presented at the 3rd Annual Wyoming Special Education Leadership Symposium, Lander, Wyoming.
- Hartung, C. M.**, Lefler, E. K., Little, C. S., Allen, E. K., Deacon, B. J. & McKibbin, C. L. (2009). Pediatric screening for child and adolescent psychopathology. Poster presented at the 14th meeting of the International Society for Research in Child and Adolescent Psychopathology, Seattle, Washington.
- Fedele, D. A., **Hartung, C. M.**, Canu, W. H., Wilkowski, B. M., Lefler, E. K., & Little, C. S. (2009). Multisite study of new ADHD symptoms in college students. Poster presented at the 14th meeting of the International Society for Research in Child and Adolescent Psychopathology, Seattle, Washington.
- Lefler, E. K., **Hartung, C. M.**, Fedele, D. A. & Little, C. S. (2009). Predictive validity of a mental health screener used in primary care for early identification of disruptive behavior disorders. Poster presented at the meeting of the Society for Research in Child Development, Denver, Colorado.
- Little, C. S., **Hartung, C. M.**, Page, M. C., Lefler, E. K. & Fedele, D. A. (2008). A comparison of student-report measures of bullying and victimization in schools. Poster presented at the 8th biennial Kansas Conference in Clinical Child Psychology, Lawrence, Kansas.
- Fedele, D. A., **Hartung, C. M.**, Canu, W. H., Lefler, E. K., & Little, C. S. (2008). Multisite cross-validation of proposed adult ADHD criteria in college students. Poster presented at the 8th biennial Kansas Conference in Clinical Child Psychology, Lawrence, Kansas.
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- Lefler, E. K., **Hartung, C. M.**, Bartgis, J., & Thomas, D. G. (2007). Inattention and hyperactivity in American Indian and non-American Indian children. Poster presented at the 13th meeting of the International Society for Research in Child and Adolescent Psychopathology, London, England.
- Bidwell, L. C., Willcutt, E. G., **Hartung, C. M.**, Shanahan, M. A., Santerre-Lemmon, L., Benard, H. & Pennington, B. F. (2007). The neuropsychology of ADHD. Poster presented at the 13th meeting of the International Society for Research in Child and Adolescent Psychopathology, London, England.
- Szalay, C. S., Little, C. S., **Hartung, C. M.** & Page, M. C. (2007). Childhood bullying: Assessment measures and relation to empathy. Poster presented at the annual meeting of the Southeastern Psychological Association, New Orleans, Louisiana.
- Lefler, E. K., **Hartung, C. M.**, Fedele, D., Bartgis, J., Armendariz, M. L., & Sigel, B. A. (2006). Sex differences in relations among ADHD, disinhibition and personality in college students. Poster presented at the 38th meeting of the Association for Behavioral and Cognitive Therapies, Chicago.
- Lefler, E. K. & **Hartung, C. M.** (2006). Sex and developmental differences in the prevalence of disruptive behavior disorder symptoms in a pediatric sample. Poster presented at the 7th biennial Kansas Conference in Clinical Child Psychology, Lawrence, Kansas.
- Sigel, B. A. & **Hartung, C. M.** (2006). Evaluation of a brief parent-training program for increasing parenting knowledge and changing maladaptive beliefs in expectant parents. Poster presented at the 7th biennial Kansas Conference in Clinical Child Psychology, Lawrence, Kansas.
- Armendariz, M. L., **Hartung, C. M.**, & Lefler, E. L. (2005). Effects of child ethnicity and sex on rater's judgments of ADHD and ODD. Poster presented at the 37th meeting of the Association for Behavioral and Cognitive Therapies, Washington, District of Columbia.

- Hartung, C. M.** (2005). Evidence-based assessment of ADHD and LD. Invited address at the Annual Meeting of the Oklahoma Psychological Association, Oklahoma City, Oklahoma.
- Bartgis, J., **Hartung, C. M.**, Lynam, D. R., Brinlee, L. & Rule, J. (2005). Relations among hyperactivity, inattention, conduct problems, and youth psychopathy in adolescents. Poster presented at the biennial meeting of the Society for Research in Child Development, Atlanta, Georgia.
- Bartgis, J., **Hartung, C. M.**, & Thomas, D. G. (2004). The relation of contrast sensitivity and ADHD: Discriminant validity and correlations with laboratory measures. Poster presented at the 36th meeting of the Association for the Advancement of Behavior Therapy, New Orleans, Louisiana.
- Van Pelt, J. C., **Hartung, C. M.**, Scambler, D. J., Sullivan, M. A., Knight, L., Page, M. C. & Lefler, E. K. (2004). Social skills and problem solving training. Poster presented at the 36th meeting of the Association for the Advancement of Behavior Therapy, New Orleans, Louisiana.
- Hartung, C. M.**, Van Pelt, J., Knight, L. A., & Armendariz, M. L. (2004). Biases in ratings of disruptive behavior: Effects of sex and negative halos. Paper presented at the 6th biennial Kansas Conference in Clinical Child Psychology, Lawrence, Kansas.
- Hartung, C. M.**, & Wernecke, V. (2004). Litigating mental retardation. Invited address at the Criminal Defense in the Death Belt Conference, Edmond, Oklahoma.
- Hartung, C. M.**, Van Pelt, J. C., & Knight, L. A. (2003). Sex bias in adult ratings of child psychopathology. Poster presented at the 35th meeting of the Association for the Advancement of Behavior Therapy, Boston, Massachusetts.
- Hartung, C. M.** & Scambler, D. J. (2003). Implementing bullying prevention programs in schools. Invited address at the Oklahoma Safe and Healthy Schools Conference, Edmond, Oklahoma.
- Hartung, C. M.**, Pennington, B. F., Willcutt, E. G., & Van Pelt, J. C. (2003). The role of inhibition in disruptive behavior disorders. Poster presented at the 11th scientific meeting of the International Society for Research in Child and Adolescent Psychopathology, Sydney, Australia.
- Hartung, C. M.**, Friedman, M., Willcutt, E. G., & Pennington, B. F. (2003). Sex differences in children and adolescents with and without attention-deficit/hyperactivity disorder. Poster presented at the biennial meeting of the Society for Research in Child Development, Tampa, Florida.
- Hartung, C. M.**, McCarthy, D. M., Milich, R., & Martin, C. A. (2002). Parent-adolescent agreement on disruptive behavior symptoms: A multitrait-multimethod model. Paper presented at the 5th biennial Kansas Conference in Clinical Child Psychology, Lawrence, Kansas.
- Hartung, C. M.**, Milich, R., Lynam, D., & Martin, C. A. (2001). Understanding the relations among gender, disinhibition, and disruptive behavior in adolescents. Poster presented at the 10th meeting of the International Society for Research in Child and Adolescent Psychopathology, Vancouver, Canada.
- Hartung, C. M.**, Willcutt, E. G., Lahey, B. B., Pelham, W. E., Loney, J., Keenan, K., & Steiner, R. (2000). Gender differences in preschoolers with attention-deficit/hyperactivity disorder. Paper presented at the 4th biennial Kansas Conference in Clinical Child Psychology, Lawrence, Kansas.
- Hartung, C. M.**, Newman, J. P., Kyriannis, J. & Martin, C. A. (1999). Understanding the relation between disruptive behavior and disinhibition in adolescents. Poster presented at the biennial meeting of the Society for Research in Child Development, Albuquerque, New Mexico.
- Martin, C. A., Milich, R., **Hartung, C. M.**, Lynam, D., Haigler, E. D., & Rayens, M. K. (1997). Substance use in adolescents correlates with depression and impulsivity. Poster presented at the 28th annual conference of the American Society of Addiction Medicine, San Diego, California.
- Milich, R., Lorch, E. P., Hooks, K., **Hartung, C. M.**, et al. (1993). The use of television viewing methodology to understand the comprehension of ADHD boys. Poster presented at the 7th scientific meeting of the Society for Research in Child and Adolescent Psychopathology, Santa Fe, California.
- Hartung, C. M.**, Milich, R., Martin, C. A., & Haigler, E. D. (1993). Comparison of mother and adolescent reports of disruptive behavior: Reliability and validity assessments. Poster presented at the annual meeting of Kentucky Psychological Association, Louisville, Kentucky.
- Hartung, C. M.**, Milich, R., Martin, C. A., & Haigler, E. D. (1993). Disinhibition and underlying processes in hyperactive and aggressive adolescents. Poster presented at the annual meeting of the American Psychological Association, Toronto, Ontario, Canada.

Martin, C., Milich, R., Haigler, T., **Hartung, C.**, & Mainus, A. (1993). Adolescents in rural Appalachia: Depression vs. acting out. Poster presented at the 40th annual meeting of the American Academy of Child and Adolescent Psychiatry, San Antonio, Texas.

Hartung, C. M., Milich, R., & Pelham, W. E. (1992). Response perseveration in ADHD boys. Paper presented at the Kentucky Conference on Advanced Studies in Psychopathology, Lexington.

Teaching & Professional Workshops

Albany County School District, Division of Special Services, 2010-present

Professional Training Workshops: Incredible Years Teacher Classroom Management Training

University of Wyoming, Department of Psychology, 2007-present

Undergraduate Instructor: Developmental Psychopathology and Gender Development

Graduate Instructor: Cognitive Assessment, Developmental Psychopathology, and Practicum Team

Oklahoma State University, Department of Psychology, 2002-2007

Undergraduate Instructor: Introduction to Clinical Psychology and Abnormal Psychology

Graduate Instructor: Child Psychopathology, Cognitive Assessment, and Practicum Team

University of Denver, Department of Psychology, 2000-2002

Undergraduate Instructor: Clinical Psychology and Child Psychopathology

Metropolitan State College of Denver, Department of Psychology, 2000

Undergraduate Instructor: Child Development

University of Kentucky, Department of Psychology, 1992-1993

Teaching Assistant: Statistics for Behavioral Sciences

Clinical Experience

Licensed Psychologist in the State of Wyoming since February 28, 2008 (#457)

Albany County School District, Division of Special Services, 2010-present

Clinical Psychologist: Conducted psychoeducational assessments and psychotherapy for children and adolescents with emotional, behavioral, and learning problems.

University of Wyoming, Department of Psychology, 2008-present

Clinical Supervisor: Supervised clinical psychology graduate students conducting assessments and therapy.

Oklahoma Indigent Defense System, State of Oklahoma, 2003-2007

Clinical Psychologist: Conducted psychological and mental retardation assessments of criminal defendants and death row inmates and provided expert testimony.

Oklahoma State University, Department of Psychology, 2002-2007

Clinical Supervisor: Supervised clinical psychology graduate students conducting assessments and therapy.

University of Denver, Developmental Neuropsychology Clinic, 1999-2002

Outpatient Evaluator: Completed neuropsychological assessments of children and adolescents.

Oregon Health Sciences University, Child Development and Rehabilitation Center, 1999

Clinical Supervisor: Supervised clinical psychology interns during evaluations of children ages one to five.

Oregon Health Sciences University, Child Development & Rehabilitation Center, 1998-1999

Postdoctoral Fellow: Provided outpatient therapy and assessments for children and adults.

The University of Chicago Medical Center, Department of Psychiatry, 1997-1998

Psychology Intern: Provided outpatient therapy and assessments for children and adolescents.

University of Kentucky, Jesse G. Harris Psychological Services Center, 1992-1997

Outpatient Therapist: Provided outpatient therapy, assessments and social skills training.

Eastern State Hospital, Lexington, Kentucky, 1993-1994

Psychology Affiliate: Provided inpatient therapy and conducted assessments of adults.

Western Psychiatric Institute and Clinic, Attention Deficit Disorder Program, 1989-1991

Provided day treatment services to children with behavior and learning problems for three summers.

Membership in Professional Associations

Association for Behavioral and Cognitive Therapies (ABCT)
Children and Adults with Attention Deficit Hyperactivity Disorder (CHADD)
International Society for Research in Child and Adolescent Psychopathology (ISRCAP)
Society for Clinical Child and Adolescent Psychology (SCCAP; Division 53 of APA)

Ad Hoc Reviewer

Aggressive Behavior (2011-2012)
Archives of General Psychiatry (2006)
Child and Adolescent Mental Health (2009-2010)
Developmental Neuropsychology (2008-2009)
Educational Psychology (2009 to 2011)
International Journal of Behavioral Development (2003 to 2011)
Journal of Abnormal Child Psychology (2001 to 2012)
Journal of Abnormal Psychology (2002 to 2011)
Journal of Child and Family Studies (2009 to 2012)
Journal of Child Psychology and Psychiatry (2009 to 2012)
Journal of Clinical Child and Adolescent Psychology (2002 to 2012)
Journal of Consulting and Clinical Psychology (2004 to 2012)
Journal of Personality (2006)
Journal of Psychopathology and Behavioral Assessment (2007)
Psychological Assessment (2006 to 2011)
Psychological Bulletin (2005)

Theses and Dissertations Chaired

- Monica L. Armendariz, M.S. (2005). Effects of child ethnicity and sex on rater's judgments of child psychopathology. Oklahoma State University.
- Elizabeth K. Lefler, M.S. (2005). Sex and developmental differences in the prevalence of disruptive behavior disorder symptoms in a pediatric sample. Oklahoma State University.
- Benjamin A. Sigel, M.S. (2006). Evaluation of a brief parenting program for increasing parenting knowledge and self-efficacy. Oklahoma State University.
- Carolyn S. Little, M.S. (2007). Measurement of bullying and victimization in elementary school children. Oklahoma State University.
- David A. Fedele, M.S. (2008). Multisite cross-validation of proposed adult ADHD criteria in college students. Oklahoma State University.
- Elizabeth K. Lefler, Ph.D. (2009). Predictive validity of a mental health screener used in primary care for early identification of disruptive behavior disorders. Oklahoma State University.
- Benjamin A. Sigel, Ph.D. (2009). One-year follow-up of the effectiveness of a brief parent training program in college students. Oklahoma State University.
- Erica K. Allen., M.S. (2010). Understanding parental help-seeking for childhood behavioral problems. University of Wyoming.
- Maryanne Jaconis., M.S. (2012). Sex differences in impairment of emerging adults with ADHD: Are differences real or due to reporter biases? University of Wyoming.
- Carolyn S. Cleveland, Ph.D. (2013, expected). Computerized alcohol interventions for mandated college students: Are ADHD symptoms related to outcomes? University of Wyoming.

Departmental and University Service

A&S Scholarship Committee, University of Wyoming, College of Arts & Sciences 2010-present
 Psi Chi Committee, Co-Advisor, University of Wyoming, Department of Psychology, 2009-present
 Clinical Transfer/Waiver Committee, University of Wyoming, Department of Psychology, 2008-present
 Faculty Search Committee, University of Wyoming, Department of Psychology, 2010-2011
 Speaker Committee, Chair, University of Wyoming, Department of Psychology, 2009-2010
 Development Committee, University of Wyoming, Department of Psychology, 2008-2009
 Research Participation Committee, Chair, University of Wyoming, Department of Psychology, 2007-2009
 Clinical Clerkship Committee, University of Wyoming, Department of Psychology, 2007-2008
 Undergraduate Curriculum Committee, University of Wyoming, Department of Psychology, 2007-2008
 Faculty Search Committee, Oklahoma State University, Department of Psychology, 2002-2007
 Academic Review Committee, Oklahoma State University, Department of Psychology, 2006-2007
 Diversified Students Committee, Oklahoma State University, Department of Psychology, 2005-2006
 Scholarship and Awards Committee, Oklahoma State University, Department of Psychology, 2004-2005

Professional References

- Benjamin B. Lahey, Ph.D., Department of Psychiatry, University of Chicago,
 5841 South Maryland Avenue, MC3077, Chicago, IL 60637
- Richard Milich, Ph.D., Department of Psychology, University of Kentucky,
 125 Kastle Hall, Lexington, KY 40506
- Bruce F. Pennington, Ph.D., Department of Psychology, University of Denver,
 2155 South Race Street, Denver, CO 80208

Additional References Available Upon Request

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Academic appointments:

Emeritus Prof. (Ed. Psychology): University of Connecticut

Clinical Prof. (Psychiatry): University of Colorado

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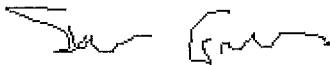
September 5, 2013

Dear Ms. Werneke:

Attached please find an affidavit by me regarding the Intellectual Disability (Mental Retardation) status of your client, Warren Waddy.

I shall be glad to answer any questions you or your colleagues may have regarding this affidavit.

Sincerely,



Stephen Greenspan, PhD
Psychological Consultant

Encl.: Report

AFFIDAVIT OF STEPHEN GREENSPAN, Ph.D.

I, Stephen Greenspan, being duly cautioned and sworn, state as follows:

All of the facts contained in this affidavit are known to me personally and if called as a witness, I could and would testify thereto.

BACKGROUND

1. Warren Waddy is a 59-year-old African-American man who is a condemned prisoner residing on Ohio's death row in Chillicothe. He was convicted in September 1987 for the July 1986 murder and robbery of 22-year-old Paula Mason in her Columbus home. Mr. Waddy has previously raised a claim, under *Atkins v. Virginia*, that he should be exempt from the death penalty because he has Mental Retardation (now termed Intellectual Disability; I shall henceforth use the new term, or its abbreviation, "ID"). For procedural and other reasons, this claim has previously been rejected. It is my understanding that Mr. Waddy's habeas attorneys are seeking to have the issue reconsidered by the courts. In August of this year, Mr. Waddy's attorneys contacted me and asked me to examine Mr. Waddy's voluminous case materials, including reports by earlier experts. As an established national expert in the field of MR/ ID, who has testified in a number of Atkins proceedings, I was asked to examine Mr. Waddy's case file and render an opinion regarding his *Atkins* claim.

REFERRAL QUESTIONS:

2. Specifically, I was asked to respond to the following referral questions:

Question one: "When considering all of the prior psychological reports, reviews and available background information, does it appear that Warren Waddy's functioning meets the criteria for someone with Intellectual Disability, as specified both in national clinical manuals and guiding court rulings in the state of Ohio?"

Question two: "If it is your opinion that Warren Waddy qualifies for a diagnosis of Intellectual Disability, how do you explain or dispute other written opinions that reached a different conclusion?"

MY QUALIFICATIONS

3. My qualifications are more fully summarized in the attached *curriculum vitae*. One notable accomplishment not included in the CV is that I am the most-cited authority in the ID section in the forthcoming DSM-5 (in the final draft circulated to the public prior to publication; the actual published version did not contain citations). In the 2002 and 2010 diagnostic manuals of the American Association

on Intellectual and Developmental Disabilities (which did contain references) I was also the most-cited authority.

4. Over the past several years, I have been qualified as an expert in psychology and Intellectual Disabilities by approximately 20 state or Federal judges, in so-called "Atkins" (death penalty exemption) proceedings, at various stages: pre-trial, penalty and habeas. In addition, I have been used as a consultant in numerous other cases. In a sizeable percentage of these cases, I have not supported a diagnosis of ID.
5. I am a Clinical Professor of Psychiatry at the University of Colorado Health Sciences Center, and Emeritus Professor of Educational Psychology at the University of Connecticut. I received a Ph.D. in Developmental Psychology from the University of Rochester, and was a Postdoctoral Fellow in Mental Retardation and Developmental Disabilities at UCLA's Neuropsychiatric Institute.
6. I have been elected "Fellow" (a designation given only to the most qualified members) by the MR/ ID division of the American Psychological Association and by the American Association on Intellectual and Developmental Disabilities. I was also elected to a term as President of the Academy on Mental Retardation (the most prestigious research organization in the field).
7. I have received a license to practice psychology in the states of Nebraska (expiration January 2015) and Tennessee (status: inactive). I have been awarded temporary visiting licenses to practice psychology in two other states: Oregon and Texas. I have published extensively on ID, with particular emphasis on "adaptive behavior." I am a leading scholar in the ID field, and my 2006 book WHAT IS MENTAL RETARDATION, co-edited with H. Switzky, is considered one of the standard reference works in the ID field, and has been described as "the best book ever published on the definition of MR."
8. In 2008, AAIDD granted me its highest honor, the Gunnar and Rosemary Dybwad Award for Humanitarianism. In August 2011, the Intellectual Disability division of the American Psychological Association awarded me its highest honor: the John Jacobson Award for critical contributions to the field of ID theory and practice. I have previously testified in another Ohio case, *in re Antun Lewis*. In that case (a federal pre-trial Atkins hearing, held in Cleveland), the judge cited my testimony extensively in support of his ruling granting the defendant's petition, on the ground that he qualified for a diagnosis of ID.

ACTIVITIES UNDERTAKEN

9. The following activities were undertaken:

- Reviewed the materials listed below.
- Interviewed the defendant in August, 2013.

(The purpose of this interview was to familiarize myself personally with the petitioner, as I believe it is always best that I do that, even when--as in this case-- I am testifying mainly as a teaching expert. Therefore, no formal testing was performed by me.)

MATERIALS REVIEWED

10. The following materials were reviewed by me:

- Educational Therapy Center, Psychiatric Evaluation and Clinical Notes (1969)
- Educational Therapy Center, Social History taken January 1969
- Richmond Public Schools - Academic Records
- Indictment, Franklin County Case No. 86 CR-10-3182
- Letter from Warren Waddy to Trial Court, dated October 1986
- Excerpt of Trial Testimony - Testimony of Warren Waddy
- Excerpt of Trial Testimony - Testimony of Witnesses Arbry Waddy and Kay Drake
- *State v. Waddy*, 1989 WL 133508 (Ohio App. 10 Dist.)
- Psychological Evaluation of Jeffrey L. Smalldon, Ph.D., dated March and April, 1995
- Transcript of Atkins Proceedings held in *State of Ohio v. Warren Waddy*, Case No. 86
- CR 3182 on January 23 and 26, 2009
- Interviews of Siblings Barbara Burrell, Jerome Waddy, Lila Brewer
- Post Evidentiary Hearing Brief of Defendant, Warren Waddy, filed in *State of Ohio v. Warren Waddy*, Case No. 86 CR 3182
- *State v. Waddy*, 2011 WL 2536366 (Ohio App. 10 Dist.)
- Psychological Report of Cynthia M. Hartung, Ph.D., dated September 7, 2012
- CV of Cynthia M. Hartung
- Affidavit of Jeffrey L. Smalldon, Ph.D., ABPP (Forensic), dated January 15, 2013
- Declaration of Luc Lecavalier, Ph.D., dated May 8, 2013
- Psychological Consultation of Luc Lecavalier
- Declaration of Daniel H. Grant, Ed.D., dated May 25, 2013
- Certified Student Records from Mansfield Business College
- Ohio Department of Rehabilitation and Correction Addendum to Mental Health Evaluation, dated June 20, 2005

- Proposed Motion for New Trial, filed in *State of Ohio v. Warren Waddy*, Case No. 86 CR 3182
- Plaintiff's Memorandum Opposing Motion for Leave to File Motion for New Trial Pursuant to Crim.R. 33(B), filed in *State of Ohio v. Warren Waddy*, Case No. 86 CR 3182
- Video Interviews of: (a) Barbara Burrell (Sister); (b) Jerome Waddy (Brother); and (c) Ronald Scott (Half-Brother)
- Background Report by Stacey Michael
- Life Chronology Timeline
- Order by Judge Bessey, 2009

DEFINITIONAL CRITERIA TO USE IN RULING ID IN OR OUT

11. A brief review of the definition and proper methods for diagnosing ID/ MR is provided. As described in my widely-cited book *WHAT IS MENTAL RETARDATION?* (Switzky & Greenspan, American Association on Mental Retardation, 2006), ID is not always an easy diagnosis to make, especially with individuals in the range of mild ID, where virtually all *Atkins* applicants are likely to be found. As Ohio lacks a statutory definition of ID in criminal legislation, the standard to be used is derived from clinical manuals as spelled out in *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625 as follows:

{¶ 12} Clinical definitions of mental retardation, cited with approval in *Atkins*, provide a standard for evaluating an individual's claim of mental retardation. *Id.* at fn. 3, citing definitions from the American Association of Mental Retardation and the American Psychiatric Association. These definitions require (1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18. . . .

12. **The Intellectual Criterion.** MR is a disorder whose core impairment is in the area of intellectual functioning. This construct is typically measured through performance on an intelligence test, which results in a full-scale IQ score that locates an individual's functioning in relation to the mean for the general population. Generally, IQ tests are constructed so that the population mean is set at a score of 100, with a standard deviation (an index of statistical variability) of 15. The ceiling for MR is currently established by both 2010 AAIDD-11 and DSM IV-TR as "approximately two standard deviations below the population mean." The term "approximately" refers mainly to the fact that no test is fully reliable and one should take various factors into account when interpreting a test number.
13. One thing to take into account is the fact that test scores vary approximately five points around one's "true score." As two standard deviations (2 x 15) equals

30 points, the upper IQ level for meeting the intellectual criterion for MR is 75 (100 minus 30 plus 5 [the reliability index]). In addition, one should take into account factors such as practice effect (possible learning from taking a second test), changes in and adequacy of test norms (a major example of which is the so-called "Flynn effect"), and possible malingering.

14. To summarize, the phrase "approximately two standard deviations below the population mean on a standardized test of intelligence" means that one should not rely rigidly on an IQ score number, but should take into account the adequacy of the test, the nature and meaning of the norms, the context in which the test was administered, ethnic and linguistic factors, etc. This is the main use for "clinical judgment" in diagnosing MR. As noted in the book CLINICAL JUDGMENT (AAMR, 2006) by Robert Schalock and Ruth Luckasson (two of the main authors of AAMR-10), clinical judgment in diagnosing MR is not a matter of relying on intuition or gut feeling but rather involves using test scores in a thoughtful and scientifically valid manner. A rigid reliance on a test score, without such thoughtfulness, can and often does result in "false positives" (wrongly concluding someone has MR when he does not) or "false negatives" (wrongly concluding someone does not have MR when he does).
15. The requirement that clinicians and agencies diagnosing MR interpret IQ scores flexibly is explicitly spelled out in the manuals published by the two major American scientific and medical organizations in the mental retardation field: AAIDD (which published the 2010 AAIDD-11 diagnostic manual) and the American Psychiatric Association (which published the 1994 DSM IV and the 2002 DSM IV-TR Manuals). 2010 AAIDD-11 notes that the intent of the definition of intelligence:

is not to specify a hard and fast cutoff point/score for meeting the significant limitations in intelligence functioning criterion of ID. Rather, one needs to use clinical judgment in interpreting the obtained score in reference to the test's standard error of measurement, the assessment instrument's strengths and limitations, and other factors such as practice effects, fatigue effects, and age of norms used The use of "approximately" reflects the role of clinical judgment in weighing the factors that contribute to the validity and precision of a decision. The term also addresses statistical error and uncertainty inherent in any assessment of human behavior. In that regard, the decision-making process cannot be viewed as only a statistical calculation A fixed cutoff for diagnosing an individual as having ID is not intended, and cannot be justified psychometrically. The diagnosis of ID is intended to reflect clinical judgment rather than an actuarial determination. The term approximately addresses statistical error and uncertainty inherent in any assessment of human behavior. (pp. 35, 40.)

16. 2010 AAIDD-11 further states that the operational definition of the intellectual deficit criterion is "an IQ score that is approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations." (p. 27) This point is similarly emphasized in AAMR's publication, USER'S GUIDE FOR AAMR's 2002 DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORT: APPLICATIONS FOR CLINICIANS, EDUCATORS, DISABILITY PROGRAM MANAGERS AND POLICYMAKERS (October 2005) ("User's Guide") as follows: "The intellectual functioning criterion for diagnosing mental retardation is approximately two standard deviations below the mean, considering the standard error of measurement (SEM) for the specific instrument used and the instrument's strengths and limitations." (pp. 11-12).
17. The DSM IV-TR made the same point, as seen in the following passage:
"Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below [using a standardized individually administered IQ test] . . . It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior." (pp. 41-42).
18. Because in the past, clinicians often relied rigidly on an IQ number, and particularly failed to take into account the five-point standard error of test scores, AAMR/AAIDD, beginning in 1992 and in successive manuals, has emphasized that the Standard Error of Measurement effectively raises the range of scores that satisfy the intellectual deficit criterion. For example, AAMR's 1992 Manual, AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS (9th Edition, 1992) (1992 AAMR-9) operationally defined approximately two standard deviations below the mean as "a score below 70 to 75." (p. 5). Similarly 2002 AAMR-10 noted that the standard for intellectual functioning "is approximately two standard deviations below the mean, considering the Standard Error of Measurement for the specific assessment instruments used and the instruments' strengths and limitations In effect, this expands the operational definitions of mental retardation to 75, and that score of 75 may still contain measurement error." (p. 58). This indicates that clinicians or agencies making a determination of MR solely on whether a score is below or above 70 are not engaging in acceptable practice. Raising the ceiling from 70 to 70-75 also reflected a decision that past manuals, in their concern to eliminate false positives, had defined the MR class too narrowly and some loosening of the criteria was needed to avoid the now-widespread problem of false negatives.
19. An additional factor to take into account when looking at IQ scores is what has been generally referred to as the "Flynn Effect." This phenomenon is named

after James Flynn, who discovered that the major U.S.-normed intelligence tests, particularly the various editions of the Wechsler Intelligence Scale for Children, the Wechsler Adult Intelligence Scale and Stanford-Binet, toughen their norms whenever they go through a revision. Thus, someone who received an Intellectual Disability-disqualifying score in the mid-70's on the WAIS-R would be likely to receive an MR-qualifying score in the high 60's if he were tested on the next edition: the WAIS-III. Dividing the average drop in score from the old to the new test edition by the number of elapsed years between editions gives an average result of 0.3, which is the amount that a subject's full-scale IQ score rises each year due to norm obsolescence. This means that for every decade that an IQ test ages, a person's full scale IQ score is likely to go up on that test by three points. AAIDD standards call for Flynn adjustments in the interpretation of IQ scores. 2010 AAIDD-11 notes that "best practices require recognition of a potential Flynn effect when older editions of an intelligence test (with corresponding older norms) are used in the interpretation and assessment of an IQ score 'In cases where a test with aging norms is used, a correction for the age of the norm is warranted.'" 2010 AAIDD-11, p. 37 *quoting* User's Guide, p. 21.

20. The recently-released DSM-5 codifies several provisions noted above. It establishes a recommended IQ ceiling score of 75, although stating that ceilings should not be rigidly relied on. It also strongly recommends correcting for sources of test error, mentioning the Flynn Effect by name. It indicates that other types of cognitive testing, specifically neuropsychological measures of executive functioning, should be given much weight and may in some cases be more important than IQ scores. It starts with a description of cognitive deficits in ID that emphasize reasoning, planning, understanding of consequences, etc., that are different from and broader than what is measured by IQ scores.
21. ***The Adaptive Behavior Criterion.*** For more than 45 years, AAIDD has emphasized that one cannot rely solely on IQ scores in determining whether an individual has MR. IQ test scores, particularly in the "mild" level of impairment, do not always translate to non-academic settings, and a diagnosis of MR should indicate a fairly global impairment affecting many areas of functioning. To qualify for a diagnosis of MR, one must show significant deficits in both IQ and "adaptive behavior." The current AAIDD conceptualization of adaptive behavior relies on a "tripartite model" of intelligence and adaptive functioning that I developed more than 25 years ago, and uses my work as the basis for this evaluation.
22. The current and past AAIDD Manual's three-domain model of adaptive behavior is an evolution of the 10-skill model in its earlier 1992 AAMR manual. The earlier 1992 AAMR manual's criterion for adaptive deficits required impairments in at least two of the following ten adaptive skills areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, and health/safety.

23. DSM-IV (published in 1994) and DSM IV-TR (text revision, published in 2000) took the 1992 AAMR definition and modified it slightly, by breaking health and safety up into separate skill areas. Thus, the DSM IV-TR required deficits in two out of eleven adaptive skill areas, with health and safety now constituting separate skill areas. In May, 2013, DSM-5 was modified to bring it into line with the 2010 AAIDD manual, and thus put into place two major changes: (a) substitution of the term "Intellectual Disabilities" for "Mental Retardation," and (b) substituting the tripartite (conceptual, social and practical) model of adaptive behavior, with a requirement of one out of three domain deficits, for DSM-IV-TR's two-out-of eleven adaptive skills deficit model.
24. The tripartite model of adaptive deficits has three parts: (a) "conceptual" adaptive skills (communicative and related academic competence); (b) "practical" adaptive skills (competence and understanding of physical or mechanical processes) and (c) "social" adaptive skills (understanding people and social processes). In determining if someone meets the Adaptive Behavior criterion, it is necessary to show significant deficits in only one of these three areas (2010 AAIDD).
25. The 2010 AAIDD manual specifies that the most important source of information regarding whether an individual meets the adaptive behavior criterion is whether one falls approximately two standard deviations below the mean (*i.e.*, a standard score below the 70-75 range) on a standardized rating measure of adaptive behavior such as the Vineland-2. Two pathways to meeting the AAMR's adaptive behavior criterion were offered: (a) a standard score below 70-75 on an overall (composite) score, or (b) a standard score below 70-75 in at least one of the three adaptive skill areas of conceptual adaptive skills, practical adaptive skills or social adaptive skills.
26. In establishing the possibility that individuals with MR/ID can be above 70-75 in one, or even two, of the three adaptive skill areas (or have good scores on particular items within sub-average adaptive skill areas), AAIDD emphasized that having mild MR is not incompatible with being able to do many things, such as being able to drive a car, hold a job, being married, having relatively normal language and (even) committing crimes that may require some degree of planning and volition. One of the central principles of MR/ID diagnosis is the idea that "[w]ithin an individual, limitations co-exist with strengths." 2010 AAIDD, p. 1.
27. One operational difference between 2010 AAIDD and DSM IV-TR, in terms of adaptive behavior/functioning, is that the DSM used the words "limitations" and "deficits," implying either no statistical cutting score or, at most, a score of one standard deviation below the mean (85 or less). 2010 AAIDD-11, on the other hand, uses the words "significant deficits," implying a score of approximately two standard deviations below the mean (approximately 70-75 or less), although as mentioned, this can be accomplished either by an overall adaptive composite score (quotient) of 70-75 or less, or such a score in only one of the three domains of "social", "practical" or "conceptual" adaptive skills.

28. The way in which AAMR made the transition from its ten adaptive skill areas in 1992 to its three adaptive behavior domains in 2002 and 2010 was simply to take the ten areas (eleven in DSM IV-TR) and collapse them into the three domains, as follows: Conceptual Adaptive Behavior, consisting of "Communication", "Functional Academics" and "Self-Direction"; Practical Adaptive Behavior, consisting of "Community Use", "Home Living", "Health/ Safety", "Self-Care" and "Work"; and Social Adaptive Behavior, consisting of "leisure" and "social."
29. One important thing to keep in mind about the 2-out-of-11 skills (or one out of three domains) of the adaptive functioning deficit, is the clear implication that a diagnosis of ID is not ruled out by evidence of any particular skill that is at or near normal levels. For example, one can work (as most people with mild ID do), drive a car, and engage in numerous other tasks, and this cannot be used to rule out ID, especially as there is not one single area of adaptive functioning deficit that (unlike IQ scores) is critical for diagnostic purposes.
30. In the recently-published DSM-5, there was switch from the 2-out-of-11 deficient skills emphasis in DSM-IV-TR to the 1-out-of-3 deficient domains emphasis in 2010 AAIDD. As this is a transition period, and as DSM-IV-TR was in place in earlier habeas proceedings in this case, it is appropriate to use either or both standards when evaluating Mr. Waddy.
31. ***The Developmental Criterion.*** MR is a term indicating that an individual has intellectual and adaptive impairments that first manifested during what is termed the "developmental period." The developmental period is defined as anytime between birth and 18 (some extend the period to include gestation and entirety of one's 18th year). The purpose of this criterion is to rule out those who developed normally in childhood and adolescence, but whose impairments first manifested in adulthood, such as through a motor vehicle accident. Information about whether one meets the developmental criterion can come from a variety of sources, such as medical or school records and testimony by teachers, family members and peers.
32. One of the unresolved questions in interpreting the developmental criterion involves whether one needs test data (IQ or adaptive functioning) that meets the 70-75 standard, obtained during, or retroactively referenced to, the developmental period. The views of AAIDD are instructive in this regard. As discussed below, both the most recent diagnostic manual produced by the AAIDD in 2010 and AAMR's User's Guide contemplate retrospective assessment, especially in *Atkins* cases, long after the end of the developmental period and conceive that such assessment may be possible despite the lack of contemporaneous diagnoses of ID. In a retrospective assessment, knowledgeable informants are asked to rate a person on an instrument such as the Vineland Adaptive Behavior Scale, not as he is today (difficult if not impossible the case of an incarcerated person) but as he was at some point in the past, typically around the time of the instant crime or before the age of 18.

Outcome-based evidence, such as a child being retained in school, very low academic achievement, assignment to special education, and receipt of social security disability funding should easily satisfy the developmental criterion, even in the absence of formal IQ or adaptive behavior data collected during that period. However, if possible, the third definitional criterion (developmental onset) should use both a flexible framework (by seeing if there was evidence of failure and general impairment before age 18) and a more rigid framework (by looking at test scores, including retrospective adaptive behavior ratings [described above]) for legally relevant periods in the past.

MY RESPONSE TO THE FIRST REFERRAL QUESTION

33. The first referral question was: "When considering all of the prior psychological reports, reviews and available background information, does it appear that Warren Waddy's functioning meets the criteria for someone with Intellectual Disability, as specified both in national clinical manuals and guiding court rulings in the state of Ohio?" My answer to this question is that **the evidence I have examined leads me to conclude that Mr. Waddy does meet national and state criteria for diagnosing Intellectual Disability.** My reason for reaching this conclusion is that all three definitional prongs have been satisfied. I shall address each of these prongs in order.

PRONG ONE: SIGNIFICANT INTELLECTUAL DEFICITS

34. Several "gold standard" individually-administered IQ tests have been given to Mr. Waddy, and in virtually all of these he meets the usual clinical standard of a full-scale IQ score of 75 or lower, with adjustment for other sources of error, particularly use of outdated norms. Results of a number of neuropsychological measures also show some very significant impairments that are suggestive of someone functioning in the range of Intellectual Disability.
35. In 2008, Dr. Daniel Grant administered the WAIS-IV and the Stanford-Binet-5, and obtained identical scores of 76 on both. Dr. Grant did not perform a Flynn effect (norm-obsolescence) adjustment for either set of results. The WAIS-IV was published in 2008 and its norms were collected in 2006 and, thus its norms were two years old in 2008. A Flynn adjustment would reduce the WAIS-IV score by one point (2 years times 0.3 equals 0.6, rounded to 1), for an adjusted score of 75. The Stanford-Binet-5 was published in 2003 and its norms were collected in 2001; thus its norms were seven years old in 2008. A Flynn adjustment would reduce the score by two points (7 years times 0.3 equals 2.1, rounded to 2), for an adjusted score of 74. Both of these scores meet the usual clinical ceiling of a score at or below 75.
36. In 2012, Dr. Cynthia Hartung administered the WAIS-IV to Mr. Waddy. She obtained a full-scale IQ score of 73, which is below the usual clinical ceiling for prong one. She did a Flynn correction, using the publication date of 2008, and

subtracted one point (4 years times 0.3 equals 1.2, rounded to 1), resulting in a Flynn adjusted score of 72. However, a more usual procedure is to take into account that the norms are collected approximately two years before the publication date. Using 2006 as the norm-collection date would cause an additional point to be subtracted (6 years times 0.3 equals 1.8, rounded to 2), resulting in an adjusted full-scale IQ score of 71. Dr. Hartung considered this to be a valid result, noting that results of the TOMM (Test of Memory Malingering) and her own clinical observation, indicated that Mr. Waddy was putting forth an adequate effort.

37. In 1995, Dr. Jeffrey L. Smalldon administered the WAIS-R to Mr. Waddy, and obtained a full-scale IQ score of 83. The WAIS-R was published in 1981, and its norms (collected in 1979) were 16 years obsolete in 1995. A Flynn adjustment would cause 5 points (16 times 0.3 equals 4.8 rounded to 5) to be subtracted, resulting in a Flynn-adjusted score of 78, which is close to the usual clinical ceiling of 75. Dr. Smalldon reported that based on both clinical judgment and a perfect score on the Rey 15-Item Test (a measure of cognitive malingering), Mr. Waddy appeared to be making a good effort.
38. Dr. Smalldon also reported the results of a battery of neuropsychological measures, which according to DSM-5 are often a better indicator of prong one deficit than full-scale IQ. Specifically, Mr. Waddy was found to have "striking deficit" on speech-sound perception, Trail-Making (when required to do set-shifting), Booklet Category Test, Tactual Performance and "core academic skills." In combination with the results on the WAIS-IV, these findings are suggestive of "a mild degree of underlying brain impairment."
39. According to a psychiatric report of the Educational Therapy Center (ETC) in Richmond, Virginia, in 1968, when he was 14 years of age, a "Miss Phillips" (no information is available about her) administered the Weschler Intelligence Scale for Children (WISC) to Warren Waddy for the "Juvenile and Domestic relations Court." The test protocol is not available, but the ETC report indicated that Mr. Waddy received a full-scale IQ score of 72. The WISC was published in 1949 and norms were gathered in 1947, making the norms 21 years obsolete at the time of testing. This would cause an additional six points to be subtracted (21 years times 0.3 equals 6.3, rounded to 6), resulting in a Flynn-adjusted full-scale IQ score of 66, which is well under the usual clinical ceiling of 75.
40. When considering all of the intellectual and neuropsychological testing carried out on Warren Waddy, between the ages of 14 and 58, there is fairly consistent evidence that he is significantly intellectually impaired and, thus, meets prong one for a diagnosis of ID, as specified in the two major clinical manuals and the Ohio *Lott* standard that is based on those manuals.

PRONG TWO: IMPAIRMENTS IN ADAPTIVE BEHAVIOR

41. As recommended in 2010 AAIDD and DSM-5, Dr. Hartung administered a formal norm-based measure of adaptive behavior: the Adaptive Behavior Assessment Scale, second edition (ABAS-2), using as third-party informants Mr. Waddy's older sister and younger brother. As is often done in Atkins assessments, Dr. Hartung specified target rating ages before the age of 18 (this is done for two reasons: the need to establish developmental onset, and the fact that many petitioners have spend decades in prison, starting at an early age).
42. The ABAS-2 gives two scoring options: four summary scores (Conceptual, Practical and Social, and overall Composite) and scale scores on ten adaptive skills. In DSM-IV-TR, the standard was two very low (scale score of 4 or less which is minus 2 standard deviations) out of the ten (actually eleven, as one of the ABAS-2 skills "health and safety" is split in two) skills. On 2010 AAIDD and DSM-5, the standard is one score below 75 (approximately two standard deviations below the mean) out of the three adaptive domains (or overall Composite).
43. Using the 2010 AAIDD and DSM-5 standard, the scores for the sister were as follows: Conceptual = 65, Practical = 70, Social = 70, Composite = 61. (It needs to be understood that these scores are not averaged, which is why the overall Composite can be, and often is, lower than any of the constituent domains). Mr. Waddy far exceeded the deficiency in 1 out of 3 standard, as he met the prong two criterion on all 4 summary domains.
44. For the younger brother, again using the 2010 AAIDD and DSM-5 standard, the scores for obtained were as follows: Conceptual = 67, Practical = 75, Social = 66, Composite = 62. Although the scores were slightly higher than from the sister, Mr. Waddy was again rated at or below the 75 ceiling on all four domains, which clearly meets the clinical standard for prong two.
45. Using the DSM-IV-TR standard (applicable when Dr. Hartung filed her report, but since then replaced by DSM-5), Mr. Waddy received scale scores at or below minus two standard deviations on 5 of the 10 skill areas (communication, self-direction, leisure, community use, health & safety) while for the brother the same result (5 skills very low) with four of the five skills (communication, self-direction, leisure and health & safety) being the same as from the sister but with the fifth deficient skill being social (for the sister it was community use). Thus, for both third-party raters, very similar, strongly qualifying scores were obtained that far exceeded the required 2 skill area deficiencies.
46. Dr. Hartung also asked Mr. Waddy to rate himself on the ABAS-2. Although the ABAS-2 has forms and norms for self-ratings, these are useful mainly for programming purposes, and are not considered appropriate for diagnosing ID, as

there is a universal tendency for individuals with ID to view themselves as more competent than they actually are, as seen by others. If there is any evidence that contradicts the opinion that Mr. Waddy was trying to look as if he has ID, it can be found in the fact that he rated himself considerably higher than his siblings did.

47. Using the 1-out-of-3 (2010 AAIDD and DSM-5) domains standard, his self-scores were as follows: Conceptual =81, Practical = 82, Social= 68, and overall Composite = 75. Even given the inflated nature of the self-scores (something noted also by Dr. Hartung), Mr. Waddy still received a qualifying score on two summary domains, thus exceeding the diagnostic standard of only one. Using the 2-out-of-10/ 11 (DSM-IV-TR standard), Mr. Waddy again rated himself higher than his siblings did, being deficient on 2 (as opposed to 5) skill areas. However, even though rating himself higher, Mr. Waddy still met the diagnostic standard (of 2 deficient scores) using this method.

48. As is required by the clinical manuals, Dr. Hartung did not just rely on the rating measures, but noted descriptive/ qualitative information that validates the ratings. Dr. Hartung (and Dr. Smalldon, even if he did not use a formal instrument) noted many examples of deficient adaptive functioning, many of it occurring during the pre-18 period). Among the prong two deficiencies noted were: (a) being held back two grades (2 and 3 in elementary school--and it is reported that he would have been held back in grade 4 if not expelled); (b) being placed in a slow learner class which Mr. Waddy himself described as being for "retarded" students; (c) getting failing grades in many academic subjects; (d) being unable to hold a job for very long; (e) being unable to pass adult education classes; (f) being dependent on women to take care of him after he moved out on his own; (g) routinely showing very poor judgment with an apparent inability to anticipate consequences of his actions. Unfortunately, very little information is available about Mr. Waddy's adaptive functioning during the adult period, with much of it coming from the report by Dr. Smalldon. It is notable, however, that even in the highly structured prison setting (where adaptive demands are usually fairly simple and routine) a psychologist in 2005 noted that Mr. Waddy had deficits. .

49. My own interview with Mr. Waddy did not involve formal testing but enabled me to get a sense of him as a person. Based on my clinical and personal experience with several hundred individuals with ID, I saw nothing that would rule out ID.

50. In sum, there is considerable information, from both formal standardized rating instruments and anecdotal data, to indicate that Warren Waddy had significant adaptive functioning deficits.

PRONG THREE: DEVELOPMENTAL ONSET

51. 2010 AAIDD and DSM-IV-TR specify that intellectual and adaptive limitations should be evident from a time predating age 18, while the recently published DSM-5 specified onset in the developmental period, but did not tie that to a specific age. There is very substantial evidence that this prong is satisfied.
52. The following indicators are, together or separately, sufficient to establish that Mr. Waddy's impairments manifested during the developmental period: (a) being held back two times and in line for a third; (b) being placed in a slow learner class, and in an educational program viewed as intended for students with mental retardation; (c) being given an individualized IQ test during childhood and obtaining a score in the ID range; (d) being seen as especially slow by his siblings (in a family where most were slow) and being late at attaining developmental milestones; (e) being given an EEG exam, and obtaining results indicting damage to the occipital region of the brain; and (f) retrospective ABAS-2 ratings (discussed in the preceding section) which gave strong indications of adaptive deficits prior to age 18.
53. Although evidence about etiology is not needed (and usually is not known) for diagnosing ID, there were several risk factors for ID that were present. The three main ones are: (a) an abnormal EEG, which is suggestive of brain damage; (b) likely brain damage from a habit of regularly banging his head before bed and when stressed (this is also a symptom of a neuro-developmental disorder, separate from being a cause of such), and (c) growing up in a severely neglecting and under-stimulating home, with parents who themselves have been described as "slow."
54. In sum, prong three (developmental onset) is very clearly and substantially established, through a multitude of evidence.

MY RESPONSE TO THE SECOND REFERRAL QUESTION

55. The second referral question was: "If it is your opinion that Warren Waddy qualifies for a diagnosis of Intellectual Disability, how do you explain or dispute other written opinions which reached a different conclusion?" **My comments on three written opinions that dispute, or fail to support, a diagnosis of ID for Warren Waddy, follow:**
56. **Opinion by State Counsel Steven L. Taylor.** In his July 2013 Memorandum Contra a New Trial, state counsel Steven L. Taylor made three arguments in response to the assertion by Dr. Hartung that prong one for an Atkins claim has been met. These arguments are: (a) that the Flynn Effect is an unproven theory that should not be applied, (b) that even with Flynn adjustment the adjusted score does not support an Atkins claim because it is over the ceiling

of 70, and (c) that Mr. Waddy is a "malevolent recidivist with sociopathic tendencies who is capable of ... 'tanking an IQ test'."

57. Mr. Taylor's arguments are unfounded in my opinion, as: (a) the Flynn Effect is now widely-accepted science in the fields of psychology and intelligence, is widely accepted in most federal and state courts, and is specifically mentioned as something that should be applied in DSM-5, (b) 2002 and 2010 AAIDD said that the appropriate ceiling is not 70 but "70-75" and DSM-5 has established the ceiling at 75, and also indicated that prong one can be established through other indicia besides full-scale IQ, and (c) Drs. Smalldon and Hartung indicated that Mr. Waddy obtained scores from tests of malingering (the TOMM for Hartung, the Rey 15-Item Test for Smalldon) that, in addition to clinical judgment by them and Dr. Grant, showed that Mr. Waddy was making an adequate effort. Further evidence for the validity of test results can be found in the substantial congruence across scores and testers, as in Dr. Grant obtaining identical scores across two separate tests. If Mr. Waddy was "tanking" the tests, the results would have been much lower and there would have been many behavioral signs (none noted by Dr. Grant) of an effort to look "dumb." Furthermore, Mr. Waddy has never been diagnosed as a sociopath to my knowledge (not that it would rule out ID if he had).
58. **Opinion by Defense Neuropsychologist Jeffrey Smalldon.** In his 1995 report, defense neuropsychologist Dr. Jeffrey Smalldon did not provide a diagnosis of ID for Warren Waddy. Instead he focused diagnostically on two other DSM categories: depression and character disorder.
59. In a subsequent report, dated 2012, Dr. Smalldon, indicated that he has changed his mind, and now is prepared to testify that Mr. Waddy indeed did have ID. He bases this on the fact that was not originally asked to diagnose or rule out ID, that he now understands and accepts the validity of the Flynn effect (which was not true earlier), that he now has a much better understanding of the diagnostic literature on ID (including the need to adopt a higher ceiling and more flexible approach to prong one) and that he now has a better understanding of Mr. Waddy's adaptive deficits and developmental onset than was the case in 1995.
60. **Opinion by Court of Common Pleas Judge John P. Bessey.** In 2009, after the 2002 *Atkins* and *Lott* decisions, the Hon. John P. Bessey (who had earlier dismissed an *Atkins* claim without holding an evidentiary hearing) held such a hearing, and rejected the claim by Warren Waddy that he should be exempt from the death penalty due to ID. Judge Bessey gave the following reasons: (a) he received an IQ score in the "slow learner" range (above 80) in the Richmond Virginia schools in approximately 1966; (b) he received a score of 83 from Dr. Jeffrey Smalldon in 1995; (c) Dr. Smalldon noted depression and character disorder, but did not give Mr. Waddy a diagnosis of ID; (d) Mr. Waddy has never

been labeled ID, nor has he ever scored below 70 on an IQ test; (e) the judge noted that he "has deep reservations concerning the reliability and relevance of the Flynn effect and concludes that it is not a factor that would justify a finding that Waddy's test scores should be adjusted to the extent necessary to establish by a preponderance of the evidence, that he is mentally retarded..." (f) Judge Bessey also asserted that prong two was not met, as "at no point has the defendant ever been classified as MR based on an assessment of his conceptual, social and practical skills", (g) that "throughout his life [he] exhibited at least a basic set of adaptive skills that have allowed him to function in the real world", using a evidence holding jobs, maintaining his own apartment, succeeding as a drug dealer, attending welding and business schools, and taking care of his daughter; (h) Mr. Waddy has antisocial tendencies that caused or contributed to his low adaptive skills, and that he "exhibits a myriad of antisocial traits that, while impairing his ability to succeed in society, do not impair him so as to merit a MR classification;" and finally (i) that the third prong (developmental onset) has not been established in that "because he has not been diagnosed as MR at any point in his life, it stands to reason that he experienced no onset of MR at all, let alone prior to the age of 18."

61. I shall respond to these in the same order as they were made by Judge Bessey, and as summarized above:

- (a) No information is available about the Richmond test, what the test was or how obsolete it may have been, why it was given or by whom, and whether it might be a group test (totally improper for ruling ID in or out) or otherwise lacking in reliability or validity). For all of these reasons I do not consider it worth mentioning (which is why I did not mention it previously) or attaching any weight to. It should also be noted that the Slow Learner label was often used during that time period to describe children (especially if they were poor and minority) who would more typically have been classified as ID. Furthermore, in the period between 1961 and 1973 (when the Borderline category of ID was dropped) a score of 85 or less would have qualified one for a classification of MR/ ID.
- (b) I addressed Dr. Smalldon's IQ score in a previous section. With Flynn adjustment, it would have been only two points above the current DSM-5 recommended ceiling of 75 and this, in combination with other IQ and Smalldon's neuropsychological findings and significant prong two findings, would have strongly supported the appropriateness of a diagnosis of ID.
- (c) As noted in DSM-5, and all previous DSM and AAIDD manuals, ID is not an exclusionary diagnosis and it is very common for people with ID to be given other psychiatric labels. In fact, depression and character disorders are both mentioned in DSM-5 as co-occurring disorders. Furthermore, as mentioned in paragraph 60 above, Dr. Smalldon has since changed his mind, and now is willing to give Mr. Waddy a diagnosis of ID.

- (d) If evidence of having been labeled ID in the developmental period were a requirement for gaining Atkins relief, then half or more of successful Atkins petitions would have been unsuccessful. I can provide a list, of quite a few cases I know about, where a judicial finding of ID was made even when there was no such label assigned during the developmental period. That is because schools and families are very averse to assigning the ID label, particular to minority children, and there are many extraneous factors (local finances, politics, adequacy of services, state and district policies) that affect whether that label is assigned or not. The main requirement for satisfying prong three is early evidence of incompetence and failure, and certainly there is ample evidence of that. Having been classified as ID during the developmental period is not a requirement for prong three or an adult diagnosis of ID. As for the judge's argument that no scores have been below, 70: there was a 1968 WISC score (at age 14) from the Educational Therapy Center which, when corrected for norm obsolescence, is 66. More to the point, however, is that a "bright line" requirement of 70 has never been a requirement in Ohio, and there are several scores at or below 75, which today is the recognized standard.
- (e) Judge Bessey may have his doubts about the validity or relevance of the Flynn effect, but it is established science, and its use is recognized in DSM-5 and the majority of courts. In my experience, the Flynn effect is poorly understood or explained by many psychologists as well as attorneys, and the judge's doubts may reflect the fact that it was never explained to him in a clear and adequate manner.
- (f) Judge Bessey is correct in asserting that adaptive behavior had not been formally evaluated, but that reflects in part the unfortunate tendency of psychologists at that time to assume that prong two should be evaluated fully only if prong one was met. Today, it is understood that prong two should always be formally evaluated, especially in a high stakes proceeding, and furthermore that prong one is not automatically invalidated by a score above an arbitrary number. Furthermore, formal evaluation of adaptive functioning has now been undertaken by Dr. Hartung, and the results strongly support a diagnosis of ID.
- (g) As I noted in my response (paragraph 58) to state counsel Taylor, it is improper to point to specific seeming accomplishments and use those as evidence against a diagnosis of ID. That is because the currently-applicable clinical manuals only require significant deficits in one out of three adaptive domains, and there is no specific skill that must be deficient in order for an ID diagnosis to apply. The judge's (and counsel Taylor's) comments seem to reflect a stereotypic view of people with ID as globally incompetent that no longer fits with current knowledge about the disorder. Furthermore, many things pointed to

as accomplishments (such as being enrolled in two vocational courses) may upon closer examination turn out to be anything but (Mr. Waddy succeeded at neither). Many adults with ID demonstrate adequate simple parenting skills (this is a topic on which I have published several seminal papers) when children are very young, but are more likely to fail in that role (and other roles) over time, when more complicated scenarios occur.

- (h) There is zero scientific evidence that having antisocial tendencies brings about deficits in adaptive functioning. One can have an antisocial personality disorder and have adequate levels of adaptive functioning. The two constructs are independent of each other.
- (i) To repeat the point I made above under "d", being labeled ID in childhood is not a requirement for receiving that classification today. All that is required is evidence of early incompetence, and that standard is more than adequately met, in my opinion.

SUMMARY OF FINDINGS

62. It is my professional opinion, to a reasonable degree of scientific certainty, that Warren Waddy meets all three prongs for a diagnosis of Intellectual Disability, as specified in diagnostic manuals relied on by mental health professionals and as urged by the courts in Ohio after *Lott*.

63. Written opinions I have seen that dispute a diagnosis of ID, lack scientific validity and do not reflect current thinking about ID, in my professional opinion.

64. I affirm, under penalty of perjury, that all of the statements made by me in this affidavit are truthful and represent my honest opinions about the matters under consideration.

Further affiant sayeth naught.

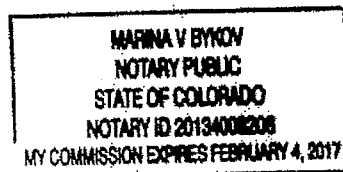
Executed this 5th day of September, 2013, at Littleton, Colorado.

Stephen Greenspan

Stephen Greenspan, PhD

Subscribed and sworn to before me, a Notary Public, this 5th day of September, 2013.

Marina V Bykov



JEFFREY L. SMALLDON, PH.D.

Diplomate in Forensic Psychology
American Board of Professional Psychology

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AFFIDAVIT OF JEFFREY L. SMALLDON, PH.D., ABPP (FORENSIC)

I, Jeffrey L. Smalldon, Ph.D., ABPP (Forensic), being first duly sworn upon my oath, do depose and state the following:

1. I am a psychologist licensed to practice in the state of Ohio. My professional practice is located at 5151 Reed Road, Suite A-211, Columbus, Ohio, 43220. I received my Ph.D. from The Ohio State University in 1989, and I've been licensed for independent practice since 1990 (#4376). My best estimate is that since receiving my doctorate, I've conducted psychological evaluations of somewhere between 7,500 and 10,000 individuals. Perhaps eighty to eighty-five percent of those evaluations were conducted in various forensic contexts. Many of them were conducted pursuant to a court appointment.
2. I hold the Diplomate in Forensic Psychology from the American Board of Forensic Psychology (a constituent board of the American Board of Professional Psychology). This is a credential that has been awarded to only about three hundred (300) of the many thousands of psychologists in the United States and Canada who would identify forensic consultation as one area of practice specialization.
3. Often, I've been asked to evaluate individuals who have been indicted or convicted on a charge of capital murder. Over the past twenty years or so, I have provided consultation on close to 300 such cases. The majority have involved pre-trial preparation for the possibility that the defendant would be found guilty, and that his/her legal representatives would then request testimony from me at a hearing held to determine sentence.
4. I would estimate that I have testified at mitigation in approximately 50-60 of the capital cases where I've provided consultation. In each instance, I have been qualified as an expert by the presiding judge and permitted to render a range of professional opinions, for example about the defendant's psychosocial history and its implications for his behavior over time; about the results of psychological and neuropsychological testing; about the defendant's diagnosis and its implications; and about the likelihood of his positive adjustment in an institutional setting.

5. Consultation on capital cases is an area of highly specialized practice within the broader field of forensic psychology. This is attested to by the frequency with which the American Academy of Forensic Psychology – the premier organization in the country for providing continuing education in forensic psychology – offers focused programming on the subject.
6. In 2002, the United States Supreme Court concluded that it is unconstitutional to execute the mentally retarded (*Atkins v. Virginia*, 2002, 536 U.S. 304). *Atkins* left to each state the task of creating and operationalizing a definition of “mental retardation.” In *State v. Lott*, 97 Ohio St. 3d 303, 2002-Ohio6625, the Ohio State Supreme Court set forth the standards and procedures for use in resolving *Atkins*-related MR claims.
7. Following the *Atkins* and *Lott* decisions, Ohio psychologists who provided consultation in the context of capital proceedings had to deal with the issue of whether the individuals who they were evaluating might qualify for an exemption from the death penalty due to mental retardation.
8. The MR-based constitutional bar to the death penalty was not in existence in January of 1995, when I was asked by attorneys Harry R. Reinhart and Carol Wright to conduct an evaluation of Warren Waddy and review a relatively large collection of case-related background records. In March of the following year (1996), I prepared a written report, summarizing the results of my evaluation. I submitted it, along with a cover affidavit, to Mr. Reinhart and Ms. Wright.
9. During the summer of 2000, Mr. Reinhart and Ms. Wright requested that I interview Mr. Waddy’s then-twenty-year-old daughter Natalie, primarily to ascertain what emotional impact it might have on her if the State were to carry out her father’s impending death sentence. Following my interview with Natalie, I summarized my findings and impressions in another affidavit, that one submitted in October of 2000. My interview with Natalie had nothing to do with “the MR issue.”
10. In 2009, *almost fifteen years after I’d last had contact with Mr. Waddy*, his legal representatives, Kort W. Gatterdam, Esq., and W. Joseph Edwards, Esq., sounded me out about appearing at a so-called “*Atkins* hearing,” where the issue to be determined by the Court was whether Mr. Waddy was “mentally retarded” and, as a result, exempt from the death penalty in accordance with the parameters specified in the *Atkins* and *Lott* decisions. I explained to them that I’d be willing to appear even though I hadn’t specifically been asked to perform “an assessment of mental retardation” back in the mid-nineties when I evaluated Mr. Waddy. I offered to summarize my findings and their implications upon request. I also said that if asked, I’d offer an opinion, with reasonable psychological certainty, on the mental retardation question. In part, my willingness to do so was based on the fact that psychologists routinely form opinions about whether a given

individual is "mentally retarded" -- or "intellectually disabled" to use the more current phrase -- when they perform Competency to Stand Trial evaluations. At the time, I felt as though I had sufficient information on which to base a conclusion about whether Mr. Waddy was mentally retarded.

11. At the hearing that was held on January 26, 2009, I was called as a witness *by the State*. I remain uncertain why counsel for Mr. Waddy didn't retain a "mental retardation expert" and ask that he/she perform a current assessment, bringing to the task not only a narrow focus on the MR issue but his/her specialized expertise on how best to go about conducting that kind of specialized assessment. In any case, I testified that in my opinion Mr. Waddy was *not* mentally retarded. I cited three separate instances when he had been administered IQ testing. In 1966, when he was thirteen years old, he was tested while a student in the Richmond, Virginia public school system and determined to fall in the "slow learner" range (which was thought to imply an IQ somewhere in the 80 to 89 range). He was administered a second IQ test on October 21, 1968. On that test, the Wechsler Intelligence Scale for Children (WISC), he received a Full Scale IQ estimate of 72, along with a Verbal IQ estimate of 79 and a Performance IQ estimate of 71. I also cited results from my own administration -- in 1995 -- of the Wechsler Adult Intelligence Scale-Revised (WAIS-R). On the WAIS-R, he received a Full Scale IQ estimate of 83. I testified that when I was asked to assess Mr. Waddy in 1995, I would have informed counsel had I thought there was a sufficient foundation to conclude that Mr. Waddy was mentally retarded in accordance with two generally congruent definitions that had been sanctioned by the American Association on Mental Retardation (AAMR) and published in the American Psychiatric Association's Diagnostic and Statistical Manual, Fourth Edition (DSM-IV).
12. In my testimony at the January 2009 hearing, I also addressed the issue of the so-called "Flynn Effect." In short, the Flynn Effect, named after New Zealand political scientist James R. Flynn, calls for a reduction in IQ scores to account for inflation in the score based on the number of years that have elapsed since the test was normed. I cited Flynn's contention that .3 points should be subtracted from an individual's IQ score for each year that had elapsed between when the test was normed and when the test was administered. When I was invited to assess the status of the proposed "Flynn Effect adjustment" among members of the forensic psychological community, I testified that the Flynn Effect had been "the subject of pretty arcane and to me often fairly opaque arguments being made...by statisticians and epidemiologists on both sides of the argument, whether or not it ought to be applied to lower IQ scores in certain contexts or whether it shouldn't." I testified further that the Flynn Effect "is very seldom used to lower scores," and that the "only context" for advocating the theory "has been...death penalty cases." I added that debate with respect to the Flynn Effect "[had] not been resolved in favor of Flynn's contention that individual IQ scores should be lowered." After being asked to review an

article summarizing a survey that had been conducted [among a narrow, not necessarily representative sample of psychologists] about whether IQ scores should be adjusted to account for the Flynn Effect, I testified that the conclusion of the authors who'd conducted the survey was that "there is definitely not a standard to adjust for the Flynn Effect."

13. The judge who presided over that hearing seems to have given my testimony considerable weight. In his decision, which was filed on November 25, 2009, The Honorable John P. Bessey wrote, in part, "Based on the testimony presented in the matter *sua generis* pertaining to the application of the Flynn Effect [I was the only psychologist who testified at the hearing], this Court has deep reservations concerning the reliability and relevance of the Flynn Effect. Those reservations notwithstanding..., the Court has considered the Flynn Effect and concludes that it is not a factor that would justify a finding that Waddy's test scores should be adjusted to the extent necessary to establish, by a preponderance of the evidence, that he is mentally retarded....Therefore, pursuant to the evidence presented, this Court holds the Defendant has failed to establish by a preponderance of the evidence that his IQ is 70 or less. Since Ohio holds there is a rebuttable presumption that an IQ score above 70 will not qualify as MR, and the Defendant here has not rebutted that presumption, the Court finds accordingly that the Defendant has not met the first prong of the *Lott* test for MR."
14. Judge Bessey went on to identify me by name, and to cite my testimony in the course of rendering his final opinion with respect to the MR issue: "Dr. Smalldon testified that, based on his consideration of the sum total of the information that was available to him, the Defendant was not MR. This assessment was based partly on the information regarding the Defendant's role as a caregiver to a small child, and his attendance at Business College...Therefore, based on the evidence and testimony presented, this Court holds that the Defendant has failed to show by a preponderance of the evidence that he suffered from significant limitations in adaptive skills which would allow a court to classify him as MR."
15. In December of 2012, I was contacted by attorney Vicki Werneke of the Office of the Federal Public Defender, Northern District of Ohio. The request from Ms. Werneke was that I review some additional materials related to the Waddy case, review my own case file (including a transcript of my testimony at the January 2009 hearing), and consider whether there was anything I would change about the opinions that I offered – specifically with respect to the Flynn Effect and the mental retardation issue – at the 2009 "Atkins hearing."

16. She provided me with: a copy of my 1995 report concerning Mr. Waddy; a transcript of my testimony at the January 2009 hearing; declarations of Anthony Waddy, Jerome Waddy, Ronald Scott, Roslyn Ramsey, and Barbara Burrell; a copy of the October 19, 2012 report summarizing a psychological evaluation of Mr. Waddy that had performed by Cynthia M. Hartung, Ph.D.; a copy of Dr. Hartung's CV; and an Addendum to Mental Health Evaluation dated June 20, 2005 (part of Mr. Waddy's file with the Ohio Department of Rehabilitation and Correction). She asked that I review these materials and make them a part of my larger consideration of whether I would change anything about the opinions that I expressed at the 2009 hearing on the question of whether or not Mr. Waddy would – or at least might – qualify for the designation “mentally retarded” or “intellectually disabled.”
17. For a number of reasons, there *are* changes that I would make in the testimony and opinions that I offered in early-2009. For one thing, I would not be equivocal with respect to the question of whether the Flynn Effect adjustment is appropriate in the death penalty case context. A lot has changed since early-2009. For example, in 2010 an entire Special Issue of the Journal of Psychoeducational Assessment was devoted to arguments for and against the Flynn Effect adjustment. The issue's guest editors were Alan S. Kaufman and Lawrence G. Weiss, both very well-known as experts in the field of psychological testing/assessment. Although the issue included some articles by authors who argued against the Flynn Effect reduction, by and large the content of that issue *supported* the Flynn Effect adjustment, specifically in the context of death penalty litigation.
18. I'll cite just a few examples. In an article titled “Failure to Apply the Flynn Correction in Death Penalty Litigation: Standard Practice of Today Maybe, but Certainly Malpractice of Tomorrow,” Reynolds, Niland, Wright, and Rosenn acknowledge past controversy over whether the Flynn Effect adjustment should be applied in capital cases but state, in their conclusion, “The highest court in this country has made the determination that executing persons with mental retardation violates the Eighth Amendment's prohibition against cruel and unusual punishment. As a *generally accepted scientific theory* [emphasis added] that could potentially make the difference between a constitutional and unconstitutional execution, *the [Flynn Effect] must be applied in the legal context* [emphasis added]....No one's life should depend on when an IQ test was normed.” In the concluding section of an article titled “IQ Scores Should Be Corrected for the Flynn Effect in High-Stakes Decisions,” Fletcher, Stuebing, and Hughes write, “IQ test scores should be corrected for any high-stakes decision that employ these assessments, including capital offense cases....Arguments against correction ignore expert consensus about the assessment of intellectual disabilities and do not take into account the wide acceptance of the [Flynn Effect]. More research on the precision of the estimate would be helpful, but the level of precision we reported of a mean of about 3 and a [standard error of

measurement] of about 1 supports the correction and is consistent with the Flynn correction of 3 points per decade.” All things considered, one of the Special Issue’s guest editors, Alan Kaufman, who is renowned for his work on intelligence testing, also came down on the side of *favoring* the application of the Flynn Effect adjustment in the context of capital litigation.

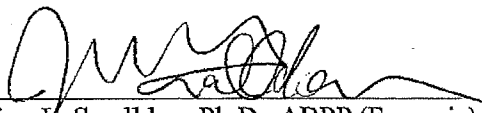
19. Also in 2010, psychologists Mark D. Cunningham and Marc J. Tasse published a frequently-cited article titled “Looking to Science Rather Than Convention in Adjusting IQ Scores When Death Is at Issue.” Dr. Cunningham is very well-known for his work with and research on capital defendants, and for his consultation in the death penalty arena. Dr. Tasse is Director of the Ohio State University Nisonger Center, University Center for Excellence in Developmental Disabilities, and also part of the American Association on Intellectual and Developmental Disabilities (AAIDD) Ad Hoc Committee on Terminology and Classification that authored the 11th edition (2010) of the text, Intellectual Disability: Definition, Classification, and Systems of Supports. In their article, which appeared in Professional Psychology: Research and Practice, they proposed as “best practice at capital sentencing” 1.) reporting IQ scores “from the historical testing”; 2.) describing the Flynn Effect and the various studies that have documented it as a real phenomenon (“the progressive inflation in the group mean and the effect of this on observed IQ scores, including in the zone of ambiguity [IQ = 71-80]”); and 3.) reporting “the corrected IQ scores calculated from the interval between the year the test was normed and the year the test was administered, multiplied by the associated inflation rate from the best synthesis of available normative data.” In other words, Cunningham and Tasse were advocating the application of the Flynn Effect adjustment as “best practice” in the context of death penalty litigation.
20. In the above-referenced text, Intellectual Disability: Definition, Classification, and Systems of Support (2010; 11th edition), there appears the following passage, related to the Flynn Effect adjustment: “As discussed in the *User’s Guide*...that accompanies the 10th edition of this *Manual*, best practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score. As suggested in the *User’s Guide*: ‘The main recommendation resulting from this work [regarding the Flynn Effect] is that all intellectual assessment must use a reliable and appropriate individually administered intelligence test....*In cases where a test with aging norms is used, a correction for the age of the norms is warranted* [emphasis added].’” This is further support for application of the Flynn Effect adjustment in high-stakes capital cases.
21. Much has been written about the Flynn Effect since January of 2009. In consideration of all the new, relevant research and scholarly dialogue that has appeared in the professional literature since then, I would now state without equivocation that it is appropriate to apply

the Flynn Effect adjustment in capital cases where historical IQ estimates were obtained using IQ tests with outdated norms. Of course that would include the estimate of Mr. Waddy's Full Scale IQ that I obtained myself, in 1995. To obtain that estimate, I used the Wechsler Adult Intelligence Scale-Revised (WAIS-R), the norms for which were published some fourteen years prior to the year when I administered the test. As noted in Dr. Hartung's report, application of the Flynn Effect (14 years x 0.3 points per year) would result in a lowering of the Full Scale IQ estimate from 83 to 79. The score of 79 falls within the "zone of ambiguity," to use the terminology that appears in the Cunningham/Tasse article that is referenced above. Using a more recent version of the Wechsler test, the Wechsler Adult Intelligence Scale-IV (WAIS-IV), Dr. Hartung obtained a Full Scale IQ estimate of 73, which she concluded was a valid estimate. Dr. Hartung also cited literature in support of her contention that "it is not unusual for different IQ tests, consisting of different subtests, to result in significantly different [IQ] scores [perhaps within a range of 10 or more points]." She argued – and I would agree – that "the most weight should be given to the WAIS-IV [IQ estimate that she obtained – a Full Scale estimate of 73] because it is considered superior to the older Wechsler tests," in part because it "correlates more strongly with the concept of general intelligence than previous versions." She cites a 2008 article by Floyd, Clark, & Shadish in support of this latter contention.

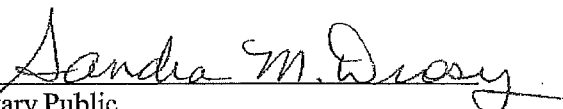
22. It's important to reiterate that at the time of my 1995 assessment of Mr. Waddy, I was not retained as "a mental retardation expert." I did not undertake a formal MR assessment, using best practices for such an assessment as they've been described and written about extensively in the professional literature more recently, especially since the U.S. Supreme Court's *Atkins v. Virginia* (2002) decision. I was a forensic consultant, being asked to interview Mr. Waddy, perform a battery of clinical and neuropsychological tests/assessment procedures, and review a rich collection of case-relevant records, all with an eye toward identifying factors that may have been relevant at the time of Mr. Waddy's sentencing hearing. Since this was pre-*Atkins*, there was nowhere near the level of focus on the MR issue that there has been since 2002. Whether there should have been or not is perhaps debatable – but the fact is that there wasn't, at least not in the capital case consultation that I provided in those years.
23. The additional information about Mr. Waddy's psychosocial history that Ms. Wernicke provided to me and asked me to consider – for example in the form of the above-cited declarations from people who knew him well during his formative years, and in the form of the Addendum to Mental Health Evaluation (2005) by Dr. Timothy L. Patterson, a psychiatrist, who cited Mr. Waddy's "low" level of intellectual functioning and "low level of academic performance" – lends additional support to the possibility that Mr. Waddy would, in fact, qualify for classification as "mentally retarded" or "intellectually disabled," using the definitions that are currently in effect and used by the AAIDD and the American Psychiatric Association (in its Diagnostic and Statistical Manual-IV-TR).

24. The bottom line, then, is that I would not testify today in the same way that I testified at Mr. Waddy's January 2009 Atkins hearing. I would support use of the Flynn Effect adjustment to lower the Full Scale IQ estimate of 83 that I obtained for Mr. Waddy to an adjusted estimate of 79; I would caution against reliance on the IQ estimate that was obtained for Mr. Waddy when he was twelve years old, in part because it's unclear which test was used to obtain it and unclear, too, whether it was even an individually-administered test; I would support use of the Flynn Effect adjustment to lower the Full Scale IQ estimate of 72 that was obtained for Mr. Waddy in 1968 -- using the Wechsler Intelligence Scale for Children (WISC) -- to an adjusted estimate of 66; and I would cite the strong likelihood that, all things considered, Mr. Waddy would have met prongs two and three of the *Lott* MR test, which require "significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction" and onset before the age of eighteen.

Further Affiant sayeth naught.


Jeffrey L. Smalldon, Ph.D., ABPP (Forensic)

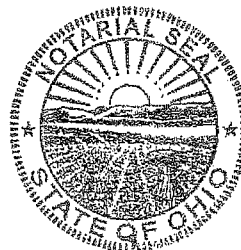
Sworn to and subscribed before me, a Notary Public, this 15th day of January, 2013.


Notary Public

Sandra m. Diosy
Printed Name

My commission expires:

6/24/16



Sandra M. Diosy
Notary Public, State of Ohio
My Commission Expires 06-24-2016

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

VICTOR WAYNE HOOKS,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

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Case No. PCD-2006-350

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 10 2006

MICHAEL S. RICHIE
CLERK

OPINION DENYING POST-CONVICTION RELIEF

CHAPEL, PRESIDING JUDGE:

Victor Wayne Hooks was convicted of First Degree Murder and manslaughter. He was sentenced to death for the murder and to 500 years imprisonment for manslaughter. This Court affirmed the judgments and sentences.¹ This Court denied Hooks's Application for Post-Conviction Relief,² and the Tenth Circuit denied in part his federal habeas petition.³ On December 31, 2002, Hooks filed a Second Application for Post-Conviction Relief in a Death Penalty Case, requesting an evidentiary hearing on the issue of mental retardation. We granted that motion on January 15, 2003, and remanded the case to the District Court of Oklahoma County for an evidentiary hearing. We subsequently remanded the case for a jury determination on the

¹ *Hooks v. State*, 1993 OK CR 41, 862 P.2d 1273, *cert. denied*, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 490 (1994).

² *Hooks v. State*, 1995 OK CR 56, 902 P.2d 1120, *cert. denied*, 517 U.S. 1145, 116 S.Ct. 1440, 134 L.Ed.2d 561 (1996).

³ The Tenth Circuit remanded one issue (regarding the applicability of Oklahoma's procedural bar) for a hearing in the United States District Court for the Western District of Oklahoma. *Hooks v. Gibson*, 184 F.3d 1206 (10th Cir. 1999).

issue of mental retardation.⁴ That jury hearing was conducted in June, 2004, before the Honorable Jerry D. Bass, and concluded with a jury determination that Hooks is not mentally retarded. This Court affirmed that determination and Hooks's capital sentence, and denied relief on his second post-conviction application.⁵

On March 31, 2006, Hooks filed this third subsequent application for post-conviction, raising issues of ineffective assistance of counsel stemming from the mental retardation proceedings.⁶ This Court ordered a response from the State, which was filed on June 19, 2006. Hooks's reply to that response was filed on June 30, 2006. Oklahoma's capital post-conviction statute allows subsequent post-conviction filings in an extremely narrow range of circumstances.⁷ An application must contain claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered subsequent application, because the legal or factual basis for the claim was unavailable.⁸ A factual basis is unavailable if it could not be ascertained through the exercise of reasonable diligence on or before the date of a previous post-conviction application, and the facts would establish by clear and convincing evidence that, but for the

⁴ *Hooks v. State*, PCD-2002-980, *Order Remanding for Jury Determination of Mental Retardation* (Okla. Cr. Dec. 9, 2003) (not for publication).

⁵ *Hooks v. State*, 2005 OK CR 23, 126 P.3d 636.

⁶ This Court suggested this procedure for claims of ineffective assistance of counsel resulting from our decisions in capital post-conviction mental retardation proceedings in *Howell v. State*, PCD-2003-268, (Okla. Cr. Jan. 31, 2006) (not for publication). Contrary to Hooks's claim, that Order did not indicate that, if Howell filed a subsequent post-conviction claim for ineffective assistance of counsel, the Court would automatically review those claims on the merits. Any subsequent post-conviction claim must first meet the requirements of the subsequent post-conviction statute.

error, no reasonable factfinder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.⁹ A legal basis is unavailable if it was not recognized by or could not have been reasonably formulated from a final decision of an appellate court, or is a retroactive new rule of constitutional law.¹⁰

Hooks argues that he must be allowed to raise his claims of ineffective assistance during the mental retardation proceedings in a separate post-conviction application because the same counsel represented him during the jury proceedings and in this Court on his capital mental retardation claim. In *Davis v. State*,¹¹ we held that a defendant may raise a claim of ineffective assistance of counsel for the first time on post-conviction where he was represented by the same counsel at trial and on his direct appeal. We note that these circumstances differ from those in *Davis* and similar cases. Hooks's mental retardation proceedings, while taking place in two separate courts, are not separate proceedings. Counsel first filed a second post-conviction application, claiming that Hooks was not eligible for the death penalty because he was mentally retarded. In the course of deciding that issue, this Court remanded the case to the district court for a jury proceeding determining whether Hooks was mentally retarded. Post-conviction counsel represented

⁷ 22 O.S.Supp.2004, § 1089(D)(8).

⁸ 22 O.S.2001, § 1089(D)(8).

⁹ 22 O.S.2001, § 1089(D)(8)(b). We note that this section does not preclude relief for claims arising from retrospective capital mental retardation proceedings. As the issue of mental retardation is one of eligibility for the death penalty, if the factual basis would have caused a reasonable factfinder to find a defendant was mentally retarded, the death penalty cannot be imposed.

¹⁰ 22 O.S.2001, § 1089(D)(9).

Hooks at that proceeding, then continued representing him as this Court used the results of that proceeding to rule on his post-conviction application. This Court retained jurisdiction of the case throughout the process. Hooks has not been represented by the same counsel in two separate proceedings. Hooks was appropriately represented by counsel throughout the course of a single proceeding, which involved several steps in separate courts. Our holding in *Davis* does not directly apply to this situation. However, in *Howell* this Court indicated that, in the peculiar and narrow circumstances raised by retrospective capital mental retardation proceedings, a subsequent post-conviction claim is the appropriate way to raise claims of ineffective assistance of counsel arising from the mental retardation proceedings themselves.¹²

In Proposition I Hooks claims that his right to due process under the federal and Oklahoma constitutions was violated when prosecutors failed to turn over potentially exculpatory evidence to defense counsel.¹³ At the start of trial, the prosecutor handed defense counsel a note briefly describing a conversation between the prosecutor and one of Hooks's former prison case managers, Pat Prater. The note included Prater's name and contact number, and stated that Prater wouldn't be surprised to learn that Hooks was mentally retarded because he talked like a retarded person. Hooks first claims that the

¹¹ *Davis v. State*, 2005 OK CR 21, 123 P.3d 243, 245-46.

¹² *Howell v. State*, PCD-2003-268, (Okla. Cr. January 31, 2006) (not for publication).

¹³ I note at the outset that it is appropriate for this Court to review all the affidavits and materials attached to the Application in considering Hooks's propositions of error. Our Rule 9.7(D) provides that the record on post-conviction shall include "any affidavits and evidentiary material filed along with the original application." Rule 9.7(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006). We review these documents "to determine if a threshold showing is met to require a review on the merits." *Id.*

prosecutor's failure to include other details of the conversation, reinforcing the manager's belief that Hooks could be retarded, amounts to a violation of his right to exculpatory evidence under *Brady v. Maryland*.¹⁴ Hooks could have raised this issue in his supplemental post-conviction brief to this Court after the mental retardation proceeding was held. In an additional supplemental brief filed in those proceedings, Hooks mentioned the evidence as part of his claim that he had presented sufficient evidence to show he was mentally retarded. In that supplemental brief, when discussing this evidence, Hooks did not specifically claim that his right to exculpatory evidence was violated, but he did cite to *Brady*. This claim could have been raised in a previous post-conviction proceeding. It is barred from our consideration under the limits of the subsequent post-conviction statute.

Hooks also claims in the title of Proposition I that mental retardation post-conviction counsel was ineffective for failing to follow up on the information contained in the prosecutor's note by failing to contact and interview the witness, or call the witness during the proceedings. In footnote 11 of his brief, Hooks notes he "has also raised an issue" of ineffective assistance based on the alleged *Brady* violation. However, nowhere in Proposition I does Hooks make any argument or give any citation to authority regarding ineffective assistance of counsel. The Court will not consider the

¹⁴ *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (suppression of evidence favorable to the accused and material to guilt or punishment violates due process).

Proposition I claim that counsel was ineffective for failing to raise the *Brady* violation.¹⁵

In Proposition II Hooks claims his mental retardation post-conviction counsel was ineffective by failing to develop, investigate and present evidence of Hooks's mental retardation. We review claims of ineffective assistance of counsel *de novo*, to see whether counsel's constitutionally deficient performance, if any, prejudiced the defense so as to deprive Hooks of a fair trial with reliable results.¹⁶ Hooks must show counsel's performance was so deficient that he did not have counsel as guaranteed by the Sixth Amendment, and that the deficient performance created errors so serious as to deprive him of a fair trial with reliable results.¹⁷ There must be a reasonable probability that, without counsel's errors, jurors would have concluded that Hooks was mentally retarded and, therefore, not eligible for the death penalty.¹⁸ A reasonable probability is one sufficient to undermine confidence in the outcome.¹⁹ We measure counsel's performance against an objective standard of reasonableness under prevailing professional norms.²⁰ In reviewing a claim of ineffective assistance we give great deference to trial counsel's strategic

¹⁵ Rule 3.5(C)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006).

¹⁶ *Davis*, 123 P.3d at 246; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

¹⁷ *Hooks v. State*, 2001 OK CR 1, 19 P.3d 294, 317, *cert. denied*, 534 U.S. 963, 122 S.Ct. 371, 151 L.Ed.2d 282; *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069-70, 80 L.Ed.2d 674, 693 (1984).

¹⁸ *See Hooks*, 19 P.3d at 317 (absent counsel's errors, jury would conclude that the balance of aggravating and mitigating circumstances did not support a death sentence); *Ullery v. State*, 1999 OK CR 36, 988 P.2d 332, 351 (same).

¹⁹ *Williams v. Taylor*, 529 U.S. 362, 394, 120 S.Ct. 1479, 1513, 146 L.Ed.2d 435 (2000).

²⁰ *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 2462, 162 L.Ed.2d 360 (2005); *Wiggins*, 539 U.S. at 521, 123 S.Ct. at 2527.

decisions.²¹ We consider counsel's choices made from counsel's perspective at the time.²² Hooks must present evidence overcoming this Court's presumption that counsel's conduct was professional and could be considered sound strategy.²³ If we determine that a defendant was not prejudiced by counsel's actions or omissions, we will not find counsel ineffective.²⁴ Hooks does not meet this standard.

Hooks first claims that this Court's mental retardation procedures deprived him of effective representation because the supplemental briefs to this Court were prepared by the person who represented him in the district court mental retardation proceedings. As we discuss above, because we agree that counsel ought not be put in the position of having to argue his or her own ineffectiveness, the current (third) subsequent post-conviction application is the appropriate way to address claims of ineffective assistance during mental retardation post-conviction proceedings. For this reason, we also reject Hooks's later claim that post-conviction "appellate" counsel was ineffective. Counsel was not ineffective for failing to claim Hooks had ineffective assistance in the district court mental retardation proceedings conducted as part of the second application for post-conviction relief.

²¹ *Hooks*, 19 P.3d at 317.

²² *Rompilla*, 125 S.Ct. at 2462; *Wiggins*, 539 U.S. at 523, 123 S.Ct. at 2356; *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2052; *Hooks*, 19 P.3d at 317.

²³ *Ryder v. State*, 2004 OK CR 2, 83 P.3d 856, 874-75, cert. denied, 543 U.S. 886, 125 S.Ct. 215, 160 L.Ed.2d 146; *Patterson v. State*, 2002 OK CR 18, 45 P.3d 925, 929 (2002); *Banks v. State*, 2002 OK CR 9, 43 P.3d 390, 402, cert. denied, 537 U.S. 1126, 123 S.Ct. 898, 154 L.Ed.2d 811; *Hooks*, 19 P.3d at 317.

²⁴ *Williams*, 529 U.S. at 393, 120 S.Ct. at 1513 (defendant prejudiced where counsel's actions deny him a substantive or procedural right to which he is entitled by law); *Strickland*, 466 U.S.

Hooks claims generally that counsel had no strategic reason for failing to investigate and present evidence. Hooks refers to counsel's affidavit, which states that counsel suffered from a lack of time and resources in preparing Hooks's case for trial, and had no strategic reason for the alleged omissions. He claims both that counsel lacked the proper training and skill to handle his case, and that counsel represented three other death row inmates in mental retardation proceedings within the four months preceding his trial. This Court rejects any suggestion that counsel was inexperienced or unskilled; the record reflects that counsel is qualified and able to represent defendants in capital mental retardation proceedings.

Hooks claims counsel was ineffective in failing to have Hooks's IQ tested before the mental retardation trial. Hooks presented evidence of nine IQ tests, from first grade to the months before the mental retardation proceeding, with scores ranging from 53 to 80. In the latest test presented to the jury, conducted by Dr. Hall, a State's expert, Hooks had an unreliable result of 53. Hooks had a history of not cooperating when taking IQ tests, some tests may have been irregularly administered, and some scores may have reflected health or emotional problems Hooks may have had at the time of those tests. The experts agreed that the most reliable test was administered in 1994, with a score of 72. The experts at Hooks's trial agreed that, given the 5-point standard error of measurement in the test scores, Hooks was in a gray area. While some experts noted Hooks's reliable score of 72 could have been slightly

at 694, 104 S.Ct. at 2052; *Hooks*, 19 P.3d at 317; *Alverson v. State*, 1999 OK CR 21, 983 P.2d

inflated,²⁵ nothing before this Court now or from the district court proceedings suggests that the score inflation would have been significantly outside the standard error of measurement. Counsel did not arrange for Hooks to be tested by a defense expert before the mental retardation proceedings. Counsel avers that this was due to a lack of time, and that a subsequent test showed a score of 67.

Counsel fails to show that Hooks was prejudiced by this omission. Counsel relies on an affidavit by Dr. Hall. Dr. Hall had testified for the State that she believed Hooks functioned in the borderline range. After reviewing the most recent IQ test, Dr. Hall avers that she would now say Hooks falls within the mild mentally retarded to borderline range, based on the evidence that the two most apparently reliable scores, of 67 and 72, are within the upper end of the mild mentally retarded range and the lower end of the borderline range. Dr. Hall stated that it is "possible" Hooks meets the requirement of significantly subaverage intellectual functioning necessary for a finding of mental retardation for capital proceedings. Assuming that Hooks would have had the same test results as he did when tested after the mental retardation proceedings, we cannot say that counsel's failure to have Hooks tested before those proceedings undermines our confidence in the outcome of the case. Jurors were presented with a wide range of IQ scores, most of which placed him somewhere in the gray area between borderline functioning and mentally

498, 510, *cert. denied*, 528 U.S. 1089, 120 S.Ct. 820, 145 L.Ed.2d 690 (2000).

retarded. Jurors also considered other evidence showing Hooks's intellectual and adaptive functioning were above the deficits required for a finding of mental retardation. The new test results and Dr. Hall's new opinion do not constitute such significant changes from the evidence presented that, taken into account with the other evidence, jurors would have reached a different conclusion. As Hooks fails to show prejudice, we will not find counsel ineffective for this lapse.

Hooks next claims counsel was ineffective for failing to investigate Hooks's adaptive functioning abilities while he was on death row. Hooks first discusses his letters to his daughter, which the prosecution relied on in the mental retardation proceedings. Witnesses testified that the letters were in Hooks's handwriting. However, Hooks claimed at the time, and continues to claim, that he did not write the letters by himself and they do not accurately reflect his capabilities.²⁶ Hooks also claims that one of the letters referred to a scheme to solicit money which did not occur. Hooks claims counsel was ineffective in failing to put on any witnesses to substantiate these claims.

²⁵ The experts referred to the "Flynn Effect", a theory suggesting that, as IQ scores in the general population rise through time, IQ tests must be renormed over time to provide accurate assessments.

²⁶ According to Hooks's brief, mental retardation counsel had an affidavit from Walanzo Robinson, a death row inmate, stating that Robinson had helped Hooks write some letters. Robinson was executed before Hooks's mental retardation proceedings. Hooks claims counsel should have taken Robinson's deposition before his death, to ensure his evidence could be admitted in the proceedings. Counsel did not mention Robinson in her affidavit, and this Court does not have a copy of Robinson's affidavit before it. Without some evidence or material before us to support this claim, we do not review it. Hooks also submits affidavits from two jurors who claim the letters were of great importance to their decision that Hooks was not mentally retarded. A juror may not testify to any matter or statement made during deliberations which influenced his mental processes or verdict, other than extraneous prejudicial information or outside influences. 12 O.S.2001, § 2606(B); *Matthews v. State*, 2002 OK CR 16, 45 P.3d 907, 914-15. We do not consider these affidavits.

Hooks's expert testified, and counsel argued, that Hooks had help with the letters and their value should be discounted. In closing argument, the prosecutor quoted the letters extensively and noted that there was no evidence Hooks had any help writing them.

Hooks has submitted materials which he contends counsel could have discovered and should have used, in support of this claim. He attached an affidavit from Paris Powell, a fellow prisoner, to his second supplemental brief to the second post-conviction application, and again to this post-conviction application. Powell avers that he often helped Hooks with routine written requests and composed letters to Hooks's family for him to copy. Hooks submits prison records to show that references to visitors and money regarding the solicitation scheme are not supported by records of visits or deposits in Hooks's prison account. These materials are offered to show that (a) Hooks did not compose the letters himself, and (b) the solicitation scheme did not happen as he describes it in a letter.²⁷

The State argues that, despite counsel's affidavit stating otherwise, counsel made a reasonable strategic decision not to present this evidence.²⁸ We need not search the record for strategic reasons counsel may have had to

²⁷ In his second post-conviction application, Hooks claimed that the letters should not have been admitted. We held that any question of Hooks's sole authorship went to the evidence's credibility, not its admissibility. *Hooks*, 126 P.3d at 644-45. Hooks did not raise any ineffective assistance issues in connection with this evidence, and the discussion in the previous opinion does not bar this claim.

²⁸ The State argues that the prisoner's credibility would "start out damaged" due to his residence on death row and status as a convicted capital murderer. Of course, such information would have been inadmissible, and this Court is confident, based on the excellent conduct of the mental retardation proceedings, that the district court would not have allowed jurors to hear it.

avoid presenting this evidence. Hooks fails to show he was prejudiced by counsel's failure to present it. The letters to his daughter, and the description of a scheme he may or may not have carried out in prison (whether as described in the letter or in some other form), were significant to the State's case. However, the State presented other significant evidence bearing on Hooks's intellectual and adaptive functioning, including ability to communicate and plan. Among other things, witnesses testified regarding Hooks's ability to hold a job, care for his family, and run a prostitution ring. Witnesses all agreed that, whether or not Hooks had help composing the letters to his daughter, that was his handwriting and his penmanship, and the content of the letters appears to reflect his sentiments if not his words. We cannot conclude that counsel's omissions deprived Hooks of a fair trial with reliable results.

Hooks also argues counsel was ineffective for failing to follow up on the prosecutor's information about Pat Prater, Hooks's former case manager who would not have been surprised to learn that Hooks was mentally retarded. Counsel states that she had no strategic reason for failing to contact Prater.²⁹

²⁹ The State would have this Court speculate that Hooks's counsel or co-counsel had in fact spoken to Prater at some point. The State argues that, although counsel averred that she did not call Prater after receiving the prosecutor's note, counsel did not specifically say she had never talked to Prater. The State also suggests that we can infer this because Hooks relies on an affidavit prepared by Hooks's federal defense team, rather than submitting his own affidavit from Prater. We decline to so speculate. The State suggests that Prater's opinion as to Hooks's mental retardation would have been inadmissible since she was a lay witness. The law does not support this claim; A lay witnesses may testify as to an opinion (a) rationally based on her opinion, (b) helpful to a clear understanding of her testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge, 12 O.S.2001, § 2701. Although mental illness is a diagnosable condition, lay opinion is proper and admissible on the issue of sanity. *Ullery v. State*, 1999 OK CR 36, 988 P.2d 332, 349-50. Similarly, although a person may be diagnosed with mental retardation, lay people may have an opinion

Counsel avers the failure was due to the press of time and the limited information in the prosecutor's note, which suggested that Prater's testimony would be of limited value. Hooks submits an affidavit summarizing the conversation, held after the mental retardation proceedings, between Prater and a defense investigator and federal defense attorney investigating Hooks's claims of mental retardation. According to the affidavit, Prater provided the federal defense team with specific examples of why she thought Hooks was mentally slow and childlike, and said she believed Hooks was retarded. Hooks's expert, Dr. Cowardin, revised her evaluation of Hooks after reading the affidavit setting forth Prater's opinion. Dr. Cowardin believed that Prater's opinion would have "lent credibility" to the testing data and opinion she gave at Hooks's mental retardation proceedings. However, as the State notes, Dr. Cowardin did not substantially or significantly change her conclusions based on the Prater material. Similarly, there is no indication that Dr. Hall would have changed her opinion had she had Prater's information regarding Hooks's functioning in a prison setting. Prater's observations of Hooks's behavior in prison could have supplemented the observations of Hooks's abilities he offered through family and friends. However, as neither party put on evidence regarding Hooks's ability to function in prison, Prater's testimony would not have countered any State's evidence. Prater's opinion did not cause any expert

as to whether a person appears to be mentally retarded. In recent capital mental retardation cases, including Hooks's own proceeding, both the State and the defense relied on lay witness opinions regarding the defendant's mental abilities. *Myers v. State*, 2005 OK CR 22, 130 P.3d 262, 268, *cert. denied*, __ U.S. __, 126 S.Ct. 1788, 164 L.Ed.2d 530 (2006); *Lambert v. State*, 2005 OK CR 26, 126 P.3d 646, 652; *Hooks*, 126 P.3d at 641; *Pickens v. State*, 2005 OK CR 27, 126 P.3d 612, 615-16.

to substantially revise conclusions as to Hooks's mental abilities, and that evidence would not have contradicted any State's witnesses. We conclude there is not a reasonable probability that, with this evidence, jurors would have found Hooks was mentally retarded.

Hooks claims that counsel should have investigated and called Paris Powell as a witness, not only on the issue of his letters, but to show that he could not function in a day-to-day prison routine without help. Powell completed an affidavit in which he describes helping Hooks fill out canteen claims, helping him write letters, and observing him in daily life. Powell concludes that Hooks was "slow minded". Again, although Dr. Cowardin used this information in re-evaluating Hooks, it did not significantly affect her conclusions. Hooks presented several witnesses who testified as to his difficulty functioning in daily life. He has not shown he was prejudiced by counsel's failure to use Powell's testimony for this purpose.

Hooks claims counsel should have spoken with Cuc Van Dinh, ex-husband of State's witness Shanna Dinh, to develop impeachment evidence. Dinh, who lived with Hooks as a teenager, testified about his conduct with her and the prostitution ring he headed. According to Cuc Van Dinh's affidavit, Dinh was actually living with him during part of the time she testified she was with Hooks. At the mental retardation proceeding, counsel attempted to impeach Dinh through other witnesses, in order to show that she did not live with Hooks as long as she claimed she did. The district court noted that, despite possible discrepancies as to the amount of time Dinh lived with Hooks,

she was testifying as to her observations and the parties did not dispute the fact that Dinh observed Hooks over a significant time period, and declined to admit the evidence. Hooks raised this issue in his supplemental brief to this Court from the mental retardation proceedings, attaching a copy of Cuc Van Dinh's affidavit.³⁰ This Court considered the affidavit in deciding the evidentiary issue. We concluded that the district court did not abuse its discretion, and noted that the affidavit's information "resembles the lines of questioning discussed above", referring to the impeachment evidence not admitted at the proceedings.³¹ After review, our conclusion remains the same. Whether Dinh lived with Hooks for months or years, her testimony went to her observations of his behavior and mental ability. Hooks has not shown he was prejudiced by counsel's failure to procure Cuc Van Dinh's evidence for impeachment.

Hooks claims counsel was ineffective when counsel failed to give the State information that Dr. Philip Murphy had been professionally disciplined. Dr. Murphy had administered an IQ test to Hooks in 1988, with a score of 80. Neither party called him as a witness, but an expert referred to his test. As a remedy for this discovery violation, the trial court refused to allow Hooks to introduce evidence of the disciplinary action in cross-examining the expert witnesses, to discount their use of Murphy's test results. Hooks claimed in his

³⁰ Again, the State suggests this Court "must presume" that counsel investigated Dinh's marriage, implying that counsel had spoken to Cuc Van Dinh, since counsel did not specifically state she never spoke to Cuc Van Dinh before the proceedings. This Court will not speculate that counsel took actions where the record offers no indication that such actions occurred.

³¹ *Hooks*, 126 P.3d at 643, n. 21.

second post-conviction application that the trial court erred in ruling this was a discovery violation, rather than an attempt at impeachment. This Court upheld the district court's ruling. In doing so, we noted again that Murphy's was one of a range of test scores, that the information about this test was sparse, that no expert relied on it in forming their opinion of Hooks's abilities, and that evidence discrediting Murphy could not have affected the jury's determination.³² We remain of this opinion. Hooks has failed to show he was prejudiced by counsel's failure to give the State this document.

Hooks claims counsel should have reviewed the letters to his daughter, and redacted portions "regarding crime facts". The letters are not attached as exhibits to Hooks's Subsequent Application for Post-Conviction, and are thus not part of the record this Court may review. Hooks quotes a portion of one letter in his Application. This paragraph refers to Hooks's wife (and victim) by name, and states, "Lord Know's I done everything I Could do To Protect - Save her", and "if I Had a Choice She Would be with You now." [Application at 43] While it does contain the victim's name, this letter has no references to the facts of the murder of which Hooks was convicted. In her affidavit, mental retardation post-conviction counsel states that after the trial "some" jurors told her the letters mentioned the victim and, upon reading them during deliberations, they realized this was a murder case. The Court is puzzled as to exactly what Hooks expects us to do with this information. The remarks in counsel's affidavit are (a) hearsay and (b) would be inadmissible if contained in

³² *Hooks*, 126 P.3d at 644.

a juror affidavit, as descriptions of statements or material affecting deliberations.³³ Nothing properly before this Court suggests that the jury was informed of the facts of the crime, and we will not find counsel was ineffective for failing to review and redact information in the letters.

To summarize, we find that counsel was not ineffective for failing to develop, investigate and present evidence. We further find that counsel was not ineffective for failing to provide discovery or review and redact evidentiary material. We find that this proceeding is the appropriate place for claims of ineffective assistance of counsel during the capital mental retardation proceedings in the second post-conviction application. Hooks's request for discovery and an evidentiary hearing on this issue are **DENIED**.

Decision

The Application for Capital Post-Conviction Relief and Motions for Discovery and Evidentiary Hearing are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

³³ 12 O.S.2001, § 2606(B).

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POST-CONVICTION**

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C. JOHNSON, J.:	CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	CONCUR IN RESULTS